In the

Supreme Court of the United States

VINCENT R. MANCUSI, Warden of Attica Correctional Facility,

Petitioner,

v.

WILLIAM C. STUBBS,

Respondent.

No. 71-237

Washington, D. C.
April 17, 1972

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VINCENT R. MANCUSI, Warden of Attica Correctional Facility, Petitioner,	:	
v.	:	No. 71-237
WILLIAM C. STUBBS, Respondent.	:	

Washington, D. C.,

Monday, April 17, 1972.

The above-entitled matter came on for argument at 10:05 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:

MRS. MARIA L. MARCUS, Assistant Attorney General of New York, 80 Centre Street, New York, New York 10013; for the Petitioner.

BRUCE K. CARPENTER, ESQ., Woodin & Carpenter, 14 Lester Building, 57 East Fourth Atreet, Dunkirk, New York 14048; 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 first in No. 71-237, Mancusi against Stubbs.

Mrs. Marcus, we'll pause for a moment until Mr. Carpenter gets settled.

Mrs. Marcus.

ORAL ARGUMENT OF MRS. MARIA L. MARCUS,

ON BEHALF OF THE PETITIONER

MRS. MARCUS: Mr. Chief Justice, and may it please the Court:

This habeas corpus proceeding presents the question of whether New York is prohibited from using a 1964 Tennessee murder conviction as a predicate for increased punishment. This Tennessee conviction resulted from a retrial where the prior recorded testimony of a witness was read into the record because the witness had since moved to Sweden.

To state briefly the history of the Tennessee and New York proceedings: The crime of which respondent Stubbs was convicted was a 1954 murder of Mrs. Alex Holm. Stubbs met Mr. and Mrs. Holm, an elderly Swedish couple who were strangers to him, at a roadside picnic table. He kidnapped them at gunpoint and ultimately murdered Mrs. Holm, and seriously wounded her husband.

At Stubbs' 1954 trial, defendant was represented by three appointed counsel. Alex Holm testified, as did Stubbs

himself, and Stubbs was convicted of first-degree murder, kidnapping, and assault with intent to murder.

Nine years later, Stubbs moved for a writ of habeas corpus in the District Court in Tennessee, asking that his conviction be vacated on the grounds that his attorneys were appointed three days before trial.

The District Court, under a former Circuit Court rule which required automatic reversal in cases of tardy apointment of counsel, vacated Stubbs' first trial and remanded him for possible retrial.

At the second trial, in 1964, the prosecutor sent a subpoena to Alex Holm's former address, a farm in Texas, which was returned unsigned, and he also contacted Holm's son, who advised the court that his father was now a permanent resident of Sweden.

His son took the stand and so testified. The prior testimony of Holm was then read into the record, over objections by counsel.

Stubbs was among the witnesses who testified. He was convicted of first-degree murder. The conviction was appealed to the Supreme Court of Tennessee, and affirmed.

After his release from the Tennessee prison, he went to Monroe County, New York, where he was arrested and convicted for first-degree assault and possession of a firearm.

Based upon the predicate of the Tennessee conviction,

sentence, as a second felony offender, was 32 to 34 years.

Q How long had he served on the first sentence?

MRS. MARCUS: Well, when he appealed his conviction to the Tennessee Supreme Court, they gave him credit for the ten-year period between trials, and apparently he served only about two more years. And it's not explained exactly why he was parolled at that point, but that's apparently what happened.

A petition for writ of habeas corpus challenging both convictions was filed in the United States District Court for the Western District of New York, which denied the petition.

The Second Circuit, which had granted a certificate of probable cause, solely on the grounds of the validity of the Tennessee conviction, reversed the district court. The court below held that respondent had been deprived of his right of confrontation at the Tennessee retrial, because due diligence had not been exercised to obtain the presence of the absent witness before the testimony of Alex Holm was read into the record, and because counsel at the first trial had been tardily appointed and had not questioned Holm about whether, after Stubbs had kidnapped the Holms at gunpoint, they had made him welcome as their guest.

This absence of questioning on the guest theory, the majority held, could not be harmless error. The dissenting

judge, Leonard P. Moore, called the majority decision an extraordinary sample of justice dispensed by the federal courts.

We urge reversal of the decision below on three grounds: First, that there was no lack of due diligence in obtaining the presence of the witness. Second, that even assuming that due diligence was not exercised, the error in this case would have been harmless. And third, that tardy appointment of counsel at the first trial did not in fact deprive respondent Stubbs of effective legal assistance.

Barber vs. Page was not violated by the use of testimony of a witness permanently domiciled on a foreign continent. This Court, in Barber vs. Page, ruled that a good faith effort must be made to have a witness present prior to reading his testimony into the record at another trial.

Q Does it appear, Mrs. Marcus, whether any offer was made to pay the expense --

MRS. MARCUS: Nothing in the --

Q -- of the witness?

MRS. MARCUS: There's nothing in the record to indicate that. Of course, this was not only before this Court decided Barber but even before this Court decided Pointer.

However, it should be pointed out that it would have been greatly to the prosecutor's advantage to have this witness at the trial, simply because he was a victim to a very, very tragic circumstance; his wife had been murdered; he, himself,

was shot twice in the face. And of course the sympathetic effect of such testimony on the jury would have been much greater than simply --

Q What was the purpose of the quest offense? That it was not a felony murder?

MRS.MARCUS: Yes. I think that's why the court below seized on that.

Q Was he convicted of a felony murder or of a --

MRS.MARCUS: He was convicted of first-degree murder; the judge charged both felony murder and common-law murder.

Q He may have been -- or that he may have been convicted on a premeditated murder?

MRS. MARCUS: Yes.

Q And what's the significance the quest theory?

MRS. MARCUS: Apparently the court below felt that since Stubbs himself testified to the ownership of the gun, and the fact that he kidnapped the Holms and compelled them to drive to the spot where the shooting occurred; but he said that --

Q Well, would the evidence have supported -- did the Tennessee Supreme Court indicate that the evidence did or didn't support a first-degree common-law --

MRS. MARCUS: Oh, yes.

