In the

Supreme Court of the United States

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,

Petitioner,

v.

HARRY LEE WILLIAMS,

Respondent.

No. 74-676

Washington, D.C.
October 7, 1975

Pages 1 thru 50

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

IN THE SUPREME COURT OF THE UNITED STATES

W. J. ESTELLE, JR., DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, Petitioner	No. 74-676
v.	
HARRY LEE WILLIAMS	

Tuesday, October 7, 1975

Washington, D. C.

The above-entitled matter came on for argument at 11:55 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:

DUNKLIN SULLIVAN, ESQ., Assistant Attorney General of Texas, Austin, Texas

BEN L. ADERHOLT, ESQ., Houston, Texas, (Appointed by this Court)

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 next in No. 74-676, W. J. Estelle, Director, Texas Department of Corrections against Harry Lee Williams.

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

ORAL ARGUMENT OF DUNKLIN SULLIVAN, ESQ.

ON BEHALF OF PETITIONER

MR. SULLIVAN: Mr. Chief Justice and may it Please the Court:

I am the Assistant Attorney General from Texas and I represent Petitioner in this case, W. J. Estelle, the Director of the Texas Department of Corrections.

We are here on this case on a petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

The question involved in this case is whether a defendant's trial and jail clothing is so inherently prejudicial that it destroys his presumption of innocence and therefore denies him a fair trial.

The Respondent in this case, Harry Lee Williams, was convicted by a jury of assault with intent to murder with malice in November of 1970, Houston, and was assessed by the trial judge as punishment to confinement for 10 years in the Texas Department of Corrections.

The Court of Criminal Appeals of Texas affirmed this conviction on direct appeal. The Federal District Court below then held an evidentiary hearing in the federal habeas corpus case and denied the respondent relief, holding that while trial and jail clothing was inherently prejudicial, that evidence of his guilt was so overwhelming that trial and jail clothing was harmless error.

The United States Court of Appeals for the Fifth Circuit reversed this holding and affirming again that trial and jail clothes is inherently prejudicial but they found that harmless error was not available in this particular set of circumstances.

And although the Fifth Circuit had held in the Hernandez case in 1971 for the first time specifically saying that trial and jail clothing was inherently prejudicial, in the Williams case they held for the first time that the decision would be given retroactive application.

Our contention is that the United States Constitution, while it guarantees a fair trial, does not guarantee a perfect trial and we contend that trying a man in jail clothing is not so fundamentally unfair to destroy the presumption of innocence and deny a man a fair trial.

A juror is aware -- most jurors are -- that defendants are arrested and they are kept in jail prior to trial, and that when a defendant is brought into the courtroom in

jail clothing, that the jurors are not so surprised or shocked.

QUESTION: Do you have bail in Texas?

MR. SULLIVAN: Yes, your Honor, we do.

QUESTION: Well, you said that they assumed that everybody that comes there has been staying in jail.

Isn't that what you said?

MR. SULLIVAN: Yes, sir.

QUESTION: You didn't mean that, did you?

MR. SULLIVAN: Well, I mean the ones that are not able to be released on bail would be brought in in jail clothes.

QUESTION: Those that don't have enough money to buy clothes.

MR. SULLIVAN: Or -- yes, sir.

QUESTION: And have to wear the jail clothes.

MR. SULLIVAN: And have to wear the jail clothes.

QUESTION: Those are the ones you are talking about.

MR. SULLIVAN: Yes, sir.

QUESTION: Mr. Sullivan, what kind of jail clothes would they wear, the old striped ones?

MR. SULLIVAN: No, your Honor, they weren't striped. Most of the ones were, I think, described -- it was a white T-shirt and it had Harris County Jail stencilled

across the back and a pair of pants that had Harris County Jail maybe stencilled down one side of the pants. No striped clothes.

MR. CHIEF JUSTICE BURGER: We'll resume there after lunch, Counsel.

[Whereupon, a recess was taken for luncheon from 12:00 o'clock noon to 1:02 o'clock p.m.]

AFTERNOON SESSION

MR. CHIEF JUSTICE BURGER: Mr. Sullivan, you may resume your argument.

MR. SULLIVAN: Thank you, your Honor.

I believe the last thing we talked about was Judge Blackmun had asked about the attire of the defendants who were brought into the courtroom and I would like to say that they didn't have on the striped uniform with the little old striped hat.

It was a pair of white overalls in most cases with Harris County Jail stencilled across the back of the uniform and sometimes down the leg of one or either both pair [of the legs of] the trousers he had on.

I would also like to point out to the Court that there were none of these defendants, as far as I can determine, that were compelled to go to trial in the jail clothes they had on.

The reason they were tried was because the attorney raised no objection to the trial judge asking that they be tried in the other type clothing than the clothes they had on and it is our position that being tried in jail clothing is not any more prejudicial to a defendant than reading to a jury the indictment or under -- reading to a jury prior convictions alleged in the indictment for enhancement under the state habitual criminal statutes.

QUESTION: Mr. Sullivan, did Judge Love give any instructions about prison garb to the jury at all?

MR. SULLIVAN: No, sir, he didn't. However the voir dire of the whole prosecuting attorney on the/ jury panel did so speak or ask any of the jurors if the fact that the defendant was in jail clothing would have any kind of effect on them and none of the jurors voiced an objection and the defense attorney did the same thing.

He said that the fact that this man sitting over here with the jail clothes on, does that have any effect on you? And, again, none of the jurors objected.

QUESTION: Do you know whether Mr. Williams had any personal clothes that were taken from him at the time of his incarceration?

MR. SULLIVAN: Yes, sir, he says that he did in the federal habeas here. He said that he had the clothes on that he was arrested in and he had asked somebody at the

rehabilitation center, told them that he wanted to have these clothes when he went to the state court for trial.

QUESTION: Is it your position that personal clothes might be more offensive in the eyes of the jury than prison garb? Might be?

