In the

Supreme Court of the United States

LYMAN A. MOORE,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

No. 69-5001

Washington, D. C.
January 18, 1972

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HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

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LYMAN A. MOORE, Petitioner,	:	
v.	:	No. 69-5001
PEOPLE OF THE STATE OF ILLINOIS, Respondent.	:	

Washington, D. C.,

Tuesday, January 18, 1972.

The above-entitled matter came on for argument at 10:41 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

JAMES J. DOHERTY, ESQ., Assistant Public Defender, Room 1124, County Building, Chicago, Illinois 60602, for the Petitioner.

THOMAS J. IMMEL, ESQ., Assistant Attorney General of Illinois, for the Respondent.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 69-5001, Moore against Illinois.

Mr. Doherty, you may proceed whenever you're ready.

ORAL ARGUMENT OF JAMES J. DOHERTY, ESQ.,

ON BEHALF OF THE PETITIONER

MR. DOHERTY: Mr. Chief Justice, and may it please the Court:

In the prosecution for murder, the State concealed six items of exonerating evidence and used a weapon that was not connected with the petitioner Moore or the offense, to denounce him as a bad man generally; and the jury, that had been selected in violation of Witherspoon standards, found the petitioner guilty and fixed his punishment at death.

This case begins at 10:00 p.m. on Wednesday, April 25th, 1962. A bartender in Lansing, Illinois, ejected a profane customer from his tavern. At 10:55 p.m. that customer rushed back in with a twelve-gauge shotgun and shot him in the heart and killed him.

Two days later, at a nearby tavern, a man known only by the nickname "Slick" bragged that he had shot the bartender in Lansing.

Trial was held 25 months later. Two State witnesses identified petitioner Moore as the assailant. Two of his employers testified that he was at work 50 miles north of

Lansing, Illinois, at the Wilmette Country Club, until after midnight.

Q Where is Lansing, what part of the State?

MR. DOHERTY: Lansing is south, Your Honor.

Q South of Chicago?

MR. DOHERTY: Chicago, Riverdale, Dalton, South Holland, Lansing.

Q About 50 miles south of Chicago?

MR. DOHERY: Oh, no, no, no, Your Honor. I'd say about 27, 30 miles.

Q Yes.

MR. DOHERTY: And a little bit east.

Q East.

MR. DOHERTY: As far southeast as you can get in Cook County.

And Wilmette is way north.

Q I know where that is.

MR. DOHERTY: And this was before we had that Dan Ryan Expressway opened up. You couldn't have got there, 50 miles, except by going through small side streets, and with nothing open, of course the outer drive was open.

Now, opposing those two people that said that he was the assailant were these employers, and verified by the work records. He was paid overtime. He worked until after midnight that night.

The most damaging evidence against this man Moore was the testimony of State witness Virgle Sanders. Virgle Sanders identified the petitioner Moore as the man that he knew, a man that he had seen several times before, but knew only by the nickname "Slick".

He testified that on Friday afternoon, 1:30 p.m. -- that's less than 40 hours after this killing -- this man "Slick" was in a tavern, the Ponderosa Tap, and said to him: "Hey, Virgle, it's open season on bartenders. I shot one in Lansing last Wednesday night."

Now, five of the concealed items of exonerating evidence involved Virgle Sanders. They were uncovered in a post-conviction hearing that took place on January 1967.

Friday night -- I mean Friday afternoon, April 27th, 1:30 p.m., that's the bragging incident, real the voluntary confession of this man "Slick" that he killed the bartender. The next day, Saturday, the Lansing police are in that Ponderosa Tap and they're talking to a man named William Leon Thompson. "Did you hear about it?" Oh, yes, he'd heard about it.

"Can you identify Slick?" "Yes, I can."

Monday, April 30th, 1962, Sanders is in the police station at Lansing and he's giving a statement. He tells the police that he first met Slick about six months ago. Now, that would make it November 1, 1961, in Wanda and Del's tavern.

Of course the police wouldn't know the significance

of that until six months later; but that statement is one of the things that was withheld from the trial lawyers.

Immediately after getting his statement, the Lansing police get their shotguns and automatic weapons and they go and they raid Wanda and Del's tavern, looking for the man called "Slick". And he wasn't there.

They talked to the owner, his name is Delbert Jones. "Do you know him?" "Yes."

"Can you identify him?" "Yes."

And that's the second thing that these trial lawyers knew nothing about.

Q That's Jones, Delbert Jones?

MR. DOHERTY: That's right.

Q The proprietor of Wanda and Del's.

MR. DOHERTY: The fact that he could identify him. Yes. Well, he hung around in his tavern.

Q And they said, "Do you know Slick?"

MR. DOHERTY: Yes. Absolutely.

Q They didn't say, "Do you know Lyman Moore?"

MR. DOHERTY: No, sir. The name Lyman Moore doesn't come into this yet. This is only a man known by the nickname "Slick".

Q Right.

MR.DOHERTY: That's all.

Now, the Lansing police, after this raid, let's make

it May 1. They have an immediate suspect, James E. Watts; James E. "Slick" Watts. Nobody knows about that until right near the end of the post-conviction hearing, when the State brings it out. And that's January 1967.

So that's the third thing that was withheld from these trial men. They didn't know that they had had an immediate suspect named James E. "Slick" Watts.

Q Well, where do you -- James E. Watts had the nickname "Slick"?

MR. DOHERTY: That's right. That comes right from the Chief of Police. The Chief of Police testified that he assigned Lieutenant Turbin to look for James E. "Slick" Watts. Now, where he looked for him, I don't know.

But they have never found him, not even to this day, as I stand before you now in 1971 -- or '72, excuse me.

That's the third thing.

Now, on May 1st, 1962, the Lansing police -- let's just recapitulate a little bit -- they know three people who all know each other and who all know a man named "Slick". And that's Virgle Sanders, William Leon Thompson, and Delbert Jones, the owner of Wanda and Del's.

Six months later, petitioner Moore is arrested. And the Lansing police photograph him, take the photograph over to William Leon Thompson's home. "That ain't Slick; that ain't the Slick I knew. Doesn't resemble him." He tells that to

Lieutenant Turbin and Sergeant Vandernoord, and they don't tell that to anybody.

Oh, excuse me, they do. They tell it to the prosecutors. They don't tell it to the defense lawyer.

And right after they took petitioner Moore into custody, they get a report, a kickback sheet from the FBI, which shows that petitioner Moore was in a Federal Penitentiary from February 18, 1957, to March 4, 1962. Now, you put that together with the statement that he originally gave, and what do you find out? That it's impossible for him to be the man known as "Slick" that Sanders first met in Wanda and Del's on or about November 1, 1961.