Q -- premeditated -- it did?

MRS. MARCUS: Yes.

Q Well, then, you're arquinq harmless error, or suggestinq it in any way?

MRS. MARCUS: We're arguinq, in any event, that, as far as harmless error is concerned, that the guest theory has no relation because, in fact, for two reasons: First of all, in respect to the exercise of due diligence, '64 counsel didn't indicate that if the witness had been there they would have asked him any questions about the quest theory at all; second, the guest theory was completely refuted by the record, because --

Q And you said he took the stand in -- what was it, the first of second trial?

MRS. MARCUS: He took the stand in the first trial.

Q Did the testimony indicate that he was a quest

MRS. MARCUS: Quite the contrary. What Holm was asked on rebuttal by the prosecutor: "Did relations ever become friendly between you and your kidnapper?" And he replied, "No, sir, there was no friendly relations." So that the court erroneously assumed that --

Q I mean the testimony of Stubbs.

MRS. MARCUS: No, this was -- now we're speakinq of Alex Holm.

Q Oh.

MRS. MARCUS: He made this reply. There was a--

Q I know, but when Stubbs took the stand, did he offer testimony from which the guest theory --

MRS. MARCUS: The testimony that he offered was that Mrs. Holm, when he was pointing a pistol in her face, asked him to put the pistol down and that she would give him no trouble. And I think there was an attempt by '54 counsel to say that this was an expression of friendship.

Q Mrs. Marcus, if I might --

Q So that possible friendship was at least hinted at in the first trial?

MRS. MARCUS: It was hinted at by virtue of his say "They told me they would give me no trouble."

Q Mrs. Marcus, if I could back up a minute. The first conviction was upset because of ineffective counsel?

MRS. MARCUS: It was not -- not any finding on the record that counsel was ineffective, but because of a rule mandating automatic reversal in cases where counsel was tardily appointed. Now, the period of --

Q Don't you think that's different from the average case? Because, I would assume that if counsel had more time, he might have been able to ask more questions.

MRS. MARCUS: Well, in this case --

Q On cross-examination.

MRS. MARCUS: -- in this case, in the first place, the record shows that the cross-examination was capably

handled as was the direct examination. Also, as the Tennessee Supreme Court pointed out, it's very difficult to --

Q Did the Court of Appeals find that to be true?

MRS. MARCUS: The Court of Appeals? It made no reference whatsoever to lack of preparation time, or the kind of question that could have been asked, except for the guest theory. That was the only basis on which harmless error was rejected.

But not only does the record show that Stubbs was effectively represented by three counsel, by the way, not only one; but this --

Q Well, if I remember correctly, in the Scottsworth trial they had 20-some counsel.

MRS. MARCUS: Yes.

Q And this Court upset that, so the number doesn't help.

MRS. MARCUS: I think the record helps a great deal, though, because, in reading it, it's clear that -- in fact, I think what makes it clearer yet --

Q You see, I have great difficulty in looking at a record and deciding as to what somebody would say on the second hearing. I assume that at the second trial the lawyer looked at the record of the first trial and finds, "Gee, I should have asked that question."

MRS. MARCUS: Well, we were given --

Q And he then has the opportunity to ask it. But he didn't in this case.

MRS. MARCUS: We were given a little assistance as to what would have happened, because '64 counsel brought into the record the questions that they would have asked.

It's first notable that they made no mention of a guest theory whatsoever; and it's second notable that with a lot of time to research into Holmn's past life, they didn't discover anything about his background which could have formed a basis for cross-examination.

Q Well, how do you know what they might have wanted to ask him.

MRS. MARCUS: They said -- they read it into the record, and it is -- it's --

Q They read into the record that they couldn't think of another question they would have wanted to ask him?

MRS. MARCUS: No.

Q If he'd been there?

MRS. MARCUS: But hs listed the questions that they would have asked and said -- they further added, there might have been other questions; but these were the ones that -- on the basis of --

Q Are those questions in this record, Mrs. Marcus?

MRS. MARCUS: They are, indeed; yes.

Q Can you tell us what page?

MRS. MARCUS: It's on page 73.

Q Page 73? Thank you.

Q So what difference would it have made if he was a guest; how would that have helped the defendant?

MRS. MARCUS: Well, the court below felt that it might have helped the defendant because if -- Stubbs' testimony, since he said on the stand that he kidnapped the Holms at gunpoint and compelled them to drive to the spot where the shooting occurred, this evidence was rather overwhelming, and the court below thought that the quest theory might show that if there was a felony which had come to an end, that there might be more to say about the circumstances of the shooting. I think that's why they brought in the guest theory.

Q Well, wasn't it a felony murder conviction?

MRS. MARCUS: Well, it was a first-degree murder conviction. The judge charged both felony murder and premeditated murder.

Q Well, if the defendant was a guest, there couldn't have been a felony murder; right?

MRS. MARCUS: That was the idea.--

Q Right. So then how would --

MRS. MARCUS: -- that I think the court below had.

Q How would that have helped him?

MRS. MARCUS: Well, it would have helped him simply

on the felony murder aspect, but not on the first-degree murder aspect.

Q And they did convict him of first-degree murder?

MRS. MARCUS: Yes, apparently so.

Q But I suppose it's a matter of Tennessee State law, if the judge charges the jury that they may find him guilty of first-degree murder on either --

MRS. MARCUS: On either ground.

Q -- the theory or --

MRS. MARCUS: It could have included either one.

Q And it turns out that one of the theories might not have been supported in evidentiary; that would be reversible even though the other theory were adequately supported?

MRS. MARCUS: In Barber, this Court discussed the reading of preliminary hearing testimony of a witness who was in a federal prison across the State border. The Court pointed out that increased cooperation between the States and the Federal Government meant that State process could cross a State border, and that States could issue writs of habeas corpus ad testificandum, that Federal courts had the power to issue such writs at the request of State prosecutorial authorities.