MR. SULLIVAN: No, sir, it really isn't, to be honest. I just don't think that it makes that much of an impression. And we have cited some testimony here from jurors in a federal habeas hearing in which they responded that they really didn't remember what type of clothing the defendant had on and it just didn't make that much of an impression on them.

QUESTION: One of the courts below commented that it was the preference of some defense attorneys to have their clients tried in prison clothes, that it would give the impression he had already served some time so why give him a lot more, in effect.

MR. SULLIVAN: Yes, sir, that is exactly correct and of course, in this case, you could almost say that the defense counsel, when he asked the prospective jurors if it would be okay with them, if it wouldn't harm them in any way, that he consented to having his man tried in these prison clothes.

And there is a Fifth Circuit case where the defense attorney did testify that he wanted his man tried in

jail garb because he thought it would make a sympathetic impression on the jury so --

QUESTION: As I understand the Fifth Circuit has explicitly cut out an exception from their so-called "per se" rule for that situation. Isn't that correct?

MR. SULLIVAN : Yes, sir, that's correct, if you can get an attorney to testify that he wanted his man tried in jail clothes because he thought it would make the jury be in sympathy and that is an exception.

QUESTION: Well, I suppose after this decision of the Fifth Circuit, in any case, where there was not a request that he be tried in civilian clothes, that you would assume that he and his counsel were satisfied or even preferred that he be tried in jail attire. Isn't that correct?

MR. SULLIVAN: Yes, sir, and that is the thing that bothers me about the Fifth Circuit's holding in this case, they've now -- in the Hernandez case, when we filed our motion for rehearing, they said that the defendant has got to make an objection. He has got to make the trial judge aware that he doesn't want to be tried in jail clothes and then they started sort of undercutting that decision and now they say, well, in Harris County everybody was tried in jail clothes and so the fact that the lawyer, you know, didn't object does not waiver that right because the lawyers

testified -- a lot of them did -- that they didn't think there would be any use in objecting because everybody was being tried and objection would be denied. There wouldn't be substantial objection.

QUESTION: In other words, it is your position that if the defendant asks to be tried in civilian clothes that he is entitled to it?

MR. SULLIVAN: Yes, sir, I think that that would be the best thing as far as --

QUESTION: But how about the Constitution? Assuming he requests to be tried in his street clothes, in his civilian clothes, and is turned down and he is convicted, would his conviction stand under your view of the Constitution?

MR. SULLIVAN: Under my view, then, I'd think that he would have to show that he was harmed, substantially harmed by the being so tried.

QUESTION: Oh, so you wouldn't have a per se ruling in that situation?

You wouldn't presume any harm?

MR. SULLIVAN: No, sir, unless he was able to specifically show harm.

QUESTION: When you answered Justice White's question about a request to be tried in street clothes, do you mean a request to the trial judge?

MR. SULLIVAN: Yes, sir, to the trial judge because in habeas hearings, of course, the petitioner will say I asked somebody at the rehabilitation center in the hold-over tank and, of course, he can't remember who it was and it is pretty hard to find out who he was talking about.

It puts the state in a hard position to rebut his testimony.

QUESTION: Well, even if he is perfectly accurate in his testimony, I suppose asking somebody at the rehabilitation center isn't the same thing as calling it to the attention of the judge who is responsible for conducting the trial.

MR. SULLIVAN: Yes, your Honor, that is my position that it should be brought to the attention of the trial judge. In fact, in this very case here we have a certificate from the trial judge and he stated that if he had been asked or requested for Williams to be tried in civilian clothes, he would have allowed that request.

QUESTION: How does the prisoner prove he was harmed by being tried in prison garb?

MR. SULLIVAN: Well, your Honor, I think in one of the Tenth Circuit cases they proved he was harmed when the prosecutor kept referring to his as "the man sitting over here with the jail clothes on just like all the rest of them," and they seemed to infer from that that the jury might --

QUESTION: Well, that sounds to me like prosecutorial misconduct. How, otherwise, does he prove it?

If no one says anything about it and there he sits and he is convicted, how do we know if the jury considered this?

MR. SULLIVAN: Well, perhaps by the length of the term of the sentence he got, maybe.

There was an Oklahoma case where the maximum punishment was seven years and the objected he was tried in jail clothes. He got a five-year sentence.

QUESTION: But was that a jury-sentencing arrangement?

MR. SULLIVAN: Yes, sir, I believe so.

QUESTION: That is, in your state it is the jury sentence that does it?

MR. SULLIVAN: Sir?

QUESTION: In your state, Texas, the jury imposes, fixes the sentence, does it?

MR. SULLIVAN: Yes, sir, but in this particular case the trial judge set it, in the Williams case. The defendant has the choice, either the jury can assess the punishment or else the trial judge can.

In this case he elected to have the trial judge assess the punishment. The trial judge assessed him 10 years. The maximum was 25 years.

QUESTION: Mr. Sullivan, why does Texas try them in jury clothes?

MR. SULLIVAN: In -- well, your Honor, we haven't tried them since the Hernandez decision in '71. Up until that time the only reason I have is that they just never -- it never occurred to them that it was inherently unfair.

QUESTION: It used to be the fashion to do it this way.

MR. SULLIVAN: Yes, sir, in Harris County and some of the other counties that had large numbers of defendants, I suppose because a lot of the defendants when they were arrested, maybe the clothes they had on were -- that they didn't think would make a very good impression and they thought perhaps they looked better to the jury and the overalls were starched and --

QUESTION: This is why I asked you before as to whether it might not be possible to be less offensive for the defendant to be in issued garments rather than in his own. One can imagine that certain types of dress would not be very welcome in Harris County or any other county.

I am trying -- what I am trying to get at is, what the interest of the state is in trying a man in prison clothes.

MR. SULLIVAN: Well, your Honor, I really don't think -- like I said, it was the state, you know, having much --

you know, it hadn't formed much of an impression one way or another but they just assumed that it was okay unless the defendant raised an objection to it.

