In the

Supreme Court of the United States

ANTHONY LOUIS TACON,

Appellant,

vs.

STATE OF ARIZONA,

Appellee.

No. 71-6060

Washington, D. C.
January 9, 1973

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ANTHONY LOUIS TACON, Appellant, v. STATE OF ARIZONA, Appellee.	No. 71-6060

Washington, D. C.,

Tuesday, January 9, 1973.

The above-entitled matter came on for argument at 11:04 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:

ROBERT J. HIRSH, ESQ., 509 Transamerica Building, Tucson, Arizona, 85701; for the Appellant.

WILLIAM P. DIXON, ESQ., Assistant Attorney General of Arizona, 159 State Capitol, Phoenix, Arizona, 85007; for the Appellee.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments now in No. 71-6060, Tacon against Arizona.

Mr. Hirsh, you may proceed whenever you are ready.

ORAL ARGUMENT OF ROBERT J. HIRSH, ESQ.,

ON BEHALF OF THE APPELLANT

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

If I could give the Court a brief recitation of the facts in this particular matter, Mr. Tacon was a soldier at Fort Huachuca in 1969, and in February of that year he was arrested for unlawful sale of marijuana. He was claimed to have transferred a lid or an ounce of marijuana to an undercover agent, and the result of that arrest was a charge in the Cochise County Superior Court in Southeastern Arizona.

Mr. Tacon was given appointed counsel. He was released on his own recognizance, released back to his company commander, and in the summer of that year, he had spent time consulting with the Court appointed attorney, and there was a continuance granted at the Court appointed attorney's request.

There was no time set after the motion for continuance was made. The trial judge didn't set a time certain, and in December 1969 Mr. Tacon was discharged from the service. He called his Court appointed attorney and said, "Mr. Whitney, I've got to go back to New York. I am discharged from the

service."

Mr. Whitney thereupon told Tacon, "That's fine. Give me your address back there and I will notify you when the trial comes up."

On March 3rd --

Q Were these conditions -- on remaining within the jurisdiction of the Court?

MR. HIRSH: No, sir, it wasn't. That was one of the issues that was raised in Cochise County at a hearing, and the only restriction that Tacon had on him was that his orders had been flagged, and Tacon testified at the hearing that he didn't know the meaning of that, and all he understood was that he was to remain at Fort Huachuca as long as he was in the Army, but he didn't understand or didn't have anyone tell him that he couldn't go back to New York.

The trial judge had a different belief as to that and trial judge, in fact, had claimed that Tacon had violated his trust and violated the bail arrangement by leaving the State, although, I think, the record shows that Tacon did act in good faith.

When he went back to New York, he called the court appointed attorney in Cochise County, and also he had a Federal charge that at that time was against him, and he called the U.S. Commissioner in Nogales, and the bail restrictions in the Federal charge did specify that he was not allowed to leave the

State of Arizona without prior permission.

Tacon called the U.S. Commissioner, got specific, express permission to leave the State and then went to New York.

So the state of the record indicates that at least he didn't have any good faith plea for cause to believe that he was not allowed to leave the State of Arizona.

Q Does the record show how he got back to New York on his own funds?

MR. HIRSH: No, it does not show that.

I assume that he had some severance pay from the service or the service provided money to get back to New York.

Q Was he a New Yorker when he entered the Army?

Unless it has changed, the Army lets you out where you came in. So he probably got back to New York at the taxpayers' expense.

MR. HIRSH: I am almost certain that he was a New York resident, but I don't have a specific recollection of it.

I know his family, during the time he was in the service, moved to Florida, and his mother was a Florida resident at the time this particular case came up for trial.

Q Does the record show whether he consulted with his lawyer before he left Arizona?

MR. HIRSH: Yes, it does. The Appendix shows that -- in fact, our hearing after the trial indicates that -- and the attorney verifies this -- that Tacon called the attorney on the

phone and advised him that he was now being discharged from the service, told him he was going to New York, and the attorney said, "Fine, you just give me your address in New York in order to enable me to locate you when the case is called for trial."

So, I think it is clear from the record that Tacon did act in good faith when he went back to New York, and I am fairly well convinced he didn't violate the law, based on my interpretation of the facts.

In any event, Tacon returns to New York, and on March the 3rd, the trial judge, by minute entry, advises counsel that the trial date is to be March 31, 1970.

The attorney -- the court appointed attorney -- after receiving notice of the trial date, then writes a letter to Tacon. And in this letter, he merely states, "Your trial is now set for March 31st. I want you to be out in Bisbee at least one week prior to the time set for trial."

That was it. There was nothing about trial in absentia if he wasn't present. There was no more said.

Q Is there any explanation for the long delay between the alleged commission of the offense and the trial?

MR. HIRSH: Court procedures in Arizona. Sometimes we have long delays in Arizona -- I shouldn't make admissions like that, but there is no apparent explanation. It is common, at least in my county, to have delays of a year or a year and a half, depending on the court calendar. It is not common in

Federal court. It is common in our State court.

