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# Supreme Court of the United States

October Term, 1968

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FILED

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JOHN F. DAVIS, CLERK

In the Matter of:

Docket No. 198

CHARD M. SMITH,

Petitioner,

vs.

ED M. HOOEY, JUDGE,  
CRIMINAL DISTRICT COURT  
HARRISS COUNTY, TEXAS,

Respondent.

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Place Washington, D. C.

Date December 11, 1968

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C O N T E N T S

ORAL ARGUMENT OF:

P A G E

Charles Alan Wright, Esq. on behalf of Petitioner

3

Jos E. Moss, Esq. on behalf of Respondent

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Rebuttal of Charles Alan Wright, Esq.

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 October

3 [REDACTED], 1968

4 RICHARD M. SMITH,

5 Petitioner,

6 VS.

No. 198

7 FRED M. HOOEY, JUDGE,  
8 CRIMINAL DISTRICT COURT  
9 OF HARRISS COUNTY, TEXAS,

Respondent.

11 Washington, D. C.

12 Wednesday, December 11, 1968

13 The above-entitled matter came on for argument at  
14 12:40 o'clock p.m.

15 BEFORE:

16 EARL WARREN, Chief Justice  
17 HUGO L. BLACK, Associate Justice  
18 WILLIAM O. DOUGLAS, Associate Justice  
19 JOHN M. HARLAN, Associate Justice  
20 WILLIAM J. BRENNAN, JR., Associate Justice  
21 POTTER STEWART, Associate Justice  
22 BYRON R. WHITE, Associate Justice  
23 ABE FORTAS, Associate Justice  
24 THURGOOD MARSHALL, Associate Justice

25 APPEARANCES:

CHARLES ALAN WRIGHT, Esq.  
2500 Red River Street  
Austin, Texas 78705  
Counsel for Petitioner

1 APPEARANCES (Continued):

2 JOE S. MOSS, Esq.  
3 Assistant District Attorney  
4 Harris County  
5 Houston, Texas  
6 Counsel for Respondent

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1                                    P R O C E E D I N G S

2                    MR. CHIEF JUSTICE WARREN:    Number 198, Richard M.  
3    Smith, petitioner, versus Fred M. Hooey, Judge, Criminal  
4    District Court of Harris County, Texas.

5                    THE CLERK:    Counsel are present.

6                    MR. CHIEF JUSTICE WARREN:    Mr. Wright.

7                    ORAL ARGUMENT OF CHARLES ALAN WRIGHT, ESQ.

8                                    ON BEHALF OF PETITIONER

9                    MR. WRIGHT:    Mr. Chief Justice, may it please the  
10    Court, the issue here is whether or not a State is excused from  
11    the duty otherwise put upon it to give a speedy trial to a per-  
12    son indicted on a State charge because that person is, during  
13    the pendency of indictment, in a Federal penitentiary on some  
14    other charge.

15                    The Texas Supreme Court, in a consistent line of cases,  
16    has ruled it is not, that although it is bound to give a speedy  
17    charge to a person under Texas indictment who is in a Texas  
18    prison, that it is not required to have some other sovereign to  
19    produce a prisoner in order that it may try him.

20                    I propose to spend, unless the Court has questions in  
21    the matter, very little time on the merits, in part because I  
22    do not think there is an issue as between my friends for the  
23    State and myself on the underlying constitutional principle.    I  
24    do not find such an issue drawn in the brief, and I believe  
25    that Mr. Moss speaks for the respondent, that it will appear we

1 agree on the basic constitutional point.

2 Of course, the agreement of counsel cannot point an  
3 authoritative instruction on the Constitution of the United  
4 States, but I would think on the substantive point, your deci-  
5 sion last term spoken through Justice Marshall in the case of  
6 Page versus Barber is quite decisive that the problem decided  
7 in Page and Barber is really indistinguishable from the problem  
8 this case presents, that where someone who is needed for crimi-  
9 nal proceeding is in the custody of some other sovereign, that  
10 at least the State has the duty to make a reasonable effort to  
11 endeavor to get him back from the prison in which he presently  
12 languishes. For reasonable effort is all Page and Barber  
13 requires, and that is all we contend for is the role in this  
14 case, since I think it is quite clear here that Texas has made  
15 no efforts to get this petitioner back from Leavenworth.

16 I want to call to the Court's attention a study of  
17 this matter that is not referred to in either of the briefs  
18 because it has become available only very recently, and that is  
19 the 63-page National Survey of Detainers prepared by the  
20 National Defender project of National Legal Aid and Defender  
21 Association.

22 That association made copies available to counsel for  
23 the respondent and myself, and I am sure would be glad to make  
24 copies of their very comprehensive survey available to the  
25 Court.

1 MR. CHIEF JUSTICE WARREN: We would like to have them  
2 if they are available.

3 MR. WRIGHT: I am sure that they can be made avail-  
4 able. I will see that that happens, Mr. Chief Justice.

5 There is an issue between my friends and myself. I  
6 am not sure whether it goes to substance or procedure, and it  
7 has to do with the effect of the solvency of a person under the  
8 State charges. The State makes the argument that they do not  
9 know when the present petitioner became indigent and that since  
10 the indictment that they returned against him in 1960 alleged  
11 he recently acquired by theft some \$42,000; that unless he  
12 notified them he was indigent, they would have no reason to know  
13 he was indigent and therefore no reason to think he could not  
14 finance his own way to Houston in order to stand trial.

