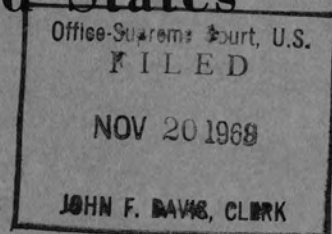


2/68

Supreme Court of the United States



In the Matter of:

Docket No. 32

GALE H. JOHNSON,

Petitioner,

vs.

JOHN E. BENNETT, WARDEN,
IOWA STATE PENITENTIARY,

Respondent.

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Place Washington, D. C.

Date November 13, 1968

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C O N T E N T S

ORAL ARGUMENTS OF:

P A G E

Ronald L. Carlson, Esq., on behalf of the
Petitioner

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* * * * *

1 IN THE SUPREME COURT OF THE UNITED STATES

2 October Term, 1968

3 -----X
4 GALE H. JOHNSON,

5 Petitioner;

6 vs.

No. 32

7 JOHN E. BENNETT, WARDEN,
8 IOWA STATE PENITENTIARY,

9 Respondent.
10 -----X

Washington, D. C.

11 Wednesday, November 13, 1968

12 The above-entitled matter came on for argument at

13 2:18 p.m.

14 BEFORE:

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

21 APPEARANCES:

22 RONALD L. CARLSON, Esq.
23 College of Law, University of Iowa,
24 Iowa City, Iowa
25 Counsel for the petitioner

WILLIAM A. CLAERHOUT, Esq.
Assistant Attorney General
State House, Des Moines, Iowa
Counsel for the respondent

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MR. CHIEF JUSTICE WARREN: Number 32, Gale H. Johnson,
r, versus John E. Bennett, Warden.

Mr. Carlson?

ORAL ARGUMENT OF RONALD L. CARLSON, ESQ.

ON BEHALF OF THE PETITIONER

MR. CARLSON: Thank you, Your Honor.

May it please the Court: I am Ronald Carlson, from Iowa City, Iowa. I am here today, Your Honors, representing Gale Johnson, who is a prisoner in our Iowa State Penitentiary in Fort Madison, Iowa.

Mr. Johnson was originally charged in this case with the crime of murder. The jury, Your Honors, was presented the four alternative forms: Murder in the first degree with death penalty; murder in the first degree with life imprisonment; murder in the second degree; or not guilty.

The jury rejected the first two alternatives, that is, the first degree murder alternatives, and found Mr. Johnson guilty of murder in the second degree.

Q This was 34 years ago?

A Yes, sir.

Q And he was given a life sentence?

A Yes, sir.

We have a rule there, I believe, Your Honor, that provides that the life sentence is non-paroleable. It has to

1 be commutable to a term of years. At the present time, I be-
2 lieve, he is being considered for parole, but there is nothing
3 certain about it. I believe he would have to undergo commu-
4 tation.

5 Q What I meant was that life almost means life.

6 A That is right.

7 He claims certain very distinct errors occurred in
8 this trial, Your Honors.

9 Q Has he raised these questions in other proceed-
10 ings?

11 A Yes, sir. He has been denied evidentiary hear-
12 ings on every occasion.

13 Q When was the last time?

14 A 1949, Your Honor. That was while the witness
15 who was suppressed was still alive. That is very important.
16 He filed three habeas corpus that year. Then he filed a
17 Federal habeas corpus in 1960. Again, the witness was still
18 alive. He was still trying.

19 He took an affidavit from the witness. He filed for
20 habeas corpus again in the Iowa Supreme Court as original
21 petition in 1966. This was again denied without hearing. He
22 then went back to Federal District Court and filed for habeas
23 corpus. Now he got his evidentiary hearing. Now he was able
24 to put on record the significant facts about the suppression
25 that we are talking about here today.

1 Q Was he an indigent at the time he was convicted,
2 do you know?

3 A Yes, sir; at least, Your Honor, he was an indi-
4 gent as it pertained to his securing of witnesses. By reason
5 of his poverty, he was entitled to use a statute under which
6 he could subpoena witnesses if he could show the trial court
7 that the witness was material and necessary to the defense.

8 He made application and the court granted the subpoena
9 under the statute. So apparently that was the case. The
10 statute, admittedly, that he subpoenaed his witness under, re-
11 quired him to make a preliminary showing of the necessity of
12 this witness. So he went to the trial court, back in 1934, and
13 he applied for this witness.

14 The subpoena was issued. It was sent from the county
15 of trial approximately 165 miles away to the county of the resi-
16 dence of the witness. The witness' name was Mr. Orsucci.

17 The sheriff in Polk County, which is Des Moines,
18 Iowa, received this subpoena, and did not serve it. In fact,
19 he made a subpoena return indicating the witness could not be
20 served, in that the witness, Mr. Orsucci, was confined in a
21 mental institution.

22 Your Honors, I am very sorry to say this was not
23 true. In fact, this witness, Mr. Orsucci, was, at the very
24 time of the subpoena return, under lock and key of the very
25 sheriff whose responsibility it was to serve this subpoena.

1 This fact that I am now stating is beyond dispute in
2 this proceeding, so we have a purely legal question, I think,
3 involved.

4 The records of the Polk County Jail were subpoenaed
5 into the habeas corpus hearing below, and I reflected them
6 in our appendix here. They demonstrate that this witness who
7 was subpoenaed by the defendant was, in fact, during the course
8 of the trial, in the Polk County Jail at the relevant times.

