IN THE SUPREME COURT OF THE UNITED STATES

GARY MANESS, Petitioner,	:	
v.	:	No. 75-6909
LOUIE L. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF OFFENDER REHABILITATION, Respondent.	:	

Washington, D. C.,

Wednesday, March 23, 1977.

The above-entitled matter came on for further argument at 10:31 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

BENNETT H. BRUMMER, ESQ., Public Defender, Miami, Florida; on behalf of the Petitioner.

ARTHUR JOEL BERGER, ESQ., Assistant Attorney General of Florida, Tallahassee, Florida; on behalf of the Respondent.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will resume our arguments in Maness v. Wainwright.

Mr. Brummer, I think you have 17 minutes remaining of your time.

ORAL ARGUMENT OF BENNETT H. BRUMMER, ESQ.,

ON BEHALF OF THE PETITIONER -- RESUMED

MR. BRUMMER: Thank you, Your Honor. Mr. Chief Justice, and may it please the Court:

The petitioner has based his constitutional claim on Sixth Amendment grounds as well as fundamental fairness, on the basis that the voucher rule had been applied to sanctify the testimony of Linda Maness. Although Linda was clearly adverse within the definition of adverse set forth in Chambers, the petitioner was unable to cross-examine her or to contradict her. This left her denial of guilt intact before the jury. Her denial pointed the finger at the petitioner because he was the only other suspect.

The petitioner was also unable to get Linda to admit her guilt on the stand. It was a reasonable prospect of doing this because Linda had previously made admissions against her penal interests with regard to this case on a number of occasions. But defense counsel was unable to ask Linda whether she knew in fact that the petitioner did not do it because the trial court applied the voucher rule to preclude this inquiry.

Even if defense counsel could only have elicited from Linda that she had previously stated that the petitioner did not do it, this evidence would have had a dramatic impact upon the jury. This is especially true in light of the fact that she had testified on the stand that the petitioner was alone at the time, alone with the baby at the time that the baby was injured and that she had gone to the store.

It is very important to note that Linda's testimony is the only evidence which would point the finger of guilt at the petitioner, rather than at Linda, except for the confession given by the petitioner which he recanted on the stand and attempted to explain away. His inability to extract evidence from Linda also hurt his ability to support the recantation of his confession.

Under Washington v. Texas, the petitioner was entitled to use the testimony of the witnesses he had called to the stand. The situation here is very similar to the situation that this Court condemned in Davis v. Alaska. It is a deprivation of the right to confrontation and compulsory process to restrict a party to a single question suggesting bias or interest when an adverse witness answers with a general denial and the party is seeking to adduce relevant and material evidence which is probative in his defense.

Such a restriction deprived the petitioner here from revealing the falsehood and bias in Linda's testimony. Also

it may have appeared to the jury that the defense was engaged in a baseless attack on Linda, and this may have hurt the petitioner as well.

We would call the Court's attention to the opinion of the Ninth Circuit Court of Appeals in United States v. Torres, which is based on this Court's decision in Chambers. The situation there parallels the situation in Davis.

We would submit that the rights to confrontation and compulsory process are clearly applicable without regard to whether a third party confession appears in the record. We base this submission on the cases of Washington, Davis and Torres, in addition to this Court's decision in Chambers.

As early as his direct appeal, the petitioner has argued that the voucher rule has been applied to limit the right of the petitioner to use the testimony of Linda and Dana Maness in violation of the Sixth Amendment principles set forth in Washington v. Texas.

In Chambers, this Court set forth a balancing test for evaluation of the constitutionality of a clash between the Sixth Amendment and state evidentiary rules. The two components are the value and validity of the rule in question and the impact -- the second is the impact on the petitioner's ability to present a defense.

With regard to the first component, in this case the voucher rule is an irrational rule. It promotes no state

interest whatsoever. Certainly, the respondent has not come forward with any defense or explanation of the rationale for the rule or the rationale for the application of the rule in this particular case.

With regard to the impact of the rule on the petitioner's ability to present a defense, we would refer this Court to the findings of the court below, to the effect that the voucher rule undoubtedly worked to the detriment of the petitioner and that some evidence suggesting his guilt -- excuse me -- suggesting his innocence was excluded.

It is also important to notice that the court said that the fact-finding process had been impaired due to the inability of the petitioner to cross-examine Linda Maness. Because there is no legitimate state interest to be a countervailing weight in the balancing test, we submit that in light of the findings of the Fifth Circuit, the conclusion is inexorable, that the record reflects a constitutional violation of the petitioner's right to fundamental fairness as well as the Sixth Amendment guarantees incorporated in the due process clause.

In conclusion, I would like to briefly address myself to an additional question which the respondent has attempted to smuggle before this Court in his brief on the merits. The additional question relates to the exhaustion of state remedies.

