Supreme Court of the United States

In the Matter of:

GALE H. JOHNSON,

Petitioner,

vs.

JOHN E. BENNETT, WARDEN,
IOWA STATE PENITENTIARY,

Respondent.

Docket No. 32

Place Washington, D. C.

Date November 14, 1968

ALDERSON REPORTING COMPANY, INC.

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C O N T E N T S

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

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Respondent.

No. 32

Washington, D. C.
Thursday, November 14, 1968

The above-entitled matter came on for further argument at 10:10 a.m.

BEFORE:

EARL WARREN, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

RONALD L. CARLSON, Esq.
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Assistant Attorney General
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Counsel for the respondent

MR. CHIEF JUSTICE WARREN: No. 32, Gale H. Johnson, Petitioner, versus John E. Bennett, Warden, Iowa State Penitentiary. Mr. Carlson, you may continue with your argument.

ORAL ARGUMENT OF RONALD L. CARLSON, ESQ.

ON BEHALF OF PETITIONER (Resumed)

MR. CARLSON: Thank you very much, your Honor.

May it please the Court, your Honors at the conclusion of remarks yesterday, counsel had mentioned that the Iowa State Penitentiary at Fort Madison had, prior to my client's trial, become the focus of investigation by the Prosecuting Attorney's Office. He had interviewed prisoners there about what they might know about MR. Johnson, what they had been able to find out, and so forth.

Two prisoners ultimately came up with a report of admissions made by Mr. Johnson to this offense, oral admissions, as well as notes which were introduced at the trial as State's Exhibits Nos. 1 and 2. These notes sought to portray the prisoner in this case as a man seeking to cook up an alibi. The prisoners said they got the notes when my client was trying to smuggle them outside the penitentiary. These notes were also validated at trial by a handwriting expert called by the State. This handwriting expert said Mr. Johnson, who was required to print his handwriting on an exemplar card, was the same man who printed the note.

In about 1960, Mr. Johnson was able to send these

three exhibits to a handwriting expert who is the leading authority on this subject. This man made a detailed examination of the handwriting on the exemplar card, the detail of the analysis appearing on the two notes, and he concluded that the original trial testimony was completely wrong; that the notes were not written by Mr. Johnson; that they were apparently forged notes.

Q Are those the notes that were reproduced in the appendix?

A They are printed in the appendix, your Honor, but not in this form. They do appear with the exhibits we have sent to the Court, however.

Q Mr. Carlton, this issue of handwriting came up at the trial, did it not, the original trial?

A Yes, sir, it did, although for reasons I will mention we were not able to present any handwriting of significance of our own.

Q At the original trial, there was a handwriting analysis?

A Yes, sir, and that was presented by the State.

Q What are the samples that were used at that time?

A The sample used was a printed card which was introduced in evidence.

Q Were the same documents compared at the

habeus corpus hearing as were at the original trial?

A Yes, sir, and that is very important, your Honor. Our sample is the 1934 handwriting sample used at Mr. Johnson's trial.

Q Was it a handwriting expert who testified at the trial?

A Yes, a Mr. Faxon was called by the State.

Q He testified that the handwriting on both were the same, did he?

A Yes, he did, your Honor.

Q Now we have a new set of experts who 33 years later now say no on their analysis, it is not the same; is that right?

A That is right. They san the opinion at that time was erroneous.

Q Was there any suggestion that it was deliberately false, that the expert at that time testified falsely?

A It is perhaps significant, your Honor, in connection with other evidence in the case, my client received notice of that about two months before trial. The Prosecution had these notes in July. Our trial was in November. On this evidence, notice was served six days before the trial, not on the Petitioner's Attorney, but upon the Petitioner in his jail cell. He hurriedly wrote his lawyers saying that the notes were going to be introduced. He did not

even have copies. He only had notice that this was going to be introduced against him. There was no opportunity afforded for the defense to give this kind of evidence the necessary kind of scrutiny to reveal its falsity. While the notification may have been technically correct, we question the propriety, we question the genesis, since they were penitentiary inmates, in not giving defense counsel a proper opportunity for scrutiny.