Q Well, was he in prison at the time of the crime?

MR. DOHERTY: No. He got out March 4, 1962.

Q And when was the crime?

MR. DOHERTY: April 25, 1962.

Q And the statement had to have been after that?

MR. DOHERTY: The statement given by Virgle Sanders was given on April 30, 1962, at 8:50 p.m.

Q Yes? And he said?

MR. DOHERTY: Six months ago -- and where does that put it? When I got this on post-conviction, I asked Virgle Sanders: "Are you sure that you met this man "Slick" before Christmas?"

You know, I don't like this answer, like, you know,

two, three months, four months, five months, rough guess; no, I want to pin him down.

And I ask him: "Are you sure it was before Christmas?" Oh, yes, he's sure.

And silly, you know, it's repeated, give him a chance to get off the hook. "Are you definite that it was before Christmas?" "Oh, yes." It's in this record.

Q So this fellow "Slick" must have been talking about a different crime, at least?

MR. DOHERTY: No.

Q No?

MR. DOHERTY: No. The man that bragged, the man that voluntarily confessed to this crime is James E. "Slick" Watts.

Q Oh, I understand --

MR. DOHERTY: The man that Chief Braschler assigned to look for him and the man that they said at trial was petitioner Moore.

So, at the time of the arrest, they know from the kickback sheet from the FBI that it's impossible for this man to be the man that's in Wanda and Del's on November 1, and they also, in addition to that, know that William Leon Thompson has already told them that he's not the man.

Q As I understand it, Mr. Doherty, everything you've told us so far, you're telling us is information that was not available to defense counsel at the time of trial --

MR. DOHERTY: That's correct.

Q -- and none of this that you're talking about got into evidence at the trial itself; is that right?

MR. DOHERTY: That's right. Got it in the post-conviction.

Q Yes. And your argument is that this was information, perhaps exculpatory or something of Moore --

MR. DOHERTY: Correct.

Q -- and that the prosecution should have made available to the defense counsel; is that it?

MR. DOHERTY: That's right.

Q Even though -- and you're also telling us defense counsel had no knowledge of any of this at the time, at the time of trial?

MR. DOHERTY: It's impossible for him to have had knowledge of four things.

Q No. What I want to know is, are you telling us that defense counsel had no knowledge of any of these things at the time of trial?

MR. DOHERTY: That's right.

Q All right.

MR. DOHERTY: This was not developed until January 1967 in the hearing at post-conviction, long after the trial. The trial was on, in the month of May 1964, Your Honor.

Q Yes.

MR. DOHERTY: Now --

Q Did you tell us earlier that -- you say the name was Sanders?

MR. DOHERTY: Virgle Sanders.

Q It was Sanders' testimony that identified Moore as the "Slick" who committed the murder?

MR. DOHERTY: That's right. That's right. Exactly. And that was the most damaging testimony of all.

Q William Leon Thompson doesn't turn up anywhere until the post-conviction hearing, is that it?

MR. DOHERTY: That's correct, Your Honor.

And neither does Delbert Jones.

At the post-conviction hearing, we show a picture of James E. Watts to Delbert Jones and William Leon Thompson, and they both say, "That's Slick".

Q And were they both in the tavern at the time of the alleged crime?

MR. DOHERTY: No, Your Honor. No, Your Honor, --

Q Then tie up their testimony.

MR. DOHERTY: -- it's a different tavern altogether when this confession takes place by a man called "Slick". It's a different tavern altogether, in a nearby town.

Q Clear up this, the tie-in between those two things, if you will, for me.

MR. DOHERTY: You mean --

Q Between what Thompson said and --

MR. DOHERTY: Oh. They're looking for a man named "Slick". They have an immediate suspect, James E. "Slick" Watts; the Lansing police. Is that right?

Now, then, six months later, when they arrest petitioner Moore and take his photograph, they take it over to the home of William Leon Thompson. That's the man they talked to Saturday morning, who said, "Yes, I know Slick; yes, I can identify Slick."

On Saturday morning, April 28, 1962.

Now, November 2nd or 3rd, they go over to his home with a picture of the petitioner Moore. They say, "Here you are." He says, "That's not Slick. That's not him."

Now, they didn't tell anybody that. They didn't tell anybody. And then --

Q How was it this information was in the hands of the prosecutor as contrasted with the police?

MR. DOHERTY: Well now, I would say this. There are two things that the prosecution knew definitely about, and one is that incident where William Leon Thompson said, "No, that's not Slick; doesn't resemble him."

Lieutenant Turbin testified at the post-conviction hearing that he told that to the prosecutors. He related that event to the prosecutors. So they certainly have knowledge of that.

There is another thing that we're coming to now that they had knowledge of, because it took place right in front of their eyes.

Q Before you get to this, though, Mr. Doherty, may I be clear about this: Sanders testified at the trial that he was present in the tavern where the brag was made that "I killed somebody in Lansing"; is that right?

MR. DOHERTY: Yes.

Q And then, he then identified Moore as that "somebody" who was in that tavern, bragged that he had killed someone in Lansing; is that it?

MR. DOHERTY: That's right. That is exactly right. He said, "I know this fellow; I've seen him a couple of times. I only knew him by the nickname 'Slick'." And he said, "Hey, Virgle, it's open season on bartenders; I shot one in Lansing last Wednesday night." Now, this is Friday afternoon. This is 39 hours and 35 minutes later.

Sure, his alibi and his work record alibi covered that. But who's going to believe it when the man says "I know him". The jury is going to believe who?

They're going to believe this man Sanders.

Now, on post-conviction, when I show photographs to Delbert Jones and Leon Thompson, they say James F. Watts is the man called "Slick". "That's Slick". Or when I show the situation, "Are you sure it was before Christmas?" "Yes."

Yes, he's sure it's before Christmas.

I say to Sanders: "Now, look, if you would have known that this man Moore was in the Federal Penitentiary until March 4, 1962, would you have identified him as the man that you knew as 'Slick'?"

And his answer was: "If he's in jail it would be impossible to be the same man."

Now, that doesn't take a great deal of genius for me to do that. If they would have had that information, the trial lawyers, they would have done the same thing. They could have impeached Virgle Sanders.

And if Virgle Sanders is a material witness as far as the prosecution is concerned, why is not that evidence that was withheld --

Q Well, didn't --

MR. DOHERTY: -- used to destroy the material --

Q Didn't Moore's attorney know where he was?

MR. DOHERTY: Who? Oh, sure. Yes, they did.

Q Well, they didn't attempt to impeach Sanders?

MR. DOHERTY: They didn't get the statement. That's what they testified to under oath at the post-conviction hearing.

Q All right.

MR. DOHERTY: They didn't get that statement 16.