We would submit to the Court that this case reflects

no reason whatsoever for this Court to depart from its normal policy to disregard a question when it is not properly before this Court, was not presented to the court below, and if accepted by this Court would alter rather than affirm the judgment of the court below.

Additionally, substantively the argument is without merit. The petitioner has presented to the state courts a claim substantially equivalent to the claim presented to the federal district court. This is the test set forth in the respondent's brief and in the Fifth Circuit case in Lamberti v. Wainwright, clearly under the exhaustion doctrine of repeated applications to the state courts are not necessary, and the mere possibility of success in state court, in light of the facts of Chambers v. Mississippi, are no bar -- is no bar to federal relief in this case under this Court's decision in Wilberding.

QUESTION: But it was raised in the Fifth Circuit, wasn't it?

MR. BRUMER: It was not raised in the Fifth Circuit before the panel which decided -- which entered the judgment which is before this Court. It was raised in a supplemental brief after the decision was made by the panel when the Fifth Circuit tentatively agreed to hear the case en banc. The court subsequently vacated the order granting the hearing en banc and no action was ever taken en banc. The court reinstated

the panel decision and the panel decision in no way could have related to the exhaustion argument.

QUESTION: Now, but really what I am saying is that your due process argument certainly was advanced below?

MR. BRUMMER: Yes, there is no question -- that was the only question that was raised below. The respondent's exhaustion argument was not.

We would respectfully request that this Court reverse the judgment of the court below. I would respectfully reserve the remainder of my time for rebuttal.

QUESTION: Mr. Brummer, before you sit down, we talked yesterday a little bit about the fact that these letters are no in evidence, the ones that you rely on. And in the examination of the wife in the court below, when the letters were offered the court, after looking at one or two of them, said, counsel, what you have shown me is a bunch of love letters to her husband from a girl who loves her husband, no matter what he has done, it says so. Can we accept that characterization by the court as a correct description of what is in the letters?

MR. BRUMMER: No, you cannot, Your Honor. The letters clearly reflect that the wife wrote to the petitioner saying they don't understand how I can still love you, but they all think you did it. Those were the letters that we attempted to submit to --

QUESTION: Where, Mr. Brummer, is the most accurate

statement in the record of what you contend the letters show? I couldn't even find the summary of the letters in the appendix.

MR. BRUMMER: In the order of dismissal entered by the district court, the district court accepted our averments as to the contents of those letters on the basis that --

QUESTION: Well, how do we know from the written material what your averments are? Where do we find that? Where --

MR. BRUMMER: The order of dismissal, Your Honor, is contained in the appendix at pages 213 and 214. At pages 213 and 214, the district court's order of dismissal was reflective saying that Linda knew the petitioner had not done it and that Linda was not at the store during the afternoon of April 14, 1971.

QUESTION: On page 213, it describes the letters in that way?

MR. BRUMMER: Yes, Your Honor, and these allegations were based on the averments of the petitioner --

QUESTION: I see.

MR. BRUMMER: -- which were uncontroverted before the district court. He was entirely entitled to make those findings. Certainly the respondent gave him no call not to, nor did the respondent cross-appeal those findings.

QUESTION: I see -- the allegation that she knew

petitioner had not done it.

MR. BRUMMER: That's correct, and that is exactly what the defense counsel tried to ask her on the stand. It was maybe the third question out of his mouth on approximately page 85 of this appendix. He said, "Isn't it a fact that you know that Gary Maness did not" -- and he was cut off in mid-question by an objection based on the voucher rule, and that objection was sustained by the trial court.

QUESTION: Mr. Brummer, I have a lot of trouble with these letters. They are not in the record, they are not any place. How are they before us?

MR. BRUMMER: They are before you, Your Honor, in support of our general --

QUESTION: Well, how are they before us if they are not here? Are they?

MR. BRUMMER: The letters are before you in fact because they are attached to our motion to supplement in the Fifth Circuit which was denied by the Fifth Circuit. The unavailability of the letters never became a question until the Fifth Circuit raised the question of their unavailability. In the district court, the question of the unavailability never came up. We were relying on civil rule of federal procedure eight, which says that the effect of a failure of the respondent to deny is to admit our allegations and our petition. And if the respondent is without --

QUESTION: You mean that they have admitted that --

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

QUESTION: Well, what did they admit that these letters say?

MR. BRUMMER: Whatever we allege because they made no such --

QUESTION: Well, I don't see how in the world -- your allegations mean something, but the letters are different.

MR. BRUMMER: Your Honor --

QUESTION: The best you have in this record is your version of what the letters say, that is the most that is in this record.

MR. BRUMMER: Your Honor, federal rule of civil procedure 8(b) says if the respondent is without knowledge he may so state and his constitutional --

QUESTION: I don't care about any rule at all, in what I am saying.

MR. BRUMMER: I see.