Now, if he objected to the trial judge, they would allow him to get some civilian clothing from somewhere. If he didn't object they assumed that it was okay.

QUESTION: Well, is the state's real interest here or is it part of the state's interest to prevent this decision from being applied to everyone who has ever been tried in Texas and he is still in jail?

MR. SULLIVAN: No, sir, our main interest is in keeping it from being applied retroactively.

QUESTION: Well, that is what I mean.

MR. SULLIVAN: Right.

QUESTION: When was this tried?

MR. SULLIVAN: The Williams case was tried in 1970.

QUESTION: 1970?

MR. SULLIVAN: Yes, sir.

QUESTION: And this was applied retroactively, then?

MR. SULLIVAN: Yes, sir.

QUESTION: And this was -- you mean, it was applied retroactively in the sense that the Fifth Circuit had already decided the case of Hernandez?

MR. SULLIVAN: No, sir, Hernandez didn't say if it was retroactive.

QUESTION: Was this the first case?

MR. SULLIVAN: No, sir, Hernandez was the first case.

QUESTION: Well, was this the first case that announced this particular rule?

MR. SULLIVAN: Of retroactivity?

QUESTION: Well, you think this is a retroactivity case, is it?

MR. SULLIVAN: Yes, that's what they say in the Williams case. They say that we hold that now it is going to be applied retroactively.

QUESTION: To everyone who has ever been tried.

MR. SULLIVAN: Right.

QUESTION: Who is still in jail.

MR. SULLIVAN: Yes, sir. And, of course, our concern is, if it is given retroactive application, we have got, you know, all the people in the penitentiary that were convicted on the recidivist statutes. If they can just allege and knock out one prior conviction because of being tried in jail clothes, they will be entitled to be released.

QUESTION: Why do you say Williams is being applied retroactively?

MR. SULLIVAN: Because the Fifth Circuit held it

was.

QUESTION: I know, but why? That may be what the Fifth Circuit said, but in this case is it applied retroactively?

MR. SULLIVAN: Well, yes, I suppose so because --

QUESTION: Isn't this the first case that ever announced this particular rule?

MR. SULLIVAN: Uh --

QUESTION: Mr. Sullivan, if this circuit in Brooks against Texas, as I recall, said trial in prison garb is inherently unfair, that is in 1967.

MR. SULLIVAN: Yes, sir.

QUESTION: Hernandez was in 1971.

MR. SULLIVAN: Right.

QUESTION: And the trial of Williams was in 1970. So that in 1970 CA-5 by dictum had held or had said that trial in prison garb was inherently unfair. That is the sequence, isn't it?

MR. SULLIVAN: That is in the Brooks case you are talking about?

QUESTION: Yes.

MR. SULLIVAN: Yes. They had said that, of course. The Brooks case, of course was disposed of mainly because of the ineffective assistance of an attorney in that case and they did say that trial in prison clothes -- garb is

inherently unfair but that was just at the conclusion of a lot of other things that the attorney didn't do.

In fact, there was a federal judge in Houston that in 1970, some three years after the Brooks decision decided, you know, that the Brooks decision really didn't stand for that proposition and he said it was all right to try a defendant in jail clothing. It was not inherently prejudicial so --

QUESTION: Well, isn't Williams, though, the first case that said that a conviction in prison clothes cannot be upheld even though the defendant did not request being tried in civilian clothes?

MR. SULLIVAN: Yes, sir, I suppose.

Of course, in the Hernandez case the defense attorney made no objection either. He testified at the federal habeas hearing that he did object because he felt that it would be -- that everybody was being tried and that he felt it would be a useless objection and when Hernandez went up the Fifth Circuit, you know, reversed that, saying that for the first time that a trial in prison clothes is inherently prejudicial and --

QUESTION: So this case, Williams didn't go any farther than prior cases had gone?

MR. SULLIVAN: Except for specifically holding that it was retroactive because, see, we had argued before

that it wasn't and there was another Fifth Circuit case, Goodspeed, I believe, in which one judge said he thought it ought to be applied retroactively but the other two said, well, we are not presented with that yet. We are not going to make that determination.

But in the Williams case they definitely said it was retroactive so -- and of course, it is for this reason that, although we don't think it is inherently prejudicial, we haven't tried anybody in jail clothes since Hernandez in '71 and we would ask this Court to hold that this Williams case should not be applied retrospectively.

QUESTION: In any event, not any trial before Hernandez.

MR. SULLIVAN: Hernandez.

QUESTION: Right.

MR. SULLIVAN: Yes, sir.

QUESTION: And Hernandez was decided when?

MR. SULLIVAN: In '71. 1971.

QUESTION: So any trials before 1971.

MR. SULLIVAN: Yes, your Honor.

QUESTION: You are also asking us to hold that it isn't constitutional infirmity to try a person in prison garb, aren't you?

MR. SULLIVAN: Yes, sir, that is true. But, of course, I recognize there is a possibility of unfairness

here and you know, trying to be fair to the defendant and the state, I suppose if there is a possibility that a defendant might suffer some collateral effects, so if this Court would hold that -- you know, don't do it any more, well, we would have no quarrel with that but especially not to hold it retroactive.

QUESTION: Is this the trial judge who, when some prisoner objected, loaned his -- the judge loaned him a suit of his own clothes?

MR. SULLIVAN: Yes, your Honor.

QUESTION: To be tried in.

MR. SULLIVAN: Yes, sir and there is a case on the books in the Court of Criminal Appeals of another trial judge that did the same thing. The defendant, you know, didn't have any clothes to wear. His attorney objected and the judge went back and had an old suit of clothes he lent the appellant himself.