Q Well, the statement is what had referred to the

first meeting on November 1st, 1961?

MR. DOHERTY: Not in those words, but yes. "About six months ago."

Q In other words, when they first interviewed Sanders, the police took a statement from him some time before the trial?

MR. DOHERTY: Right.

Q How long before the trial?

MR. DOHERTY: On April 30th, 1962, at 8:50 p.m., and filed in May 1964, 25 months later.

Q And you had no access to that statement until 1967, at the post-conviction hearing?

MR. DOHERTY: Oh, you mean afterwards?

Q Yes.

MR. DOHERTY: Why, certainly I found it. I got discovery on these people. I got everything in the file.

Q I know, but you didn't happen to --

MR. DOHERTY: Oh, they didn't have it; they testified they didn't see it, the trial lawyers.

Q So the defense counsel did not know that Sanders had told the police that he, Sanders, had met Slick six months before?

MR. DOHERTY: Precisely.

Q Yes.

MR. DOHERTY: Precisely.

Q Mr. Doherty, did Moore's defense lawyers at the trial cross-examine Sanders on the length of time he had known the defendant, and that sort of thing?

MR. DOHERTY: No, Your Honor, they did not. And, you know, that's dangerous.

Q They might have developed this on their own, I take it, had they sought to cross-examine.

MR. DOHERTY: When a man testifies that he knows this man, that's bad enough, without making it worse and driving it deeper in by inquiring, "How long did you know him?"

Q Well, it's a calculated risk, but some would and some wouldn't. Isn't that true?

MR. DOHERTY: Right. Well, you see, with the information that I have now, and I had at post-conviction, then it's sensible cross-examination; but without that information, that's the most dangerous thing that I could imagine to ask, "How long have you known him?"

Q Was there anything at the time of trial. Now, I'm putting you in the time of trial. Was there at the time of trial to bring to the notice of the prosecutor that this six-month factor was significant?

None of you really knew that until the post-conviction hearing, did you?

MR. DOHERTY: Well, -- the prosecutor testified at post-conviction that he didn't remember whether statement 16,

from the Lansing Police Department's file, was turned over -- or was in his file. Now, he never said that he gave it to the trial lawyers, defense lawyers; but he said:

"I don't recall. Mr. Doherty, I'll answer you this way: if it was in my file, then they saw it, because I showed them my entire file."

That's how he put it. Is that your question precisely?

Q Well, my question goes a little beyond that. And that is -- to put it another way: Until you developed the information about this man being in prison until -- what time?

MR. DOHERTY: March 4, 1962.

Q -- March 4. Until that evidence came out, the six-month statement didn't have any particular significance, did it?

MR. DOHERTY: Well, in my mind it should have, Your Honor. It should have had particular significance in November 1962, when they're going over and they're talking to William Leon Thompson, because by then they had the kickback sheet from the FBI, and the FBI shows it, and all you've got to do is just look at it. Six months ago, from April, makes it November 1, 1962. And the FBI report shows he didn't get out until March 4, 1962.

Q Well, you're speaking now of the police officers who had the interview, rather than the prosecutor, are you not?

I'm just trying to get the difference of -- between

what was known to the prosecutor and what was known to the police.

MR. DOHERTY: All right.

Q We don't know yet whether that's important.

MR. DOHERTY: Well, I say that the -- that that's imputable to the police, under the Warden vs. Barbee, that's a law question.

Q That's another question.

MR. DOHERTY: But I won't talk about that.

Let's get to the last thing, and that will help a lot. When -- you know, here they are now. They know all these things and yet they don't bring in Virgle Sanders to look at this man; they don't bring in Delbert Jones. They just close their eyes for 18 months to the truth. And Your Honors have told us time and again, a trial is a search for the truth.

They closed their eyes to the truth. When Virgle Sanders first saw petitioner Moore, the day before he testified at the trial, he takes a look at him and he says, "The guy that I knew as Slick looked to be about 30 or 40 pounds heavier than this guy."

Now, that was in the presence of the Lansing police officers and the prosecutors. And the Lansing police officers said, "Well, you know how those jailhouse beans are."

That is Item 5, and that is actively encouraging Virgle Sanders to falsely identify the petitioner Moore as the

man called "Slick".

And that was in the presence of the prosecutors. So the prosecutors know now of two things: they know of that because they were there; and they know about William Leon Thompson saying, "No, that is not Slick."

At the post-conviction hearing --

Q You think the prosecutor -- the prosecutor knew about Sanders' prior statement when they turned the file, their file, over to the defendant's trial counsel?

MR. DOHERTY: I can't say that.

Q What?

MR. DOHERTY: What -- when he turned it over? To the defense lawyers? That's in dispute. That's in dispute.

At the --

Q Well, --

MR. DOHERTY: -- post-conviction hearing they said that he didn't. And he -- when he testified, he said, "I don't remember if it was in there."

Q Well, I know, but did the prosecution turn its file over or not, at the trial?

MR. DOHERTY: I say no.

Q Well now, you say no, but let's assume that that's not right, that they did turn their file over.

MR. DOHERTY: Okay, fine.

Q The fact is that the -- that Sanders' statement

was not in the file.

MR. DOHERTY: I don't say that. It might have been. It might have been.

Assume -- you want to assume that they turned it over?

Q Yes.

MR. DOHERTY: It might have been. Perfectly willing to stipulate to that. But one thing we know is this: that's all that could have been in there, not the other four things, because they weren't reported.

Q Oh, I understand that. I understand that, but I'm just trying to inquire about this one item.

MR. DOHERTY: The statement?

Q Yes.

MR. DOHERTY: I think it was in there.

Q The prosecution testified that they turned the file over, didn't they?

MR. DOHERTY: That's what they said -- that's what he said, yes. And the defense lawyers denied it.

Oh, he said he turned it over to <u>one</u> of the defense lawyers.

Q Then what did the Supreme Court of -- what did the State court find on it?

MR. DOHERTY: They said that -

Q That the -- they said that --

MR. DOHERTY: -- there was no request for suppressed

information during trial and the record reflects that the prosecutor showed his entire file to -- and that's what you're bound by now, that finding.

Q Well, that's -- so they did turn their file over?

MR. DOHERTY: I don't say so.

Q Well, the court found it, that it was --

MR. DOHERTY: That's right. They found it, and they found that there was no request during trial for the suppressed information.

Q Well, there's no independent evidence anywhere that the prosecution knew of the statement by Sanders, is there? How do you know --

MR. DOHERTY: The prosecution knew of the statement. I would have to assume they knew of the statement.

Q Because it was in their file or not?

MR. DOHERTY: Well, no. All you've got to do is take a look at the way in which he questioned Sanders. The prosecutor questioned Sanders. Actually he put him on and he cross-examined him, is what he did. And --

Q So if the file didn't contain the statement, it must have been deliberately withheld?