QUESTION: In the record, the letters are not in the record, right?

MR. BRUMMER: Yes.

QUESTION: They are not in the record?

MR. BRUMMER: That is correct.

QUESTION: So we cannot consider them, can we?

MR. BRUMMER: I think that you can safely ignore them

and still grant this petitioner relief.

Your Honor, the proffer of Dana Maness' testimony supports the exact same contentions that are raised in the letters, that the petitioner was not guilty and that Linda knew it and that Linda was not at the store at the time the baby was injured as she had testified from the stand. The same allegations. The letters are merely corroborative in a sense of Dana Maness' testimony, which is before the Court in the proffer on pages 123 and 124. And we would submit that that, coupled with the inability to cross-examine Linda Maness is sufficient to warrant granting this petitioner relief.

QUESTION: Did you proffer the letters themselves?

MR. BRUMMER: We did not, Your Honor. The trial judge, however, precluded -- was willing to look at those letters and exclude them without any admission. She made it quite clear that there was no sense in the petitioner's counsel persisting because she was not going to let those letters into evidence in any way.

QUESTION: Well, how does the reviewing court evaluate the trial judge's exclusion without examining the letters?

MR. BRUMMER: Your Honor, the letters are only supportive of our general claim.

QUESTION: Well, how does a reviewing court know that?

MR. BRUMMER: Because we made allegations to that fact in the federal district court, which is the court where the

respondent could have called into question -- neither the respondent nor the court called those into question. As a matter of fact, the court adopted those characterizations. That is how you know.

QUESTION: Mr. Brummer, let me ask one more question. Justice Powell has showed me the appendix to your motion to supplement the record in the Court of Appeals in which you did quote from at least one of the letters. And in one of those letters there is the statement "Nobody can understand why I still love you, but then they all think you did it." That is what you said before.

MR. BRUMMER: That's correct.

QUESTION: Now, can you tell me whether that letter was one of those that was shown to the trial judge at the trial? Is there any way we can know whether that is one of those letters? Is there any way we can know which two letters were shown to the trial judge?

MR. BRUMMER: Your Honor, there were not just two letters shown to the trial judge, the petitioner's counsel said "I have a bunch of letters." The trial judge said let me see the one that you have there, and then she excluded all the letters on the basis of the voucher rule.

QUESTION: But he refers specifically to one love letter to her husband from a girl who loves her husband, no matter what he has done. It says -- his characterization is

quite different from the impression one gets from the language you emphasize. The answer I suppose is the record really does not tell us which letters were shown to the trial judge. The whole bunch was handed to him, but which one he was referring to, we do not know, because none were marked at the trial?

MR. BRUMMER: I suggest that the Court might look at page 88 of the appendix, which identifies -- page 88 of the appendix -- which reflects --

QUESTION: He says I have a whole bunch of letters, Your Honor. The Court, "I just want to see the one we are talking about."

MR. BRUMMER: That is what the trial judge said --

QUESTION: And I am just trying to figure out which one you were talking about.

MR. BRUMMER: April 28, 1971, approximately at mid-page, Your Honor.

QUESTION: Right.

MR. BRUMMER: But it is clear on that page, he has a whole bunch of letters and he makes every attempt to have those letters introduced into evidence.

QUESTION: Well, every attempt is something -- I think you perhaps would have done a better job.

MR. BRUMMER: Thank you. If possible, I would like to reserve some of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Yes, you can reserve.

MR. BRUMMER: Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Berger.

ORAL ARGUMENT OF ARTHUR JOEL BERGER, ESQ.,

ON BEHALF OF THE RESPONDENT

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

My name is Arthur Joel Berger, counsel for the respondent, Louie Wainwright.

Your Honors, petitioner's argument in this case is predicated on a mischaracterization that solely because of an arbitrary finding that Linda Maness was not an adverse witness, that the trial court, pursuant to Florida statute 90.09, kept numerous facts from the jury which would tend to establish a doubt of petitioner's guilt.

Petitioner then relies on Chambers as the legal basis for his relief. The respondent submits, Your Honors, that under a proper characterization of what in fact occurred below, four concepts resolved this case, and that these are the crucial concepts with which this Court must filter the various factual matters which it has before it.

The State of Florida has no problem with this Court's decision in Chambers. But the factual situation in Chambers, Your Honors, is materially different from that situation which this Court is presented with in the instant case.

In Chambers, the defendant was precluded from

introducing -- dynamite, highly probative, quality, reliable evidence, evidence of his innocence. But in this case, Your Honors, the evidence which was excluded was smoke screen, was innuendo evidence, on which petitioner sought to confuse the jury.

QUESTION: But it wasn't excluded on that basis, was it?

MR. BERGER: That is correct, Your Honor. There were numerous rules of evidence which sustained the trial court's rulings in exclusion.

