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In the

# Supreme Court of the United States

LEON CHAMBERS, )  
 )  
 Petitioner, )  
 )  
 v. )  
 )  
 MISSISSIPPI, )  
 )  
 Respondent. )

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SUPREME COURT, U. S.

No. 71-5908

Washington, D. C.  
November 15, 1972

Pages 1 thru 41

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MISSISSIPPI, :  
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Respondent. :  
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No. 71-5908

Washington, D. C.,

Wednesday, November 15, 1972.

The above-entitled matter came on for argument at  
11:02 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:

PETER WESTEN, ESQ., 1775 K Street, N. W., Washington,  
D. C. 20006; for the Petitioner.

TIMMIE HANCOCK, ESQ., Special Assistant Attorney  
General, P. O. Box 220, Jackson, Mississippi  
39205; 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 71-5908, Chambers against Mississippi.

Mr. Westen.

ORAL ARGUMENT OF PETER WESTEN, ESQ.,

ON BEHALF OF THE PETITIONER

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

The petitioner in this case, Leon Chambers, was convicted of a murder which another man was seen committing, and to which that other man spontaneously and repeatedly confessed within hours of the shooting. The case presents two questions.

First, whether Chambers has a right under the Constitution to introduce the other man's confessions to prove he is innocent; and, second, whether Chambers has a right under the Constitution to cross-examine the other man and impeach him for repudiating his confession in court and denying that he had anything to do with the crime.

The case began with a shooting that took place at night during a racial disturbance in June 1969 in the town of Woodville, Mississippi. The victim was a policeman named Aaron Liberty. Liberty and other policemen were confronting an angry crowd of about fifty blacks. As Liberty faced the crowd, he was suddenly shot four times in the back. The

bullets came from a 22-caliber gun from somewhere in the alley behind him. As he died, he turned and shot both barrels of his riot gun into the alley. The first shot passed over the heads of the crowd, the second shot hit a man who, by then, was running down the alley. That man was the petitioner, Leon Chambers.

Chambers was left in the alley, severely wounded. When the police had gone, he was taken to a local hospital, where, two days later, he was placed under arrest for the murder of Aaron Liberty.

Chambers insisted from the outset that he was innocent, and that the State had arrested the wrong man. Indeed, within hours of the shooting, another man, Gable McDonald, spontaneously confessed on separate occasions to three different people that he was the one who shot Officer Liberty.

He first confessed to Berkley Turner, who left the scene of the shooting with him that night. He next confessed to Sam Hardin, whom he had known all of his life, and who drove him home on the night of the shooting. He confessed the next day to Albert Carter, his next-door neighbor, whom he had known for at least 25 years.

Four months later, McDonald repeated his confession. He dictated it in the presence of a minister and signed it under oath. It was detailed. He said that he shot Officer

Liberty at close range from the mouth of the alley. He said that he used his own nine-shot 22-caliber pistol, which he discarded after the shooting. He said that he was confessing because it was no secret any longer that he was the one that shot Liberty. He said that he was telling the truth, but admitted that he would be afraid to testify in court.

QUESTION: Mr. Westen, does the record show what has happened to -- Gabriel McDonald, is it?

MR. WESTEN: Gable McDonald had a preliminary hearing, one month after he signed his written confession, before a Justice of the Peace, who, after a few days of deliberation, dismissed the charges against him.

One year later, Chambers himself went to trial for the murder of Aaron Liberty. He based his defense on showing that he was innocent and that it was not he but McDonald who killed Liberty.

The evidence against Chambers is practically non-existent. One witness testified that he was watching Chambers at the time of the shooting, and could swear that Chambers did not shoot Liberty.

Three policemen, who were on the scene, one who was standing only two yards from Chambers and another who was standing four yards from Chambers and watching him at the time, denied seeing Chambers shoot Liberty.

The police testified also that despite a diligent

search they never found the murder weapon.

There was evidence also in the record that Chambers -- there was no evidence in the record that Chambers had ever owned a 22-caliber gun. It is true that one witness, a policeman, the one who was standing farthest from Chambers, testified that he saw Chambers shoot Liberty.

QUESTION: Was there any evidence offered that McDonald ever owned a gun like this?

MR. WESTEN: Yes. The record showed that he had purchased, before the shooting, a nine-shot 22-caliber pistol, and that he purchased shortly thereafter, shortly after the shooting, a second 22-caliber pistol.

QUESTION: At what stage in the process of the proposed impeachment was that evidence offered?

MR. WESTEN: That was offered as part of the defendant's affirmative case. He called, the defendant called a witness who sold the two guns to Gable McDonald in Natchez, Mississippi, and who had federal firearms records.

I was saying that there was one eyewitness, a policeman, who testified that he saw Chambers shoot Liberty, but the record also shows that neither that policeman nor any other policeman even searched Chambers, who was lying, at the most, 20 or 25 feet from them after he was shot, and that that same policeman spent the next day asking members of the black community if they knew who shot Liberty.