MR. DOHERTY: I'm not going to say that. I'm not going to say that. I don't have to be that extravagant, Your Honor.

Q Well, you have -- if you're going to rely on this statement, you have to show --

MR. DOHERTY: That's only one of five. Only one of five.

Q Well, I understand that, but you're relying on that as part of the five.

MR. DOHERTY: That's right.

Q And you are going to have to establish that they didn't get it.

MR. DOHERTY: They didn't. They testified that they didn't. And the most the prosecutor would testify to at post-conviction was: Well, he doesn't remember if it was in there; and if it was in there, then they got it.

Now, that's the record before you now.

Q Mr. Doherty, your time is running. When are you going to get to the gun?

MR. DOHERTY: Yes, the gun. I better get to the gun. All right. The gun.

Now, they introduced a sixteen-gauge gun. Bill of Particulars, page 2 of the abstract: "What kind of a gun killed this man?" "Twelve-gauge."

Answer by the prosecutor that tried this case: a twelve-gauge.

They had in their file at all times a report from the Chicago Scientific Crime Detection Laboratory by Sergeant Benz,

that the wadding dug out of the chest of the deceased is from a twelve-gauge shell.

You know, I have two little pillboxes here, and I tell you, you can put a sixteen-gauge shell into a twelve-gauge chamber, and it's a little dangerous, it's a little loose, you shouldn't do it; but no way in God's world can you put a twelve-gauge shell into a sixteen-gauge. It's impossible. You couldn't do it with a hydraulic press, and if you can, I'll let you shoot me with it.

Now, -- thus it's a twelve-gauge gun.

Q Now, you're saying --

MR. DOHERTY: And you know what this amounts to? It had nothing to do with him. It came from the back seat of a car owned by Barbee, the sawed-off barrel was found under the bed in Barbee's home. So, therefore, what you've got at most is propensity evidence of another.

And in Spencer vs. Texas, in the dissenting opinion, and all the authorities cited in there, they said: You can't use propensity evidence.

They did it. They denounced this man as a bad man generally. Jim Fleming stood in front of that jury and he said to them: "This is not the gun, no question about that, folks. This is not the gun."

Now they say it could be. But Jim Fleming said, "This is not the gun. No question about that, folks."

"But anybody that's with a man that has this kind of a gun -- and look at those shells -- he deserves the death penalty." That's what he told them, and that was wrong. He shouldn't have done that.

MR. CHIEF JUSTICE BURGER: All right. You have a little left for rebuttal, Mr. Doherty.

Mr. Immel.

ORAL ARGUMENT OF THOMAS J. IMMEL, ESQ.,

ON BEHALF OF THE RESPONDENT

MR, IMMEL: Honorable Chief Justice, members of the Court:

I would like to say, as a prosecutor from the State of Illinois, that if the evidence in this case remotely resembled the characterization which has been asscribed to it by my learned colleague, and my friend, that I wouldn't have the courage to stand before this Court this morning.

Counsel has been involved in this case for a considerable length of time and, in my fair judgment, as an attorney he has woven a legend. And for that reason I'm going to take the liberty of restating the facts as I truly think they are reflected in the record.

I will return the Court to April 25, 1962, when a gentleman, who I contend was Lyman Moore, and a companion, who was a dark-haired man, wearing a mustache, went into a tavern in Lansing, and where the petitioner, Lyman Moore, was subse-

quently ejected for profane language; who returned approximately one hour later and at that time laid a shotgun across the bar and terminated Mr. Bernie Zitek.

Now, not mentioned this morning at all is the fact that two people; one, the cocktail waitress, Patricia Hill, from a distance of six feet, observed this whole incident twice. She observed the ejection, she observed the subsequent shooting an hour later. And she said at trial that Lyman Moore was the gunman. That Lyman Moore was the man ejected an hour earlier.

Another patron of the tavern, a man by the name of Henley Powell, was present in the tavern at the time that the shooting took place. He is not able to tell us whether Moore was the man ejected from the tavern, he may not even have been there at the time.

But Henley Powell was playing pinochle with a few other gentlemen around a table, and his testimony is -- and it's pertinent in another point here -- playing pinochle, he suffers the fate of many pinochle players, he can't bid. So he lays his hand down, and he's sitting out the hand, and he looks toward the door, and what does he observe but Lyman Moore, who he identifies at trial, come through the door, carrying a shotgun, walk up to the bar, and kill the bartender, Mr. Zitek.

Henley Powell pursued Lyman Moore out of that tavern,

and was confronted with him in a well-lighted street, whereupon Lyman Moore told Henley Powell, according to Mr. Powell: "Get back or I'll kill you too."

Now, these two people were not discussed here this morning. But this was the State's case in chief, this was the eyewitness to the killing.

Now, two days later, in another tavern, called the Ponderosa Tap, in no way related to the tavern where the killing takes place, Virgle Sanders is having a beer with a gentleman who he, at that time, is identifying as "Slick", and at trial says he knew as "Slick". And this gentleman says to him, "It's open season on bartenders; I shot one over in Lansing."

Now, totally unmentioned in any of the petitioner's briefs, and not mentioned here this morning, is that there were a couple of other people there when that conversation took place. One of whom was the bartender, "Skinhead"; "Skinhead" Joyce.

Now, Skinhead is standing behind the bar and Virgle Sanders approaches him and says, "This gentleman would like to have a ride over to Harvey, can we arrange that?" And Mr. Skinhead Moore -- Joyce, rather, testified at the trial that, "Yes" he arranged for the ride, that Lyman Moore was the man in the bar conversing with Virgle Sanders.

Now, -- that he could get a ride for Mr. Moore, so

who do they contact? They contact the owner of the Ponderosa, who is also in the tavern at the time, and they say, "Can you arrange for a lift for this fellow here, and his companion" -- who again, by the way, is the dark-haired man wearing a mustache, the same description we have of the companion of Moore at the time he's ejected from the tavern.

Okay. What happens then?

Mr. Fair accommodates these two gentlemen and drives them all the way to Harvey, in the course of which they stopped twice, at two different taverns, and enjoyed themselves as companions.

Now, Mr. Fair testified at trial that Lyman Moore is the man that he accommodated, that he is the man who was in the Ponderosa, that he's the man he drove to Harvey. And that, furthermore, in the course of the automobile ride -- and by this time in his testimony he's referring to them as Moore and Barbee, because they're on a first-name basis at this point, or a second-name basis, in any event -- at this point he says, During the course of the automobile ride one of them -- it's not clear from the record which -- said, "If we hadn't had that trouble with the bartender in Lansing, we wouldn't be in this spot" or testimony to that effect.