QUESTION: But it wasn't -- the trial judge didn't use those reasons?

MR. BERGER: Yes, Your Honor, I am merely suggesting -- I will subsequently get into the reasons why this occurred.

QUESTION: Oh, well, I --

MR. BERGER: I merely am stating that once you see the situation factually as it exists in this record, that you will be able to see that what petitioner is setting up is a smoke screen, and he wishes to analogize that smoke screen to the solid evidence, the dynamite evidence that Chambers had which so concerned this Court.

Thus, Your Honors, Chambers was decided not only on evidentiary principles but, most importantly, as Justice Powell emphasized in his opinion, was decided on the totality of the circumstances that were before this Court when it rendered its

Chambers decision.

The second concept we ask you to filter -- and we subsequently get to the facts of what actually occurred in this case -- is that in Chambers this Court took painstaking efforts to clarify one proposition, that the state and the defense must still follow the rules of evidence. And those rules of evidence, Your Honors, that this Court required both sides to follow, the rules which in fact are based on theory that these rules enhance the integrity of the fact-finding process. This Court did not hold in Chambers that every evidentiary ruling becomes a constitutional question because of whether that rule of evidence enhanced the truth-finding process.

This Court did not state that the mere preclusion of any evidence denies due process if it in some way hampers the defendant in presenting his case or from creating some doubt of guilt. If such were the test, Your HOnors, which is essence what the defendant is saying to this Court, if such were the test there would be no rule of evidence which could withstand a due process attack.

In this respect, Your Honors, the Maness situation is directly opposite the rationale of Chambers, in that Maness the rules of evidence which kept out the evidence were rules designed to insure the integrity of the truth-finding process.

The third concept we ask you to look at in this case are where we get to the facts --

QUESTION: Mr. Berger, you characterize the voucher rule as such a rule?

MR. BERGER: Your Honors, we note what this Court has said in Chambers, but we do submit that the voucher rule has one very important fact purpose with regard to integrity of the truth-finding process, and that is that it precludes confusion of the jury. It precludes --

QUESTION: In other words, you characterize the voucher rule as such a rule?

MR. BERGER: Yes, sir, it does --

QUESTION: So your position is not that the voucher rule didn't have any impact but, rather, that the voucher rule is a good sound rule?

MR. BERGER: No, Your Honors. We will suggest later that this case does not turn on the voucher rule at all. As we have indicated, the petitioner has mis-characterized the situation. He tries to create a simple picture before this Court that the voucher rule on this evidence would come in. But we submit that, in spite of our position or in our position, that other rules of evidence, rules which no doubt can --

QUESTION: Well, would it not be correct to say that the trial judge did in part rely on the voucher rule --

MR. BERGER: Yes, Your Honor.

QUESTION: -- and your point is that he had other grounds on which he might have relied --

MR. BERGER: Yes, Your Honor, but we don't --

QUESTION: -- but you don't really know whether he would have relied on those grounds had he not based his ruling on the voucher rule?

MR. BERGER: Well, Your Honors, as we will show clearly, the only purpose of the voucher rule is primarily state objection. There are some indications in the record that the court was merely stating, well, you have got to show that this witness was adverse, but you will see in reading this transcript that the crucial portions of this record -- which we will get to very soon -- that the court --

QUESTION: I think Wigmore contains a statement that many jurisdictions follow a rule that on appeal, where a challenge is made to the exclusion of evidence, the trial judge's ruling will be upheld if there was any basis upon which the exclusion could have been properly sustained, even though the reason assigned by the trial judge was not a correct one. Does Florida follow that rule, do you know?

MR. BERGER: Yes, Your Honor, in those cases which Florida follows, are cited immediately after our citation to the same stated in cases by this Court --

QUESTION: Is all of this argument before the Court of Appeals?

MR. BERGER: I'm sorry, Your Honor.

QUESTION: Is this position taken in the Court of

Appeals, the position you are now arguing?

MR. BERGER: Which position, Your Honor?

QUESTION: That there were other reasons for -- or are these fresh new reasons?

MR. BERGER: No, the -- the initial brief that was filed by respondent in this case directed generally to these propositions, the exact theory, Your Honors, which we are presenting to this Court in our brief, both grounds were presented in the supplemental brief ordered by the en banc court.

QUESTION: Well, I am not talking about the en banc court, I am talking about the panel court.

MR. BERGER: The three-judge court, Your Honor?

QUESTION: Yes, sir.

MR. BERGER: They did not -- I do not think that the opinion began with this court or the brief of our side laid out all of these rules and principles.

QUESTION: You didn't raise them. It is brand new then? I'm not saying you can't do it, I am just trying to find out the facts. I am not saying it is improper.

MR. BERGER: The theory that was -- the exact theory we are presenting here, Your Honors, is the one that I was on when I got the case and the supplemental brief en banc.