This Court has, in fact, never ruled on the question of what good faith means in the context of a witness who is

not in the United States or in a territory of the United States, but is beyond the reach of compulsory process, by a State prosecutor.

However, a number of State court and lower court decisions, Federal decisions, indicate that proof that a witness is living on a foreign continent at the time of trial is sufficient to establish unavailability.

And cases in which it has been found that due diligence was not exercised have been those in which the witness might have been in the jurisdiction.

We ask this Court not to extend Barber vs. Page to overseas witnesses beyond the State's reach by compulsory process, but insted to adopt the rationale already set out by many courts that good faith in an overseas witness is shown by establishing that he is residenced there.

Now, respondent attempts two counterveiling arguments here. First, that the --

Q You mean that's the rule that doesn't require in any instance, then, that the State offer to pay his expenses to come here?

MRS. MARCUS: It would not establish a constitutional duty to do so, where the witness is beyond the reach of compulsory process.

Q Well, is it suggested that no inquiry be made of him at all, if it's discovered that he's permanently

residenced overseas?

MRS. MARCUS: The suggestion is that it would not be part of the constitutional duty of the prosecutor to do so.

Q Well, where does the duty end? What's to be done by the prosecutor?

MRS. MARCUS: Well, as far as what the prosecutor may -- in cases, for example,where the travel expenses are not too onerous, he may well feel that having the witness present would be to his advantage, and he would pursue it regardless of what the --

Q No, but what -- I'm sorry, I don't understand what you're suggesting would be the constitutional limit of the prosecutor --

MRS. MARCUS: The establishment of his residence overseas, as far as the --

Q Well, once that's established, whether it's Mexico, Canada, no matter where it is --

MRS. MARCUS: Right.

Q -- that that's the end of it?

MRS. MARCUS: That it's --

Q So he can use the prior testimony?

MRS. MARCUS: As far as his constitutional duty is concerned, yes.

Q It doesn't even require him to send a letter and say: "If you don't mind, would you mind coming over and

testifying"?

MRS. MARCUS: I think that where's there no compulsory process to back this up, we ask this Court to say that the limit of the duty would be the establishment that the witness is living overseas, and that is the rationale that these other courts have adopted.

Q That's even if the witness is willing to come over at his own expense?

MRS. MARCUS: Well, if he's willing to come, and the prosecutor is aware of that, of course --

Q Well, he wouldn't know unless he --

MRS. MARCUS: -- he would bring him.

Q I'm just saying that you wouldn't even ask the prosecutor to write a letter over and say: "This case is coming up, and if you could come over, you'd be welcome"?

MRS. MARCUS: Under the rule that these courts have established, that would be in the prosecutor's discretion rather than a constitutional duty.

Q Did the defense ask for an allowance to bring Mr. Holm from Sweden?

MRS. MARCUS: No, they did not; they objected to the witness not being there, but there was no reference to an allowance of any kind.

Q Did either side request a deposition?

MRS. MARCUS: No. No, Your Honor. In other words,

the --

Q Do you know whether, under Tennessee practice, a deposition may be employed in a criminal case?

MRS. MARCUS: Well, the prior hearing testimony was taken at a trial where the witness Holm was confronted, was cross-examined, so that this testimony, I think, would have been the most valid that they possibly could read into the record. It was taken at the first trial, under the usual circumstances.

Q Ten years closer to the event?

MRS. MARCUS: It was directly after the event, yes. Now --

Q And the facts were that the State, in that second trial, served process on Holm at his last-known adress, which was in Texas, in the United States of America?

MRS. MARCUS: Yes, they did.

Q And that was returned on -- "moved"?

MRS. MARCUS: Right.

Q And then was there any notification to him at all in Sweden?

MRS. MARCUS: They then contacted his son, who advised the court as to his whereabouts, and testified on the stand as to his whereabouts.

Q That he's moved to Sweden?

MRS. MARCUS: Yes. And --

Q Was Holm himself ever notified?

MRS. MARCUS: There was a remark by '64 defense counsel that quoted -- referring to a newspaper interview where Holm's son was quoted as saying his father was not aware that the trial was taking place, but even if this -- of course this was excluded as hearsay by the judge, but it's interesting to note that '64 defense counsel made no effort to cross-examine the son at the stand as to whether or not his father knew. So there's nothing in the record, really, no proper evidence on this point.

Q After the unsuccessful attempt to service in Texas, --

MRS. MARCUS: Right.

Q -- that was the end of it, as far as counsel was concerned?

MRS. MARCUS: As far as -- except for the establishm of where he was.

Q Through the son?

MRS. MARCUS: Right.

Now, respondent argues here that the Walsh Act, which is 28 U.S.C. 1783, could somehow have been applied to subpoena this witness. That statute only empowered a Federal Court to bring a witness before itself where the United States Attorney or someone acting under his direction so desired.

It could not authorize a State prosecutor to bring a

witness to a State trial. Indeed, our research, and a call to the Office of the United States Attorney for the Southern District, has never revealed any case in which it's been used by State prosecutors to secure a witness in a State trial. Thus, it would have been more than due diligence, it would have been the height of ingenuity for the prosecutor to have thought of that. And it would have been unusable.

Here --

Q Mrs. Marcus, I take it that your position is the State of New York is not bound by Judge Miller's habeas corpus ruling?

MRS. MARCUS: Right. And this, there was an attempt by respondent to argue that New York is in privity with Tennessee and therefore this ruling would prevent us from looking at the record at all, to determine whether counsel was effective or not.

Now, this privity period might have some interest if we were relying on the 1954 conviction as a predicate. That was what was vacated. But, in point of fact, we're relying on the '64 conviction, which was appealed to the Supreme Court of Tennessee, and which included a ruling that the cross-examination was effective.