Q It was a year -- more than a year -- wasn't it?

MR. HIRSH: Yes, sir.

They are trying to resolve -- attempting to resolve those problems right now to speed up the process.

In any event, Tacon -- and I might add, the Arizona Supreme Court opinion is in error and the Attorney General is in error when they say that Tacon, by that letter of March 3rd, was advised that he would be tried in absentia.

This is the only notice that Tacon received from his court appointed lawyer, that is, the letter of March the 3rd.

Tacon received this, he testifies, at around the 8th or 9th of March, and he now has -- finds himself with a short time to get out to Arizona, and he has no funds, at least this is what he testifies to.

On the 28th, it is, of March, he attempts to call the court appointed attorney. This is on a Saturday, and he calls the attorney in Wilcox, Arizona, at his home, and he is unable to reach him.

He again calls on Monday, that is the first business day after the weekend, and tells him, "I simply don't have the funds to get to Arizona. I don't know what to do."

And the court appointed attorney -- and I might add on the 24th, County Attorney of Cochise County gets wind of the fact that Tacon might not be available in Arizona for trial, and

the State is bringing a witness from El Reno, Oklahoma, to testify and the county is anticipating spending some $1,000 in order to see this witness gets to Cochise County.

The County Attorney then advises the judge that there is some question about Tacon appearing at trial, and the judge says, "Well,"-- there is admitted entry and it is part of the Appendix in this case. The judge says, "If he is not here, we are going to try him in absentia." There is admitted entry to that effect.

The court appointed attorney is advised of this and in the telephone conversation that occurs on March the 30th tells Tacon -- this is the first time that Tacon is advised -- that if he is not present in Arizona the very next day that he will be tried in absentia.

Q Affirmatively advised to that effect?

MR. HIRSH: Well, this goes to the issue of waiver, and I think it is the State's position that there was a knowing and intelligent waiver of his right to be present, and the waiver is fortified by the claim that Tacon was specifically advised that he would be tried in absentia if he didn't appear.

That simply isn't the case at all and the fact of the matter is that he was advised of the trial date by the letter of March the 3rd, but that was the only notice he had received in enough time to get to Arizona in order to be present for trial.

In any event, the trial starts March 31st, the court appointed lawyer appears before the court and advises the court that there was a telephone conversation with Tacon, but Tacon didn't have the funds to be present.

The judge who had apparently made up his mind from the week previous said, "You search the court area and see if this gentleman is around and if he is not around we are going to try him in absentia, and I am making a finding now pursuant to Arizona Rule of Procedure 231 that Tacon's absence is voluntary."

Our Rule provides that this finding is to be made at the outset of the trial, and we will get into the distinction between Rule 43 in the Arizona Rule, but in any event, the finding of voluntariness is made by the trial judge at the start of the trial prior to commencement of trial that morning.

They go through the first day of trial, and, I might add parenthetically, there was a confession extracted from Tacon of questionable voluntariness, and this isn't in the record. But they had Tacon locked up for three hours after the sale was made and Tacon was crying and after three hours of interrogation he finally confessed that he, in fact, had sold the lid of marijuana to the undercover agent.

So that was at issue that second day of trial. The first day of trial they selected the jury and made opening statements and examined the first witness, the one from El Reno.

And the second day, the State had intended to present evidence of the confession -- have a voluntariness hearing outside of the presence of the jury.

The court appointed lawyer gets word after the first night of trial that Tacon's mother now finds out that Tacon is supposed to be in Arizona, and the mother is going to provide funds for Tacon to arrive in Arizona.

Q Who did that word come from?

MR. HIRSH: The way that the information got to the mother was the result of a letter being sent to Tacon's former mother-in-law's residence in New York, and the former mother-in-law then advised the mother in -- Tacon's mother -- in Miami. Tacon's mother then called, I believe, Whitney, the court appointed lawyer, and thereafter hired a lawyer by the name of Bert Levy in Miami to attempt to negotiate with Whitney to see that Tacon arrived in Arizona for trial.

Q So that when Whitney came into court to make his representation on the second day of the trial he had had no direct communication from the defendant himself that he would be there? Is that correct?

MR. HIRSH: Yes, sir. The only communication he had had theretofore was the telephone conversation on March 30th, and thereafter he didn't hear directly from Tacon. He heard from the mother and then from the attorney in Miami.

Q And the substance of the conversation on March 30th

was that he might be there or might not?

MR. HIRSH: No, the substance of the conversation was to the effect that, "Mr. Whitney, I want to be there. I intend to be there. But I simply don't have the funds at the present time to get to Arizona, and would you see if you can get me a continuance."

And Whitney said, "I doubt if I am going to be able, in fact, I am sure I can't --"

Q This is on March 30th?

MR. HIRSH: This is on March 30th, yes, sir.

This is on Monday, the first business day after the weekend.

The reason he gave for not calling earlier was that he just didn't know what to do. He thought -- he was hopeful that he would come into some money or something would happen that would enable him to have the funds to arrive in Arizona but his expectations simply didn't materialize.