As for Chambers' affirmative case, which is the issue here, he moved first to introduce McDonald's oral confessions. The confessions were spontaneous. They were independent of one another. They were uttered on the scene of -- they were uttered within hours of the shooting. They were made to friends of his, and to people who had themselves witnessed the shooting.

Furthermore, the confessions were corroborated by eyewitness testimony. One witness testified that he saw McDonald shoot Liberty. Another testified that he saw McDonald immediately after the shooting, carrying a pistol.

As I said before, there was evidence that McDonald had owned two 22-caliber pistols; one that he had purchased before the shooting and another that he had purchased immediately thereafter.

Nonetheless, when Chambers called Sam Hardin and Berkley Turner as defense witnesses, the trial court excluded -- prevented them from discussing McDonald's confessions. He excluded the confessions on the ground that declarations against penal interests are hearsay and inadmissible in Mississippi.

Chambers then moved to introduce McDonald's written confession. For that purpose he called McDonald as a defense witness. He had no illusions at that point that McDonald would be a friendly witness, because at McDonald's



own preliminary hearing, long before the trial, McDonald had repudiated his confession.

But Chambers called him for the purpose of authenticating the confession and laying a basis for introducing it. And he examined McDonald for that purpose only.

When --

QUESTION: Was the written confession introduced?

MR. WESTEN: Yes, it was. It was --

QUESTION: On what ground?

MR. WESTEN: It was introduced --

QUESTION: Why was that admissible?

MR. WESTEN: It -- I think if the State had made a hearsay objection, it would have probably been sustained. But they did not, and hearsay is only excluded on motion, on objection, in Mississippi. It may well have been that --

QUESTION: So he was subject to cross-examination on his repudiation?

MR. WESTEN: He was -- he --

QUESTION: I mean he was subject to questioning by --

MR. WESTEN: The State interrogated him about the truth of this confession. But Chambers was denied the right to cross-examine him, following the State's examination about his repudiation.

QUESTION: All Chambes did was ask him, "Is this your confession?"

MR. WESTEN: That's right.

QUESTION: And --

MR. WESTEN: He knew at that point --

QUESTION: And then introduced it?

MR. WESTEN: That's right.

And the State made no objection. It may have been that -- the written confession had already been introduced in McDonald's own preliminary hearing. Whether that was the reason or whether the State failed to make the objection for other reasons, it was read to the jury.

QUESTION: And so Chambers said -- called him to the stand and said, "Is this" -- showed him a copy of the confession and said, "Is this your confession?"

MR. WESTEN: That's right.

QUESTION: He had signed it. "Is this your signature?"

MR. WESTEN: Yes.

QUESTION: And the next question might have been, "Did you also admit that you killed" --

MR. WESTEN: Liberty.

QUESTION: -- "Liberty; did you also admit that to anybody else?"

MR. WESTEN: He might have asked that question, but

he had very good reasons for not asking it. He had made a motion before trial to examine McDonald's --

QUESTION: I know, but let's assume he had asked it. If the written confession -- if he was entitled or permitted to inquire about the written confession, might he not have been permitted to inquire about the oral confessions?

MR. WESTEN: Certainly. And I think if he had asked that question, it would have been admitted. But there were reasons --

QUESTION: And he -- and McDonald might have said, "Yes, I did tell so-and-so that I killed Liberty"?

MR. WESTEN: He might have, yes. But he most likely would have denied it. For these reasons --

QUESTION: Yes, let's assume he had denied it.

MR. WESTEN: If he had denied it, which is what Chambers expected, because at McDonald's own preliminary hearing he had already denied talking to anyone else about the shooting or having confessed to anyone else, before his written confession,

If he had denied it, Chambers would have been left with an answer that he couldn't impeach, and could not follow up because the trial court had already ruled that --

QUESTION: It would have been -- he would have been in better shape than he is now, though, wouldn't he?

MR. WESTEN: That's a question, perhaps, of trial

strategy.

QUESTION: Perhaps that's what this case is all about.

MR. WESTEN: But he -- but I think it would have been madness to ask a witness for an answer that could not be impeached. Chambers -- he knew -- Chambers called McDonald because there was certain testimony he wanted from him, and he examined him for that purpose only. And until the court permitted him to pursue inquiry fully, he refused to elicit answers that he could not follow up, and to leave --

QUESTION: Mr. Westen, at the conclusion of McDonald's cross-examination by the State, your client's counsel asked leave to cross-examine, it was denied, but then he didn't even make any effort to put any questions on what would be called redirect, I suppose. I would think he could have gotten some of what he wanted in on redirect, without necessarily having leave to cross.

MR. WESTEN: There are two things -- there are two answers to that. Redirect makes some sense, where there's a hope of rehabilitating the witness, where the witness is friendly, where he is prepared to support the party who called him. But in this case, McDonald had denied on cross-examination everything he had said on direct examination. He'd repudiated it. And the only thing -- and there's almost nothing that can be done on redirect with a witness like that.