Moreover, the district court never even considered whether counsel in fact conducted a proper cross-examination because it was operating on a per se rule that made that kind

of inquiry unnecessary. So that it never dealt with the question at all of whether the '54 counsel's cross-examination was effective or not. It did it merely on a per se rule, which this Court, in Chambers v. Maroney, has since rejected. This Court, in Chambers, held that the mere fact that counsel is tardily appointed doesn't even call for a hearing necessarily, much less automatic reversal. It calls for an inquiry into the record to find out whether, in fact, there was effective representation.

I'd like to point out that even assuming that the State should have sent a request to the witness prior to reading his testimony in the record, the error in this case would have been harmless, because the outcome of the trial would have been the same whether the State had communicated with Holm or not.

If a letter had been sent to Holm, and he had refused to come to Tennessee, his prior testimony would have been read into the record at the second trial.

Q Suppose he had agreed to come and pay his own expenses?

MRS. MARCUS: If he had agreed to come, I believe that it's beyond a reasonable doubt that he would have testified the same way, for several reasons: First of all, the facts --

Q Well, may I assume that the lawyer would have additional questions?

MRS.MARCUS: Well, as I said, he did list what he would have had. But I think there are other reasons to prove beyond a reasonable doubt that he would have testified the same way.

First of all, the facts were --

Q My point is not on his testimony, my point is on his cross-examination.

MRS. MARCUS: Yes, I think that he would --

Q And I don't think you can really, beyond a reasonable doubt, determine what a lawyer would say in cross-examining a witness.

MRS. MARCUS: I think, though, that looking at this record and this witness, what we can say is that the witness would have withstood cross-examination.

Q Have you ever known every question he would ask on cross-examination, before it started?

MRS. MARCUS: No. No, Your Honor. But --

Q Thank you.

MRS. MARCUS: -- the question would be: How would the witness have reacted to this cross-examination. And the testimony was uncomplicated. Stubbs was a strong witness to a tragic situation, with no motive to lie. Stubbs had --

Q You mean Holm?

MRS. MARCUS: Holm, yes. Stubb's identity, the ownership of the gun, and the fact of the kidnapping were

corroborated by Stubbs himself. And, moreover, Holm could have refreshed his recollection by reading his prior testimony from the earlier trial. And '64 counsel, with plenty of time to research into Holm's background, did not find anything upon which to base new questions.

Q At the trial, did Stubbs deny firing any gun?

MRS. MARCUS: He testified at both trials, and he reiterated that when he was released from the Texas prison he hitchhiked for several days, going toward Bristol, Tennessee, where he hoped to meet a truck route going to New York. He encountered Mr. and Mrs. Alex Holm. He had a gun which he had been given by a friend. He had no money, no job prospects. He said that he kidnapped the Holms at gunpoint.

Q This was all his testimony?

MRS. MARCUS: This is his testimony at both trials

Q You're paraphrasing it.

Right.

MRS. MARCUS: Kidnapped the Holms at gunpoint, and with his left hand holding the gun, at intervals pointing it at Mrs. Holm's face, they drove on until near Bristol, Tennessee, he testified that he saw a tree in a reddish haze, he heard a loud bang, he felt a pain. He thought that Holm must have gotten the gun away from him. And then Stubbs fled from the car.

Now, Stubbs' testimony about his subsequent flight,

the blood on his clothes, the roadblock at which he was arrested, and a hospital room identification, in which Holm pointed to him, in the presence of a number of police officers, and said, "This is the man that killed my wife and shot me". That subsequent --

Q Was Stubbs wounded when he was apprehended?

MRS. MARCUS: Yes. He had head wounds, because Holm had hit him several times with the gun on the head. Once having seized it.

Q No gunshot wound?

MRS. MARCUS: There was some testimony that a bullet might have grazed him, yes.

Q Didn't Stubbs also offer the explanation, when he was first apprehended, that he had fallen off a cliff whil he was fishing, and that was how he got the blood on him?

MRS. MARCUS: Yes, he told that -- it was the first story that he told the police officers, that the blood was there only because he had had an accident while fishing and he had slipped on a cliff.

The disputed testimony of Alex Holm, of course, paralleled that of Stubbs himself, as to the fact that Stubbs had kidnapped them and compelled them to drive to the spot where the shooting occurred.

Now, the hospital room identification was not objected to, and the police officers testified in court, at

both trials, as to that identification.

I pointed out --

Q Mrs. Marcus, I gather, in this instance, the only issue before us is whether the State did what it should have done in bringing Mr. Holm back for the second trial?

MRS. MARCUS: Well, whether -- even if not, it would have been harmless error in the context of the overwhelming evidence in this case.

Q But apart from that? On the basic issue? I just want to be clear. Your position is that as far as the State need go is to satisfy itself that the witness permanently resides overseas, and that satisfies any constitutional obligation it has?

MRS. MARCUS: Insofar as the witness is resident beyond --

Q Yes.

MRS. MARCUS: -- the reach of compulsory process.

Q Because he's living in some foreign country.

Now, we don't agree with you. I gather, from Judge Friendly's opinion, he thought that was not the proper test. He thought that the --

Q That's Judge Adams --

MRS. MARCUS: Judge Adams' opinion, Your Honor?

Q Oh, Adams, I'm sorry; yes. The majority opinion at page 27. Is that"where there is no showing that a witness

beyond the effective reach of a court's subpoena will refuse to return voluntarily to testify if requested." So under that test it would have to be an inquiry made of the witness --

MRS. MARCUS: Yes. He --

Q -- and to get from him a refusal to appear. Now, there's nothing in that test, I gather, which suggests that there should also be an offer by the State to pay the expenses of the witness if he will testify.

MRS. MARCUS: No, he made no mention of that, and then he ultimately, on our second point, which was that the evidence here is so overwhelming, with the hospital identification, and --

Q Yes, but if I may, I'd like to continue.

MRS. MARCUS: Yes, surely.

Q Now, if we don't agree with your test, but think that the test suggested by Judge Adams is the more appropriate one, then I gather there can be a reversal only if we agree with your second point, namely, on harmless error?

MRS. MARCUS: Yes. That's right.