Q Are you suggesting that had you had mor opportunity, you might have established that the handwriting expert indeed was not giving honest testimony? Is that what you are saying?

A No, I think perhaps not, your Honor, but I think we could establish the two prisoners were not giving honest testimony--the ones who produced the notes--because the current evidence says Mr. Johnson did not produce those notes, and I think inferentially from the record it appears that perhaps these two prisoners who produced them or someone that they were working with perhaps printed them.

Q Assuming the handwriting expert was honestly giving his expert opinion that this was the same handwriting, where does that leave us?

A That leaves us right here, your Honor.

I think in Pyle versus Kansas the point was made that if false evidence comes into the case, even though the Prosecutor does not know about it---

Q My whole point is how are we to say it was false if it was honest expert opinion based on the fact that later honest experts gave testimony that it was not?

A Then it comes down to whose opinion is correct. I think if the opinion today is correct, and we submit it is, and the State has now had this examined here by its own expert at the State Bureau of Criminal Investigation and this expert says it is correct, Mr. Johnson did not write these notes.

Q You mean in effect this comes to us with virtually a stipulation on the part of the State that these were not written by this Defendant?

A In the trial brief, the State said, "We concede the introduction of these notes were in error, but we simply say it didn't form a material part of the case."

Q Thank you.

Q Of course, you are still dealing with opinions and not fully the facts.

A Yes, I think that is true.

Q It is opinion evidence.

A I think that is true.

Q The opinion on both sides now is these notes were not written by the Petitioner. In the original trial, there was a conflict in the opinion evidence, wasn't there?

A No, there was no defense opinion that was

mustered at that time.

Q There was just a denial on hispart?

A Just a denial, and this denial was done by a prisoner named Mr. Yates who said for the Defendant that the notes were fictitious, they were false, and I told the Prosecuting Attorney they were also.

Q That was before the jury at the original trial?

A Yes, that was before the jury at the original trial.

This same prisoner also said he received a monetary offer of $25 to provide names of witnesses against the Defendant, stating at page 107:

"Question: Was anything talked about, any money?

"Answer: Well, Mr. Daly offered me $25 to name the Defense witnesses."

Then, if we turn over to the Prosecutor's closing argument on page 110, he says:

"Before I go into that, I want to say the State would have been glad to have paid Yates $25 to get the names of the alibi witnesses."

We don't suggest that this reference is absolutely clear, but it is perhaps suggestive of a climate which may have been created at the penitentiary for the production of this kind of evidence which the current expert witness was

not correct.

Q The Petitioner was in a penitentiary prior to trial?

A Yes, he was, your Honor. When this notice was served on him on the eve of trial, he had been transferred up to a county jail but, in the main, he was in a penitentiary.

Q Where these two prisoners who presented these notes the same prisoners who testified at the trial that the prisoner had confessed to them that he had done it?

A They were the very same persons, your Honor, the same source of testimony in both cases.

Q Whatobjection was made to the introduction of these notes?

A They were vigorously objected to.

Q Where is it in the record?

A Could I locate that for you? I am reserving some time.

Q Never mind.

A In addition to the burdens of the suppressed witness and what we contend is false evidence, our Petitioner here was required, your Honors, to bear on further burden, and that was the burden of proof on a lead issue in this case -- the issue of whether the prisoner was at Burlington, Iowa or at Des Moines, 165 miles away, at the time of the offense.

He presented a strong alibi offense here. He called

the owner of a gasoline station who had filled his tank in Des Moines at the time the homicide occurred, at 165 miles away. He traded there about a year, and this man appeared as an independent witness with no axe to grind.

The owner of a cigar store said that Mr. Johnson was in his store and had bought a cigar.

I am not asking the Court to retry the facts, but I am raising the point that a strong alibi was presented. Many independent witnesses placed my client at a point in the City of Des Moines where it would have been impossible for my client to have committed this murder, if he had been believed.

Witnesses were called on this point of alibi and the jury was instructed that in order to prevail on non-presence at the scene, the Defendant was required to prove by a preponderance of the evidence that he was elsewhere.