QUESTION: Mr. Berger, that is what we are trying to get clear. Did you raise these arguments and make these points when you argued to the three-member panel of the Fifth Circuit?

MR. BERGER: I didn't argue the case to the three-member court.

QUESTION: Well, you --

MR. BERGER: We did not precisely take these exact positions.

QUESTION: Mr. Berger, just to get something precise before us, because it would help me, toward the very beginning of what counsel intended to be an adverse examination of the wife, he started out, isn't it a fact that you know that your husband Gary Maness -- objection -- did not -- objection sustained. Counsel has represented to us that the intent of that question was to represent or to ask if she did not know that her husband did not kill the baby. Now, what was the reason, what is the proper reason for sustaining that objection to the leading question, other than the fact that she was not an adverse witness and therefore the voucher rule applied?

MR. BERGER: Well, Your Honor, if I might rephrase your question, what petitioner is asserting is that it was the voucher rule that kept this out, and we ask Your Honors to look very closely at Florida Statutes 90.09, 1971 statutes, which says nothing about leading questions, Your Honor. It talks about adversity.

What this court did, which we will get to in one moment, is sustain these objections and expressly stated, Your Honors, on page 86, the court said the objection sustained

is stricken. She is your witness, ask her questions that are not leading. It didn't say you could not impeach her. It said --

QUESTION: But, of course, to ask her questions that are not leading is because she is not an adverse witness.

MR. BERGER: No, Your Honor. The court may under Florida law, has in its discretion the right to allow any party to ask leading questions. You can ask leading questions of your own witness. It has nothing to do directly with the voucher rule. The court was merely stating that.

QUESTION: You have a right to ask leading questions but it is not at the discretion of the court if the witness is adverse, so the whole basis for the ruling is quite obviously that the court was not willing to accept the view that she should be treated as a hostile witness. Am I wrong about that?

MR. BERGER: Well, Your Honor, I guess we differ on that because my understanding is that this is a ruling -- petitioner is trying to indicate a ruling totally on Florida Statute 90.09, and that there is nothing in this statute which indicates anything about leading questions. That is totally an independent proposition.

The third concept which I wish to emphasize is this, that the state trial court judge acted fairly to both sides in this case. It did not act arbitrarily when it ruled, and it did not abuse its discretion in any one of those rulings.

Finally, the fourth and last principle we ask you to look at before we go to the record in this case is this: Assuming that there was any evidentiary error which this Court finds in this case, that error does not run to the level of denying petitioner an unfair trial, for three primary reasons.

If Your Honors will review the testimony of the petitioner, you will find, according to his confession, this crime occurred around 4:00 o'clock. The state obviously does not know when the fatal blows were struck. The petitioner, in his testimony, does not state that he was not in the house at 4:00 o'clock. In fact, his testimony indicates that he was there.

QUESTION: Well, does not the autopsy of the infant child show that the injuries were over a long period of time?

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

QUESTION: They could not determine when the lethal blows were struck on the child's head?

MR. BERGER: That's correct, Your Honor. The petitioner tells you that he was still at the house, in fact during his entire testimony there was not one statement in this record during petitioner's case in which he says Linda did it. There are a lot of inferences that petitioner wishes you to draw stating that he said that, but unless petitioner turns to the jury and tells them, "My wife did it," how can any evidentiary evidence that might have occurred in this court --

QUESTION: Mr. Berger, right on the first page of the examination, the question, "Did you kill your baby?" Answer, "No, I did not." Didn't that present that very point?

MR. BERGER: Well, we --

QUESTION: You don't think that gave the idea to the judge that that was the defense's theory?

MR. BERGER: Your Honor, what I am stating at this point is that if petitioner, when he gets up there on the stand and does not state "My wife did it," that that is a totality in construing the totality of the circumstances. It is very important to determine whether if this Court finds any evidentiary error, that this case constitutes a denial of due process.

The second point is that the defendant never presented any secondary evidence other than his statements to indicate in any way that Linda had at any time touched that child.

The third point is that the evidence which petitioner is complaining about now, that he says was kept out, was not highly exculpatory. At best, Your Honors, this evidence was directed toward a showing that Linda was not a credible witness, she might be a liar. And furthermore, that she might have been present at the time of the crime. But mere presence at the time of a crime, Your Honors, is not, as petitioner would have this Court equate, made a showing that Linda committed

this crime.

As we have indicated, this case turns on 15 pages in the appendix, and I ask the Court to indulge me, if they would, to look at the appendix with me to see exactly what occurred at this trial and what the judge's rulings were. That would be starting on --

QUESTION: To begin with?

MR. BERGER: Yes, that would be starting on page 85. Now, I will let you get a sense from the cold record of what the trial judge was doing.

QUESTION: Page 85?

MR. BERGER: Yes, Justice Stewart, 85.