9 Q Is it clear whether this was a deliberate false-
10 hood or a mistake on the part of the sheriff?

11 A Your Honor, the facts, I think, would exclude
12 the mistake analysis. If Your Honor's question goes to whether
13 we have direct admissions of the sheriff or a prosecuting offi-
14 cer that they were locking the man up to keep him away from
15 the trial, we don't have such admissions.

16 Q Then you don't have any findings, do you?

17 A We do have the finding of the Court of Appeals
18 below, for instance, which says the evidence on the point estab-
19 lishes a prima facie case that the sheriff made a false return.
20 That also, Your Honor, is established by our trial court's
21 finding below.

22 Q It was not deliberate, was it?

23 A The trial court made an independent investiga-
24 tion at the mental institution. He concluded -- I believe his
25 order appears on page 34 of our appendix -- that the records

1 there show that this witness was never entered there as a
2 patient and he could find no evidence that the transfer of the
3 witness to the mental institution was contemplated.

4 Why the sheriff put on the return "Your witness is in
5 a mental institution" is virtually unexplainable.

6 Q I take it the sheriff is unavailable?

7 A Yes. He is deceased, Your Honor.

8 Q Did you say this county was 160 miles from the
9 trial county?

10 A Yes.

11 Q The prosecutor, I take it, is the official in
12 the trial county?

13 A Yes.

14 Q Was there any evidence that the local sheriff in
15 that county knew anything of this?

16 A There is no evidence in the record, Your Honor,
17 positive and clearcut, that the prosecutor in our county was
18 aware of what was going on in Des Moines.

19 Q So on the suppression issue, this would indicate
20 that a new trial would be required, knowing about the suppres-
21 sion?

22 A Yes. I think the law protects against govern-
23 mental action, against carving them up into small units. In
24 other words, if sheriff officers in another county brutalized
25 a confession from a defendant, could it be said that the

1 prosecutor in a different county could take a confession on a
2 silver platter and use it?

3 Q This area of knowing suppression of evidence
4 ordinarily involves someone, such as a local police officer,
5 who was responsible.

6 A This is correct.

7 In connection with the false notes that were intro-
8 duced into the trial, I will speak just a little bit about the
9 prosecutor's participation.

10 Q Will there be an attempt to re-try him?

11 A I don't know. There might be an attempt to re-
12 try him.

13 Q I suppose many witnesses are not available.

14 A Many witnesses are not available. I think it
15 would be very difficult, Your Honor.

16 The suppression point we have mentioned here, Your
17 Honor, the respondent treats at page 7 of the respondent's
18 brief, saying "The fact that a requested defense witness was
19 held in jail during the course of petitioner's trial is undis-
20 puted."

21 So, as I say, there apparently is no fact issue on
22 that key question.

23 The respondent would deny the due process implica-
24 tions which we allege exist in this particular situation by
25 saying basically that the case is an old one. The respondent

1 asserts that the petitioner in the years ensuing since his
2 conviction has more or less sat on his hands.

3 In respondent's brief resisting certiorari, the
4 respondent stated, "The unusual age of this case, combined
5 with the death of the witness and lack of concern by the peti-
6 tioner while the witness was alive, served to highlight his
7 lack of availability of relief here."

8 It is our point that he has sought in every way he
9 knows how, and in every way a man in the penitentiary can do,
10 to keep his case alive, to bring it on for hearing. It seems
11 to us it is especially unseemly for the State to take this
12 position when they have resisted his attempts to get this case
13 into court, to get this witness' evidence before the judge of
14 record, now to say "Well, he sat on his hands."

15 I think the record bears out that he has filed one
16 habeas corpus after another. In addition to that, he has not
17 left us completely dry as it pertains to exactly what this
18 witness' experience was. He did obtain an affidavit from the
19 man, which appears at page 33 of our appendix, wherein Mr.
20 Orsucci said, "On the relevant date I was confined in Polk
21 County Jail. I saw in the Des Moines Register a news item
22 saying I was being sought for a witness."

23 He tells us that he passed a note to the turnkey,
24 wanting to be let out. He passed a note to the judge. His
25 requests were denied and he was never served with a subpoena.

1 Mr. Orsucci's particular position in the trial of
2 the case is not much referred to. We have our ideas of how he
3 would have been used. I think he certainly was a key figure
4 in this whole thing. He had been arrested for this murder.
5 Clearly, I think, the defense wanted him to point out that the
6 State's witnesses down there in Burlington, the place of the
7 trial, had identified him as being one of the men implicated.
8 He would have very clearly undercut their credibility had he
9 been introduced, I think.

0 Q Where was he tried?

1 A Burlington, Iowa, Your Honor, is where my
2 petitioner was tried.

3 Q What did Burlington have to do with it?

4 A There were two witnesses in Burlington at the
5 scene who had identified my petitioner, and one of them apparent-
6 ly made an identification of this Mr. Orsucci as well, which
7 proved to be erroneous.

8 Q Do I understand from you that before the judge
9 issued the subpoena, it was necessary for him to be of the
10 opinion that this witness was necessary to the defense?

11 A That is precisely right, Your Honor. That is
12 exactly what the law provides.

13 Prosecutorial knowledge plays a great role, or
14 lack thereof, in connection with a second development in this
15 trial. There was introduced, we contend, false documents,

1 false notes, against the petitioner.

2 The State Penitentiary at Fort Madison, and I think
3 this is undisputed, was a great focus for the prosecutor to be
4 investigation before the trial.

5 MR. CHIEF JUSTICE WARREN: We will recess now.

6 (Whereupon, at 2:30 p.m. the oral argument in the
7 above-entitled matter was recessed until 10 a.m. the following
8 day, Thursday, November 14, 1968.)
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