As Mr. Justice Brennan pointed out in Speiser versus Randall, the burden of proof may well be determinative in a given case and we suggest, therefore, that this instruction given by the Trial Court as well as the references by the Prosecuting Attorney, which appear on pages 113 and 114 of our record, were highly detrimental to our prisoner's presumption of innocense and his fair-trial rights in this case.

It is up to the defense, the Prosecutor said, the burden of proof of alibi, and they have to prove that, and

that the Court will instruct you that they have to prove alibi.

Again, the Prosecutor said, "Are you going to accept the alibi of pool-hangers-on in their relation with Johnson when the man never denied it himself? Certainly," he tells the jury, "you are entitled to what he says and the burden of proof rests on the Defense, and they have to meet that burden."

Q Was there a statute on that necessity of proof?

A No, there was not at this time, your Honor. This was a judicial interpretation that had brought us to this point. Later on, Iowa enacted a statute requiring the Defendant to give the names of his alibi witnesses in advance, but that is not involved in this case.

Apparently Iowa and one other state, George, observe to this rule, and every Federal case that we have been able to discover has struck down charging the jury that the Defendant has the burden of proof in a law case.

Q Is that still the law in Iowa so far as the Iowa courts are concerned? I gather the Eighth Circuit recently held that it violates the United States Constitution.

A It held it slaughters the presumption and unfairly penalizes the Defendant.

I should mention a case which is not in the advance

sheets yet for you. This is a very recent one. It is the State of Iowa versus Larry Carter which will be out of Northwest in a couple of weeks, I anticipate.

Q The case of what?

A Larry C-a-r-t-e-r.

Q Do you have the date of it?

A It was filed October 15, 1968.

On the point of what is the law in Iowa, the Supreme Court notes that this case is before the Court and suggests the matter will probably be decided by the Supreme Court in the near future, and then instructs the Trial Courts not to give this instruction pending any disposition this Court might make.

Q Was there objection to this?

A Yes, there was.

Q On Constitutional grounds?

A The objection took the form of saying that the instruction violated the Petitioner's rights in that it disparaged alibi.

I am frank to admit, your Honor, that the fairly complete attack, I think, that we have made on the alibi instruction was not spread on this exception but it was not a case where the trial counsel permitted the Court to go ahead and instruct and then comb the record later. The existence of this instruction was fully put on the record.

Your Honors, I am going to try to save some time, so unless there is a question, I will stop here.

MR. CHIEF JUSTICE WARREN: Thank you very much.

Mr. Claerhout.

ORAL ARGUMENT OF WILLIAM A. CLAERHOUT, ESQ.

ON BEHALF OF THE RESPONDENT

MR. CLAERHOUT: Mr. Chief Justice, and may it please the Court, so that the Court will have a better appreciation of the rather complicated rules of law here involved, I would like to very briefly recount the basic facts involved in this case.

It began about 5:30 in the morning on May 27, 1934 when a Burlington, Iowa policeman was shot while investigating a reported burglary. He later died of shotgun wounds without making an identification of his assailant. However, two witnesses before the scene heard shots and heard two people running from the scene. One of the two persons these two witnesses identified very positively was the Petitioner in this case.

Q What time of day was that? Was it nighttime?

A I don't know, Your Honor, whether it was light or dark, but it was established it was about 5:30 or 6:00 in the morning, in May, so I would speculate it would be light at that time.

Nevertheless, the Petitioner was seen by these two

witnesses, walking briskly from the scene after the shots. He was seen in the company of another man. The two got into a black V-8 Ford and drove away.

The State also presented testimony showing the Petitioner a few miles east of Burlington, in Illinois, the Friday night before this Sunday morning. At that time, he also had a shotgun.

Q The Friday night before the Sunday morning?

A The Friday night before the Sunday morning, 36 hours or so before.

Although no shotgun was ever found, the Ford V-8 was identified at the residence of Mr. Johnson in Des Moines when he was arrested. It was identified by the witnesses who had seen it in Burlington.

Although Mr. Johnson did not take the witness stand, he did present at least six witnesses from Des Moines who claimed that he was in Des Moines at a time when it would have been impossible for him to have also been in Burlington, 165 miles away, at the time of the murder.

Thus, the alibi proposition is raised.

There are three issues involved here, and I think----

Q May I ask, did the State attempt to discredit those witnesses, his alibi witnesses?