15 In the view the petitioner submits of that, the fact  
16 of his indigency is irrelevant; that the obligation to give a  
17 speedy trial extends as well to a prisoner or a person under  
18 indictment who is rich as it does to one who is without funds.  
19 It is a little hard to see what good it would have done the  
20 petitioner if he had had funds. The State says, "We would have  
21 given him a trial within two weeks, any time he showed up in  
22 Houston," and if he had the money to pay his way from Leavenworth  
23 to Houston and said to himself, "I think I will go to Houston  
24 to stand trial," I imagine the Federal prison authorities at  
25 Leavenworth would have taken a dim view of that. They would not

1 have allowed him to go unless the State had made an effort.

2 We are told in a memorandum of Solicitor General that  
3 ordinarily the policy of the Bureau of Prisons requires a writ  
4 of habeus corpus ad prosequendum from the State court, and when  
5 that comes, the Bureau then is very cooperative and invariably  
6 will make the prisoner available.

7 But it is not the fact that Mr. Smith did or did not  
8 have funds that in my submission is significant. It is the  
9 fact that he was confined by the Federal authorities and that  
10 some request of the State authorities was necessary before the  
11 Federal authorities would let him out of the walls of Leaven-  
12 worth to go to Houston to stand trial.

13 There are obvious problems in this case because the  
14 record is not a very thick one. I am aware of that from the  
15 outset of the case. And the State suggests in its brief,  
16 because of the skimpiness of the record that this court either  
17 should dismiss the writ as improperly granted or should remand  
18 the case to either the Texas Supreme Court or a State trial  
19 court for further fact-finding.

20 I submit, however, that the record, skimpy as it is,  
21 presents every fact that is necessary for decision of the com-  
22 paratively narrow issue that the case presents, that it would  
23 be nice to have a good deal of background. To this day,  
24 though I am counsel, I do not know on what Federal offense my  
25 client was convicted, but I cannot think it makes any



1 difference whether he was in Leavenworth on one crime or not;  
2 these are matters of color only, and the basic legal facts are  
3 perfectly clear in the record that he was indicted in April of  
4 1960 in Harris County for a crime allegedly committed in May of  
5 1959; that as of that time, he was a Federal prisoner; that the  
6 Sheriff of Harris County wrote to Leavenworth and was advised  
7 he would not be released until 1970; that beginning at least in  
8 March of 1961, the petitioner made repeated requests to have a  
9 speedy trial; that he has not been brought for trial at any  
10 time; that there is now a lapse of some eight years and that the  
11 time is long since passed when it is possible to give the  
12 petitioner the kind of trial to which he is constitutionally  
13 entitled.

14         So that in our submission, the writ was properly  
15 granted and the record is ample to decide the matter that is  
16 before you. The record, in addition to being skimpy, is some-  
17 what informal. The petitioner addressed his writ of mandamus  
18 in the State court to a nonexistent court, the Texas Criminal  
19 Court of Appeals, and it was transferred by that court to the  
20 Texas Supreme Court, since the Texas Supreme Court has juris-  
21 diction in these matters.

22         The Texas Supreme Court entered no formal order;  
23 instead, the Administrative Assistant of the Court wrote to the  
24 petitioner, saying that "Your petition has been denied," and  
25 referred to the Cooper case and the Lawrence case as authority

1 for denial. But the mere fact of informality in the State  
2 court proceedings does not mean we have any less a final judg-  
3 ment of the highest court of the State in which a decision  
4 could be had.

5 I refer to the case of N. Ray Sommers, for example,  
6 in 325 Fed. 2d, in which was a letter from the Chief Justice,  
7 Secretary of the Illinois Bar Committee, that was the defini-  
8 tive action of the Illinois court. This court held nonetheless  
9 that that letter was a sufficiently definitive act to permit  
10 review under Section 1257.

11 Q The record does seem to show that your client  
12 was told he could be tried within two weeks, any time he made  
13 himself available.

14 A The record certainly shows that.

15 Q As I read the response in this case from the  
16 Solicitor General here on pages 32 and 33 of your brief, it  
17 indicates that if the prisoner himself, as is your client,  
18 requests it, the Bureau of Prisons will make him available for  
19 a State court trial.

20 I am referring to the full paragraph in the middle of  
21 page 33, and he further says that the petitioner did not request  
22 any assistance from the United States Bureau of Prisons in this  
23 case. Is that all correct?

24 A To the best of my knowledge, it is correct,  
25 Justice Stewart.

1           Q     That would seem to indicate he could have at  
2 least tried to make himself available and probably would have  
3 succeeded, and then the Texas court said: If you do make your-  
4 self available, you will be tried.

5           A     I read it somewhat differently, with respect,  
6 your Honor. It seems to me what General Griswold said there is  
7 that occasionally this has happened at the instance of a  
8 prisoner, but that a prisoner, not lettered in law, can hardly  
9 be expected to know that this procedure was available.

10           He was doing the obvious things. He was besieging  
11 the Harris County authorities with motions, letters of various  
12 kinds as was told in the response; that under the published  
13 rules of the Board of Prisons, the prisoner is not advised that  
14 "If you will ask us, we will come to your assistance." Instead,  
15 the rules speak only that a prisoner will be made available if  
16 the State authorities request it.

17           I think it would be asking a good deal to say that the  
18 peittioner has waived any right he had because he did not pur-  
19 sue a remedy that even a reasonably observant person would not  
20 know existed.

21           Q     I have one other question. At the bottom of  
22 page 33, the final sentence of the Solicitor General's remarks,  
23 is there a "not" omitted?

24           A     There is a "not" omitted there. You will see the  
25 "not" appears on page 25 of our brief, where we quoted it, but

1 here in the appendix it was omitted. Unfortunately, in indigent  
2 cases, counsel do not get to proofread the briefs.