I would like to reserve time for rebuttal.

Thank you.

MRS. CHIEF JUSTICE BURGER: Very well, Mrs. Marcus.

Mr. Carpenter.

ORAL ARGUMENT OF BRUCE K. CARPENTER, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. CARPENTER: Mr. Chief Justice, and may it please the court:

Perhaps in order to clarify the questions that are raised, I should address myself first to what happened, the facts of the case, at the Tennessee trial a little bit.

The uncontroverted testimony was that some 55 miles away from the homicide, the place where the homicide took place, in another part of Tennessee, Stubbs approached Mr. and Mrs. Holm. Now, Stubbs was hungry. He had been without food, this is Stubbs' testimony, for some time. He was desperate. He wanted a ride, to get up to New York where he had relation

He asked, he approached the Holms, asked them for a ride; was refused; went away. And then he said he remembered he had the gun. He came back, forced his way in their car. He drove. They were in the back seat. And away they went.

Now, at this point, of course, we have serious misconduct.

Now, the testimony of Stubbs was that very shortly after this trip began, the friendly relations began to exist between him and the Holms. They began to express sympathy for his condition, and said, "If you'd only asked us properly for a ride, we would have given you one." Or food. So that this, Stubbs said, happened about four miles after the trip

began.

Q Now, you say Stubbs said this. Did he so testify at both trials?

MR. CARPENTER: Yes, he did.

Q He did?

MR. CARPENTER: Yes.

Now, the trip continued. They passed through towns. Stubbs says they passed a police officer. They continue on their way. And, all of a sudden, --

Q Didn't he also say right at that point that he put the gun down on the seat of the car?

MR. CARPENTER: Yes.

Q And that that was so that the police officers and others wouldn't see the gun?

MR. CARPENTER: Yes. At the request of Mrs. Holm, he put the gun down. He had had it, he said, in his lap. Then, the testimony was, he put it on the seat beside him.

Q He didn't throw the gun away, though, at any time, or offer to give it to the Holms?

MR. CARPENTER: No. No, he did not.

But, at any rate, according to the defense point of view, the gun is on the side of the seat beside Mr. Stubbs. He feels that friendly relations have been developed. He feels at ease. And then, they come across a place where there's

some people nearby. According to Holm, Stubbs took the gun and turned around and started shooting, while the car is still moving; and shot the wife and shot Mr. Holm twice.

Q They were both in the back seat?

MR. CARPENTER: They were both in the back seat.

Q Did they both agree on that, Stubbs and Holm agree that the two were in the back seat?

MR. CARPENTER: Oh, yes. Yes. There's no question. Mrs. Holms was sitting more or less in the middle, there was some luggage off to the left, and Mr. Holm was on the far right.

Now, Stubbs testified that he did not shoot anyone; that, as he was driving, he was suddenly hit on the head, presumably by the gun, and the car crashed and he struggled out and got away, and escaped.

Now, the trial judge in Tennessee --

Q But he says then he doesn't know how they were shot?

MR. CARPENTER: He doesn't know how they were shot. He presumes that -- he says Mr. Holm has the gun, and he had to struggle to get it away, and then --

Q That who had to struggle to get it away?

MR. CARPENTER: Stubbs had to struggle.

Q And did he get it away from Holm?

MR. CARPENTER: No, because the gun was found in the

car, in the back seat of the car. The back seat. When the police officers arrived.

Now, the trial judge in --

Q And did the car crash in fact?

MR. CARPENTER: The car didn't crash, it went off the road and wound up in a ditch, pointing in the same direction that it had been traveling.

The trial judge charged, and I have quoted this portion in the appendix to the brief, it's not part of the printed record, that if this theory were accepted by the jury, they should acquit.

So I think then that as to the question of whether or not Mr. Holm's testimonywas crucial or devastating, there should be no question in the case as to that, certainly, there was no other witness --

Q He was the only eyewitness for the prosecution?

MR. CARPENTER: He was the only eyewitness for the prosecution, yes, Your Honor. And he was the only witness, if you include Stubbs' testimony -- Stubbs being present in the car -- who said that Stubbs had done the shooting. Well, certainly, this is different from those cases where confrontation is considered in the context of a peripheral statement, that may or may not have affected the outcome.

Q But this subject of the alleged friendly relations, the happy relationship that developed, was explored

at the first trial, was it not?

MR. CARPENTER: It was not adequately explored at the first trial.

Q No, but it was explored, though?

MR. CARPENTER: It was explored by reason of Mr. Stubbs' testimony.

Q Yes.

MR. CARPENTER: Now, I gather the --

Q And then of course Mr. Holm was examined on the same subject, and he said there were no friendly relations at all?

MR. CARPENTER: Yes.

Now, the transcript of the first trial, I just had occasion to read it last week, is not part of the records of this Court, I'll leave the copy, the certified copy that I obtained from Tennessee with the Clerk. But Holm testified first, at the first Tennessee trial. He was the first witness. And my impression, in reading that transcript is that counsel who cross-examined him then, and this part is reproduced in the Appendix, were not aware of the defense that was to be offered. I mean, my feeling is that they didn't learn of this until Stubbs testified, until he told his story.

I think there's a clear indication of the fact that counsel were unprepared at this first trial.

Q You mean in three days, couldn't three lawyers

have found that out if that were a valid notion?

MR. CARPENTER: Well, they might have. But this case involved people who were from out of State, people that were not local people; both the Holms and the Stubbses. The counsel perhaps might have learned; but they didn't.

At any rate, I --

Q Maybe it didn't occur to the defendant until he got on the stand?

MR. CARPENTER: Well, it's possible. But his testimony was straightforward at both trials to this, there was no conflict over the years.

Q I would think that all they would have to do to learn of it was just to interview their own client.

MR. CARPENTER: Yes. I should think they might have done so. I don't know. The problems of a lawyer who is preparing a defense are difficult. You really need to have time to mull over things. What's apparent here as after-sight when we've had plenty of chance to consider the record and explore it don't often -- these matters which seem so clear now are not so clear when you first get a case.