A Yes, your Honor. It was a very vigorous trial on both sides and those witnesses were attacked vigorously on

their association with the Petitioner. One, I believe, was his mother; his brother was involved, and his father. Yes, they were attacked.

Q But there were others, were there not, like the gasoline station man, and so forth?

A Yes, sir.

Q Was he a close associate?

A I don't know that the record shows that they were close associates. Perhaps they knew each other, and I believe that is as far as that went.

There are three issues involved here. I think they are very crucial issues that had been before this Court before, and I will attempt to spend at least short of ten minutes on each of them.

The first is the suppression of Witness Orsucci. The Court found Mr. Thomas Orsucci one of the 13 or 14 witnesses requested was in the Polk County Jail and not in the Clarinda Institute for the Insane, as the Deputy Sheriff had written on the subpoena return. This we do not dispute.

Q It also appears that he had never been in this Clarinda Institute.

A I believe that is a fair result, and I believe the District Court so found.

Q And this was the Sheriff's Office that had control of people in the jail?

A The people in the Polk County Jail.

Q What was he in jail for? Was it public drunkeness?

A I believe it was something like that.

Q He was released just two days before the Petitioner in this case was convicted and sentenced to life imprisonment.

A I believe it was about December 8. It was within the vicinity of the time the conviction was handed down, yes, sir.

Q Did that sheriff testify in any of the habeas corpus hearings that you have had since?

A No, your Honor, I don't believe he has.

Q Is he living?

A I understand from my predecessors on this case--and, of course, there have been a number--but the immediate, the Assistant Sheriff, the one who filled out the returns, a man named Koons is actually deceased prior to the time the matter came up for hearing in DistrictCourt.

Q How about the man who testified originally?

A I am not sure whether or not, your Honor, that particular sheriff testified. I don't recall.

Q Mr. Orsucci has long since been deceased?

A Your Honor, he died in 1965, a short time before this matter finally made it to the hearing stage in Federal

Court.

Q These proceedings were not initiated by the Petitioner until after Mr. Orsucci died?

A There were proceedings attempted as early as 1948 or 1949 at about the time the Petitioner obtained an affidavit from Mr. Orsucci. However, no hearing was had until after he deceased.

Q Was a hearing ever requested on that issue?

A I don't believe, your Honor, that a hearing was specifically requested on the Orsucci issue.

Q A hearing was requested in District Court and the District Court denied habeas corpus without a hearing?

A Yes, your Honor. Therewere many, many issues before the Court, and I believe that was one of them.

If I may, the rule, we think, is entirely applicable, and we are not contesting any of this Court's rules.

I should like to quote from *Brady versus Maryland*, 373 U. S. page 87:

"The suppression by the Prosecution of evidence favorable to an accused upon request violates due processes where the evidence is material either to guilt or punishment irrespective of good faith or bad faith of the Prosecution."

We submit that the Petitioner has freely admitted the purpose for which Mr. Orsucci was going to be used; that is

he was going to be used to impeach one of the two eye-witnesses of the flight of the two people from the scene of the murder. Mr. Orsucci was not going to be used to say that Mr. Johnson was not the one, but he was going to be used to impeach one of thos witnesses who had previously identified Mr. Orsucci as being the partner of Mr. Johnson.

We think that his testimony, going by what the Petitioner admits it was going to be, was probably not favorable to his case and, secondly, we don't think and we completely agree with all of the Federal Courts below, that even if this testimony had been presented, it would not have been material to the guilt or punishment.

The impeachment would not have affected the very sure testimony of the two witnesses as to the Petitioner. It would only have affected the unsureness of one of the witnesses.

Q I gather then you make no point of the fact that this was a sheriff of a county 165 miles away?

A Your Honor, because it was said in *Brady* that irrespective of good faith or bad faith of the prosecution, I think the handwriting is on the wall, but I must call attention of the Court to the 8th Circuit which did not reach that position because it found that the testimony would not have been material. So, I don't think this Court really has to go that far.

Q I gather from the answer you just gave that you would not think if this were a proper case for its application that that would make impossible the application of the rule on suppression.