The final thing I'd like to say is as to why I don't particularly feel it is inherently prejudicial is that there are some real fine attorneys in the Harris County Bar Association and there was never -- there were very few objections made by any of those lawyers to defendants being tried in this jail clothing and I argue that the reason they didn't object was because they just attached no significance to it. They just didn't think it made that much difference

and it is hard for me to believe that an attorney who really thinks a client is going to be denied a fair trial by being tried in jail clothes would just stand by and not make an objection because he thought it would be denied because, of course, you never know until you make an objection if it will be denied or not.

QUESTION: Mr. Sullivan, in Texas do state judges wear robes?

MR. SULLIVAN: Yes, sir.

QUESTION: Did they in 1970?

MR. SULLIVAN: Yes, sir.

QUESTION: If they had not, do you think it would make a difference in the fairness of the trial?

At one time they did not. Am I not correct on that?

MR. SULLIVAN: Yes, sir, at one time they did not. I don't know exactly the year they started, started wearing robes.

QUESTION: Do I understand that Texas or at least Harris County changed its way of doing things after the Hernandez decision in 1971?

MR. SULLIVAN: Yes, sir, that is correct.

QUESTION: So now, since 1971, even without a request from the defendant, civilian clothes are provided?

MR. SULLIVAN: Yes, sir, they are provided. I

think the only way you can get tried in jail clothes now is to say, "I want to be tried in jail clothes."

QUESTION: And that has been true since 1971.

MR. SULLIVAN: Since 1971, since the Hernandez decision.

QUESTION: Is that true throughout Texas or only in Harris County?

MR. SULLIVAN: I think throughout the state, your Honor. It is, you know, since Hernandez has come down we don't do it any more.

QUESTION: And before Hernandez, was this problem peculiar to Harris County or was it general throughout Texas?

MR. SULLIVAN: It was mainly Harris County. There were some out of Tarrant County, where Fort Worth is and Dallas County had some -- the larger counties mainly. There were a couple from some of the smaller counties.

QUESTION: From what?

MR. SULLIVAN: From some of the other smaller counties in the state but not a whole lot.

QUESTION: Umn hmn, mostly from --

MR. SULLIVAN: Mostly from Harris County, your Honor.

QUESTION: Houston is Harris County.

MR. SULLIVAN: Yes, sir.

QUESTION: So it has been changed throughout the

states since 1971.

MR. SULLIVAN: Yes, sir, since Hernandez.

QUESTION: So now routinely defendants are tried in civilian clothes. The only way they would be tried in jail clothes would be if they may an affirmative request.

MR. SULLIVAN: Yes, sir, that is my understanding.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Sullivan.

Mr. Aderholt.

ORAL ARGUMENT OF BEN L. ADERHOLT, ESQ.

ON BEHALF OF RESPONDENT

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

Let me respond first to some of the questions that were presented to Mr. Sullivan and then I will present on the rest of the argument.

The identity of jail clothes in Texas, I agree with Mr. Sullivan, is as he has described it. I would add that the penitentiary garb and the jail garb, I believe the testimony shows is the same -- the same white coveralls, possibly with a different lettering on the garment showing whether it is the jail or the Department of Corrections.

In addition to that, the defendant is brought in in shower thongs.

QUESTION: In what?

MR. ADERHOLT: Shower thongs, where the feet

slip through a kind of a crow's foot.

The defendants were all tried.

QUESTION: Would you state again what that is called?

MR. ADERHOLT: Shower thongs [he pronounces it "shower tongs"] is what I call them and what I believe the defendant called them in the habeas corpus hearings --

QUESTION: Shower thongs.

MR. ADERHOLT: -- where his feet -- sandals, where his feet are bare and slips one of the tongs --

QUESTION: Thongs.

MR. ADERHOLT: -- through his toes.

QUESTION: Oh, yes.

MR. ADERHOLT: This was in November, a cold month, and I think this would have been something that the jury would have immediately seen.

Second --

QUESTION: Well, what if they had seen it? What is unfair about it?

MR. ADERHOLT: I think it carries with it all kinds of negative inferences. The same could then -- the defendant could come in in a Rabbi's clothing or a surgeon's whites rather than the prison whites. I think that the jury makes shorthand assessment of the defendant, especially in this case where the defendant did not take the

stand.

QUESTION: But they know he has been indicted. It is probably no secret to most jurors that criminal defendants who can't make bail spend time in jail between the time of their arraignment and trial. But what does this add to that?

MR. ADERHOLT: I am not sure that the jury, Mr. Justice Rehnquist, knows or should know whether the defendant cannot make bail.

QUESTION: Well, how would it prejudice the jury in determining the issues in these criminal offenses with which he is charged to know that he had not been able to make bail -- or to know that he had been able to make bail?

MR. ADERHOLT: I think precisely because we are not able to measure what the jury thinks of a man who comes in dressed like this -- in addition to that, I --

QUESTION: Now, wait a minute. You say, because we don't know, therefore we decided it is unconstitutional.

I would have thought that the rule was just the opposite, that there is a presumption of constitutionality and if you don't know, that is the reason for saying there is no constitutional infirment.

MR. ADERHOLT: One of the lower courts stated that the prosecutor could not have gotten admissible prior conviction for other charges brought against the defendant.

He also stated that the jury might have inferred or probably did infer from the appearance of the defendant that he had other charges pending or was a convicted criminal and was too dangerous to release.

QUESTION: Well, why would it be any sort of a permissible inference on the jury's part that he had prior convictions, from seeing him in prison garb?

MR. ADERHOLT: Because he has "Jail" printed on his chest and because he is not a free man. He is brought in by the Sheriff and he --

QUESTION: But he is in the custody of the Sheriff during the trial whether he has got prison garb on or not, isn't he?

MR. ADERHOLT: But he doesn't have a choice of putting on clothes that would make him look like an ordinary average defendant that has the presumption of dignity and the self-respect of a free man.

QUESTION: What if his counsel has consented on the record to being tried in jail clothing because he wants to be tried in jail clothing? Is the judge then required to explain to the jury that you must draw no inferences from this because the defendant affirmatively wishes to be tried in jail clothing?