The reason why Chambers did not go ahead and ask individual questions on cross-examination, to ask him about his explanation for repudiating the confession and what he was really doing that night, and about the truth of his alibi, and about his 22-caliber pistol, was that the judge had ruled -- had made a ruling that he had no right to put leading questions to his witness.

QUESTION: Mr. Westen, under the laws of Mississippi, in those conditions, if he asked the question, wasn't he bound by the answer?

MR. WESTEN: He would have been, and that's what he had been told from the outset of trial.

QUESTION: Well, isn't that the answer?

MR. WESTEN: That's -- that is our answer.

QUESTION: Your position is that he was a hostile witness inherently, and that he should have had the privilege of treating him that way from the outset; is that it?

MR. WESTEN: That's what was argued in the State court. As far as this Court's concerned, as far as the constitutional question is concerned, McDonald became a witness against Chambers when he denied the truth of the facts on which Chambers rested his defense. It was at that point that Chambers, we submit, had a constitutional right to cross-examine him, to probe the truth of his testimony, to determine if he was committing perjury, and to impeach him with independent

evidence, to show, to discredit his testimony.

QUESTION: Was McDonald ever indicted?

MR. WESTEN: No, he was not.

And I should say that at the point where the Justice of the Peace dismissed charges against McDonald, the only evidence they had against McDonald was his sworn confession; they did not know about the three oral confessions, and they did not know about the eyewitness.

QUESTION: Was the eyewitness called at Chambers' trial?

MR. WESTEN: Yes, he was.

QUESTION: And did he testify that he had seen McDonald rather than Chambers shoot the officer?

MR. WESTEN: Yes, he did.

We urge this Court to reverse the conviction on two independent grounds.

First, Chambers was denied his right under the Constitution to call Hardin and Turner as witnesses in his behalf, and to introduce McDonald's confessions, to prove he was innocent.

The right to call witnesses, the right of the accused to call witnesses and present testimony is protected by both the due process clause of the Fourteenth Amendment and the compulsory process clause of the Sixth Amendment.

With respect to due process, we rely on the line

of cases, of which the leading case is Brady vs. Maryland. Brady stands for the general proposition that it is a denial of due process for the State, for no good reason, to deprive the defendant of exculpatory evidence that has a material bearing on his innocence.

In Brady, the State deprived the defendant of exculpatory evidence by withholding it from him. In this case, Mississippi has denied Chambers the benefit of exculpatory confessions by withholding them from the jury. The effect in each case is the same. In each case, the State put a man on trial for his life, and then, for no good reason, deprived him of the benefit of evidence that would have shown he was innocent.

QUESTION: Well, it's your position that he should be able to call a witness who can testify as to an exculpatory confession, wholly aside from impeaching anyone?

MR. WESTEN: That's right. That's the --

QUESTION: I mean just as a general proposition, even if McDonald had never been called at all, he should have been able to call a policeman who would testify as to an out-of-court confession by some third party?

MR. WESTEN: We --

QUESTION: Is that your position?

MR. WESTEN: That is our position. But I should expand on it. It's our position that the due process and the

compulsory process entitle the accused to offer evidence to show he is innocent, unless the State can show some reason for withholding it from the jury.

In this --

QUESTION: Wasn't it that what you felt you should be permitted to do was to produce the men to whom the oral confessions were made?

MR. WESTEN: That's right.

QUESTION: To argue and so forth. Not some police-  
[sic]  
man to testify that the -- that Chambers had admitted to them.

MR. WESTEN: We submit that we should have been permitted to put on the stand Sam Hardin and Berkley Turner, to testify --

QUESTION: The ones to whom the alleged oral confessions were made?

MR. WESTEN: That's right, to recite McDonald's out-of-court confession.

QUESTION: Even though McDonald isn't in court, and is wholly unavailable?

MR. WESTEN: No, because we think that that's one reason why Mississippi is incapable, in this case, of making a showing -- of showing a reason for withholding the confession. The presence of McDonald rendered his out-of-court confession sufficiently reliable -- it provided a sufficient basis for introducing a hearsay confession, that



there was no legitimate reason to keep it out.

There's another reason. We think that --

QUESTION: Before you get to that reason, do you go so far as to ask that the old Donnelly case be overruled?

MR. WESTEN: We don't think that the Court has to overrule Donnelly. Donnelly was not a constitutional case. It established a federal hearsay rule, and it did so on facts that were not nearly as compelling as they are in this case. In Donnelly, the declarant was dead, and there was no way to cross-examine him about the truth of his out-of-court statement.

In addition, there was only one confession, as opposed to three as in this case.

And, finally, there was eyewitness testimony in this case to corroborate the hearsay confession, which was not the case in Donnelly.

QUESTION: Would you say that Mississippi couldn't go so far as to require a predicate for the hearsay testimony, as most States, I believe, do, by first asking McDonald, as long as he's there: "Did you ever make a confession, oral confession to Berkley Turner?"