A I think the evidence would have to be found material before we could arrive at that question.

Q If a witness identified both Orsucci and Johnson, as they did in this case -- isn't that right?

A Yes, sir.

Q And the Defense could present a witness who would totally discredit that testimony so far as Orsucci was concerned, do you not believe that that would have anything to do with the credibility of that witness' testimony in the trial?

A Your Honor, Mr. Chief Justice, I think that it would not. I take this position based upon the peculiar facts of this case. Thw two attorneys that represented the Defendant at that trial hae been found to be very able. A review of the trial transcript record shows that they were very vigorous. They tried very hard to shake these two witnesses as to their identification of the Petitioner, and they were steadfast.

I believe this further because I think the Defense used these many witnesses, several witnesses they had as an alibi. I think that the impeachment would have merely

amounted to one more alibi by the witness. Therefore, I do not think -- and I agree with the Court of Appeals below -- that even if that testimony had been presented, it would not have impeached the one witness, let alone both.

Q But you don't think that if it was established that they were entirely wrong about Orsucci in their testimony that that would have any effect upon the correctness of their identifcation of Johnson?

A No, your Honor, for this reason: I believe it would have made the State's case even stronger if the witness had said, "True, I am sure about the one man but yet I am sure about the Defendant.

Q But they didn't say that. They didn't say that. They said both of these men were there, and the Defendant presents a man who, let us assume, could establish that he was not the one, the second, man, that they identified. Do you not think that that would have a tendency to discredit their entire testimony?

A Well, Mr. Chief Justice, only one of the witnesses, I believe, was going to be impeached, of course.

Q Just stick to that one witness.

A No, quite candidly I think that Mr. Orsucci's involvement in this case, the possibility that maybe he was the other witness would have been looked upon by the jury as more favorable to the State perhaps than to the Defendant.

I don't think impeachment of that witness could have been maintained.

Q But neither you nor the Court knew the witness. You didn't see him. You don't know what kind of witness he would have made.

A No, sir.

Q Of course, you don't. How can you predict what effect he would have on the jury?

A Mr. Mustice, this is exactly our point. The jury in 1934 was present. They had some 43 witnesses, I believe, to look at and they disbelieved, obviously, Petitioner's witnesses because, if they would have, they would have found him not guilty.

Q So, we would assume this witness would be just as ineffective without knowing a thing about him.

A Mr. Justice, I think we have to rely upon what the witness said he would use this witness for.

Q Don't you agree some witnesses are better and more persuasive than others?

A Very much so.

Q So, there is no way anyone can predict what effect he would have on that jury, is there?

A Not with any reasonable probabilityl I think it is subject to some speculation.

Q That is what we are saying.

A I might add that much has been made about whether or not this particular witness would have been favorable. It is interesting to note that an affidavit was obtained in 1949 from this Mr. Orsucci saying that he had evidence relevant to the Defense. Nothing further was ever done on that apparently although, of course, as we have already seen, the Petitioner did try to get a hearing in Federal Court.

He did manage in 1961, three or four years before Mr. Orsucci died, to get the Court to direct a deposition be taken of another witness, a Mr. Ruggles, on a perjury question. Mr. Ruggles lived in California. By the Petitioner's own admission in the habeas corpus hearing, when he finally did get it, he spent almost $2,000 obtaining this particular deposition while Mr. Orsucci was not in California but in Des Moines, and he admitted his brother often talked with Mr. Orsucci. Yet, no testimony was ever perpetuated from what is now claimed to be this important witness, Mr. Orsucci.

Q If he had been given the hearing, Mr. Morsucci could have been present as a witness?

A That is right.

Q He could not take the deposition of Mr. Orsucci if he was in Des Moines and subject to subpoena?

A I don't believe I understand. He could have taken the deposition of Mr. Orsucci in Des Moines if he could take the deposition of Mr. Ruggles in California.

Q In your state practice, can a defendant take a deposition of any witness he wants whether he is subject to the subpoena power or not?

A I don't quite know the answer to that, Mr. Chief Justice, but I do know that in the Federal District Court, the Judge did or der a deposition to be taken in 1961 of this Mr. Ruggles.

Q Ruggles was in California?

A Yes, sir.