In any event, after the first day of trial, the judge is now advised that there are funds available for Tacon to arrive, there is a motion for continuance made and the judge again made a second express finding at that time, denied the motion for continuance, made a second express finding that Tacon was voluntarily absent --

Q What was the motion, specifically?

MR. HIRSH: The specific motion was a motion to

continue for one day in order to enable Tacon to be present at trial and in order to, I suppose, in part, controvert the voluntariness of the confession.

Q Did he get there the next day?

MR. HIRSH: He got there on the third -- he got there the night of the second, which would be Thursday night. The trial terminated on April 1st, that was on a Wednesday.

Q So that even if the motion had been granted it would have been fruitless?

MR. HIRSH: I suppose that if the judge had given him one day he would give him a day and a half, until Tacon actually appeared. I don't think the judge was that --

Q Well, I know, but the fact is that --

MR. HIRSH: Yes. The continuance was for one day. The motion was made --

Q Because the anticipation was that he could easily be there by that time?

MR. HIRSH: I expect that he had the hopes that Tacon could arrive.

In any event, that motion was denied. The case proceeded to trial. The jury went out and promptly found Tacon guilty.

Tacon arrived Friday morning, turned himself in -- There was a warrant for his arrest, and remained in the Cochise County Jail until he was sentenced some three or four weeks

thereafter.

The trial judge --

Q Was there another motion on the night of the second day?

MR. HIRSH: No, sir.

The second day, the trial terminated, and the jury found Tacon guilty. They were out a very short time.

Q There was no further motion to keep the record open pending his arrival?

MR. HIRSH: No, sir.

Q Was there any statement that he was going to testify, or not?

MR. HIRSH: No, I don't believe there was that representation. I don't see how the court appointed attorney could have made that representation, and recalling the record --

Q I didn't say he should. I just wondered if he did make that --

MR. HIRSH: I believe that one representation that was made was that he wanted to contest the voluntariness of the confession. I am sure that that's in the record. That's not in the Appendix, but it is in the trial record.

Q So he would have testified outside the presence of the jury on that, I suppose.

MR. HIRSH: He would have testified that that confession was involuntarily made, I believe.

Again, I wasn't trial counsel in the case, and I know there was substantial question as to voluntariness that was raised and the issue was resolved adversely to Tacon by the trial judge, but at least there would have been some chance that that confession was excluded.

I might add that confession was replete with evidence of other crimes that weren't related to this -- in fact, my claim before the Arizona Supreme Court was that this confession shouldn't have been admitted because there were irrelevant material that showed that Tacon had engaged in other bad acts, and it should have been excluded for that reason.

Q Was there any request to delete the irrelevant parts of the confession?

MR. HIRSH: No, he didn't. This man did not have a lot of experience. The record was not a good one.

I took the case on appeal and I was -- the record should have been, could have been quite --

Q Has motion for a new trial ever been made?

MR. HIRSH: No, sir.

Q How about -- does Arizona procedure provide any way of collateral relief for the improper admission of a confession in violation of the Federal Constitution?

MR. HIRSH: There is no specific procedure other than appeal, that we have means of getting into court in Arizona -- we don't have a 2255 statute, or anything comparable in Federal

law, but we call the petitions for coram nobis relief.

Q Could he raise the voluntariness of his confession by coram nobis in the State court?

MR. HIRSH: Well, he could have raised the issue on appeal.

Q Could he raise the voluntariness and get an evidentiary hearing?

MR. HIRSH: I suppose he could, at this juncture.

Q Do you know why no motion for a new trial was made?

MR. HIRSH: Yes, Your Honor.

It was not made because -- our position was the burden was on the State of Arizona to affirmatively show this man's absence from trial was knowingly and voluntarily made; and the State never presented hearing on this particular matter and I don't feel that for the defendant to now have the burden of making a motion for a new trial and having the burden of proving that he was absent is violative of his Constitutional right and violative of the Constitution.

In order to have waiver, I think this Court has long held the burden is on the State of Arizona or on the Government to show that waiver and show it by clear and convincing evidence.

Q But your motion might have been granted and instead you have taken the burden of an appeal up here.

MR. HIRSH: I doubt that in view of the trial judge's

feelings towards this man -- I doubt that the trial judge would have granted any relief in this particular case.

Q Arizona Supreme Court would have granted relief if your analysis is correct.

MR. HIRSH: Well, the matter went up -- the same issue was presented to the Arizona Supreme Court and, in fact, the first time that anyone claimed that there should have been a motion for a new trial made was in the response by the Attorney General in this case that perhaps the defendant should have made a motion for a new trial.

But the same issues were presented to the trial judge. They were presented to the -- I take that back. They weren't presented to the trial judge. They were presented to the Arizona Supreme Court, and the Arizona Supreme Court didn't mention our Rule 311 that provides for a motion for a new trial.

The Arizona Supreme Court met the issue directly and held that the absence of Tacon was voluntary, that Rule 241 was Constitutional and that was the end of it.