MR. WESTEN: Yes. And I think that relates to Mr. Justice White's question, and I think that kind of rule would make a lot of sense. That's the proposed federal rule. That's the rule in California.

But Mississippi doesn't have that rule. It excludes

hearsay confessions whether or not there was a predicate, whether or not there was a prior question to the witness about whether he made the out-of-court statement.

It is our position that it would have served no purpose to ask it, for the purpose of introducing McDonald's confessions for their truth, as hearsay, to prove Chambers was innocent. There was no purpose served by asking McDonald, in Mississippi, --

QUESTION: Well, in any event, I gather your submission is that you should be -- have been permitted to put on Hardin and whoever the other chap was, to testify what McDonald had told them, not for impeachment purposes but for --

MR. WESTEN: For hearsay.

QUESTION: -- affirmatively, on your defense.

MR. WESTEN: That's right. They are two arguments we make.

The first is that Chambers had an affirmative right to show he was innocent by offering evidence --

QUESTION: That somebody did it.

MR. WESTEN: -- to show that it was not he but somebody else that committed the crime. And we submit that under the decisions of this Court, in California vs. Green and in Dutton vs. Evans, there is no legitimate ground for withholding those hearsay confessions to exculpate Chambers.

In Dutton vs. Evans, the Court --

QUESTION: As long as McDonald's around.

MR. WESTEN: Excuse me?

QUESTION: As long as McDonald is around, --

MR. WESTEN: As long as -- yes.

QUESTION: -- and subject to examination.

MR. WESTEN: We think that California vs. Green and Dutton vs. Evans are cumulative in this case, both factors are present. Under the standard in California vs. Green, the declarant was present. Under the standard in Dutton vs. Evans, the statement was a spontaneous declaration against penal interest, that carries, in the language of the plurality opinion, "such indicia of reliability that they can be introduced" -- they can be introduced in satisfaction of the strict constitutional standard of the confrontation clause.

In this case, the standard of --

QUESTION: I had rather understood that basically this case is 180 degrees opposite of either Dutton v. Evans or the Green v. California. There the claim was, the constitutional claim was that the Sixth Amendment permitted -- did not permit those exceptions to the hearsay rule; and in this case you're saying that the Constitution, including the Sixth Amendment, requires that Mississippi make these exceptions to the hearsay rule. Just exactly the opposite claim.

Isn't that -- have I got this wrong?

MR. WESTEN: In many ways for -- in some ways,

perhaps, it's the converse of Dutton, and of California vs. Green, but for this reason: In California vs. Green and in Dutton, the State offered hearsay against the accused under its own rules of evidence; and the question was, were those hearsay statements so inherently reliable in the context -- in their context, that they could be introduced in satisfaction of the strict constitutional standard of the confrontation clause.

In this case, Chambers contends that he has a right under the compulsory process clause of the Sixth Amendment, which has nothing to do with confrontation, and due process clause of the Fourteenth Amendment, to offer the evidence in his favor, affirmatively to prove he's innocent. But unless the State can demonstrate that the hearsay is so inherently unreliable that the only way to protect the integrity of the courtroom is to exclude it altogether.

And we submit that under the federal standard -- and I should say that whether or not the hearsay is reliable is itself a federal question, and it's a federal question because it determines the scope of the defendant's right to prove he is innocent.

In light of California vs. Green and Dutton vs. Evans, I see no way in which Mississippi can demonstrate that these statements are so unreliable that they have to be kept out to preserve the integrity of the courtroom.

QUESTION: Mr. Westen, may I come back to the questions that were asked you by Mr. Justice White. Let's assume for the moment that McDonald was not in the courtroom and not available, and no one knew where he was. Would your position be the same as to the admissibility of the testimony of the three persons to whom the oral confessions were made?

MR. WESTEN: It's my feeling that where a hearsay statement is corroborated by an eyewitness, and is corroborated by the declarant's own written confession, and corroborated by independent oral confessions, and is a declaration against penal interest, and is spontaneous, and uttered on the scene of the crime to friends of the declarant, that it is sufficiently reliable to be introduced in his favor.

But that -- the Court doesn't have to decide that, because the declarant was present here.

QUESTION: Right.

MR. WESTEN: I think it's important --

QUESTION: But your theory, as I understand it, is that in effect you look at the totality of the circumstances, to see whether or not the evidence could be admitted, it was inherently reliable?

MR. WESTEN: Well, perhaps I've misled you, Mr. Justice Powell. It's my position that the due process clause, and --

QUESTION: Right.

MR. WESTEN: -- the compulsory process clause entitle the accused to offer any, any exculpatory evidence that has material bearing on his innocence unless the State comes forward and makes its showing that the evidence is so unreliable that it has to be kept out.

So it's not the accused who has to demonstrate that it is reliable, it's the State that has to demonstrate that it is inherently unreliable.

QUESTION: But this isn't a new question, I mean there's a historic rule about this, about third-party confessions.