3 Q So that should say: "It does not appear."

4 A That is what it should say, yes, sir.

5 Q Do the Federal authorities indicate that if the  
6 prisoner himself requests it, they would not only make him  
7 available but make him available at their expense?

8 A I do not gather that, but I do not think what is  
9 said here is definitive one way or the other. As I read this,  
10 what Solicitor General Griswold is saying is that if occasionally  
11 a prisoner asks us, we will write to the prosecutor and say:  
12 If you get a writ of habeus corpus ad prosequendum from your  
13 State court, then we will make this prisoner available so that  
14 you may try him.

15 I do not think it is saying at all that the United  
16 States, acting simply at the request of the prisoner, would  
17 release a prisoner in Harris County and say to the State  
18 authorities, "Here he is; go ahead."

19 Q What if such a writ is issued at the instance of  
20 State authorities; what happens then?

21 A Then the practice is that the writ would be  
22 honored, the State is required to pay expenses of transporting  
23 him and guards.

24 Q That is precisely what Texas is not interested  
25 in doing.



1           Is it also true that the Federal officials first  
2 transfer to the nearest Government facility at their own  
3 expense?

4           A     It says in some instances, to mitigate the cost  
5 to the State, the Bureau of Prisons has moved an inmate close to  
6 the site of prosecution.

7           Q     Is this Federal procedure formalized in any way?

8           A     There is a statutory procedure for it, Sec-  
9 tion 4085, and also there are rules of the Board of Prisons  
10 that are issued from time to time in a bulletin that comes out  
11 which is made available to State authorities, telling them  
12 exactly what the procedure is.

13          Q     That contemplates that the State will make the  
14 application, does it not?

15          A     Yes, sir.

16          Thank you, your Honor.

17          MR. CHIEF JUSTICE WARREN:   Mr. Moss.  
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1 ORAL ARGUMENT OF JOE S. MOSS, ESQ.

2 ON BEHALF OF RESPONDENT

3 MR. MOSS: Mr. Chief Justice, may it please the  
4 Court, there is absolutely no issue here about the right of  
5 this petitioner to a speedy trial. I, as a representative of  
6 the prosecution in the concerned jurisdiction of Harris County  
7 of the State of Texas, have long thought it is absolutely out-  
8 rageous to keep things like this hanging over the heads of  
9 prisoners who are incarcerated under the jurisdiction of other  
10 sovereigns, whether it be the State or Federal Government.

11 Likewise, I fully realize, as your Honors have  
12 noticed in some of your recent opinions, that it is a matter of  
13 common knowledge that people charged of a crime rarely want a  
14 trial at all and, if they must have one, they hardly ever want  
15 it to be speedy. Delay, as such, operates to the disadvantage  
16 of the prosecution and to the advantage of the defendant,  
17 petitioner here, because the memories of witnesses dull and  
18 that necessarily affects the burden that the prosecution must  
19 bear in establishing the guilt.

20 Bearing that in mind, we are here today concerned  
21 with a remedy. We are going to try to find out if the failure  
22 of this man to have a speedy trial has denied him his consti-  
23 tutional rights and, if it has, the next question is: Did he  
24 waive it, as we know is being done every day in cases gener-  
25 ally.

1           There is an illustration in Harris County, Texas,  
2 where there are 40 or 50 arrests a day made on the basis of  
3 searches and seizures without a warrant, where a person affected  
4 gives his consent to the search and seizure, which, under the  
5 Constitution of our country, he is not required to do. He  
6 waived his rights. In this case, did he waive it?

7           Ewell, by this court some three years ago, said:  
8 Whether the delay alone amounts to a constitutional depriva-  
9 tion of right is a matter to be determined in the first instance  
10 in the trial court. Any argument to the contrary in this  
11 court is premature and that this court would not pass on it  
12 until such time as the sentencing judge in the lower court had  
13 heard the facts.

14           In this case the record, let me say, has been pre-  
15 pared by stipulation only, and I certainly compliment the  
16 gentleman on the great effort he made to get it here, and I  
17 agree with him on every turn. Not one time have I disagreed  
18 with any stipulation he wanted and not at one time has he dis-  
19 agreed with any I asked for, even as late as today, in order  
20 to correct an understatement in the brief.

21           The prosecuting authorities of the State of Texas  
22 never knew anything about this procedure in the Supreme Court  
23 or in the misnamed Court of Criminal Appeals of Texas until  
24 after the application for writ of certiorari was filed in this  
25 court, the Supreme Court of the United States.

1           If you read the records, you will find that the denial  
2 of the relief in the Supreme Court of Texas was on June 21, last  
3 year -- the petition was filed then and the denial was on the  
4 twenty-eighth, and I have a notice in my file here that I have  
5 shown counsel that it was not actually mailed down there until  
6 E. J. Johnson, a case worker from the penitentiary, sent it on  
7 June 22.

8           Q     What was the writ; what was the action? This  
9 was a petition for writ of mandamus?

10          A     Yes, sir, to mandamus the trial judge to dismiss  
11 the indictment because he did not have a speedy trial, after  
12 seven years, which he, in truth, had not had and which he, in  
13 truth, in fact, was entitled to if he had not waived it.

14          Now, so we know that five or six days elapsed between  
15 the time this thing was filed in the Supreme Court of Texas and  
16 the decision came out and we had no notice of it. In August,  
17 in the same year, the petition was filed up here and we did get  
18 notice of it and also at that time of the former proceedings in  
19 the Supreme Court.

20          Let me say that in the appendix here prepared by  
21 eminent counsel, the petition itself as contained in the  
22 appendix does not show it is verified and it does not show it  
23 contains an affidavit of indigency, or poverty, as we call it in  
24 Texas.