That would seem to follow from your colloquy with Justice Rehnquist.

MR. ADERHOLT: In view of the long line of cases, I think that a trial judge might consider something in his charge just to protect the integrity of the trial.

On the other hand, I believe that the Fifth Circuit in Garcia, which carved out this exception of where it is used as a trial tactic to gain sympathy from the jury --

QUESTION: Well, what do you suggest that the jury infers when there has been a trial in jail clothing by request if nothing is explained to them?

Don't they draw the same inferences that they would in any other case?

MR. ADERHOLT: If I understand your question and statement correctly, Mr. Chief Justice, I believe that they would draw the same inference.

QUESTION: That is just as harmful or just as beneficial -- depending on the point of view -- as in the case where he has not consented, is it not?

MR. ADERHOLT: I would never consider it to be a beneficial thing. Some lawyers may believe that it would be beneficial to gain sympathy because he had been in jail and couldn't get out to prepare his defense, that he had been incarcerated long enough for this kind of offense and therefore no longer. I --

QUESTION: But then let me go back to the same question I asked of your opponent. Suppose this man's

regular clothing were of a hippie type and he showed up in sandals in December in Harris County and insisted on wearing those clothes. Might he not be worse off in the eyes of a particular jury than to be in a clean -- if it is clean -- prison garb?

And while you are answering that, you and your opponents say different things about where "Harris County Jail" is. You said it was on the chest. Your opponent said it was on the back. What does the record show?

MR. ADERHOLT: I believe the record does show it to be on his back.

The hippie clothes question, Mr. Justice Blackmun, I can't imagine any lawyer not being extremely cautious in trying -- in dressing his defendant for trial before an average jury in Texas, especially and I think anywhere.

The objective would be to emulate -- give a mirror image to the jury, as was stated in an article in the Practical Lawyer by a prosecutor in Ohio and he takes our position that it is extremely unfair.

QUESTION: But the real difference is, if a man wants to make a jackass out of himself, he has a right to do it but he can't be compelled to do it.

MR. ADERHOLT: I think that is the distinction, Mr. Justice Marshall.

QUESTION: You don't suggest that he was

compelled to do it here, do you?

MR. ADERHOLT: Yes, we do.

QUESTION: I thought he made no objection here.

MR. ADERHOLT: He made no objection. The record shows that he asked the captain -- and he named the captain on the trial in the habeas corpus who refused to let him put on a suit that the man had pressed and waiting for him at the rehabilitation center.

In addition to that, the rehabilitation centers where the defendants live are some miles from the trial location in Houston, Texas. At that time the accused requested a suit that he had ready and waiting for him and this was denied. This was refused.

QUESTION: But he did not renew that request to the trial judge who was presiding over the trial, did he?

MR. ADERHOLT: No, he did not.

QUESTION: Well, isn't that judge the person who has the responsibility for the conduct of the trial?

MR. ADERHOLT: Yes, your Honor, I think he should have made an objection. This was an inept trial by the defense counsel, if I may say so.

QUESTION: Well, now are you arguing ineffective assistance of counsel?

MR. ADERHOLT: We argued that in the Fifth Circuit. However, we felt the stronger case was on the

previous presidential decisions.

I would like to add to that that the trial judge appointed a lawyer to represent this man earlier in 1970. The man was -- the defendant was indigent and the trial court allowed this trial to proceed with the defendant in jail clothes in the face of some 19 decisions before December of 1970 in 15 different courts including the eastern district of Louisiana, the Fifth Circuit in Brooks versus Texas and some nine or ten Supreme Court decisions in other states.

I believe that it was well-established law -- rule in -- by the time that the defendant was tried. There were nine Supreme Court decisions in Florida, Colorado, Alabama, Arkansas, Pennsylvania, Michigan --

QUESTION: Was the trial judge supposed to read through all those by himself without ever having it called to his attention by defense counsel?

MR. ADERHOLT: No, your Honor, but I do believe that the Sheriff is the one who compelled the accused to wear these clothes. The state did this.

QUESTION: Well, but is the state simply -- is the state one entity in this sense that if you make a complaint to a captain in the sheriff's office some miles away from the courthouse, it is the same as having protested to the judge to whom the state has entrusted responsibility for the trial?

MR. ADERHOLT: He should have made an objection to the court. He did not. The decisions do not require an objection.

QUESTION: Well, what decisions? Are you talking about a decision of this Court?

MR. ADERHOLT: No, your Honor, I am talking about lower court decisions.

QUESTION: Well, why shouldn't an objection be required here where whatever may be the case with, perhaps, more fundamental rights -- if this is a constitutional right -- if some lawyers like to have the client tried in jail garb, as the record here indicates and others apparently feel it is prejudicial.

Why shouldn't we at least require that someone who doesn't want to be tried that way have called the objection to the attention of the trial judge?

MR. ADERHOLT: With the exception of the fundamental nature that you discussed, I think that an objection should be lodged but there are those cases where, as in this case, as in Hernandez, as in many others, where the circumstances are such where any objection is chilled, the lawyer testified in the habeas corpus hearing that he had made an objection in a trial court in that county before and he was denied.

QUESTION: Well, you say "chilled." I certainly,

in 16 years of practice, I would not only make an objection before different trial judges, I'd make the same objection time and again before the same trial judge and I never felt he was going to cut my head off if I did it so long as I was courteous and respectful.

To say that you made an objection before another trial judge and it was denied doesn't strike me as any reason at all why you shouldn't make an objection before this trial judge.

QUESTION: In this connection, do you accept Judge Love's exhibit -- well, the exhibit which is Judge Love's affidavit to the effect that on numerous occasions during that period of time since 1958, "I have granted requests by defendants or their attorneys for them to be allowed to obtain civilian clothes to wear at their trials.

"I have never compelled a defendant to go to trial in jail clothes whenever his attorney requests otherwise."

And he goes on to say that, "Had this request been made of me, I would have granted such request and permitted the defendant to be tried in civilian clothing."