So I think it is superfluous, number one, to have made a motion for a new trial and, number two, I think that, again, that would be at odds with the Constitution because it would place the burden on showing waiver on the defendant. And, again, that conflicts with all the principles that --

Q Well, there you are assuming that on that motion the

conventional rule of putting the burden on the movant would have applied; but if you had pressed that point in the trial court, how do we now know that the court would not have adopted your version of the burden of proof?

MR. HIRSH: Well, of course, you can't be certain. I know this judge personally --

Q That's not what we are concerned about.

MR. HIRSH: I understand that, Your Honor.

I have doubts that he would have accepted that and perhaps I was remiss in not making a request, but, as I say, the issue as to whether or not that motion should have been made was never brought up, was never raised in the Arizona Supreme Court, and it is now raised for the first time by the Attorney General here.

I think if the State wanted to interpose that argument perhaps they should have raised it at some previous time.

In view of the fact that the Arizona Supreme Court did resolve this matter on the issue, my position in this particular matter -- I might add,after the trial terminated, there was a contempt hearing.

Tacon received a sentence of 5 to 5½ years in the Arizona State Penitentiary by this judge and a short time after judgment was entered and sentence was passed he filed -- directed the County Attorney to file an order to show cause -- ordering Tacon to show cause why he shouldn't be held in contempt for

failing to abide by the court's order, appearing at the time specified in the minute entry.

That was my first appearance in the case and the result of that was that we had an evidentiary hearing on the question of whether or not Tacon wilfully and intentionally absented himself from the jurisdiction.

We didn't get into the Constitutional question, although the hearing was akin to the issue that's before the Court now.

The trial judge, after hearing all the evidence, took the matter under advisement and it is -- to this day, he is still under advisement. He never did rule as to whether or not Tacon was held -- or should be held -- in contempt for his wilful failure to appear.

He did state -- and I might add, state gratuitously -- on the record that after Tacon -- at the close of the hearing, Tacon requested to make a statement to the court.

In the statement, he said, "Your Honor, I swear to you that I intended to be present at trial. I never intended to absent myself and I swear to you that what I have told you is the truth."

And the trial judge at that time said, "Mr. Tacon, I can assure you that I am not impressed one bit with your stated intention at this time." And that was the end of it.

We took the appeal to the Arizona Supreme Court and it

was on that language that the Arizona Supreme Court said that the trial judge apparently felt that this man wilfully and intentionally absented himself from the jurisdiction, and did not voluntarily -- waived his right to be present at the trial. And they use that language as a claim that the trial judge made a finding.

Q I suppose the judge has heard this is about as clear a credibility finding as a judge could make?

MR. HIRSH: Well, again, I distinguish that, that the issue just squarely wasn't presented to the court.

And I think that when we are talking about a finding --

Q He heard the witness and saw him and he heard all the witness' reasons and excuses --

MR. HIRSH: I think that when we are talking about an evidentiary hearing on the question of waiver, as to waiver of a Constitutional right, I think there ought to be a little more specificity than a judge's reaction to witnesses' testimony, and I think we are talking about, in fact, an evidentiary hearing. That's what this Court has always mandated, that an evidentiary hearing be made, and that specific findings be determined by the Court. And there were no specific findings.

I grant the Court that perhaps you can infer what the findings might have been had they been squarely presented to the court, but there were no such findings made and the issue was never squarely presented to the court. And to this day there is

no issue or finding of fact on the question of whether Anthony Tacon voluntarily appeared, or voluntarily --

Q What is your position with respect to this?

A defendant is on bail or on his personal recognizance. He goes out of the State, doesn't violate his bail, and he is notified his trial is set and he simply writes and says I have no money to be there, and until I do -- I fully intend to be there once I can ever get there, but there is just no way of my getting there.

MR. HIRSH: Well, I don't think that would give the State the right to try that individual in absentia.

Q So either -- until the State furnishes themoney to try you, they can't try you?

MR. HIRSH: No, I think that what the State can do at that time is start extra- -- if the State is, feels that there is no other alternative in this matter, then I think they can extradite, they can forfeit the bail, they can --

Q But you are saying again the State must furnish the funds to bring him back by extradition, for example.

MR. HIRSH: He will have to be brought back under compulsion and his bail is going to be forfeited, and he is going to be charged with bail jumping, if that jurisdiction has a bail jumping statute, or he is going to be --

Q Is extradition normally used after a person is indicted, or is it the function of extradition to get him back

for the purpose of indictment?

MR. HIRSH: That's the traditional function, but they can extradite under those circumstances where -- at least there is a claim for finding by authority that someone has violated his bail agreement.

Q Your position is that if the person says I have no money, and he has no money to get back, that the State may not try him until it does something else?

MR. HIRSH: That's correct.

Q You have to take that position in this case, don't you?

MR. HIRSH: I don't have to. I can be successful in this case by claiming that there was no finding of fact and that the procedures in Arizona are incompatible with the Constitution, that is the findings should be made at the termination of the trial, and that no such finding was made in this case, and ask the Court to return this case for an evidentiary hearing and a finding by a trial judge.