25          The Texas court is open to indigents the same as to



1 anyone else. There is no price on the remedies down there, but  
2 he must make this oath, and in this particular case, he did not  
3 do so, even though, in my brief for the respondent, I invite  
4 attention of the Court to the fact that the copy furnished me  
5 in my office did contain this affidavit and did contain the  
6 verification of the fact. But that was not sufficient to put  
7 jurisdiction into the courts of Texas to prosecute him for per-  
8 jury by merely giving me a copy; that it has to be filed in the  
9 court, which he studiously avoided doing, and that is significant.  
10 Because he knew if he had done that, that is exactly what we  
11 would have done to him, because we know of \$42,000 he had in  
12 greenbacks and other matters that are not in the record.

13 Even the sentence he is serving at the present time,  
14 as counsel says, we do not know what that is. We are not con-  
15 cerned with what that is, but what are we going to do about it.

16 If this petitioner had been tried in Texas at any  
17 time, other than a mistrial only three things could happen: He  
18 could be acquitted, found guilty and his sentence run concur-  
19 rently with the Federal sentence, or he could have been found  
20 guilty and the sentence be cumulative with the Federal sentence.

21 In the belief, as a member of the bar of this court,  
22 I respectfully represent to this court accumulations is rarely  
23 done by the judges in Harris County. It has to be an extreme  
24 matter before it is done; but in Ewell, this court said they  
25 would take that up later on and see what the judge does; so with

1 approximately five more years' jurisdiction of the custody of  
2 this prisoner vested in the Federal authorities, it could be he  
3 would receive a sentence that would be expired by the time the  
4 Federal Government gets through with him, and he would be  
5 released and have no more, even if we tried him.

6 Likewise, the converse is true: If we wait the other  
7 five years and then try him under the laws of Texas, if he  
8 received 10 years -- which is the maximum he could receive  
9 under the indictment -- the trial judge has the discretion to  
10 give him credit for the time he already served in some other  
11 penitentiary. If he did that -- which, I represent to this  
12 court, is almost always uniformly done -- then he has not suf-  
13 fered any loss of any right, constitutional or otherwise.

14 On the other hand, if it is cumulative, then the  
15 serious question comes up, and as we said in Ewell, that should  
16 be decided, whether that had any effect on it, should be  
17 decided after the trial judge has had a shot at it.

18 Now, as to when to get him tried, it can be only one  
19 of two occasions. It can be while he is in the custody of the  
20 United States, and let us see what that is going to entail.  
21 Expenses for two marshals, down there and back, exact words  
22 being "for the subsistence and shelter of the prisoner and  
23 deputy marshals during the entire time of their absence from  
24 headquarters."

25 As Mr. Justice White said, that is what the State of

1 Texas cannot afford to do. We just do not have the money, but  
2 I think, in all candor --

3 Q Is Texas broke?

4 A Not Texas, your Honor. It is the County.

5 Q Is Harris County broke, with all those sky-  
6 scrapers?

7 A Yes, they went up on the taxes 4.7 last Friday,  
8 and now there is movement on to get that rescinded, but the  
9 checks are still good. I have not had to discount my scrip.

10 Q I suppose if you needed a witness or two from  
11 this same State to convict him, you would find the money to  
12 bring him there?

13 A The answer to your question is yes, sir.

14 Q If you wanted to extradite a rich prisoner from  
15 New York, you pay his expenses even if he had \$42,000?

16 A We went to Belgium and got one the other day.  
17 We get them when we want them. We just don't want this fellow  
18 until we can get him.

19 Now, the day that warden says to us, "Come up here and  
20 get him; you can have him," we are going to be there with the  
21 money and pistols and handcuffs and we are going to take him  
22 back to Texas and do something with him; that is, unless your  
23 Honor says no. But you see, there, we don't have to feed his  
24 guards and we don't have to pay their expenses to and fro. We  
25 just can send an officer or two officers and they will bring him,

1 and that is, of course, much cheaper.

2 It is often said there is no price on constitutional  
3 rights, but in this case, there is a question of "Who is going  
4 to do the paying?" That is to say, is it going to be the peti-  
5 tioner; is it going to be the State of Texas -- or, more prop-  
6 erly stated, the County; is it going to be the United States  
7 Government; or is it going to be a combination of two or more?

8 The Congress says that these prisoners can be  
9 delivered by the Attorney General at the request of executive  
10 authority if he finds it in the public interest do do so. So  
11 if we brought him down there, I have serious doubts as to who  
12 would have jurisdiction of him, within the meaning of "juris-  
13 diction." I do not believe there is a percentage of jurisdic-  
14 tion; you either have it or you do not.

15 If the Texas courts are down there trying to litigate  
16 with a prisoner in custody of Federal authority, I have a doubt  
17 that would constitute jurisdiction. It might be 90 percent  
18 jurisdiction, but apparently no such thing exists.

19 Now, if we are allowed at any time, now or later, to  
20 try this man at anybody's expense, it may well turn out, as I  
21 have shown, that he has not been deprived of a thing, and his  
22 sentence may well have been served.

23 Q I think his petition for mandamus in the court  
24 below, or in the Texas Supreme Court, asked in the alternative  
25 for a trial, for a prompt trial or dismissal of indictment.



1           A     Yes, sir.

2           Q     It made no allegation that as of that time he  
3 had ever been denied.

4           A     That is right. And in the record here before  
5 you, you will find that the Solicitor General agreed with us  
6 that immediately upon notice of this procedure and that, which  
7 came simultaneously, three days' difference -- I might say, in  
8 all fairness, it was a two-day delay because of the ineffici-  
9 ency in our own office, but we got them about the same time in  
10 August of '67.