My point is if this could have been done with regard to Mr. Ruggles under Federal law, because I believe at that time the Petitioner's attorney was from Des Moines, his brother was there and so was Mr. Orsucci, so it could have been accomplished relatively easily compared with the other one.

Q What I am asking is this: In a criminal case or in a habeas corpus case, if the witnesses are all within the jurisdiction of the Court, does the defendant have the right to go out and take their depositions before a hearing in court?

A Quite honestly, your Honor, I don't know.

One other point I will raise very quickly and then on with the next, it is shown in the habeas corpus District Court hearing that the Petitioner was in fact out of prison for two-and-a-half or three years. It appears that he walked

away from a prison farm in 1953 and was later recaptured in 1956 in Detroit, having spent most of his time in Canada. We would thus submit that again if Mr. Orsucci had been as imporàant a witness as he is now claimed to be, perhaps the Petitioner might have done something during that time.

This might also answer the question which was raised yesterday about the parole. I think the question is not why parole has not been granted but why the Governor of the State who is able to commute the sentence has not commuted the sentence. Perhaps that had something to do with it. Once the sentence is commuted to a term of years, then parole thereafter could be granted.

Q I missed what you said at the beginning. You said this man escaped or tried to escape, the Petitioner?

A The Petitioner walked away from a prison farm in 1953. He admitted this during his testimony before the Federal District Court.

Q What were the circumstances of this murder? It was the killing of a police captain?

A Yes, sir.

Q In the commission of a felony?

A A reported burglary had brought forth several Burlington policemen. They surrounded the store that was reported being burglarized and when this Captain Sauer went to one side or the back of the store, shots were heard and he

was found wounded with shotgun wounds, and he later died, but he did not testify or speak.

Q So, a second-degree verdict offhand would appear to be somewhat of a compromise verdict, would it not?

A It was the least of the three convictions offered to the jury and they took that one, yes.

The false evidence which is claimed here has to do with the notes which were intercepted by other prisoners, presented to a prison official and made their way into the hands of the Prosecutor.

This Court's decision in *Miller versus Pate* -- and that is the "Bloody shorts" case -- was completely avoided by the Petitioner in his brief here until reply. We think the rule is directly on point and it was used by the Eighth Circuit, and that is this, and I quote from 386 U. S. at page 7:

"The 14th Amendment cannot tolerate a State criminal conviction by knowing use of false evidence."

There are two critical points which lead us to believe that that particular rule does not require a finding of a violation of due process here.

First of all, the talsity of the notes is still a matter of opinion.

Secondly, regardless of what is said today, the notes were before the jury in all their ramifications. The witnesses for both sides testified it was before the jury that perhaps

they were forged.

A Mr. Yates, a Defense witness, got up and gave very clear testimony that he did not think that the Petitioner had written the notes.

Furthermore, the Court gave a very clear instruction telling the jury that this sort of thing -- and one can imagine it might have been even more true in 1934 -- that this sort of evidence was the lowest form of evidence.

So, we believe that the jury was completely aware of the circumstances surrounding these notes; that it was a jury determination that was made then, and the jury's decision, we are sure, even if there had been the expert testimony available today, would have been relatively the same as it was then. We don't know whether the jury found they were false or not, but I do think that their weight was entirely decimated by the instruction and by the able objections, the other able witnesses presented by the Defense on this particular subject.

Q In the hearing below, did the State put on any testimony, any expert testimony to counteract the testimony of the Petitioner that these were forged?

A The expert testimony in the hearing was presented by the Petitioner. The State also had expert opinion testimony, but I don't recall that the expert was there, however it was, admitted at the hearing that a State expert had looked at the notes and had concluded the same as the expert

for the Petitioner in 1965, I believe it was.

Q Is this original handwriting expert who testified that these were the writing of the Defendant still living?

A To my last knowledge which was a year or so ago, he was in Chicago, Illinois.

Q I wonder why the State did not use him again to show that this was actually the handwriting of the Petitioner?

A Based upon what the state expert said and based on the lapse in years, quite frankly, I don't know why they didn't use Mr. Faxon again, but I think it was admitted by the State at that hearing that a State expert had concluded the same as the Petitioner's expert.