Petitioner starts to ask a question. He has not even asked Linda Maness her name yet. So the court states that that is what he should do. He immediately tells this court, before any question is asked, that he wants Linda declared as an adverse witness. But there is no evidence before the court to indicate that she is an adverse witness, and the court says at this point that it is denied because there is no showing.

Now he starts to ask another leading question. The prosecutor indicates something with regard to Florida Statute 90.09, but what does the court do? Does it say you cannot impeach Linda because there is no way you are going to make a showing that she is adverse? The court says the objection is sustained; ask a leading -- I don't know whether he is

impeaching her or not. The court is stating not now, she is not adverse. The court is not stating categorically that she could never be impeached.

On page 86, counsel starts to inquire, and the court does not say you are not allowed to impeach Linda Maness because she is never going to be an adverse witness and we are cutting you off right now, such as was the situation in Chambers, where in Chambers the trial court had all the facts at that point.

What she is stating is just ask her questions that are not leading. Then we go down a little and we start the testimony, and one of the questions is, "With regard to a bruise that this baby had in the morning," the defense asks, "how did that baby get the bruise on her forehead?" Does Linda Maness turn around and say, "Gary, my husband, did it." No, Your Honors. What does she say? "I don't know." This isn't an adverse witness, that he wants to call adverse, who was pointing the finger at her husband. "I don't know."

Then the court merely states after that, well I think we will just return to the narrative. I understood you were starting to ask the narrative. That is all the court says. It doesn't say don't impeach. Because we have got to look at what the trial judge is doing to petitioner in this case.

On page 88 there is an objection with regard to hearsay. The court sustains on hearsay grounds, not the adverse

sitness rule. Counsel then asks, "Did you tell anybody at any time how that baby was injured?" And this is the answer of what petitioner would have you believe is an adverse witness, "No, I didn't know how she was injured." She is not testifying against the petitioner Maness. Then the court says let's start talking about the -- the defense starts talking about a letter dated April 28, 1971, this is a letter that isn't marked, he just gets up there and says, "Read this letter to the court," a letter that is not even introduced into evidence, has not even been sought to be introduced into evidence.

Mr. Williams suggest that it is an improper predicate and the court sustains it. What does the court do with regard to this letter; in spite of the fact that it is not introduced, in spite of anything, this court bends over backwards and says let me see that letter you were starting to talk about now, the specific letter, the April 28th letter, which you wanted to have read to the jury.

And this is done, as the court emphasizes, noting that it hasn't even been marked for identification. This judge, Your Honors, is bending over backwards to try and be fair to the defendant. She looks at that letter and she makes an unchallenged ruling, after looking at that letter, and states that all this letter shows is that Linda Maness loves her husband, it doesn't show adversity.

Then the court asks, "Is there something you are

attempting to read to impeach this witness on? There has been no question asked along these lines." That is an indication, Your Honors, not that petitioner will never be allowed to impeach, but just that this court, having heard no inconsistent statements, states not now.

We then proceed on, and the court says, "You can't get this letter into evidence unless there is something she says that is contrary. If you want to impeach by an inconsistent statement, you have to have some statement for which the evidence you are going to use is inconsistent." This is not a trial judge that is saying you can never impeach because of the voucher rule.

The defense counsel says, well, I have got another letter, may I show you this letter. The trial judge, that they would have you believe is acting arbitrarily in keeping out all this evidence, says, "Okay. I will look at that letter also." She categorizes an objection again on the basis that it is leading, not that petitioner Maness will never be allowed to impeach. And all the court says is that everything you have shown me, and obviously in this case petitioner never showed all these letters. But the court never said I will never look at all these letters, I will look at everything you've got.

The court says, "All you have shown me is a bunch of love letters so far. This is not an adverse witness yet." Then

Mr. Minkus says something that will be very important in this Court's review of these various items of evidence, he explains why he wants to use these letters, not as substantive evidence of guilt, but he says on page 90, he says, "These letters can come in for impeachment." And what does the court say? The court says you can never use these letters for impeachment. This court judge did not preclude arbitrarily the impeachment of this witness. She says, "But there is nothing to impeach yet, there is an inconsistent statement."

The court then says something that is quite contradictory to the impression that petitioner wishes you to get of the trial judge's actions, because right afger this, this colloquy occurs:

"The Court: But there is nothing to impeach?

"Mr. Minkus: Could I call her as an adverse witness?"

And what does the court say to the state: "Do you want to let him?" She is not precluding him at this point. Then all she says right after that is, "Well, let's pass on the issue right now. Let's go back to the original question you were asked, and if there is something to impeach, we can come to it." And she says I think this is the best way to do it.