11           We immediately responded to their petition and sent a  
12 copy to the Solicitor and Attorney General, with the thought  
13 that both of these people -- bearing in mind this petitioner is  
14 jointly indicted with one of his codefendants, named Taylor,  
15 who has been in Atlanta Penitentiary and seeks no relief --  
16 the Attorney General would deal with both so we would not have  
17 to have two trials -- try them all at the same time.

18           But our solution to this thing and our prayer is that  
19 this be remanded to the State court in some fashion, either to  
20 the Supreme Court to develop the facts and get him up here so  
21 he can understand what rights he may have been denied, whether  
22 it is the absence of witnesses or the unlikelihood of concurrent  
23 sentences or whatever it may be, or, if that is not satis-  
24 factory with the Court, that it be remanded back to the trial  
25 court, with the instructions to the State of Texas to try him

1 within a reasonable length of time, even if they do have to  
2 spend money.

3 Now, he has not come into this court with clean hands.  
4 He did not file his affidavit of indigency down there in any  
5 court, nowhere; he did file it with me and I have it here,  
6 duplicate and original, but that does not give the State court  
7 authority to indict him and try him for perjury, which is what  
8 we would do, because that man has the money or did have it and  
9 we want to know under the law of Texas what has become of it.

10 Q What do you have to say about Mr. Wright's argu-  
11 ment that he be entitled to this remedy whether he is a mil-  
12 lionaire or whether he is a pauper?

13 A I agree with him 100 percent.

14 Q Then what is the relevancy of the argument you  
15 are just making, that he made no affidavit of indigency?

16 A The relevancy of the argument is that the  
17 sovereign State of Texas still has control of our courts and  
18 the amount of time that our judges and so on operate and work  
19 and perform their duties. One of the requirements of the State  
20 of Texas is that a man able to do so, pay the cost of his pro-  
21 cedure -- I am talking about the mandamus procedure here -- and  
22 if he does not have the money to pay it, he can make an affi-  
23 davit and still get the same relief; and in this case, this  
24 prisoner avoided that because he knew we could prove what he  
25 did with \$42,000.

1           That has no bearing on his guilt of the theft he is  
2 charged with. It has bearing on the fact he has committed a  
3 fraud upon the Supreme Court of Texas by sending a petition  
4 down there without an affidavit of indigency and then filing  
5 one here, where we clearly have no jurisdiction to prosecute  
6 him for perjury.

7           Q       Suppose he admitted he was a wealthy man and he  
8 made a demand for a speedy trial.

9           A       Then we would say, "Spend your money and get  
10 here." The prison authorities would say, "We have a benevolent  
11 attitude toward you" -- so says the Solicitor General -- "Any  
12 time you can pay the expense, we will take you down there."  
13 They even use the words "private party" in the prison rules.  
14 Certainly he is a private party if not absolutely indispensably  
15 necessary.

16           Counsel says we have ignored his request for a speedy  
17 trial. We have not. We notified him, every time, we would try  
18 him within two weeks, any time he would get here. Then when he  
19 said he was indigent, about a year ago, we undertook to get the  
20 Attorney General to deliver him to us.

21           The statute says the Governor or executive authority  
22 of the State must make the request. I don't know if the Dis-  
23 trict Attorney's Office is the executive authority within the  
24 contemplation of Congress, but I did send it to the Attorney  
25 General and Solicitor General and asked them to give us both of

1 them so we could try them both and get it over with.

2 Q Looking at the prayer with which you close your  
3 brief, it says that since this record is insufficient to permit  
4 decision, we should do one of three things: dismiss writ of  
5 certiorari; the request prayed for by petitioner be denied; and  
6 the third one, that the cause be remanded to the Supreme Court  
7 of Texas for proceedings therein or in the State trial court  
8 for the development of the facts. What are the facts?

9 A The facts are to decide whether or not he has  
10 been deprived of his asserted constitutional rights.

11 Q If you are going to bring him in for that kind  
12 of hearing, as Justice White pointed out, why not send him back  
13 to you and let him be brought there for the trial there?

14 A Bear in mind we do not have the United States  
15 Government as a party to this suit. He filed a lawsuit against  
16 the district judge that is going to preside over his trial.

17 Q It is made clear if you go to the United States  
18 District Court in Houston and get a writ of habeas corpus, it  
19 will be honored and he will be delivered. The only question is  
20 your picking up the bill.

21 A I might go one step beyond, agree and go one  
22 step further: They will even honor one from a State judge.

23 Q You will pay the expense?

24 A Yes, sir; let me know and I will have that money  
25 up here in nothing flat. We will have that man back there and

1     tried in two weeks. We will try him quicker than that to save  
2     the money.

3             Q     I suppose his first defense will be that he was  
4     denied a speedy trial.

5             A     He will be entitled to a hearing on his motion  
6     to dismiss which he filed in the trial court which counsel said  
7     we ignored, and he is wrong; we are waiting to hear. The Con-  
8     stitution says he has to be present and confronted with wit-  
9     nesses. As soon as we can get him there, we will have a hearing  
10    on that, too, and the trial judge may well dismiss it.

11            Q     Do you have any idea of how many other men are  
12    similarly situated?

13            A     I believe counsel and I agreed there are 15,000.

14            Q     Now, you say that you would bring this man back  
15    immediately and afford him a speedy trial.

16            A     Yes, sir.

17            Q     Does that mean that that principle you would  
18    apply also to all the 15,000?

19            A     Not under our jurisdiction. I thought you meant  
20    throughout the Nation.

21            Q     All of those under your jurisdiction, can you  
22    say to us the fact that you agreed to bring him back and try to  
23    get a speedy trial and pay the expenses incurred by him would  
24    lead to the same kind of treatment to other people who are  
25    similarly situated from the State of Texas?