That to me, Your Honor, is not satisfactory. I don't --

Q The fellow who uses all of his money to get as far away as he can can just sit there until the State comes and gets him, and not be tried?

MR. HIRSH: It is like the witness that, perhaps --

Q Was your answer, yes?

MR. HIRSH: Yes, sir.

Q Meanwhile, the State has spent some money getting other witnesses there, as they did in this case, did they not?

MR. HIRSH: Yes, sir.

Q They brought a man from another penitentiary --

MR. HIRSH: El Reno, Oklahoma. Yes, sir.

Q At some substantial expense?

MR. HIRSH: Yes, sir.

But you have to weigh that with the fact that a man is not going to receive a fair trial if he is absent.

Q Justice White suggests that puts a premium on fugitivity by every person once he is charged, and puts the burden on the charging State to take the time, trouble and expense of bringing him back.

MR. HIRSH: If a person uses this claim of poverty as a subterfuge to avoid returning to the State, I suppose there are a lot of means that you can use to avoid going to trial -- it doesn't answer the question as to whether this person should be constitutionally tried in absentia.

Q The majority of defendants these days don't need any subterfuge on the issue of indigency, do they?

MR. HIRSH: The other way to obviate that, resolve that problem, would be to make, to have bail restrictions restrict the individual to the State. That would be another way of resolving that problem, and in our Federal Court, we are

required -- defendants are required -- to call counsel once a week.

Q It wouldn't help any if the person left in violation of the bail terms. Your position would be the same, would it not, if he had left in violation of bail?

MR. HIRSH: That's correct, but he still could not be --

Q What do the terms, the restrictions in bail agreement, add to the problem?

MR. HIRSH: Well, they might give the local court more control over the defendant in the hopes that he will abide by that bail arrangement, but there is nothing that can be done -- the question is weighing the fact of trying someone in absentia, with, in this particular instance, a court appointed counsel, in fact, in most instances, a court appointed counsel, without that individual being present to be at the trial, to make sure -- to assure that there is integrity in that trial, and make sure that court appointed counsel does his job, as opposed to the State's -- the policy of proceeding with the trial in the defendant's absence.

It is a weighing, I think it is a matter of policy.

Q Could the motion to suppress the confession have been made before this man left Arizona?

MR. HIRSH: No, sir.

Q You can't make a pre-trial motion?

MR. HIRSH: No, sir.

We don't have any provisions, any procedural provisions, in our State procedure, to suppress confessions prior to trial.

You can suppress unlawfully obtained evidence, but as far as the voluntariness of a confession is concerned, that has to be done at trial.

We don't have any specific rule, unless the trial judge grants you permission to have that done prior to trial, but we don't have any rules that enable that to be done pretrial.

Q It is a matter of discussion with the court?

MR. HIRSH: It is not really -- the custom is to do it at the time of trial. I have done it prior to trial, when I have made special arrangements with the prosecutor and with the court, but --

Q Was any attempt made to do that here?

MR. HIRSH: No, it wasn't.

I don't know what the state of preparation of the court appointed counsel had prior to the commencement of trial, and, again, it is another reason to my mind that you have got to strike a balance as far as policy is concerned, and I think the better one is in favor of the defendant rather than in favor of the -- facilitating the State's trial of an individual.

Q When and where did you raise the constitutional issue

in this case, or was it raised by other --

MR. HIRSH: It was raised before the Arizona Supreme Court.

Q In reading their opinion -- and they seem to be concerned with the factual question of whether or not your client was voluntarily absent under the provisions of Rule 231(b) of the Rules of Criminal Procedure, 17 Arizona Revised Statutes, rather than of any constitutional question.

MR. HIRSH: The latter aspect of my claim today was raised. I would tell you that I read my brief and I believe I might have conceded the constitutional validity in part of 231 because it had just recently been ruled upon by our court, but I did claim that the procedures used, that is the placing of the burden on the defendant, was violative of his constitutional right --

Q The court doesn't deal with that.

MR. HIRSH: They didn't answer that question and affirmed at least the implicit finding of the trial judge.

Q And in your statement, in your brief, you do talk about constitutional provisions involved, but it didn't seem to me that the Arizona Supreme Court really dealt with whether or not there was here a voluntary absence or an involuntary absence, which is, as a matter of fact, conceding all along the constitutional validity of the provision and dealing with the matter only as a question of fact.

MR. HIRSH: The latter issue as to the waiver aspect and the constitutional validity of the waiver in the Arizona Procedure was raised. That issue was raised and argued.

Q But not dealt with by the court.

MR. HIRSH: But not dealt with.

Q And, therefore, if it wasn't -- if under Arizona law, it had to be raised at an earlier stage in the litigation, I wonder if your constitutional question is here at all?

MR. HIRSH: That was the first opportunity I had to raise the question. It was before the Arizona Supreme Court and I had no opportunity to go back before the trial court --

Q You didn't, but there was a lawyer there representing --

MR. HIRSH: There was a lawyer and I might add he might have said something to that effect in the transcript of record but I would have to go back and scour the trial proceedings --

Q Well, it might be very important because, as I think you know, we --

Q Our Street case says that if a State Appellate Court doesn't deal with it, the presumption is that it wasn't properly raised in the court below.