"Well, if we hadn't had that trouble with the bartender in Lansing, we'd have been all right." That's what he said.

Now, Mr. Fair was called to testify at trial, and he testified that Lyman Moore was the man that went with him from the Ponderosa, at the request of Joyce, the bartender, and he's the man that he drove to Harvey.

Now, that tells me that Virgle Sanders' statement that Lyman Moore was in the Ponderosa with him has been corroborated. And that any mis-identification or confusion of identities of Virgle Sanders is subsequently trapped with, because it is murky recollections of a phantom named "Slick" that has yet to be run to ground by anybody, and that the police obviously abandoned once they had three -- four eye-witnesses to the killing, and three witnesses to the brag. That tells me that Virgle Sanders' testimony is accurate, in so far as it purports to reflect the conversation that he had with Lyman Moore. And it's inaccurate in so far as he purports to tell us what Lyman Moore and a fellow by the name of "Slick" are the same people. They're not.

"Slick" was -- if Lyman Moore is "Slick", it's impossible. "Slick" is a fellow that this gentleman met in Wanda and Del's back in November sometime, I suppose, in 1961. Lyman Moore was in the Federal Pen at that time, on a bank robbery charge.

Q Did the bartender hear the brag, too?

MR. IMMEL: No, he didn't, no. Neither one of them testified to the contents of the conversation.

But, you see, neither of --

Q You mean neither of whom?

MR. IMMEL: Neither Joyce or Mr. Fair, --

Q Yes.

MR. IMMEL: -- who corroborate --

Q Only -- only Sanders testifies --

MR. IMMEL: Only Sanders testifies as to what was said. And that has never been questioned. Mr. Doherty today is asserting that that statement was simply made by another man, not that the statmenet wasn't made.

The verbiage of the conversation is beyond dispute. What is in dispute is who said it. I don't think it's in dispute, I think it's perfectly certain, as the record will show.

Q Is there any dispute as to when it was said?

MR. IMMEL: No. It was said in the Ponderosa Tap, and there's no dispute as to that.

Q When? When?

MR. IMMEL: Two days later, on April 27 of 1962. No dispute.

Q Did Sanders say that Slick made this brag, or that Lyman Moore made it?

MR. IMMEL: He said that the man who was in the Ponderosa who he knew as "Slick" made it. Now, the man who was in the Ponderosa was Lyman Moore. And Slick was never there.

Q Well, I mean his first report was "Slick"?

MR. IMMEL: A man he knew as "Slick".

Q Right.

MR. IMMEL: Right. He mixed up Lyman. He evidently met Slick at Wanda and Del's, and everybody down at Wanda and Del's seems to know Slick, so there's no reason to believe that this gentleman wouldn't have met Slick down at Wanda and Del's. He simply confuses Slick with Lyman Moore.

And the question is, of course, then: what have we --

Q Well, you confuse me now. Was Slick and Lyman Moore there?

MR. IMMEL: No.

Q It was only one person?

MR. IMMEL: One person. One person.

Q And he said it's Slick.

MR. IMMEL: He says, a fellow he knew as Slick, and he looks at Lyman Moore in the courtroom at the trial and says, This man.

Q No, no. I'm talking about when he reported to the police.

MR. IMMEL: When he reported it to the police, he reports that a fellow by the name of -- a man he knew as Slick --

Q Right.

MR. IMMEL: Okay. Lyman Moore, of course, at that time is not even arrested. It's months later that Lyman Moore

is arrested.

All right. Now, I hope that I've made clear to the Court what transpired in the Ponderosa, because that has never ever been briefed by petitioner, and certainly wasn't stated here this morning. Those two witnesses to that conversation have simply escaped the attention of petitioner, and I -- I think it casts an unfortunate cast on the entire case.

Now, in October of 1962, some months later, while this fruitless search for the ubiquitous "Slick" has been going on, and he hasn't turned up, two Chicago policemen, another police department, another jurisdiction, are on patrol and they're fired upon, or at least shots are fired from a 1957 Ford automobile.

They approached the automobile, and two men flee from the car. It's staked out. The car is searched, a sixteen-gauge sawed-off shotgun is retrieved from the back seat of the automobile. And then -- and documents in the car bearing the signature of Jerry Barbee are found.

Okay. The car is staked out, and in the wee hours of the morning two men come back and attempt to get into the car, and at that point they're apprehended. All right. Who was apprehended? Lyman Moore and Jerry Barbee. The two men referred to by name in the testimony of Mr. Fair.

Jerry Barbee wears a mustache, he has dark hair. He's never tried for the murder of Bernie Zitek; he wasn't there

when it happened.

Okay. An interesting thing about this shotgun. Very interesting thing about the shotgun recovered from that car.

This arrest in October resulted in two trials for two different charges. Moore and Barbee went to trial together on an armed robbery charge that took place in July. In the reported opinion to the Illinois Supreme Court, affirming the conviction, 35 Ill. 2d, cited in our brief, this Court denied certiorari; subsequent litigation in the Federal courts again wound up in another dismissal -- denial of certiorari by Your Honors.

In that case the previous relationship of Lyman Moore with this sixteen-gauge shotgun is rather clearly outlined. He and Mr. Barbee and a third gentleman staged the broad daylight holdup of a chain store supermarket, and the same gun was admitted at that trial. The witnesses said there had been a shotgun, and whatnot. In any event, there had been a previous tie-up, and it had relevance in another context besides this case.

Q Well, this gun was used in evidence against the --

MR. IMMEL: It was used against Mr. Moore twice.

Q Against Moore twice, for two --

MR. IMMEL: Two different crimes.

Q Unrelated offenses.

MR. IMMEL: Two unrelated offenses.

Q One of which the gun was used, and the other in which it was not.

MR. IMMEL: No, it was used in both cases.

Q No, I mean the gun was used in the commission of the alleged commission of the holdup.

MR. IMMEL: Could very well have been used in this crime, as I would like to develop.

Q Oh, I didn't --

MR. IMMEL: I have an answer to Mr. Doherty's comments about the Bill of Particulars and whatnot.

In any event, we then turn to the defense of this case, which has been characterized by one dissenting justice in the Illinois Supreme Court and by the petitioner as unimpeached. And that is that the alibi provided by two witnesses, the first of whom is a gentleman named Alex Koxhallari, he's a bartender at a suburban country club, and he testifies that pay records indicate that petitioner was paid for working as a cocktail waiter that night; and from that he construes that he must have been there, although he can't testify -- on cross, it's determined that he can't really say that Lyman Moore was there. He didn't see him.

On cross-examination he's confronted with the fact that he had previously made a statement to the police that he simply had not seen Lyman Moore that night; and I think his

testimony, taken for what it's worth is worth little.