Do you accept this as a statement of fact in this case or do you not?

MR. ADERHOLT: No, I do not, Mr. Justice Blackmun. The trial judge, I do not believe, would falsify such an affidavit. On the other hand, I don't know who prepared the

affidavit. It was brought the day of trial. I strenuously objected that I did not have an opportunity to cross-examine that statement. I had had depositions in the case on these very issues showing the practice of that trial court -- every case tried in his court on a non-bail defendant was tried in prison garb.

QUESTION: You mean Judge Love's court, not just the district court of Harris County?

MR. ADERHOLT: Judge Love's court, every defendant. There was no exception and this affidavit showed up in trial and I objected to Judge --

QUESTION: You mean on the habeas corpus hearing?

MR. ADERHOLT: On the habeas corpus hearing, yes, your Honor, that I did not have an opportunity to cross-examine that statement because I believe the facts to be otherwise.

QUESTION: What year did you get into this case?

MR. ADERHOLT: The end of -- early 1971, I believe, your Honor.

QUESTION: Was that by appointment?

MR. ADERHOLT: It was by appointment of Judge Love.

QUESTION: Had you taken Judge Love's deposition in the habeas case?

MR. ADERHOLT: No, I took the deposition of his clerk and the sheriff and every single lawyer who tried the

case where the defendant was tried in prison garb and that was introduced into evidence of the case of the habeas corpus hearing.

QUESTION: Mr. Aderholt, you suggested that you had argued at one point in this controversy that there was ineffective assistance of counsel. Are you referring there to the fact that counsel failed to object?

MR. ADERHOLT: I think that that was one of my grounds.

QUESTION: Was the practice in Texas generally for lawyers to object when they thought the court had made a ruling that was adverse to the client's interest?

MR. ADERHOLT: Yes, of course it is.

QUESTION: Isn't it that you not only make objection, you have to file a bill of exception in writing? Is that still the law in Texas?

MR. ADERHOLT: I don't know, Mr. Justice Marshall. I think, though, that if it is a fundamental error, that there would be no objection required.

QUESTION: But normally don't you file objection and a bill of exception both?

MR. ADERHOLT: I think it is wise, unless the record reflects what you complain of.

QUESTION: CA-5, I think, in Hernandez, repeated what it had said earlier, that this error, constitutional or

otherwise, could be waived by failing to object.

Are you suggesting that it was unnecessary for counsel to object in order to accomplish a waiver of the rights?

In other words, are you saying objection is not necessary under any circumstances?

MR. ADERHOLT: I believe that the rule is presently in all jurisdictions, with varying degrees, that there is no objection required. I do believe that the error-- that the rule should be stated, that it is error to try an accused in prison garb unless he voluntarily waives a known right to observe standard.

QUESTION: Can he waive it through his counsel? That is my point.

MR. ADERHOLT: Yes, he may.

QUESTION: Can he waive it through his counsel?

MR. ADERHOLT: Yes, he may. I certainly think he should be able to and could.

QUESTION: Can you really bring yourself to say that the right not to be tried in prison garb is -- you can equate with the right of counsel that was involved in Zerbst?

If we are talking about fundamental rights.

QUESTION: And superior to the right to jury trial.

MR. ADERHOLT: I don't know that I can answer the question. I do believe that it is of a fundamental nature to

the fairness of a jury trial. I believe that the --

QUESTION: Well, but the right to trial by jury itself was held non-retroactive.

MR. ADERHOLT: Yes, your Honor, but I don't believe retroactivity even comes into this case. I tried to persuade the Fifth Circuit not to discuss retroactivity.

QUESTION: Why isn't it in this case?

MR. ADERHOLT: Because we have 19 decisions before the case was even tried that --

QUESTION: But assuming that Hernandez was a new departure, however, retroactivity is involved in this case.

MR. ADERHOLT: Yes, because the Fifth Circuit made it so, but I do believe --

QUESTION: Well, then Hernandez is the first time it ever suggested it was putting it on a constitutional basis?

MR. ADERHOLT: No, your Honor, I believe Brooks versus Texas --

QUESTION: It just said fundamentally unfair.

MR. ADERHOLT: They said that it --

QUESTION: They said unfair.

MR. ADERHOLT: That said that it was inherently prejudicial.

QUESTION: Uh huh, well --

QUESTION: I suppose the only reason the Fifth Circuit could upset a Texas conviction would be on a constitutional basis, wouldn't it?

MR. ADERHOLT: But we have four -- five federal courts handing down decisions on the jail clothes case before Williams was tried in Harris County.

QUESTION: Are they binding on this Court?

MR. ADERHOLT: No.

QUESTION: Well, then --

MR. ADERHOLT: But I was speaking in terms of retroactivity in connection to the constitutional right. The Fifth Circuit has clearly indicated that it was a fundamental protection.

One of the earlier statements was that the Fifth Circuit had laid down a per se rule in Hernandez and also in Williams and the way I read the case is it is not a per se rule and it is not a per se rule in any of the many and lengthy decisions across the country.

In all these cases it appears to me that the question is whether or not harmless error -- whether it is harmless or not beyond a reasonable doubt.

I would add that one element that I have not stressed is that all of these cases that we are discussing are a particular class of defendant. They, if I may say so, generally have poorer counsel. They generally are not

protected as thoroughly as someone who is able to hire an attorney and get out of jail and defend himself.

There, further, is no legitimate state interest in trying a defendant in jail clothes. It is simply an unnecessary influence on the jury.

The prosecutor of Williams was brought by the state to testify in the habeas corpus hearing and the prosecutor in Judge Love's court stated that he encountered jurors who were hostile to defendants because they were brought in in jail clothes. That was his own testimony.

Any attorney who tries jury cases in Texas knows that jurors -- it is almost impossible to convince them of the presumption of innocence if the defense rested after the defendant was brought in and an indictment read, many defendants would be in a great deal of trouble if the defense stopped right there, even though the presumption of innocence would apply to them.