Then petitioner talks about some statements of the police or some statements with regard to her being out of the house. And all the court says is that at this time she is not

an adverse witness. These letters show that she is not an adverse witness. And then the court says something that this Court said in Chambers, that is on page 91. "The Court: We are going to have to proceed by the rules of evidence, counsel. She hasn't said anything for you to impeach."

At this point, counsel talks about some letters to the police, indicating that she never stated in that statement -- one statement to the police that she wasn't out of the house. The court looks at that statement and says there is nothing inconsistent because they never asked her the question. It is not stating that, as petitioner would have you believe, that what occurred at this trial is a precluding of his ability to impeach because of Florida Statute 90.09.

Then there is another crucial point which we will emphasize subsequently. Gary Maness asked his wife, "Did you tell your husband on a particular date that you were pregnant?" And what does counsel do? He doesn't get an answer. He withdraws the question. His question was never brought up again. There was never testimony.

QUESTION: Where are you?

MR. BERGER: This is at the bottom of page 92, Your Honors.

QUESTION: Well, you have skipped something in the middle of page 91, where the prosecutor said that is tending to impeach his own witness, which is not admissible. And the court

said, "That's right."

MR. BERGER: Because at that point, Your Honors, she had not indicated -- there is no evidence to indicate that Linda Maness was in fact adverse.

QUESTION: For some reason she calls defense counsel "boy." That is kind of odd, isn't it?

MR. BERGER: Beg pardon?

QUESTION: "That's right, and, boy, this is not an adverse witness."

MR. BERGER: She is not referring to defense counsel, Your Honor. That is just a colloquial expression, as I understand it. "Boy, is this an impossible situation," and things like that.

QUESTION: Well, just sticking with that for just a moment, Mr. Berger, you've pointed out that the court said just above on page 91, she hasn't said anything for you to impeach, and Mr. Minkkus said, "Well, she said that she was out of the house at the time that the baby was supposedly beaten." Now, she had said that before the jury. "And I have evidence here that says that she wasn't," and then the court wouldn't let him use that evidence, relying on the voucher rule, as I understand it. Isn't that correct?

MR. BERGER: Yes, Your Honor.

QUESTION: So that particular purported contradiction in the direct testimony as to whether or not she was present

when the child was allegedly beaten, that was a contradiction that was excluded on the voucher rule, and it really went to the heart of the whole case, didn't it, as to whether or not she was present then?

MR. BERGER: Well, Your Honor, at that time, and the court was merely stating that it had no evidence before it that she was adverse.

QUESTION: Yes, but then Mr. Minkus pointed out that there was the conflict -- oh, I see, as to the adversity point, because --

MR. BERGER: That is all the court was doing, it said don't ask any questions, there is nothing inconsistent, you haven't shown me adversity yet. It didn't say he could never show her adverse later.

QUESTION: How could the defense counsel have shown adversity, if the theory of adversity is that she really is the one who killed the child, and if that point were made to the trial judge, as it was by the direct question, "Did you kill the child?" what more was counsel required to do to demonstrate adversity?

MR. BERGER: Well, Your Honor, that raises a very important point. The concept of adversity is that a witness get before the court and tell the jury something that is incriminating against the defendant. Now, the question that you have posed or the way you have formulated the question is that

you are now making the adverse witness test, not one as we have indicated, a suspect test, which is --

QUESTION: Well, she did say something that tended to incriminate the defendant because she said that she left the house and that when she came back the baby was in the condition that precipitated the death.

MR. BERGER: Yes, but she never says that the defendant did it at this point, and all --

QUESTION: But she did say that the defendant was -- she was gone about twenty minutes and the only person there was the defendant, that's not a very difficult inference to draw, is it?

MR. BERGER: Yes, Your Honor, but she repeatedly told the jury, "I do not know how this baby was killed."

QUESTION: She said that because she wasn't there, but you don't suggest that that evidence tended to incriminate the defendant? Is that your view of the facts?

MR. BERGER: That would be correct, Your Honor. Her position is she does not know how this baby was hurt. She was not testifying --

QUESTION: All she knows is that the baby suffered the beating during the fifteen-minute period when she was away and the father was the only person present, and that is not incriminating? That is your position?

MR. BERGER: Well, she doesn't state that she knows

the father was the only person present.

QUESTION: Well, he was there when she left and he was there when she came back, and she doesn't know of anybody else there. That much is clear.

MR. BERGER: Yes, that's correct, Your Honor.

QUESTION: In a situation where there are three persons in a room and one of them is killed and it is obvious that one of the two did it, wouldn't both of them be adverse witnesses, without Moore?

MR. BERGER: No, Your Honor. We submit again that you cannot take this position that an adverse witness or any person can be impeached merely because he is a suspect, because if that is true, Your Honors, in every case that you have, unless there is a clear confession, there are multiple suspects with regard to a case.