But, in any event, Herbert Anderson, the manager of the country club, is then called to testify and he tells us that their pay records reflect that Lyman Moore was paid for that evening, and that he didn't see Lyman Moore that evening because -- but he's sure he must have been there.

So on -- the rest -- the bookkeeping entry, which was not admitted in evidence, the books and records were not admitted. That's the alibi.

Now, the interesting thing about the alibi that ought to be brought to the attention of the Court. Inasmuch as it's characterized by the defense as unimpeached and invaluable, and characterized in the dissenting opinion of the Illinois Supreme Court, which I certainly have to take cognizance of, as unimpeached.

The same alibi was introduced at the armed robbery trial, which I've just referred to. Three more eyewitnesses, in other words, has mis-identified Moore there, for a grand total of five in this case and three in that. Establish, I suppose, once and for all, that Lyman Moore is unidentifiable in the State of Illinois.

But, in any event, the alibi is presented to the Illinois Supreme Court, in that case, as an answer to the conviction. And the Illinois Supreme Court, in that decision, was unable to reach the conclusion that the alibi was unimpeach-

able. It was willing to leave it as having been a question for the jury to decide.

I simply point that out because the same Justice who dissented in this case and wrote the majority opinion in that case -- it's the same Justice.

It's different handling of the same testimony in two different cases.

Q I don't -- these offenses didn't occur the same night?

MR. IMMEL: No. It was in the same --

Q Then, what do you mean, the same alibi?

MR. IMMEL: The same, exact alibi testimony was offered, that Lyman Moore had been at work, and that the work record reflect -- oh, I'm sorry. They were on different dates, but the same testimony; that is, the work records reflect that he was here and he was paid, therefore he must have been here.

Q The same place in Wilmette?

MR. IMMEL: Yes. At the Westmoreland Country Club up in Wilmette.

I would simply call the Court's attention to the very last page of the Supreme Court's opinion, in 35 Ill. 2d, for that, because it's interesting to compare the characterization of unimpeached;in that case it didn't work, but it's supposed to persuade here. I don't believe it does.

Now, what transpired at trial, with reference to

alleged suppression of evidence, is, I think, highly disputed in this case.

First of all, let me say this: On each and every occasion that a State witness was asked on cross-examination by the defense whether he had made a statement to the police, he answered either affirmatively or negatively, and when he answered in the affirmative the statement was tendered from the prosecution's file. There were three specific instances of that. Witness Hill, Witness Powell, and Witness Fair were all asked if they had made statements, and they all said yes; and the statements were all tendered.

Virgle Sanders was the only one who was not asked by defense counsel if he made a prior statement.

Now, please picture, if you will, what's going on in the courtroom in Illinois in 1962. The prosecutor doesn't have this statement in his file. The testimony of Virgle Sanders is put on by the prosecutors, developed from two conversations in the Library on the second floor of the Criminal Court Building, where I used to work.

And that, on the basis of those interviews, and not any written statement, they weren't in the prosecutor's file, Virgle Sanders went on as a State witness.

But, in any event, --

Q Well, at the post-conviction hearing was it established that Sanders' statement was not in the file?

How can you say it wasn't? Is there some testimony that it wasn't?

MR. IMMEL: The prosecutor's file was tendered to the defense attorneys, who never discovered it in the file. The prosecutor has no recollection of it being in the file, according to his testimony.

Q Well, did the prosecutor know about the statement before the -- at the time of the trial?

MR. IMMEL: It's -- in my -- I think that the record of his testimony at the post-conviction hearing must be read to conclude that he simply didn't know about the statement. It's perfectly clear from the testimony at the trial and perfectly clear, I think, from Mr. Fleming's testimony at the post-conviction hearing, that he put Virgle Sanders on the stand as a State witness, based on his conversations with him down in the Library, where we conduct interviews with, oh, potential witnesses in a State action in that county.

Now, Lyman -- now, if the same thing had happened with Virgle Sanders that had happened with all other witnesses, that is, that at the time he was cross-examined by defense counsel he had asked the same question of Sanders that he had asked of all other witnesses, Sanders would have said, "Yeah, I gave a statement to the Lansing police."

But he was never asked that question at trial, and I want to make that perfectly clear.

At the very first instance he was asked that question at the post-conviction hearing, he said, "Yes." And the statement was then tendered. Of course, it had turned up in the meantime.

My point is simply this: as a prosecutor in Illinois, a man sitting there, if the defense counsel had asked Virgle Sanders, "Did you give a statement to the police?" and he said "Yes." One of two things would have happened in this case. Either the prosecutor would have pulled the statement out of the file, if he had it, or he would have turned, with a horrible grimace on his face, to the policeman at the table and said, "Where is this statement? I have no statement."

Neither one of those two things happened, because the question was never asked.

So no one ever got put on notice. But all this business about the statement and the six months, all of it could have been cleared up if a routine question, always asked in Illinois, was simply asked. It just didn't get asked.

Q Well, is it routine in Illinois for the prosecutor to ask his witness if he's made a statement to the police? Before he puts him on the stand?

MR. IMMEL: I frequently ask them that -- that is I frequently not ask that. It's quite clear that the question didn't get asked.

Q You don't think the prosecutor knew that this --

well, how did the prosecutor get him as a witness?

MR. IMMEL: How did he get him as a witness?

Q Yes.

MR.IMMEL: The brag that took place --

Q And where did the prosecutor find that out from?

MR. IMMEL: I presume the Lansing police found that outsomehow. I don't know. I mean, they're in the same community, and it's a small community. I think something like that would certainly have traveled through the grapevine: "By the way, you know, a bartender got killed here." That travels fast through that, you know; there's a grapevine, I suppose, at every level of society, and there's one there. And I think when a comment like that would be made in a bar two days afterward, it found its way back to the ears of some police official who followed it up.

Q My question was as to whether or not the prosecutor didn't get the information from the police; that's my question.

MR. IMMEL: My answer to your question is that there's no way to tell from this record -- I can't say no and I can't say yes. I do know that -- I know Jim Fleming, and if he had a statement in his file, he would have given it to them.

Q I didn't say statement.

MR. IMMEL: If he had known about it, he would have gotten a copy of it.

Q Suppose it was verbal?

MR. IMMEL: Well, if it was verbal, then of course we don't have a problem, because this one was a written statement, and a verbal -- yes, we presume the man had a conversation with the police, because it was the police that got him to the prosecutor.

The prosecutor, though, when he's interviewing the man to get ready for trial, isn't at that point interested in knowing about statements that he's made to the police. What he's asking him is: "What happened? We're going into the courtroom in a few minutes."