MR. WESTEN: There's a hearsay rule. There's a State and --

QUESTION: But hasn't the rule regularly followed been that an accused may not simply call somebody to testify to a third-party confession?

MR. WESTEN: That is the rule that --

QUESTION: I mean that's been a rather standard rule, hasn't it?

MR. WESTEN: The rule in federal courts, which has been established, it was established in Donnelly vs. United States, to which Mr. Justice Blackmun referred, establishes that standard, it establishes that proposition.

QUESTION: Well, how about State cases? I mean, isn't this --

MR. WESTEN: The States are generally in agreement with Donnelly, about the --

QUESTION: So need the State need to state every time that it's offered, make the demonstration other than citing 150 cases?

MR. WESTEN: It's our position that the State has the burden of demonstrating a persuasive reason for preventing the accused from proving his innocence.

As for the hearsay rules you were referring to, Mr. Justice White, Donnelly itself has been severely questioned. It would be abolished by the new, proposed federal rule of evidence. The dissent by Mr. Justice Holmes is slowly becoming the prevailing position in all of the recent States that have recently codified their laws of evidence. But we're not making the argument as a general matter, that declarations against penal interests should always be admissible, we're making the -- it's our position that in a criminal case, where there is practically no evidence against the accused, and where it is quite possible that he is being tried for a crime to which someone else -- a crime which someone else committed, and he has --

QUESTION: Well, why, Mr. Westen, isn't that a totality approach, as Mr. Justice Powell suggested?

What you're now doing, suggesting, as I understand it, is that at least in the facts of this case, where there

is so little evidence otherwise against Chambers -- there's so little evidence --

MR. WESTEN: If this were a case like Dutton vs. Evans, in which there were 19 witnesses against the accused, who all pointed the finger at him, there might be some question about whether he could offer a hearsay confession to prove that he hadn't done it.

QUESTION: Well, I ask you again, why isn't this, then, as Mr. Justice Powell suggested, the argument for a totality approach in this context?

MR. WESTEN: I'm not sure that I know what you mean by totality. I think the question is: Is the statement exculpatory? Is it material?

QUESTION: Well, what I mean is that whether or not, in the context of this particular case, he should be permitted; that you're not arguing that necessarily there should be a general proposition that always exculpatory statements should be admitted.

MR. WESTEN: Well, the general propositions that were -- on which we rest our argument is that the accused does have an affirmative right to prove he is innocent, unless the State can make some showing. In this case, it is, we submit, absolutely untenable to argue that out-of-court statements, confessions are unreliable.

QUESTION: But you have to make this on a constitu-



tional basis, not on a supervisory power basis, don't you?

MR. WESTEN: That's right. And the constitutional basis is -- I refer the Court to the opinion on the last day of the term in June, in the case holding that parolees are entitled to a hearing before they are -- before their parole is revoked.

The Court said in that opinion that the due process entitles an accused to offer evidence to show he is innocent, and to confront the witnesses against him. That's what we're arguing -- that's our position that there is an affirmative right in the accused to make out a defense, and to offer evidence that is reliable and persuasive and material to his innocence and, as our second ground -- which I haven't discussed yet, and probably won't reach -- that the accused has a right to confront and impeach, cross-examine witnesses against him.

QUESTION: And he became a witness against, in that sense, when he repudiated his confessions.

MR. WESTEN: That's right.

QUESTION: That's your argument?

MR. WESTEN: And when he denied the truth of Chambers' affirmative defense.

The -- perhaps I will reserve the remainder of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Mr. Hancock, either now

or at some time in your argument, would you address yourself to the situation, the hypothetical situation that I'll give you now:

What would be the situation under Brady, if all three of these witnesses had gone to the prosecutor or the police and told them of this confession? And let's add that McDonald himself went to the police and told them what he told the others.

And the prosecution never disclosed that to anybody, and it was never discovered until after a conviction. What would be the situation in this case under Brady, and subsequent cases?

ORAL ARGUMENT OF TIMMIE HANCOCK, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. HANCOCK: I believe under such circumstances it would be the duty of the prosecution to inform the defendant, or petitioner here, of any evidence that was favorable to him. And that the denial of the State to do such would be certainly considered by this Court in --

QUESTION: Now, in this case we have essentially, then, do we not, the question of what the defense -- what use the defense would make of that information after they discover it?

MR. HANCOCK: That is correct.

I think here we should start out by saying that the

State put on their case here, there's no question as to the sufficiency of the evidence raised; the State, in putting on their case, introduced witnesses who stated that they saw Leon Chambers do the shooting. The jury was justified upon --

QUESTION: How many witnesses said that they saw Chambers do the shooting?

MR. HANCOCK: One witness testified that he --

QUESTION: I thought you said "witnesses".

MR. HANCOCK: One witness testified that he saw Chambers when he actually pulled the trigger, and he saw the wounded man flinching as the bullets hit him. Another witness testified that he saw Leon Chambers bring his hand down, and at about that time he heard the shots fired.

QUESTION: These were policemen?

MR. HANCOCK: These were policemen.