1           A     To the best of my ability the answer is yes, sir,  
2 and yes, your Honor, but let me qualify, the holder of the  
3 purse strings, tight under our system of government, is not the  
4 District Attorney and subject to their approval, which they  
5 have always given -- as far as I know, they have always given  
6 us the money to get witnesses or prisoners or any other things,  
7 whatever we wanted that had to do with criminal prosecution, by  
8 asking for it.

9           But subject to that qualification, the answer is yes,  
10 sir, it will be done. I don't know of but two or three others  
11 in the same shape, and I know of one in reverse; we tried a  
12 fellow for robbery in Texas and he received 99 years, and  
13 Arkansas wanted him, to try to give him the death penalty, so  
14 we sent him to Arkansas with the agreement if they don't give  
15 him the death penalty they would bring him back.

16           Q     So there is no issue left here for adjudication.

17           A     No, sir; subject to that qualification, if they  
18 don't give us the money, I will promptly notify the clerk of  
19 this court.

20           I am authorized to state, based on previous experi-  
21 ences, they certainly will do it.

22           Q     Based on your representation here in open court,  
23 if we just remanded the case for further proceedings, without  
24 any adjudication of constitutionality, what would you do?

25           A     It could well be dismissed. I have every belief

1 that that trial judge is going to dismiss it on motion. I  
2 don't think he will be tried. I think it will be dismissed and  
3 he will be brought back to the Federal penitentiary.

4 Q Dismissed on grounds of delay?

5 A We have some pretrial stuff equivalent to Federal  
6 criminal rules.

7 Q Mr. Moss, I wonder if there are some further  
8 complications here. For example, here is a man who is under a  
9 Federal sentence and is serving time in a Federal penitentiary.  
10 He is also under a State indictment. He says, as I recall, that  
11 "Because of the pending State indictment, my treatment, what  
12 happens to me in the Federal penitentiary is affected."

13 He also says, "My possibilities of getting out on pro-  
14 bation are affected." And I wonder -- this may affect, of  
15 course, Ewell -- but I wonder if there is not something to the  
16 point that, as you indicated when you started off, that State-  
17 court indictment hanging around for seven years does raise a  
18 substantial question which cannot be disposed of by saying that  
19 "Let the man wait until he gets out of the Federal penitentiary  
20 and then is brought to trial in the State."

21 A I agree with your Honor. It does affect his  
22 treatment in prison based on what I am told. I know from talk-  
23 ing to other prisoners that it does and I know it has a bearing,  
24 from actual experience, I know it has a bearing with the  
25 Pardon Attorney. As to what other charges were pending as well

1 as what other he had behind him, it does have a bearing, but  
2 please don't penalize the State of Texas. They are not doing  
3 that to him. That is the Federal.

4 Q In any event, if you are going to give him a  
5 trial, you are giving him one of the alternative prayers in his  
6 petition to the State court. He wanted either trial or  
7 dismissal.

8 A I believe here he is just asking for dismissal.

9 Whatever he wants we are prepared to give him. If it  
10 should be reversed, which has an effect of putting it back in  
11 the Supreme Court of Texas, I am sure he would have a further  
12 opportunity to develop the record.

13 Q The only issue before us is the order of the  
14 Supreme Court of Texas as to issuing a writ of mandamum. That  
15 is the only order before us.

16 A Yes, sir. And it is signed by the Administrative  
17 Assistant, who has no such authority, but I am not raising that  
18 as a point. We see so many down there, they just turn it over  
19 to the Assistant and she mails them back with a letter attached  
20 to them. We get lots of writs down there in the way of habeas  
21 corpus and mandamus, lots of writs.

22 Thank you.  
23  
24  
25

1 REBUTTAL ARGUMENT OF CHARLES ALAN WRIGHT, ESQ.

2 MR. WRIGHT: I think I should speak immediately to the  
3 question "What is the relief?" that has been asked. The only  
4 relief that petitioner asked for in the Texas court was that  
5 the indictment against him be dismissed. That is all that is  
6 before you in this proceeding.

7 I call your attention to the final paragraph for  
8 petitioner of mandamus on page 4. At prior times, since  
9 March 17, 1961, according to the record, he has asked for trial  
10 or for dismissal. At the present proceeding there is a  
11 request for dismissal only. That, of course, does not foreclose  
12 what this court may do.

13 Q May I ask: What is it that is quoted on page 6?  
14 What is that?

15 A That is the case of Lawrence versus Texas.

16 Q That is not this case?

17 A No, that is not this case.

18 Q Why is it an issue?

19 A The letter from the Administrative Assistant of  
20 the Court says: "We cite you Cooper versus State and Lawrence  
21 versus State. We are enclosing a copy of the praetorian  
22 opinion in the latter case." I think, as a matter of personal  
23 privilege, I will state I did not include the Lawrence opinion  
24 as part of the appendix to be printed, but somehow it showed  
25 up in the printed appendix.