You see what I'm getting at, Your Honor? It just is not the kind of inquiry which is going to go on at that stage --

Q I hear what you're saying.

MR. IMMEL: -- of preparing a man for trial. So I don't think that there's any way we can say from this record that the prosecutor had any kind of prior notice of his statement. I wish he had. We wouldn't be here today.

Q Do you have a checks-type rule in oral argument, Mr. Immel?

MR. IMMEL: Yes. Two cases, Wolf and Moses have virtually -- have simply adopted --

Q And did you, back in 1962?

MR. IMMEL: Yes.

Q And would not, ordinarily --

MR. IMMEL: Well, I would say Moses is -- yes, at that time, right. Right. I'm just getting my dates.

Q I just wonder, since you had the rule, wouldn't it almost be routine that a prosecutor, in preparing his case, would find out whether the witnesses he's going to use had made any statement?

MR. IMMEL: Well, yes, but you see, the thing is, he might have said to Virgle Sanders: "Have you made a statement? Have you talked to the police?" And -- "Yes."

But at the point that this man -- the first time we ever know of Virgle Sanders getting together with the prosecutor is in the Library on the second floor the day before he testified.

Q No, but what I -- my question was really: I should suppose it would be ordinary routine when he got together in the Library with the witness he was going to use, that he might expect, since he's going to use him, there'd be some inquiry whether he had made any statement.

And the prosecutor would like to say to him: "Did you make any statements? Did you sign any?"

MR. IMMEL: As frequently as breakdowns in communications can occur in a large urban area, it is, nevertheless, surprising, and I even found myself in this position many times, how you'll simply pick up what the police

give you. They give you a list of statements of witnesses, and how easily you slide into the presumption that this is it.

Now, that's simply a fact of life, in a large urban community, with the heavy trial log.

The situation where you try cases by the seat of your pants is not uncommon, either; although that wouldn't have been the case where you're seeking the electric chair.

But I'm simply stating to the Court at this time that the prosecutor, had he known about a written statement, certainly would have pursued the matter and certainly, at that time, would have been on notice, because by that time he has Lyman Moore's wrapsheet from the -- from the FBI. He knows that Lyman Moore was in the penitentiary. If he has in his hands a written statement from Lyman Moore [sic] that says he met the man six months ago, he's certainly going to clear that up before he lets him go on the stand.

It's clear discrepancy.

Of course, the simple answer to it is that Lyman Moore is not Slick, and it is not the man that Virgle Sanders met in Wanda and Del's back in November, or whenever it was, in 1961. It's a simple mistaken identity situation.

And to that extent, Virgle Sanders' testimony is potentially impeachable, as to whether or not he can accurately recall who it was that he talked to in the Ponderosa.

And it's material only, really, on the aggravation or

penalty phase of this case, if you will, because it was a brag that's in issue here. If the brag didn't take place, Lyman Moore can't be nearly as bad a man as you might presume.

And that is why this would naturally be a relevant question, but two other people completely rehabilitate, in the course of this trial, any potential impeachment of Virgle Sanders' testimony, with reference to who he talked to. He might have mixed him with with Slick, he might have thought he met him before.

He may have been -- and he might have been -- he obviously is, as far as I'm concerned, completely wrong about that. But that he was talking to Lyman Moore is established beyond any doubt, not a reasonable doubt but any doubt.

And the testimony of the people who identified him, they are Fair and Joyce, the people who spot him in the Ponderosa and place him there, is not impeached in any way, shape, or form.

He's referred to, as I say, by name in the testimony of Mr. Fair.

Now, Henley Powell. I'd like to touch on this. Henley Powell, as you recall, is the gentleman who was playing cards and who witnesses the shooting.

When the police went out there that night, an officer by the name of Koppitz apparently drew a rough diagram of the premises. It's in the record. He drew a card table, and he

placed Mr. Powell at the seat that Mr. Powell said he was sitting in at the time, which would have placed him roughly looking toward you, Mr. Justice Blackmun, the door being somewhere over toward my back.

Now, it is the testimony -- the contention of petitioner that this diagram, which did not come to light until the post-conviction petition was heard, has a devastating effect on the veracity of Henley Powell as a witness, in that it shows that he perjured himself when he said he could see what was going on over by the door.

And this, to me, is an example of attempting to use de minimis to simply defeat due process.

Henley Powell's testimony was that he had been playing pinochle, seated in a position like this, threw his hand down, because he couldn't bid, and was looking toward the door when he saw Lyman Moore come in. But he's supposed to have perjured himself, because he was facing -- he was seated, facing in that direction.

Now, this is the kind of character of argument which was presented to the highest court in the country.

Q Mr. Immel, are you going to get to the gun thing?

MR. IMMEL: Yes, I am.

Q And will you have a comment or two about Witherspoon?

MR. IMMEL: Yes, I have a comment or two about Witherspoon.

As to the weapon: It, first of all, is a rule of law in Illinois and most other jurisdictions that weapons found in the possession or control of a defendant at the time of his arrest are admissible to show the circumstances of the arrest. For that reason alone, at that point.

Okay. These two gentlemen were in this car. They fled the car. They tried to get back into the car. At all times that they were certainly in that car, they were both in constructive possession of that shotgun, at the very least. And if it was Jerry Barbee's car, if he was driving it, Lyman Moore even had better access to the shotgun.

Q Well, it was a sixteen-gauge shotgun?

MR. IMMEL: Yes. Okay. But, first of all, just as to the circumstances of the arrest, quite independent of the gun's relevance to the rest of the case.

Q But the arrest was not in connection with this murder.

MR. IMMEL: The arrest was in connection with what was going on right then, a shooting had taken place; and a gun was found.

Q But that's not this murder?

MR. IMMEL: No. For that matter, he wasn't arrested for the other charge he was tried on, either, at that time. He

was arrested, based on what had happened, he fired -- a gun was fired off in the city limits, and two men fled from the car.

But, in any event, as I've described before, of course, the sawed-off shotgun had a relevance in another context in another trial.

The general rule in Illinois, and most other jurisdictions, has always been that it's proper to admit into evidence any weapon which is suitable for the commission of the crime charged, even though it may -- it's not the contention of the prosecution that this is the weapon.

Now, there's no question that this weapon is similar to the weapon that was used. It's a shotgun.

The prosecutor tendered a Bill of Particulars, an answer to a Bill of Particulars, in which he said a twelve-gauge shotgun. That's not evidence.

And a cute incident happened at trial. The defense attorney tried to call the Assistant State's Attorney to prove that it was a twelve-gauge shotgun.

In the record at page 763 through 765, the defendant tried to call the State's Attorney to testify that it was a twelve-gauge shotgun, based on the fact that the Assistant State's Attorney had filed this Bill of Particulars. The Assistant State's Attorney said that, "If I was called to testify, I would testify that I don't know what kind of gun was used." That was the end of that effort.