QUESTION: And they arrested Chambers promptly, I assume?

MR. HANCOCK: Chambers was shot immediately thereafter by the man whom he shot; Chambers shot Aaron Liberty, who was a policeman, and at that time Aaron Liberty fell backwards, and then he turned around and fired one shot into the air, and then shot Leon Chambers. Leon Chambers was carried to the hospital, and was admitted over there.

QUESTION: Was he arrested?

MR. HANCOCK: The sheriff -- the testimony of the

sheriff was to the effect that he was, considered him to be under arrest.

QUESTION: He considered him to be under arrest.

When was he arraigned?

MR. HANCOCK: He was arraigned --

QUESTION: A year later.

MR. HANCOCK: I believe he was --- it was some time later; I don't remember the exact time.

QUESTION: Any explanation for that?

MR. HANCOCK: Well, Leon Chambers, during this time, was very ill.

QUESTION: I mean this is a case where you have three policemen who saw the crime of murder, and it took them a year to get around to arraigning him. Isn't that strange?

MR. HANCOCK: Well, I think that depends to some extent upon the physical condition of Leon Chambers at the time.

QUESTION: Like what?

Well, when did Chambers get out of the hospital?

MR. HANCOCK: Pardon me, sir?

QUESTION: When did he get out of the hospital?

MR. HANCOCK: I do not know. This was not brought out in the trial, I don't believe.

QUESTION: But you don't have any reason for -- why it took them a year to get around to it?

MR. HANCOCK: No, Your Honor; not based upon the record, I do not. But this question was never raised in the lower court.

QUESTION: Was he out, walking around?

MR. HANCOCK: I do not know. The record does not show that.

QUESTION: Well, does the record show when he was ever -- when a warrant for arrest was issued?

MR. HANCOCK: Pardon me?

QUESTION: Does the record show when a warrant of arrest was issued?

MR. HANCOCK: I do not believe it does.

QUESTION: Was he -- I assume he was arrested at some time.

MR. HANCOCK: He was arrested.

QUESTION: But you don't know when?

MR. HANCOCK: He was arrested, I believe, within a week after he was shot.

QUESTION: Then was he out on bail?

MR. HANCOCK: He was released on bail.

QUESTION: Is that in the record?

MR. HANCOCK: I believe -- yes, sir, it is. He was released on \$15,000 bail, I believe.

QUESTION: That was a week afterwards?

MR. HANCOCK: I'm not sure when he was released.

That question was not raised previous to this time.

The petitioner now states that he was not allowed to put on his affirmative defense. However, the petitioner was allowed to introduce a witness who testified that he saw Gable McDonald shoot Leon Chambers. [sic.]

Now, Gable McDonald was not the defendant. The petitioner tried, attempted to show that he was innocent by showing that another man was guilty. This man being Gable McDonald.

As I said, the court, trial court allowed the petitioner to put on testimony of an eyewitness, of a person who said that he was an eyewitness and that he saw Gable McDonald shoot Leon Chambers. [sic.]

Also, the defense was allowed to call Gable McDonald as a witness. Gable McDonald admitted that he had confessed to this crime. He said that he went to the petitioner's counsel, petitioner at the lower court, at the trial court; he went to petitioner's counsel and gave them a confession.

Now, this confession was introduced into evidence. The court allowed this confession to be introduced as a confession. I don't believe that they were required to, under the decision of this Court in Donnelly, and the universal rule, almost, but the trial court allowed this confession to be introduced into evidence.

Then the State questioned Gable McDonald, and Gable

McDonald testified that he did give the confession, and he testified that he gave the confession because he was promised that he would get some money for it, if he would confess. That the police, the law enforcement officers would never know about it, and that it would ultimately wind up in a lawsuit wherein he would get one-third of the money that was brought about in this lawsuit.

So McDonald repudiated his confession, and he explained why.

At that time Leon Chambers brought on three more witnesses, and he asked them if Gable McDonald had confessed to them. The prosecuting attorneys objected to this on the ground that it was hearsay, and certainly it was. The statements were introduced for the purpose of the truthfulness of those statements. Well, the person who knew the truth, if those statements were made by Gable McDonald, was Gable McDonald himself. He's the only individual who would know if he made those statements and if -- whether they were true.

QUESTION: This argument was available for the written confession and you didn't use it.

MR. HANCOCK: Right. Right. I believe that's true. I think the State allowed more evidence, more affirmative evidence for the defendant to go in than the State was required to do so.

QUESTION: Was McDonald asked whether he had made

these oral admissions to these other people?

MR. HANCOCK: No, Your Honor, he was not.

The petitioner now states that he did not ask him, because the trial court refused to allow McDonald to be questioned as an adverse witness.

Now, --

QUESTION: Mr.Hancock, as a matter of fact, cannot an argument be made that the oral confessions are much more reliable than the written one? In this case?

Because they were -- if they did take place, they took place immediately, that night; whereas the written confession came along three or four months later.