I believe that putting a defendant in this kind of a garb is simply unnecessary. It gives the jury negative inferences and in this particular case where the defendant does not take a stand, the jury must make its assessment.

QUESTION: Do I understand you to agree that this judge is the same judge who lent a suit of clothing to a defendant who objected to being tried in jail clothes?

MR. ADERHOLT: I meant to cover that, Mr. Chief

Justice. The affidavit, or the exhibit that was referred to earlier did not, I believe, state that quite clearly. The judge did say he had lent a suit of civilian clothes to a defendant.

Again, this was not subject to my cross-examination and we do not know when he is talking about. I think that the judge was very sensitive to this issue because Hernandez had been handed down already.

The point is --

QUESTION: The affidavit says that this happened on several occasions and he had people that brought the clothing in and they were permitted to change into civilian clothes in the jury room.

MR. ADERHOLT: But we do not know when.

QUESTION: Does that not suggest that if an objection had been made, this judge would have promptly granted what you say is required?

MR. ADERHOLT: That might be a fair conclusion to be drawn from that. I do not accept it, though, because it never happened. All the defendants were tried in jail clothes. We don't know whether an objection --

QUESTION: No, we are talking about this case. You concede that no objection was made and I took it you agreed that this judge had, on prior occasions, supplied clothing. Did you agree or not agree?

MR. ADERHOLT: No, I did not, Mr. Chief Justice. I stated that we do not know very much about those occasions, whether they occurred before Williams' trial or after Williams' trial and I do not know of any incidents where this judge has done this.

QUESTION: In the Hernandez case on rehearing, the court Fifth Circuit said this: "Appellee's petition for rehearing states that surely some burden must be put on the defendant and his attorney to make known that he desires to be tried in civilian clothes before the state can be held accountable for his being tried in jail clothes."

Then the Court said, "We agree and our opinion is not to the contrary. Defendant may not remain silent and willingly go to trial in prison garb and thereafter claim error."

Now, is that the rule that was applied in the case before us?

MR. ADERHOLT: It was. The Fifth Circuit followed Brooks, its earlier decision in Brooks versus Texas in 1967 and made a very strong policy statement and also held in Hernandez versus Texas a very strong case and it looked like it was a per se rule.

I think on rehearing it took a small step back and stated all the Chapman and Harrington tests should come into play.

QUESTION: Well, that isn't what they said on rehearing. That was in the main opinion. Here they said just what I said, just what I read you. They said, "We agree a defendant may not remain silent and willingly go to trial in prison garb."

MR. ADERHOLT: But Hernandez made no objection, your Honor.

QUESTION: I know, but they went on to explain why you couldn't, in Hernandez, why you couldn't stick him with a waiver because he thought it might -- he didn't think he had any chance whatsoever to win such a motion.

MR. ADERHOLT: Well, that was trial counsel's testimony in the habeas in this case.

QUESTION: Well, I know, but you just told us that there had been so many -- you just told us what the rule was in Hernandez, that this is that it wasn't a new rule at all, that any fool ought to know that you shouldn't try a fellow in prison garb. It has been the rule since Brooks and all these other decisions in other cases.

So why wouldn't you oblige the attorney to speak up?

MR. ADERHOLT: Because Hernandez made no objection the court said, we did not decide, that is not a voluntary waiver.

QUESTION: We are not bound by Hernandez. That is

a Fifth Circuit case.

QUESTION: But even on an Hernandez basis, they had some very special reason for saying there was no voluntary waiver in Hernandez which certainly doesn't seem to apply here.

MR. ADERHOLT: Your Honor, the facts in Hernandez and in Williams are practically identical. The --

QUESTION: They must have found some other basis for reversal, in light of what Justice White just read to you.

MR. ADERHOLT: I believe that their statement on a motion for rehearing is, "The defendant may not willingly go to trial and later claim error."

However, there was no objection in Hernandez and so it must be taken to mean, within the meaning of the opinion, that an objection is not required.

QUESTION: Well, is this the key to it in this case, after quoting what Justice White has just read you from Hernandez, the Fifth Circuit went on to say, "Waiver of the objection cannot be inferred that merely from failure to object, if trial in prison garb is customary in the jurisdiction," and I think your position is that it was customary and that is what this habeas record shows.

You say that Judge Love's affidavit doesn't really depict the actual practice which you say in Judge Love's court was always to try in prison garb. Is that right?

MR. ADERHOLT: Yes, your Honor.

QUESTION: Then the Fifth Circuit goes on, "It must be shown that the practice was not customary and might not be insisted upon if objected to or that the defendant hoped to elicit sympathy by his appearance in such clothing."

MR. ADERHOLT: That is precisely my position and I believe that the Hernandez case, when looked at on its motion for rehearing, is clear and is coinscribed with the other cases on point from 1938 on.

QUESTION: Well, do you think trying a person in prison garb, when he objects or even when he doesn't object, is an error that could be harmless?

MR. ADERHOLT: Do I believe that it could ever be harmless?

QUESTION: Yes, could you hold it a harmless error?

MR. ADERHOLT: Oh, yes, I do.

QUESTION: Let's assume a man requests to be tried in his civilian clothes and is turned down. They go to trial and he is convicted and the state defends on the grounds that it was harmless error.

MR. ADERHOLT: I think that it could be harmless and I think that that ought to be the test, that the real ought-to-be and I believe is in all jurisdictions, that it is an error, a fundamental error to try an accused in prison

garb unless he voluntarily waives the right and if the probable impact on the jury was harmless beyond unreasonable doubt.

The per se rule is easier to apply but I believe that is the rule as found in all jurisdictions up to 1970.

QUESTION: Well, how do you determine whether it is harmless or not?

MR. ADERHOLT: That's --

QUESTION: You can't.

MR. ADERHOLT: That is awfully broad.

QUESTION: You can't examine the jurors.