1 Q Was it an enclosure?

2 A It was an enclosure with the letter.

3 Q So what we are talking about is what appears on  
4 page 4, right?

5 A Right.

6 Q And there you did ask for dismissal of the  
7 charge, right?

8 A Yes, sir. Petitioner asked that.

9 Q There is no showing of prejudice in this record;  
10 am I correct or not?

11 A That is correct. In Klopfer versus North Car,  
12 there is not a word in the opinion about prejudice.

13 Q What happened to this man to bring this to  
14 Harris County's attention?

15 A The allegation in the petition for mandamus is  
16 that on November 3, 1960, petitioner filed with the respondent  
17 court his motion for speedy trial which motion was completely  
18 ignored by respondent, County Prosecutor, and for a period of  
19 six years the petitioner attempted to get a speedy trial.

20 The response on behalf of Judge Hooley to the petition  
21 for certiorari was that by letter dated March 17, 1961, the  
22 petitioner requested speedy trial and in reply thereto was  
23 notified he would be afforded a trial within two weeks of any  
24 date petitioner might specify on which he could be present.

25 Since that time, by various letters and motions, the



1 petitioner has asked either for a speedy trial or dismissal of  
2 the indictment.

3 Q No formal action; just letters?

4 A Letters and so-called motions.

5 Q What about the suggestion that they have a hear-  
6 ing to see if there is any question?

7 A A hearing is required only if prejudice is an  
8 element of the Sixth Amendment claim. I am perfectly prepared  
9 to argue that it is not and that we do not want to entangle  
10 speedy trial.

11 Q What about Mr. Moss's point, Mr. Wright, that  
12 there ought to be a trial to ascertain whether there has been  
13 a waiver? I suppose there could be a waiver of a right of  
14 speedy trial.

15 A I am prepared to concede there can be, yes, sir.

16 Q As I understood Mr. Moss, he was suggesting that  
17 trial is necessary here to, or a hearing is necessary here in  
18 which a record can be made to test out whether there has, in  
19 fact, been a waiver.

20 A Perhaps I misunderstood Mr. Moss's argument. I  
21 certainly agree that his argument is, as you said -- it was  
22 Justice Fortas -- but I understood that to be in the context of  
23 his argument about indigency, that if Smith had funds and did  
24 not make himself available, that then he had waived.

25 Now, if his solvency, or indigency is real -- and I

1 agree there could have been a waiver and that would be a fact  
2 issue -- I submit as a matter of law that his solvency has  
3 nothing to do with it and that if that is correct, then there is  
4 no possibility of a finding of waiver on any other ground; when  
5 the respondent agrees that my client has repeatedly, for more  
6 than six years, been trying to assert his right to a speedy  
7 trial, we can hardly say there has been a known involuntary  
8 relinquishment of a right.

9 Q Would this mean that every Federal prisoner could  
10 have all State charges dropped against him?

11 A No.

12 Q Why not?

13 A It would mean that any prisoner whose trial was  
14 delayed so long, it can be said it is no longer possible.

15 Q What would be the cutoff date on the number of  
16 years?

17 A I think that is something that can only be  
18 decided by case-to-case adjudication. Whatever number of years,  
19 this is too much.

20 Q On anybody that has been in seven years, all the  
21 State charges have to be dropped?

22 A That would be the effect if you held as I sub-  
23 mit you should and if you further held that the decision was  
24 fully retroactive.

25 Q Is there any statute in Texas concerning the time

1 within which a man should be brought to trial?

2 A Not so far as I know.

3 Q Mr. Wright, if Texas were still refusing to try  
4 a man and said, "We are not going to try him as long as he is  
5 in custody," there might be some pretty solid basis for saying  
6 that he is being denied his right to a speedy trial; but if  
7 Texas is now willing to try him in order to dismiss the indict-  
8 ment, you would have to conclude he has been denied a speedy  
9 trial.

10 A In order to dismiss the inductment, we do.

11 Q And your argument is that seven years is just  
12 long enough in anybody's book?

13 A Yes, sir.

14 Q Hasn't he asked for a speedy trial -- didn't he  
15 ask for a trial a couple of years ago?

16 A Yes, sir.

17 Q This is a writ of mandamus?

18 A Yes, sir.

19 Q Suppose we agree with you. What would reversal  
20 mean? Do we order the Supreme Court of Texas to issue a writ of  
21 mandamus?

22 A I suppose what you would do, if you follow your  
23 usual prac@ice, reverse and remand for further action not incon-  
24 sistent with your opinion. The question would be: What would  
25 you say in your opinion?

1 Q I wonder if this is a 2283 problem.

2 A It had not occurred to me that it was.

3 Q What is the effect of our ordering the Supreme  
4 Court of Texas to grant a writ of mandamus to a trial judge?

5 A You did that in the Supreme Court of Texas in the  
6 case of Heckman versus Deane, the only case I know of in which  
7 this court issued mandamus to a State court.

8 Q We would be, in effect, ordering that a criminal  
9 proceeding not go forward.

10 A This court does that all the time. It seems to  
11 me that is precisely what you do.

12 Q Well, you do in criminal cases all right. You do  
13 in criminal cases, but you normally don't in other proceedings,  
14 do you?

15 A That, I think, is a question, in the first  
16 instance, of Texas law -- what is the proper remedy? Texas law  
17 regards mandamus from the Supreme Court as the proper way to  
18 assert a right to a speedy trial in a criminal case. It is a  
19 rather confusing set of affairs, but that is the way it is.

20 I would think, in response to your question, Mr.  
21 Justice Brennan, that what this court would do if it agreed with  
22 my brother and myself on the underlying issue, at a minimum you  
23 would say you would hold that the Texas Supreme Court is wrong  
24 in the proposition of law announced in Cooper and Lawrence; that  
25 the mere fact that a person is in Federal custody discharges any

1 obligation the State has.

2           This would be the minimum you would do, and then the  
3 State court, free from the compulsion of erroneous view of  
4 Federal law, might be free to decide for itself whether it wants  
5 to order dismissal or whether it wants to leave prejudice still  
6 in.