Q But Holm came back on the stand in rebuttal, didn't he?

MR. CARPENTER: Yes.

Q After the defendant's testimony?

MR. CARPENTER: Yes. Yes, he was --

Q And he was available then for cross-examination?

MR. CARPENTER: Yes, but no questions were asked. Oh, there were three questions that were asked as to a story that -- an attempt was made to impeach Mr. Holm at this point, an abortive attempt. Three questions were asked as to what -- whether he had told a conflicting story to an undertaker. And it never really reached the point of impeaching.

Q It may not, but certainly a confrontation of Holm was had when he took the stand in rebuttal, wasn't it?

MR. CARPENTER: Yes.

Q Well, constitutionally, Stubbs can't complain that he didn't have an opportunity for confrontation. What you're suggesting is it's ineffective assistance of counsel, a ren't you?

MR. CARPENTER: Yes. Well, of course, what --

Q What did Judge Miller later say?

MR. CARPENTER: What did Judge Miller say, Your Honor?

Q Yes, when he -- I gather --

MR. CARPENTER: Yes. Judge Miller said -- and his decision is printed as an appendix to our brief -- "The Court is of the opinion that the evidence and the record show that the constitutional rights of petitioner Stubbs were violated at the time of his trial in the Criminal Court of Sullivan County", that's the '54 trial, "in that his court-appointed counsel did not have adequate and sufficient time within which

to prepare the necessary defense prior to going to trial, and as a result the petitioner we denied effective representation by counsel."

Now, earlier in his decision, he recites that he considered the testimony of Stubbs and the entire record, to reach this determination. This determination was not apparently questioned by the Tennessee authorities. They acquiesced in this decision in promptly awarding a retrial in 1964.

Q Is it critical to your case whether or not representation was effective or ineffective?

MR. CARPENTER: Well, there are two --

Q Let's assume for the moment that there was no question whatsoever as to the effectiveness of counsel at the first trial.

MR. CARPENTER: Then, as in Barber v. Page, assume that there was effective cross-examination, there still was a denial of confrontation. There was a denial of confrontation because the prosecution needed to make a good-faith effort to obtain the presence of this witness Holm at the second trial.

Q You're saying that it's just as though Holm was living ten miles away and they thought it would be more convenient to use his prior testimony than call him?

MR. CARPENTER: Yes. In fact, there is an indication in the record, as my sister pointed out, that Mr. Holm was not even apprized of the fact that there was a trial pending.

He didn't even know about it, let alone be asked whether he wanted to come to the trial, let alone be asked whether he'd be willing to come and pay his expenses --

Q But I gather New York doesn't deny this. There was no communication directly with him at all, at least on the part of any State official?

MR. CARPENTER: Yes, I take it New York does not deny this. It seems --

Q I thought Mrs. Marcus had answered some questions asked, and conceded this.

MR. CARPENTER: Yes. Yes.

There is a further indication in the Tennessee record that counsel had been informed by the Tennessee prosecutor that Mr. Holm would be produced. At least one lawyer made a remark, and it's cited in -- the page reference is cited in the brief, that --

Q With different lawyers at the second trial?

MR. CARPENTER: Yes, different lawyers at different steps.

Q That wasn't really admissible evidence, was it? It wasn't at the State level with counsel where the trial judge was --

MR. CARPENTER: Yes.

Q -- the trial judge refused to consider?

MR. CARPENTER: Yes. It was a remark of counsel

addressed, I believe, when the jury was not present. So that it isn't a matter -- it's not in the evidence in any event. It's not testimony.

Q But at no time did the petitioner ask the court to ask the prosecutor to produce the witness?

MR. CARPENTER: No. But I think that they indicated most strenuously their desire to have the witness present in order to be questioned.

Q No, I thought --

MR. CARPENTER: Yes.

Q -- well, maybe I misunderstood; but I understood your record to show that they didn't want the trial to go on without the witness; but they weren't particular whether the witness came or not.

MR. CARPENTER: Now, I don't recall the exact wording that counsel used. I got the impression from the statements of counsel that --

Q That he made --

MR. CARPENTER: -- they wanted the witness there.

Q Yes. Well, couldn't it be that what they wanted was that the trial not go on without the witness?

MR. CARPENTER: I think so.

Q Which means no trial.

MR. CARPENTER: Yes.

Q That's what -- well, don't you think they should

have asked what was going to be done about it?

MR. CARPENTER: I think they might have asked, but this remark that I've mentioned, which is in evidence, may have been an explanation as to why they didn't. They expected Holm to be there. When, in the middle of the trial, --

Q Well, don't you think that they could have raised that point and told the court that?

MR. CARPENTER: Yes, they could have.

Q And don't you think they perhaps had an obligation to do that before trial so as not to have a second trial aborted by a mistrial?

MR. CARPENTER: Yes, if they had known that the witness Holm was not going to be present --

Q Well, you're assuming something on which there is nothing in the record, one way or the other.

MR. CARPENTER: Well, the --

Q You said <u>if</u> they had known.

MR. CARPENTER: Yes.

Q We don't know from this record whether they did or did not know. For all we know, they may have been very carefully making it a point not to make a demand. It's just as good speculation as yours, that they avoided making a demand because they never wanted to see Mr. Holm in the courtroom.

MR. CARPENTER: Well, this, of course, would be devious tactics by some counsel, perhaps it might be suggested.

Q You wouldn't --

MR. CARPENTER: I have quoted the entire passage in the record, which is not printed in the Appendix, where counsel, before the testimony was offered, made their objections.

Q This was after the trial was once underway, though.

MR. CARPENTER: This was after the trial was once underway.

Q So the only solution would have been a mistrial if they were going to -- probably a mistrial if they were going to wait for this man to be subpoenaed and determine whether he would honor an extraterritorial subpoena all the way to Sweden.

MR. CARPENTER: Yes.