MR. HANCOCK: I don't believe they necessarily can. Gable McDonald would be the only one who -- Gable McDonald was available as a witness, and he did testify in this trial. He would be the one to testify: Yes, I gave those confessions, and those confessions were truthful. Or, Yes, I gave those confessions and they were false. Or, No, I did not give those confessions.

The testimony from these other witnesses would be based purely upon hearsay, they would not know the truthfulness of the statement.

QUESTION: But unless he claimed, unless McDonald claimed that these other three people to whom he made the oral declarations had also promised him money, would they not



not be, those three confessions, would they not be as Justice Blackmun suggested more cogent, more reliable than the one that he said was given for a promise of money?

MR. HANCOCK: I don't necessarily think so, because after this great deal of time Gable McDonald knew that an investigation was being conducted into the trial. He knew that prosecution would be coming about, and under these circumstances he then made his written confession.

So I don't believe that there would be any greater grounds for the admissions to be truthful soon after than it would have been at the later date.

QUESTION: Mr. Hancock, did I understand you to say that one of the parties to whom the oral confession was made was allowed to testify?

MR. HANCOCK: He did testify, not as to the confession, because an objection to that was sustained upon the grounds that it was hearsay. But one of the parties who was going to testify to this effect did testify and he testified that he saw Gable McDonald.

QUESTION: That he did what?

MR. HANCOCK: The witness testified that he saw Gable McDonald shoot Aaron Liberty.

QUESTION: Yes, but did not the court instruct the jury to disregard that, that testimony?

MR. HANCOCK: I don't believe they did. It's --

QUESTION: I so construed the record, page 73 of the transcript.

Perhaps I'm wrong, but that was the view I took of it.

MR. HANCOCK: I might be mistaken, but I do not believe that they sustained an objection to his testimony, that he saw --

QUESTION: Was it witness Hardin?

MR. HANCOCK: Pardon?

QUESTION: Was the witness named Hardin, H-a-r-d-i-n?

MR. HANCOCK: Yes.

In any event --

QUESTION: Well, it reads: "By the Court: The jury will be so instructed at this time."

That's the last line on page 73 of the record, of the Appendix.

QUESTION: Well, that has to do with the whole --

MR. HANCOCK: Yes, that has to do with -- pardon me -- that has to do with his hearsay objections on whether or not a confession was given.

QUESTION: The oral confession.

MR. HANCOCK: The oral confession. This is not sustaining an objection to his eyewitness testimony, that "I saw Gable McDonald shoot Leon Chambers." [sic.]

QUESTION: Well, where is that in the record? Is it

in the Appendix?

MR. HANCOCK: I'm not sure that it's in the Appendix. It is in the trial --

QUESTION: Well, it is in the record?

MR. HANCOCK: It is in the trial record, that Gable McDonald testified that he -- that Hardin testified that he did see Gable McDonald shoot Leon Chambers. [sic.]

Gable McDonald -- Leon Chambers, rather, could have asked Gable McDonald if he in fact made these other confessions; but he did not do so. He chose not to ask him. He says he couldn't because he had requested the trial court to allow him to question Gable McDonald as an adverse witness.

Now, under Mississippi rules, a petitioner, a defendant is allowed to question a witness as an adverse witness, a witness whom he calls as an adverse witness, when it is shown that the testimony of the witness takes him by surprise or he is hostile. Well, there was no showing here in this case.

But, in any event, I don't think there is any magic significance to the words "cross-examination". He could have still asked Gable McDonald: Did you make other confessions?

He never did this. He never questioned Gable McDonald at all.

He didn't come back on redirect examination, after Gable McDonald said, "No, the confession -- I did give a previous confession; that confession was not true."

QUESTION: Under Mississippi practice, Mr. Hancock, is the trial judge permitted or authorized to allow leading questions in particular questioning situations, even though the witness is not an adverse witness within the meaning of the rule?

MR. HANCOCK: This is a matter within the discretion of the trial judge. But here no attempt was made at that.

QUESTION: I note the circuit judge's explanation of that. He said: The answer is that the court would not permit the defendant to cross-examine.

MR. HANCOCK: Well, as I said, there was no attempt made to cross-examine. And this is -- as I said, there is no --

QUESTION: This is the judge in your Supreme Court. He had no problem with it.

MR. HANCOCK: But maybe this was a dissenting opinion. But, as I said, I don't think there's any magic meaning to the word "cross-examination". He could have asked him on direct examination, not a leading question possibly.

QUESTION: But wouldn't he be bound by the answers?

MR. HANCOCK: Well, maybe the testimony that later on --

QUESTION: "Maybe". What's the law in Mississippi? When you ask your witness a question, are you or are you not

bound by the answer?

MR. HANCOCK: You ordinarily are bound by the answer. However, the answer might be such as to allow the defendant to then question the witness as to --

QUESTION: But the judge has already said he can't do that.

Hasn't the judge already said that?

MR. HANCOCK: That was an after-the-fact opinion.