MR. HIRSH: I understand that, and I just can't answer the question, Your Honor, as to whether or not that question was specifically raised by Mr. Whitney. I just don't

know.

No, sir.

The contempt area, I never raised it at all, because we were concerned --

Q It doesn't seem to be --

MR. HIRSH: The contempt area, we didn't raise it at all. It is concerned with that narrow issue.

As far as the trial was concerned, I just don't --

Q Whether he was voluntarily absent, to use the words of the Rule, or not, isn't that right? The factual issue.

MR. HIRSH: That's the issue before this Court?

Q Well, that's the issue that seems to have been dealt with by the Arizona Supreme Court. My question is, is there any federal issue before this Court, properly before this Court?

MR. HIRSH: I have gone through this before in Federal habeas corpus and the judge said, well, the Arizona Supreme Court didn't deal with this matter and you are therefore (inaudible).

And I said, well, the issue was raised. It is not my fault that they didn't mention it in the opinion. I can't help what they put in their opinions.

Q That's certainly true. If it was raised in a timely manner. That's my question. And that would depend in part upon Arizona law, insofar as does it require you to raise it at the first opportunity or not.

MR. HIRSH: It is a general principle of law that I have always adhered to and whether that's -- I am almost certain there is no specific statute or rule to that effect, or I can't even recall reading an Arizona case to that effect. I know as a matter of practice I always do it, and I always assume that's based on case law --

Q In any event, it sounds like a pretty good idea.

MR. HIRSH: Yes, sir.

Sound principle of law.

I only have a couple of minutes and I would like to tell the Court -- I haven't gotten around to advocating my position, and my position is,one,that Rule 231 is unconstitutionally valid, that the only time that a defendant should be tried in absentia would be, one, where he expressly consents thereto, or he makes an express waiver prior to trial, or under a Rule 43 situation, that is, where he appears at the trial, the start of the trial, and thereafter absconds or leaves because there you at least have an inference that he consulted with counsel, that he certainly knew about the trial, that he was ready to try the case and thereafter leaves, or third, disrupt --

Q The day before he can't be tried.

MR. HIRSH: That would be my position, as a matter of policy, and I think this Court has so held. If you read the line of cases up through Diaz, it has always been the position

of this Court that the position is embodied in Rule 43.

And I think even if there is the situation where he absconds after he is present at the first day of trial, I think there still has to be a later determination --

Q Indigency is irrelevant then. The fellow who before trial has plenty of money. He leaves the State, as he is permitted to do, and then just doesn't come back. He gets as far away as he can and he just sits there. He says if you want me for my trial, extradite me, but don't try me.

MR. HIRSH: That fellow is in a lot of trouble, too --

Q He is in a lot of trouble, but how about the right to try him in absentia?

MR, HIRSH: As I say, it is a matter of policy. And it is a matter of policy --

Q What's the answer?

MR. HIRSH: It's a vexatious and a difficult one.

Q I know, but what is is? The fellow with themoney. Can they try him or not?

MR. HIRSH: My position would be they cannot, because it is incompatible with the Constitution, with the defendant's right and necessity to be present at the trial. And, as I say, it is a matter of striking a balance, and I have grappled with this for some weeks --

Q So it is the same with the indigent and the non-indigent?

MR. HIRSH: Yes. In my case, I have an added factor, the fact that this man was indigent and factually I feel that he didn't make a knowing and intelligent waiver of his right to be present because he simply didn't have the funds to appear, but if you ask my hypothetically if there is any difference as far as the position I would take, there would be no difference.

My alternative position, if you reject my first, the one I have just stated to you, would be that at a minimum, if you reject the fact that -- and agree that Rule 231 is valid. And I am going to tell you what they have done on Rule 231 in Arizona.

There was a recent case decided by our Supreme Court that -- State v. Davis - - decided a day or two before this Court accepted cert, in my petition, where they had given notice to the defendant and he wasn't seen thereafter and he was tried in absentia and no one had seen him -- he had a court appointed lawyer -- and he was convicted, and I don't recall whether he was sentenced, and that case was affirmed by the Arizona Supreme Court, and apparently is the settled rule in Arizona, that all you have to do is give the basis of my case, of Tacon.

Q On the basis that he was voluntary, as a matter of fact?

MR. HIRSH: As a matter of fact, and the presumption that he had voluntarily absented himself arose as a result of

his being given notice of the trial date.

Q Was that case a constitutional decision or did it purport to be? This decision doesn't, as I understand it.

MR. HIRSH: I am almost certain that issue was raised. As a matter of fact, it was certified to our Supreme Court, as a special procedure we have in Arizona, and I am almost certain the constitutional issue was raised in that case, that again Rule 231 was attacked in the Supreme Court.

Whether they answered it in constitutional terms, I don't recall.