Q Does that State concede that those were forged?

A No, your Honor, and I think that this is a good point which has been raised here.

The return to an order to show cause, I believe it was, the State said that based upon the testimony, it would appear that the notes were wrongfully admitted. However, we contend now that this was not an admission of falsity but only the reasonable conclusion that the expert opinion in 1965 was different than it was in 1934 and there is no showing or even a hint that the 1934 examination was in any way fraudulent.

Q Who put on the habea corpus hearing?

A It was at the end of the hearing by the State's counsel.

Q A State expert never testified?

A I don't believe he ever did testify, but it was stated that if he did, he would testify relatively the same.

Q If the State has put the expert on the stand, would the State be bound by his testimony or not?

A No, I don't think so, Mr. Justice, because I think this is a jury question, and I think in 1965 it would be entirely proper, based merely upon expert testimony, to usurp the jury function and state beyond what the jury had in 1934 that these notes were false.

Q Mr. Claerhout, what about Respondent's Exhibit No. 2 on page 128? That is your exhibit, is it not?

A Yes, sir, this was the letter that I believe I referred to.

Q You did put it in evidence?

A Yes. There is not question about that.

In conclusion on that point, We think the Petitioner received due process by protection of the jury, and we think that this would be the same in 1968 as it was in 1934.

Finally, the alibi instruction---

Q Before you get to that, just on what Justice Marshall has presented to you, this is almost a clear concession that these notes were not the documents written by the Petitioner; is that correct?

A I think, Mr. Chief Justice, based on expert

opinion, this is all we have to go on, yes.

Q It says, "Examination has been made of the above-described material as requested and we have compared the known specimen of printing with the two items in question. It has been concluded and it is the opinion of the examiner that Gale Johnson, whose known printing appears on specimen K-1, is not responsible for the printing on specimens Q-1 and Q-2," and that is signed by the Director of the Ohio Bureau, Criminal Investigation Division, and you vouched for that in putting it into evidence, so the State does vouch for the fact that this is not the handwriting of the Petitioner; isn't that correct?

A If this is considered an admission, I don't think the State can admit to such a thing on mere expert opinion. I think it ought to be more---

Q What more could they have than expert opinion?

A I think if the man who actually authored the note stepped forward and said, "I did those" and not the Petitioner, I think the State then would be in a position that it would have to admit that they were not.

What it is doing here, if it were to admit, is taking the jury function, but the point is, Mr. Chief Justice, the jury was well-informed of all of this, we think, everything short of expert opinion to the contrary in 1934.

Q Your basic point is that even accepting all of this there was no knowing use of false evidence?

A No, knowing use by the Prosecutor or anyone else in the State.

Q Do you mean the very maximum offense could be claimed the expert for the State in 1934 was mistaken?

A I think so.

Q If he was mistaken, it was an honest mistake?

A I think that is a reasonable conclusion.

Q You don't doubt that the evidence o f these two notes was highly prejudicial to the Defendant?

A If they were believed.

Q You say they were believed.

A No, I say they probably were not believed in 1934 because of the strong case the Defense took against them, even presenting a witness who claimed the Petitioner had not written them, and he thought they had been forged.

Q That was an unexpert witness who said it wasn't?

A This is true, but, again, I think the Court's instruction to the jury reduced their credibility greatly by saying these are the lower forms of evidence and the jury should take great care in looking at them.

Fianlly, on the alibi issue, there are three positions involved: one of the majority of the Iowa Supreme Court, one of the Eighth Circuit Court of Appeals in overruling *Stump*, and then there is an intermediate position.

The three positions are unwise instruction and

unconstitutional.

The tother is unwise but not unconstitutional.

The hird is wise and constitutional.

Q What is the third opinion?

A There are three levels.

Q What level is the third one?

A The third one, your Honor, is the present view of the majority of the Iowa Supreme Court.

We submit that Chief Judge Van Oosterhout's opinion below and his dissent in the *Stump versus Bennett* case are indeed the wisest of all positions.

Q Unwise but constitutional?