Q And then if a mistrial occurred, I suppose it would be open to the defense to claim that the mistrial was the fault of the prosecution and that he could therefore raise a double jeopardy defense.

MR. CARPENTER: Yes, but I would say, then, -- the passage, the only passage that addresses -- in the record, that addresses itself to this point, is the statement by Mr. Mitchell, on of Stubbs' counsel at the second trial, and he says, and I quote --

Q What page is that?

MR. CARPENTER: Page 16a of the respondent's brief, at the bottom. It's at page 162 of the transcript of the '64 trial.

"Your Honor please, I think it is the law and it is the law until the courts speak otherwise. Now, as Your Honor recalls, Mr. Wooten" -- who was the prosecuting attorney -- "state that he would have Mr. Holmes" -- and Holm and Holmes are interchangeable spellings of the same word -- "present." And then there's three dots to show a suspension.

That's the only passage in the record that speaks of it. I think it explains perhaps why counsel did not move for an adjournment or apply to have the witness brought over at counsel's expense, or, since Stubbs was indigent, at court expense. They were -- I think, if there's any question, the only indication in the record is their counsel were surprised.

Q Was there another conviction besides the Tennessee conviction?

MR. CARPENTER: I believe there was, yes.

Q In Texas or some place?

MR. CARPENTER: Yes.

Q And New York specifically relied on the Tennessee one?

MR. CARPENTER: Yes. They relied on it so far as this case was concerned.

Q Yes.

MR. CARPENTER: When opposing certiorari --

Q Could they have gotten the same mileage out of the Texas conviction?

MR. CARPENTER: Yes, I thought that the case might be moot because of that, and that the Court might not want to consider the case. But, at any rate, New York --

Q Was that in the record? Was that offered in the record -- was the Texas conviction offered? How do they prove a prior conviction in New York?

MR. CARPENTER: Well, they have, following a conviction by the fact finder --

Q Yes.

MR. CARPENTER: -- the prosecutor lays an information.

Q Yes.

MR. CARPENTER: And it is possible to have a jury trial on the question whether the defendant is the same person that was convicted. And it's also permissible under the effective New York statute to raise questions as to whether the previous conviction was constitutionally obtained.

Q Now, that practice, that went forward here?

MR. CARPENTER: This went forward here, following his conviction in Monroe County, and the only conviction that was used was the Tennessee murder conviction.

Q But how does anybody know -- how did anybody

know there was a Texas conviction?

MR. CARPENTER: Well, following the mandate of the court below.

Q What about his testimony that he was on his way from the Texas Penitentiary? If he was on his way from the Texas Penitentiary, he was either a guard or a prisoner.

MR. CARPENTER: Yes. There's no --

Q Didn't he testify to that?

MR. CARPENTER: Yes. I don't know whether this would necessarily make him a felon, but my information is that he was in fact convicted of a felony in Texas, a burglary.

Q But there's --

MR. CARPENTER: Whether or not it was a valid conviction is still being litigated in the New York courts.

Q His counsel is claiming, I suppose, that that kind of conviction, too, was unconstitutional?

MR. CARPENTER: Yes.

Q In what proceeding is the Texas conviction being made an issue?

MR. CARPENTER: Well, there was no stay of proceedings following the decision below.

Q In this case?

MR. CARPENTER: Yes, in this case.

Q And this case resulted in what? Setting aside his sentence?

MR. CARPENTER: Yes, he was ordered released if the New York courts did not re-sentence him.

Q Yes.

MR. CARPENTER: Giving no effect to the Tennessee case.

Q So they are now going through the same proceeding based on the Texas conviction?

MR. CARPENTER: Yes, Your Honor.

Q So it could be/that this whole thing, as you say, may well be moot?

MR. CARPENTER: This is what I thought. It may not be moot, because if Stubbs is correct in his contention that --

Q Yes.

Q No, but if it's found against him, on the Texas, then all you'll have is another appeal, I take it?

MR. CARPENTER: Yes.

Q So there is currently another proceeding in the New York court based on the Texas conviction?

MR. CARPENTER: Yes.

I tried to ascertain exactly what had happened, and maybe my researchers are not accurate --

Q You're not representing him in the --

MR. CARPENTER: No, the Monroe County Public Defender is. I'm in communication with them. I checked on Friday --

Q Have you been assigned throughout this hearing?

MR. CARPENTER: I've been assigned in the court below, and I -- realizing I had spent a thousand bucks -- excuse me, Your Honor; dollars -- I asked the Clerk to assign me here this morning, in order to proceed.

I think, to return to the analysis of the case, it's a complicated case, and we have to go from here to here to discuss parts of it, not that -- the effect of one part on the other part.

I think that you don't, this Court does not need to enter into the question as to whether or not there was effective cross-examination, or whether there was harmless error in the representation by counsel at the Tennessee trial. If the Court determines that the prosecution in Tennessee had to make an effort, some kind of an effort, to obtain the presence of the witness Holm --

Q Mr. Carpenter, at that point, --

MR. CARPENTER: Yes, Mr. Justice.

Q -- enlighten me; what kind of an effort, in your estimation, would be sufficient?

MR. CARPENTER: I think the only effort that is sufficient, where you have an indigent defendant is an offer to pay the expenses back, and an application. I suggested --

Q Why not a deposition? Why not schedule a deposition in Sweden?

MR. CARPENTER: Well, if this is possible, I suppose

it would be -- if the witness refused to come but would attend a deposition, this might be an effective substitute.

Q But that would be expensive, too.

MR. CARPENTER: This would mean you'd have to transport more people over to Sweden than you would back, but --

Q Isn't Justice Brennan's comment appropriate? Wouldn't the defense then be complaining of expense, either in going over to attend the deposition or in hiring local counsel, and wouldn't we have another case here?

MR. CARPENTER: Well, I don't know that they -- I think, if you're representing an indigent, counsel probably would be more prudent than I was, and would go ahead and make the application before going over there, and would apply for reimbursement.