Q If they decided it on the basis of your case, then they did not decide it on constitutional grounds, federal constitutional grounds.

MR. HIRSH: Yes.

Q But you say they had to decide the federal question in your case.

MR. HIRSH: Well, it was raised.

Q Otherwise, as Mr. Justice Stewart says, there is no jurisdiction here.

MR. HIRSH: Yes. The issue was raised and --

Q You say they had to have decided it --

MR. HIRSH: By implication, they did.

Q Which depends on whether or not they had to under their system.

MR. HIRSH: By implication, they decided it by virtue

of their affirmance, because the issue was raised.

Q The question is, in our cases, that if a federal question isn't discussed in State Supreme Court cases, the reason is because it was not properly raised in the State courts.

MR. HIRSH: I think that's an assumption that probably shouldn't be indulged in. I think you have to look at the record, certainly.

Q Shouldn't (inaudible) of our thesis, though?

MR. HIRSH: The petitioner shouldn't be penalized because the appellate bench in a particular State doesn't resolve a question that's otherwise raised --

Q No, but the presumption is that the State has some rule that you have to raise it earlier than you did.

MR. HIRSH: That wasn't why. I am sure that wasn't why it wasn't discussed in the Supreme Court opinion. The matter of when the issue was raised was never mentioned and never brought up, so I am sure it wasn't on that basis --

Q You cannot psychoanalyze the Supreme Court of Arizona and say with any confidence why they didn't treat a matter which they didn't treat, can you?

MR. HIRSH: No. No, I couldn't say why the issue wasn't discussed in the opinion.

Q Do you know of any -- I always assume you have a lot of cases in Arizona where the Supreme Court says we will

not discuss this question because it was not presented below.

MR. HIRSH: That wasn't the situation here, at least as far as the opinion was concerned.

Q Excuse me. I am sorry. Have you finished?

MR. HIRSH: Yes, sir.

Q Did I -- just tell me. Did I misunderstand you a few moments ago in that in answer to my question you said that you did not raise the basic constitutionality of Rule 231 in the Arizona Supreme Court, that as you recollect, you raised only the constitutionality of where the presumption, of where the burden is put?

MR. HIRSH: That's correct.

Q And that latter question is not discussed at all and not adverted to.

MR. HIRSH: I don't believe they discuss that at all. Well, they did. They did allude to it in one or two sentences.

If you can call that an allusion to my claim, they said that in Arizona the rule is that if the defendant's given notice --

Q They didn't deal with the constitutionality?

MR. HIRSH: As far as using the phrase, "This is constitutional or is compatible with the U.S. Constitution," I don't believe they did, but, as I say, by implication --

Q But in any event, you did not attack the basic constitutionality, under the Federal Constitution, of the rule?

MR. HIRSH: That is correct, Your Honor.

In fact, I expressly conceded. Because of a recently decided case, I felt I couldn't get anywhere with the area. And in retrospect, I see that was a mistake and should have been attacked at that time. Because I see some real constitutional impediments with not only the rule, but the procedure used.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Dixon.

ORAL ARGUMENT OF WILLIAM P. DIXON, ESQ.,

ON BEHALF OF THE APPELLEE

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

In specific answer to the question of Mr. Justice Stewart, the constitutionality of Arizona Rule 231 was conceded by Appellant before the Arizona Supreme Court in his brief, and as he says in the subsequent argument, only went to whether or not the evidence finding the voluntary waiver of presence at trial was sound enough and overbearing enough to stand the problem that all constitutional waivers have to stand.

Q I wonder -- we don't have, I suppose, in the present record, the briefs that were filed in the Arizona Supreme Court?

MR. DIXON: That was my oversight.

Q It was nobody's oversight, but I wonder if they could be supplied?

MR. DIXON: They certainly could, if it would be acceptable to this Court.

Q If the Chief Justice is agreeable, I would like to ask that they be.

MR. CHIEF JUSTICE BURGER: It is not a requirement that you do ordinarily, but we would like to have them in this case.

MR. DIXON: I would like to submit them. Can I --

Q Is that the way you present your errors, or do you specify errors?

MR. DIXON: I don't understand you, Mr. Justice.

Q How do you get issues before the Supreme Court of Arizona, in your briefs or do you specify errors ahead of time?

MR. DIXON: In the briefs, is the way they are presented.

No,you don't have a motion for a new trial with any specifications of error or assignments of error. You file a notice of appeal. Your brief to the Arizona Supreme Court sets forth all of the questions which you want presented to the Court.

Q How about it. Is there -- do you know whether there is a rule in Arizona that the Appellate Court will normally or always consider only questions which have been presented below?

MR. DIXON: That is the rule, Mr. Justice White.

They have recently, probably under the pressure from this Court and the Federal Courts, been considering Federal Constitutional questions when they are raised for the first time with them; but that rule is of long standing, that unless it is presented first to the trial court, to give the trial court a chance to correct its own mistake, it will not consider it on appeal.

As I say, they have been ignoring that tacitly in recent decisions, when it has been a constitutional question that is first presented.