A I think the handwriting is on the wall even before the Iowa Supreme Court after reading their *Carter Case* that perhaps it is not the best but wouldn't go so far as to say it was unconstitutional for the reasons, of course, set forth in our brief and for the same reasons this Court found---

Q You can finish your statement.

A ---for the same reason this Court found the insanity instruction that was required to be proven beyond a reasonable doubt was not violative of due process in *Leland versus Oregon.*

Q How old is the Petitioner now?

A I understand the Petitioner was born in 1905.

MR. CHIEF JUSTICE WARREN: Mr. Carlson.

REBUTTAL ARGUMENT OF RONALD L. CARLSON, ESQ.,

ON BEHALF OF THE PETITIONER

MR. CARLSON: Thank you, your Honor.

May it please the Court, the age of the Petitioner as Mr. Justice Black asked, is presently 63 years old, I understand. He was 29 when he entered the penitentiary.

Mr. Justice Marshall has suggested that the effect of Mr. Orsucci on the jury is absolutely incalculable at this point. I think that is true, and had our right to have him secured as the witness, had the trial been vouchsafed to us, there would have been no problem on that.

It is the responsibility of the State that this was not done and we suggest their responsibilities in years since and well prior to the time Mr. Orsucci died fell within the purview of our being denied a hearing. Theirsteady resistance to our applications for hearing are of record.

In 1961, we appeared in the District Court in the Southern District of Iowa. We raised this point of the false notes and, again, we were denied without hearing. Again, this was resisted by the State.

Now, the witness dies in 1965 and Respondent says, "You did not preserve his testimony."

I suggest that we had disabilities in preserving that. We did try to take an affidavit, your Honor.

I have looked at that California deposition, and in

connection with the colloquy on that point, the Federal District Court at the time he ordered this California deposition made clear he was only doing it because the deponent there was out of state, was of old age, and there was a possibility that his testimony might be lost.

In connection with the notes, the point has been made here that the notes did occupy a very substantial place in this trial. The trial record shows that over 40 pages of transcript were dedicated on the part of State evidence to these notes.

In addition, we urged to the Courts that they were Exhibits 1 and 2 at the trial.

Q At which trial?

A This was in the 1934 trial.

Mr. Claerhout suggests because we were able to put on the stand a prisoner from the state penitentiary who said, "Mr. Prosecutor, those notes were fictitious. You knew it and I knew it," but some how they destroyed this effect on the jury, but this overlooks the fact that we were not able to generate testimony at that time, and the State's case was much more persuasive at the time of the original trial.

Q I suppose this gets back to colloquy you and I had earlier on this note issue. We have not yet in this Court, have we, said if false testimony gets in that that is fatal to a conviction unless it got in with a knowledge of its

falsity on the part of the prosectuion?

A This is why I mentioned *Pyle versus Kansas*. In that case, the lower courts have all taken the position -- and also in *Curran versus Delaware* -- that that case involves no knowledge by the prosecutor himself of perjured testimony but the point is the Defendant is injured.

Q My mind is not at all clear on this question of perjured testimony getting in, whether it is in fact false or perjured. Are you suggesting wherever it is established, however innocent the prosecutor may be of knowledge of its falsity, that that ought to be a rule which requires the upsetting of a conviction?

A I am suggesting there is evidence in this record that this prosecutor was told.

Q That is different.

You are saying there is something in the rule which establishes that he knew of the falsity of this testimony of, I gather, the handwriting expert.

A The findings are against me on that.

Q He was told in open court it was false, and the jury was told it was false; but this does not mean that the jury was told it was false.

A We were not notified of this evidence until the very eve of the trial.

I see my time has expired.

Q I am a little confused about this 35-year business. I think you told us yesterday the Iowa practices on a life sentence are that a parole is impossible, and if it is to be short of life there must be commutation of that. I thought the Attorney General said differently.

A No, I believe he has agreed with me.

Q Has there been any effort to get commutation of Johnson's sentence?

A I am not aware of any on that point. I do know, as I said yesterday, he is being considered for a partole at the present time -- a recommendation therefor.

Q A recommendation for what? For a commutation?

A For commutation.

If there are no further questions, I thank the Court very much.

(Whereupon, at 11:23 a.m., oral argument in the above-entitled matter was concluded.)