QUESTION: But didn't the judge say "you can't cross-examine this witness"?

MR. HANCOCK: No, Your Honor, he did not in the lower court.

QUESTION: What did he say?

MR. HANCOCK: The petitioner filed a motion and then later requested the trial court to proclaim Gable McDonald to be an adverse witness. At the beginning of the trial, when the motion was first made, the judge said: I will reserve my ruling on that until later when Gable McDonald is introduced as a witness.

Gable McDonald was introduced as a witness. This motion was made to the trial court, and the trial court overruled it. At that time there was no showing that any of Gable McDonald's testimony was -- took the defendant by surprise. He was willing and able to answer every question that was asked him, so he was willing to testify.

QUESTION: Well, did the judge -- did or did not the judge give him the right to cross-examine him as a hostile witness?

MR. HANCOCK: He did not give him the --

QUESTION: And under those circumstances, wouldn't he be bound by any answer that witness gave?

MR. HANCOCK: Well, I would think that would depend upon the answer.

QUESTION: Well, what is the law in Mississippi, when you call your own witness and he gives you an answer, you can impeach him?

MR. HANCOCK: The law in Mississippi, as in most jurisdictions now, is that you cannot impeach your own witness under ordinary circumstances.

QUESTION: I thought so.

So if he'd asked the question, he would have been bound by the answer.

MR. HANCOCK: If Gable McDonald had said, "Well, I refuse to answer that", at that point he would have become a hostile witness and he could have been cross-examined under Mississippi law.

QUESTION: Well, if McDonald had answered, "No, I didn't kill him, you did", he'd be bound by that answer.

MR. HANCOCK: Yes.

QUESTION: And you don't understand why he didn't ask

it?

MR. HANCOCK: Well, I believe you have to look at the totality of the circumstances. That goes to a matter of the trial strategy, which I can't read into the trial record, the trial strategy of why this was -- why he elected not to question him, or why he did not.

But, in any event, we would consider that if there were error, it was a harmless error, because there was testimony to the effect, and it was put before the jury, that Gable McDonald shot Aaron Liberty, an eyewitness -- a witness testified that he was an eyewitness to this. Gable McDonald's confession was put before the jury that he, on one occasion, confessed to the crime.

We don't believe this would be devastating in any way. We believe, under the circumstances, that ruling of the trial court was proper, that he did receive a fair trial, and that if there were any error it was purely a harmless error.

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

Mr. Westen, you have about one minute left.

REBUTTAL ARGUMENT OF PETER WESTEN, ESQ.,

ON BEHALF OF THE PETITIONER

MR. WESTEN: I will refer the Court to our reply brief on all of these questions concerning the failure to ask a question and the failure to lay a foundation. But I'd like

to say a word about it to Mr. Justice Rehnquist and Mr. Justice White.

Chambers offered the confessions for two different purposes: first, as affirmative evidence of his own innocence. For that purpose, there is no such thing as a proper foundation in Mississippi. There is no rule in Mississippi that to offer hearsay for its truth you have to first ask the witness, the witness on the stand, whether or not he made the out-of-court statement.

That might be a good rule. It's the rule in California; it's not the rule in Mississippi.

As for the -- we also offered a confession for an entirely different purpose, an opposite purpose. We offered the confession to Albert Carter in order to impeach Gable McDonald. In order to lay a foundation for an impeaching confession, it is necessary to ask the witness whether or not he made the out-of-court statement. But we were not able to do that at the trial court because, at that point in time, the trial court had ruled that we could not cross-examine McDonald. And the question put to McDonald, whether or not he had made an out-of-court confession inconsistent to what he had just testified to to the State, would have been in the nature of cross-examination.

QUESTION: Mr. Westen, turning to page 146 of your Appendix, am I right in thinking that the only time during



the trial proceedings that any constitutional dimension was suggested to these rulings of the trial court was in the motion to set aside the verdict, where, in paragraph 6 of that motion, you say "the trial of the defendant was not in accord with fundamental fairness guaranteed by the Fourteenth Amendment of the Constitution of the United States"?

MR. WESTEN: Yes, and for the above reasons, for the reasons that Chambers was unable to offer a hearsay confession to prove he was innocent, and to cross-examine McDonald.

QUESTION: But it doesn't say, in that motion, "for the above reasons", does it?

MR. WESTEN: No, but I think it's -- I think it's implied, because the above grounds are the errors, are the specific errors alleged. The argument was raised in the Mississippi Supreme Court specifically; even if it hadn't been it would have been before that court properly under the Mississippi plain error rule. But it was raised.

QUESTION: But neither of the opinions in the Supreme Court of Mississippi treated the matter as a matter of constitutional --

MR. WESTEN: I think that's right, but that's because they didn't bother with them. The questions were properly before them. They were passed upon necessarily, and they were implicitly denied.

Thank you.

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

Thank you, Mr. Hancock.

The case is submitted.

[Whereupon, at 11:52 o'clock, a.m., the case in the above-entitled matter was submitted.]