And I think rightly so, because otherwise they can go to the Federal District Court on writ of habeas, and there is no question about it.

This case, for me at least, has been one that was difficult to get a handle on in the beginning, and I think that was because of three particular reasons, the first reason being the claim of poverty. Poverty seemed to raise the constitutional question that we had run roughshod over somebody's rights, over some poor person's rights.

I think also because of the claim that there had been no hearing on voluntariness, and then, finally, of course, when I searched the record, we found that the trial judge made no express decision after he had heard all of the testimony on his motion for contempt.

But really the only issues that this case could ever present, whether before this Court or before the Arizona Supreme Court, would be two.

One is the constitutionality of Arizona's Rule 231. And the second issue would be dependent upon the resolution of the first, and that would be, granted that rule was constitutional, was there sufficient evidence before the Court to sustain the finding, if only an implied finding, which it did make?

Q Sufficiency of evidence rule?

MR. DIXON: I think it does, Mr. Chief Justice.

The only way I can read this case, is to read it as to whether or not there was a sufficiency of evidence here.

Q Well, that's none of our business in a State case, is it?

MR. DIXON: That's correct.

Q Unless there is an absolute absence of evidence, which would make it like Thompson v. Lew.

MR. DIXON: This is correct. Or unless we had a clear one where the burden was on the State and the burden was clearly not met.

This is part of the reason why I had such a difficult time getting a handle to this.

Q Do you think there is no central question presented here?

MR. DIXON: Not properly presented, Mr. Justice Douglas.

I think it could have perhaps come before this Court in a proper state, but I don't think it is properly before you today.

Q How could it have come here properly?

MR. DIXON: Had the constitutionality of Arizona Rule 231 been attacked either at the trial court or in the Arizona Supreme Court, and it was not.

Q Or by Federal habeas corpus.

MR. DIXON: Or by Federal habeas corpus.

Q Which, I take it, is still available?

MR. DIXON: As a matter of fact, State habeas corpus is still available, Your Honor.

Q Because it wasn't presented, you think, in the direct proceedings?

MR. DIXON: That's right.

Q It is not available if it was, is it? In Arizona?

MR. DIXON: I am sorry, I didn't understand that.

Q Let's assume you do present a Federal constitutional question in the criminal case and it is rejected. Then, may you raise the same thing in State habeas?

MR. DIXON: No. Unless there is --

Q You say the Federal question was presented to the Arizona Supreme Court in the brief of petitioner?

MR. DIXON: No, I say it was not, Mr. Justice Douglas. As a matter of fact, the constitutionality of Arizona Rule 231 was expressly conceded. Unfortunately, that did not get in the record before this Court.

Q Is that the reason that you have before you now that you are going to furnish to us?

MR. DIXON: Yes.

Appellant does not argue with that proposition, nor does he urge the Court to hold that Rule 231 is unconstitutional.

Q On its face? Is that what it means, or as applied or what?

MR. DIXON: Perhaps this will answer it.

The thrust of this argument is premised then on the fact that the evidence in this case does not clearly show that appellant knowingly and intelligently waived his right to be present at trial.

Q That raises a federal question then, doesn't it? Those two things put together?

MR. DIXON: Now, the first statement said he did not question the constitutionality of the rule. The second statement said --

Q Would you read the whole thing. Not the whole brief, but that whole paragraph.

MR. DIXON: All right. From the beginning?

Q I am not clear as to what you have been reading.

Isolated sentences or what?

MR. DIXON: Well --

Q Read the part that relates to the concession that you said he made in his brief.

MR. DIXON: All right.

"The established rule in this jurisdiction as to criminal trials being held in absentia has been set forth by this Court in State v. Taylor. This Court, in interpreting Rule 231 of the Rules of Criminal Procedure, held in that case that a voluntary absence from trial by a defendant constitutes a waiver of the defendant's right to be present during the trial of his case. Appellant does not argue with that proposition nor does he urge the Court to hold that Rule 231 is unconstitutional."

That's the opening paragraph of Petitioner's brief to the Arizona Supreme Court on the constitutional status of Arizona Rule 231.

Q And then you proceed to say that the thrust of this brief is that the question presented here is whether or not there was in fact a waiver?

MR. DIXON: Yes, sir.

Q Counsel, if you are in a position to leave one copy of that with the Clerk, we will have it circulated to all members of the Court, in case you don't have multiple copies with you.

MR. DIXON: I am in a position to do it, Mr. Chief Justice, but I have put my own ink marks in it from time to time.

Q We would want all the briefs, of course.

MR. DIXON: Yes.

His, ours and his reply.

I have no further formal argument. I am available for questions.

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

Thank you, Mr. Hirsh.

The case is submitted.

You will undertake to leave copies of your briefs.

MR. DIXON: Yes, sir.

We will get together and I will make sure the Clerk has all the briefs that were submitted to the Arizona Supreme Court.

MR. CHIEF JUSTICE BURGER: The case is submitted.

(Whereupon, at 11:48 o'clock, a.m., the oral arguments in the above-entitled case were concluded.)