7           I don't think that is all that this court has the  
8 power to do or could do on this record. I think that the ques-  
9 tion of the proper remedy to vindicate the right to a speedy  
10 trial is ultimately a Federal question and therefore one on  
11 which this court can speak authoritatively, and I think whether  
12 or not a showing of prejudice is required or whether or not  
13 untoward delay at some point becomes so bad that simply by  
14 itself it requires dismissal is also a question that this court  
15 is competent to decide.

16           But any one of those things would still in form be a  
17 reversal of what the Supreme Court of Texas did, and it is  
18 simply a question of how much guidance this court choses to give  
19 Texas for its further proceedings not inconsistent.

20           I must say that the worse possible disposition of the  
21 case -- I submit this with the utmost respect -- would be to  
22 say that in the light of the very commendable statements from  
23 Mr. Moss here in open court, that the case could be dismissed  
24 without opinion.

25           I have no doubt, in the light of what Mr. Moss told



1 us, that thereafter persons in this situation in Harris County  
2 would be given a speedy trial. Mr. Moss is only one of 254  
3 prosecutors in the State of Texas alone, and, as he properly  
4 said, he could not bind other prosecutors, he cannot bind the  
5 Texas courts.

6 Indeed I remind you with some poignancy of the case  
7 of Busch versus Texas decided here in 1963 in which this court,  
8 in effect, remanded without deciding the merits of the issue on  
9 the basis of representation by Assistant Attorney General, and  
10 unfortunately the Texas Court of Criminal Appeals refused to  
11 agree that the Assistant Attorney General had power to make the  
12 representation and Busch was vindicated only after long, elabo-  
13 rate litigation.

14 I think we have here a constitutional issue that is  
15 not going to go away. The number of prisoners so situated is  
16 very great. And it is disservice to the States if the issue is  
17 not decided. On seven different occasions, I myself have been  
18 appointed counsel by the Texas Supreme Court in cases raising  
19 this precise issue, with the hope that I could get them here  
20 and get them decided.

21 As it happened this time, the prisoner got the case  
22 here on his own and you appointed a man.

23 Q You won all of them?

24 A No; they all became moot before I could get a  
25 petition of certiorari to you.

1           Thank you.

2           Q     Mr. Wright, would you care to say something about  
3 Mr. Moss's argument that we should wait until after the prisoner  
4 has been tried, has been brought to trial in Texas because the  
5 Texas court itself might at that time dismiss in response to a  
6 motion based on the absence of a speedy trial or something else  
7 that would dispose of the case?

8           In other words, the question is whether this, in  
9 effect, is not premature.

10          A     I submit, Justice Fortas, that the guarantee of  
11 a speedy trial is not limited to giving you a trial at a time  
12 when you can be acquitted, when you could have your witnesses.  
13 It protects against other harms and that even if at the end of  
14 his Federal term, my prisoner were to be turned over to Harris  
15 County authorities and were successfully to move for dismissal  
16 because of a denial of a speedy trial, that he would have been  
17 adversely affected by the pendency of this charge, because that  
18 is all it is -- a charge against him during the time he has  
19 been in the Federal penitentiary.

20          Q     I don't believe the suggestion was that we wait  
21 until the end of his Federal imprisonment but right now, forth-  
22 with, in the very near future, he be brought before the Texas  
23 court where the motion is lodged there to be heard and decided.

24          And according to Mr. Moss's prediction, he ventured  
25 a guess that the judge would dismiss the indictment.

1           A     Perhaps he would, but if he were to do so with-  
2 out more, I think it would be a surprising action on the part  
3 of the respondent judge when the law in Texas authoritatively  
4 declared twice in the last two years that Federal imprisonment  
5 is an adequate excuse for not giving speedy trial. It would be  
6 a lawless act really of a Texas judge.

7           Q     They might dismiss it on other grounds.

8           A     There might be other grounds, yes, sir.

9           Q     It has been suggested there are other grounds.

10          A     It has been suggested, but I am not cognizant of  
11 what they might be.

12          Q     If we remanded this case to Texas courts without  
13 meeting the constitutional issue and they just dismissed the  
14 case, this constitutional question would go down the drain,  
15 wouldn't it, and we would never have it determined?

16          A     It would be right back in some other case if it  
17 would not be determined in this case.

18          Q     But we have it here and you say it is properly  
19 here, and if it is here, it would not be our function to just  
20 return it to the Texas court, where it could be dismissed with-  
21 out resolution of that issue, would it?

22          A     That would be precisely my submission, Mr. Chief  
23 Justice. I would not urge this court to decide a constitutional  
24 issue prematurely, but at the same time I do not think the  
25 Court can shrink from the responsibility of deciding

1 constitutional issues when they have been properly put before  
2 the Court.

3 Q I suppose if the Federal Government declined to  
4 give the State the prisoner, that would be a good excuse, would  
5 it not?

6 A In my submission, it would be. We think the  
7 obligation of the State is to make a reasonable effort to get  
8 the prisoner.

9 MR. CHIEF JUSTICE WARREN: I want to express apprecia-  
10 tion of the Court to you for having accepted an assignment to  
11 represent this indigent defendant, particularly your many  
12 efforts to bring this issue to the Court before. We consider  
13 it a public service for lawyers to undertake this kind of  
14 assignment on this basis.

15 Mr. Moss, we are grateful to you for your fair  
16 representation of the State of Texas. Thank you.

17 (Whereupon, at 1:45 o'clock p.m. argument in the  
18 above-entitled matter was concluded.)

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