Then a stipulation was entered into at the close -- toward the end of the defense case, not the State's case in chief, that if a certain crime lab technician were called, he would testify that in his opinion, that it was a twelve-gauge shotgun.

There is no -- he wasn't there, and his qualifications aren't in the record, and it's simply a stipulation that in his opinion. So there's no real hard evidence as to what the actual gauge of the shotgun ever is.

Now, the State's Attorney made a gratuitous remark in his closing argument, to the effect that this probably wasn't the gun, and the rule everywhere in the legal --

Q Mr. Immel, wasn't there medical testimony?

MR. IMMEL: There was medical testimony that a shotgun killed the man.

Q Well, didn't it say the size?

MR. IMMEL: No. Specifically, Harold Wagner, the pathologist, testified that he couldn't -- did not try to determine the size. All he had was pellets spread throughout the body and the wadding. And he turned the wadding over to the police department. That's the last he saw of it, and he was -- made no effort.

Professor -- Dr. Wagner's testimony, if examined, reveals that.

Q So there's nothing in the record to show what

size shot?

MR. IMMEL: There's no evidence, hard evidence, introduced by anybody as to exactly what size the shotgun was.

Now --

Q You say "hard evidence", is there --

MR. IMMEL: As I say, --

Q -- is there any "soft evidence"?

[Laughter.]

MR. IMMEL: Yes. Yes. A stipulation that in the opinion of a technician that, if called to testify, he would testify that in his opinion it was a twelve-gauge shotgun. That is the -- what is what we have. And we have a Bill of Particulars, which is not evidence, and which the prosecutor attempted to slough off as not being his work, really.

And also the -- this gratuitous remark that he made in his closing argument which, like the Bill of Particulars, is not evidence that, in his opinion, this probably wasn't the gun.

And of course it's not really, as far as I can see, an unfair characterization to say that Lyman Moore is a man who uses shotguns. He was arrested with one. And this was the type of closing argument we had; and that the shotgun was a particularly vicious weapon to use. That, after all, it was a shotgun that Lyman Moore killed the bartender with.

I believe I'm not going to have an opportunity to

address myself to the Witherspoon points. I simply rest on the brief on that.

MR. CHIEF JUSTICE BURGER: Justice Blackmun, would you like to pursue your Witherspoon question on overtime?

Q Well, I'd like just one -- at least I'd like one sentence as to your attitude on the Witherspoon issue.

MR. IMMEL: Well, my -- let me restrict that sentence to the question on the use of Witherspoon in the context of peremptory challenges.

I'm not going to tell the Court about our position tht Witherspoon helps the prosecution; we don't want to see it go away, necessarily, because it's affected about as many cases as it's going to affect, and I think it's a useful tool in the prosecutor's arsenal. It certainly hasn't done anything about the relative death penalties returned.

However, there's nothing in the opinion with reference to whether or not Witherspoon forbids the use of prosecution peremptory challenges to remove people who could -- becasue they could not otherwise have been challenged for cause.

There was an implication in the Anderson opinion from the California Supreme Court that they, by inference -- or at least have decided that the court, by inference, has reached this conclusion, that this is an improper use of peremptories.

My simple statement to the Court would be that it is a most unusual way to overrule Swain vs. Alabama, that I could possibly imagine, and could not possibly have been in the mind of the Court in this case, had the eight jurors who were arguably removed for cause, and I think some of them properly -- I mean arguably removed improperly for cause, and I think some of them properly were. But, in any event, my contention would simply be that under present standards and under present techniques of Witherspoon questioning, most of those people would have gone off, anyway, because when asked the second question: "Well, does that mean you couldn't sign the verdict?" They would say yes. Our experience teaches us that, from all across the country, in our conversations with prosecutors.

Therefore we still have peremptory challenges to eliminate the rest, if that's the desire of the prosecutor. I don't think that the jury that tried this man would have been composed any differently. I think that the opinion of the late Justice Black, in his dissenting opinion, has proved to be rather prophetic, in the sense that the composition of the juries isn't going to be any different.

Unless, Mr. Justice Blackmun, unless you have further questions on Witherspoon, I think I'll stand on the brief for the rest of it.

Thank you, Your Honors.

MR. CHIEF JUSTICE BURGER: Mr. Doherty.

REBUTTAL ARGUMENT OF JAMES J. DOHERTY, ESQ.,

ON BEHALF OF THE PETITIONER

MR. DOHERTY: Mr. Chief Justice, and may it please Your Honors: --

MR. CHIEF JUSTICE BURGER: You have one minute left, but we'll enlarge that to two, in light of the extent of the time.

MR. DOHERTY: All right.

I didn't call Robert Fair, because all he said was that he looked like one of the men. When Bill Joyce was called back, and that's on the post-conviction, by stipulation he testified, "He sure looks different; looks like a minister's son." That's what he said.

Now, Virgle Sanders knew him, so why bring in the people that didn't know him?

When one fellow told the police that "he sure looks different". That's not in the record, because you can't get all these in the record.

And the gun. It's terribly denigrating to the Chicago Scientific Crime Detection Laboratory, a scientist said it comes from a twelve-gauge. All you've got to do is buy the shooter's bible, or Sports Afield, or anything to find out the differences; a great deal, 3/32 of an inch between a twelve-gauge wadding and a sixteen-gauge wadding.

It's not a legal argument. It's an argument based on the immutable laws of the universe, the exact science of measurements.

Mr. Anderson stated at trial that in his opinion if Lyman Moore was missing for any length of time, he would have noticed him being missing. He says that these people, if they were asked to make the statements -- asked to make the statements?

There was a written motion for all statements given to the Lansing police. There was a promise by the prosecutors on page 8 -- excuse me, page 32 of the record: "We will give them to him, when the witness has finished testifying on direct examination, Your Honor." And they did, with two: Pat Hill, gave voluntarily; and Henley Powell, gave the statement voluntarily.

But did not fulfill their promise on Virgle Sanders.

Q Can you suggest a reason why, having asked all the other witnesses, if that is the case, about their statements, that Sanders, whom you characterize as the most damaging witness, was not cross-examined about having given a statement?

MR. DOHERTY: That's after they got done, up to Sanders, that's after they got done testifying. And so when they asked about the statements, they had the statements in their hand and they were cross-examining from them. And that

was after, not before. And the record makes that clear.

I stand to answer questions.

Thank you, Your Honors.

MR. CHIEF JUSTICE BURGER: Thank you, Mr.Doherty.

Thank you, Mr. Immel.

The case is submitted.

[Whereupon, at 11:45 o'clock, a.m., the case was submitted.]

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