But, maybe all that's necessary is, as was suggested from the bench, just ask the witness if he's willing to come back at his own expense.

Q Well, suppose the witness, instead of being in Sweden, were in the front lines in Vietnam; would that make any difference?

MR. CARPENTER: The question is -- I'm thinking of -- what is the case? A case arose in California where exactly the same situation occurred. The application was made to the Marine Corps, and the Legal Officer told the police officer investigating that he was unavailable. And it

was determined that this a satisfactory determination that the witness was unavailable.

I think one of the California cases cited in the brief for the --

Q California v. Green.

MR. CARPENTER: No, it wasn't --

Q But at least you don't disagree with that determination?

MR. CARPENTER: Well, I think there was an effort made to get the witness. An answer came back that the witness was unavailable. This is a far cry from what was not done in this case.

Q And yet the military authority could have ordered that man back into the United States, couldn't they?

MR. CARPENTER: Yes.

The case that I was mentioning which is in the brief is the case, I think, People v. Benjamin, which is cited at 83 Cal. Rptr. 764; an intermediate appellate court decision.

Q Mr. Carpenter, --

MR. CARPENTER: Yes, sir.

Q -- I take it you're relying on Barber v. Page for your main proposition, and there is at least a factual distinction between this case and Barber, isn't there, in that in Barber nobody cross-examined on behalf of the particular defendant who later raised the objection?

MR. CARPENTER: Yes.

Q Whereas here there was cross-examination on behalf of your client in the 1954 trial.

MR. CARPENTER: Yes. There was cross-examination. Of course the decision in Barber expressly made the effectiveness of the cross-examination not a factor in it, but -- so that the precise holding in Barber, as I read the case, is that assume you have effective cross-examination, or assuming cross-examination is not an issue, that is, whether or not the transcript that you're going to use ofthe absent witness's testimony is a good enough transcript to use.

Q Well, is it a holding, though, limited to the -- when you're speaking of a holding, you're talking about the facts in a particular case.

MR. CARPENTER: Yes. And another factor that distinguishes in Barber v. Page is that the distance was only 225 miles, and it was -- there was just one State line. But these factors -- I don't think the distance here, it's 4500 miles or so to Sweden, is a determining factor.

Q But, Mr. Carpenter, if there had been the most vigorous cross-examination of Mr. Holm, when he took the stand in rebuttal, after Stubbs had told the good relations story, and there had been the most vigorous cross-examination of Mr. Holm, you say that here there was none; but, had there been, would you be here?

MR. CARPENTER: Yes. I would think that Barber v. Page --

Q You still think that an effort should have been made to have Mr. Holm appear at the second trial?

MR. CARPENTER: Yes, Your Honor, because the right of confrontation involves not merely cross-examination, but also the right of a defendant to have his fact finder view the witness, face-to-face, consider the demeanor of the witness as he's giving his testimony, and determine. You might have to waive this, give it up, because of the necessities of some case. But it's something that you shouldn't give up easily.

Q Well, suppose it appeared -- hypothetically now, that's not this case -- but suppose hypothetically it appeared that defense counsel in that posture consulted with his client and said, "You will be much better off to have this testimony read from the transcript than to have this man sitting in the courtroom, flesh-and-blood, on the stand with the scars of the bullet wounds on his face"; and suppose he made that decision, would you think anyone could reasonably say that was ineffective, that tactic was ineffective assistance of counsel?

MR. CARPENTER: Why, I don't think --

Q Or was it a permissible choice?

MR. CARPENTER: I think that perhaps it's possible

for counsel to make that decision. I don't think it would be dishonest for counsel to advise a client to "better let the testimony be read".

In this case there was no hope --

Q Well, I'm not suggesting that it was dishonest, I'm simply suggesting that it might have been sounder defense tactics not to have Mr. Holm there.

MR. CARPENTER: The only defense tactics that would have worked in this case, in my opinion, is to show Mr. Holm to have been a liar. That's the only way. And counsel railed to do anything effect in the '54 trial; they had no chance to do it in the '64 trial.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you.

You have two minutes left, Mrs. Marcus.

REBUTTAL ARGUMENT OF MRS. MARIA L. MARCUS,

ON BEHALF OF THE PETITIONER

MRS. MARCUS: Yes, sir.

Q Mrs. Marcus, what's the status of this hearing on the Texas conviction?

MRS. MARCUS: He's been resentenced as a second felony offender under the Texas predicate, and he is appealing that Texas predicate. However, regardless of the outcome --

Q An appeal where, in the New York State court?

MRS. MARCUS: In the New York State court, yes.

Regardless of the outcome of that appeal, there still would be no mootness in this case, because this Court held in Sibron vs. --

Q No, but isn't the condition satisfied here? The condition was that he be resentenced, wasn't it?

MRS. MARCUS: Yes, but --

Q Well, doesn't that satisfy the condition of this judgment?

MRS. MARCUS: It does not, for the considerations that this Court discussed in Sibron vs. New York, and the Morgan case, the fact of collateral disabilities, and, more important, under New York law, upon a subsequent conviction the judge has the right to consider the whole history of the defendant and the kind of crimes which he has committed before, and has the discretion to sentence him to a live sentence.

And of course --

Q Well, what did he sentence him to here? Is it any different sentence that he got here?

MRS. MARCUS: The sentence here is not different, but, as this Court pointed out in both Sibron and Morgan, the -- it must be considered what would happen on a subsequent conviction. And what would happen is that the sentencing court would undoubtedly regard as crucial in determining what kind of person this is, what sort of chances for rehabilitation, and

what sort of danger he poses to the public in being released. A brutal murder of this kind committed seven days after release from the Texas Penitentiary would undoubtedly be central to the sentencing court, and so, under the considerations that this Court set out in Sibron and Morgan, the case cannot be moot.

MR. CHIEF JUSTICE BURGER: Thank you, Mrs. Marcus.

Thank you, Mr. Carpenter.

The case is submitted.

[Whereupon, at 11:00 o'clock, a.m., the case was submitted.]

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