MR. ADERHOLT: It was done in the habeas hearing that counsel just referred to and it should and could have been done in this case.

QUESTION: They permitted inquiry of the jurors themselves?

MR. ABERHOLT: Yes, your Honor. I think that the -- that the question should have been gone into. Now, the Hernandez decision and the Williams decision and the Thomas decision are all Fifth Circuit decisions, went into the test of harmless error on the angle of sufficiency of evidence.

In Hernandez, the court said that there was insufficiency of evidence --

QUESTION: Is it the case in Texas that you may impeach a jury verdict by examination of the jurors?

MR. ADERHOLT: I think that the question, the inquisition of the jury was whether or not they identified it as a prison uniform and whether or not it made any impact on them.

QUESTION: The Fifth Circuit's test of harmless error, as I understand it in the -- as spelled out in the Thomas case doesn't go to the jurors' impression about the prison -- about the clothing the defendant was wearing but rather as to what the evidence of guilt was in the case and if it was so overwhelming that the court can say beyond a reasonable doubt that he would have been found guilty whatever he was wearing or not wearing then, they'd find it was harmless error. That is the Thomas case, isn't it?

MR. ADERHOLT: It is, and I believe that is the holding in all these jurisdictions --

QUESTION: That's what I thought, too.

MR. ADERHOLT: -- and cases that I have -- and I did not have an opportunity to go into my view of the sufficiency or insufficiency of the evidence on the question of whether or not the defendant was guilty of assault with intent to murder with malice.

QUESTION: The federal appeals goes into that at some length.

MR. ADERHOLT: It does at some length and the testimony is set out --

QUESTION: My only question was whether the inquiry as to the harmlessness of the error was directed to the jury's impression or the impressions the members of the jury drew from the clothing he was wearing or rather, does it go to the evidence of guilt in the case? And it does, it is the latter to which the courts have directed their inquiry, is it not, in determining whether or not the error was harmless?

MR. ADERHOLT: It does, Mr. Justice Stewart, and it also, however, mentions -- the reason I bring this in, that the defendant, in order to win, must prove that he was tried in an identifiable jail or prison garb.

QUESTION: First of all.

MR. ADERHOLT: First.

QUESTION: But then that can still be harmless in the view of these courts that have decided this case.

MR. ADERHOLT: Yes. All the courts have determined --

QUESTION: Right.

MR. ADERHOLT: -- the harmless error under Chapman --

QUESTION: Right.

MR. ADERHOLT: -- to be one of the grounds of the sufficiency of the evidence.

QUESTION: Beyond, -- so that a court can say,

beyond a reasonable doubt, that however he might have been dressed at the time of this trial, he would have been found guilty.

MR. ADERHOLT: Yes, your Honor. That should be --

QUESTION: Well, nevertheless, that isn't the inquiry that has been made to juries in these situations. You just suggested you do ask jurors whether they noticed the clothing.

MR. ADERHOLT: No, your Honor, I believe that my answer was that there was one case that was brought up in the state's brief where jurors were questioned on a habeas corpus as to whether, one, they identified this as a prison garb and they said they didn't and secondly, whether or not -- what was the impact I believe was the other inquiry.

QUESTION: Yes. That indicates that it has happened at least once in these cases that you do inquire from the jurors about the impact of the clothing.

MR. ADERHOLT: Yes, your Honor, I think the state could have subpoenaed those 12 jurors and asked them to defeat our claim.

QUESTION: Or you could have subpoenaed them, I suppose.

MR. ADERHOLT: I could have but I think that the sufficiency of the evidence in this case was so poor to prove that he was guilty of the offense with malice that we

chose not to bring the jurors in and that is the difficult thing to do, is to bring jurors in.

QUESTION: Mr. Aderholt, let me ask you one more question of, perhaps, comparing the various degrees of these rights. You just agreed, I believe, with Mr. Justice Stewart in his statement of the harmless error test in this case and that is whether the evidence was so overwhelming that no matter how the guy was dressed, he would have been convicted. That situation you find harmless error.

How about where the man has been deprived of counsel? Do you have a harmless error finding there that you say, no matter whether this guy had a lawyer or not, he would have been convicted, the evidence was so overwhelming?

MR. ADERHOLT: No, I would not follow that logic.

I do, however, believe that this has been many, many years of decision as held by lower courts, since 1938, that this is one of the tests to be used under Chapman and Harrington.

QUESTION: Chapman, Justice Rehnquist has been stirring the issues before the Court in Chapman and is suggesting by his question what was said in the dissenting opinion that I remember well but Chapman decided that if a constitutional error existed in a case, the conviction nonetheless could be affirmed if the court could say beyond a reasonable doubt that that error did not affect the verdict

of guilt but recognized exceptions among which were deprivation of the right to counsel.

Now, whether or not that was rational, that is what the court did in Chapman.

MR. ADERHOLT: Yes, and included within this concept of harmless error I guess you would have to put in the two exceptions in the Fifth Circuit and the other decisions of the Garcia exception where he uses a trial tactic and, secondly, the Henderson exception where the crime was committed in prison it was impossible to keep it from the jury.

QUESTION: Right, there are exceptions to the harmless error rule.

MR. ADERHOLT: Yes.

QUESTION: If you can show there has been a deprivation of counsel, if you can show that there has been an involuntary confession, then there is no room to argue that the error was harmless. That is the Chapman holding. But those are exceptions.

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

Did you have anything further, Mr. Sullivan?

MR. SULLIVAN: No, your Honor.

MR. CHIEF JUSTICE BURGER: Mr. Aderholt, you appeared by appointment of the Court at our request, as you did in the Fifth Circuit on behalf of the Court.

I thank you for your assistance to the Court and, of course, your assistance to your client.

MR. ADERHOLT: Thank you, your Honor.

MR. CHIEF JUSTICE BURGER: The case is submitted.

[Whereupon, at 1:59 o'clock p.m., the case was submitted.]