QUESTION: My case is that there are two, there are two people in the room, one of the two killed the third one. So the question is which one of them did it. That is the only question involved. Wouldn't they automatically be adverse witnesses, both of them?

MR. BERGER: I submit not, Your Honor. Again, I submit that that is just a suspect test and there would have to be some kind of --

QUESTION: Well, the only way they could be a non-adverse witness would be for the witness to say he didn't do it,

I did it. That is the only way.

MR. BERGER: No, Your Honor. We submit --

QUESTION: Well, what other way?

MR. BERGER: We submit that --

QUESTION: What other testimony could he give?

MR. BERGER: If Linda Maness had gotten before the jury and said "I know Gary Maness did it, he did it," in that situation there would be adversity.

QUESTION: Well, suppose the witness says, in my case, the witness says "I didn't do it," both of them said "I didn't do it," could one of them cross-examine the other one?

MR. BERGER: Do you mean if one party is called to the stand?

QUESTION: Yes.

MR. BERGER: I submit, Your Honor, that that is not the predicate.

QUESTION: Well, how would you establish that he is an adverse witness in my hypothetical?

MR. BERGER: I submit, Your Honor, that you could not unless the witness was getting up there actively --

QUESTION: You couldn't establish that he was an adverse witness on my facts, that one of the two of them did it?

MR. BERGER: That is correct, Your Honor.

QUESTION: Okay.

MR. BERGER: Because as I have indicated, that would

allow every suspect in the case to be brought to the stand and cross-examined again, totally withdrawing that witness for no apparent reason. And if there were four people involved or suspects, you could just bring each one of those four with some kind of doubt.

QUESTION: What is wrong with that?

MR. BERGER: Well, Your Honor, those four we submit would be confusion of the jury, with the evidence in this case, like in Chambers.

QUESTION: Well, wouldn't you agree that with this dialogue back and forth between the judge, that this jury was confused in this case?

MR. BERGER: Yes, Your Honor, and that is exactly what counsel wanted to do.

QUESTION: So it would have been less confusing if she had testified?

MR. BERGER: Counsel has brought that across, Your Honors, without any answers, he was creating doubt merely by the questions.

QUESTION: What is the rule of evidence in Florida about prior inconsistent statements of a third-party witness?

MR. BERGER: Your Honor, rules contained in Florida Statute 90.09 --

QUESTION: Well, what is it?

MR. BERGER: -- that statement says before the last

proof can be given, and that is a prior inconsistent statement, the circumstances of the statement sufficient to designate the occasion must be mentioned to the witness and he must be asked whether or not he made the statement.

QUESTION: But what I want to know is whether the prior statement is admissible only for impeachment or is it --

MR. BERGER: Oh, I see what you are getting at, Your Honor. Florida law provides that if you have impeaching evidence, that evidence comes in only for impeachment unless that particular piece of evidence also is admissible substantive evidence under rules of law. We have indicated in the remainder of our brief, which we weren't able to get to, that there are numerous rules which preclude this evidence from coming in as substantive evidence, even though on this record, Your Honors will note, there is no indication that --

QUESTION: Well, let's just assume that it is an out-of-court statement of the witness, a third-party witness, who testifies to something in court and then the examiner wants to introduce into evidence an out-of-court prior statement inconsistent with this same witness.

MR. BERGER: Oh, I see.

QUESTION: Let's assume that it is admissible, is it admissible only for impeachment or not?

MR. BERGER: No, Your Honor. The procedures that would have to be employed in this case is that the normal

impeachment type of examination would have to occur. Following that, counsel must mark for identification and seek to introduce that evidence as substantive evidence itself, not just to show contradictions.

QUESTION: Is it admissible for its truth?

MR. BERGER: That depends on the evidence. As I indicated before, and I am sorry if I wasn't clear, then the court must rule on this piece of evidence as it would any other piece of evidence, if it is admissible.

QUESTION: So if it is hearsay, it is hearsay, it is not admissible?

MR. BERGER: Exactly. It would be used for impeachment but if it is clear hearsay it could not be admissible as substantive evidence if the parties sought to admit it as substantive evidence and told the court that it wanted that evidence admitted as substantive evidence in addition to impeaching evidence.

Thank you, Your Honors.

MR. CHIEF JUSTICE BURGER: Do you have anything further? You have one mimute left.

ORAL ARGUMENT OF BENNETT H. BRUMMER, ESQ.,

ON BEHALF OF THE PETITIONER--REBUTTAL

MR. BRUMMER: Thank you, Your Honor.

QUESTION: Mr. Brummer, I won't treaspass on your limited time, but if the Chief Justice will extend it a minute,

on page 28 of your Attorney General's brief, he makes this statement: "At no time during Gary's testimony did Gary directly state that Linda gave Misty the fatal beating on April 14th."

MR. BRUMMER: "At no time" --

QUESTION: I am reading from the Attorney General's brief, page 28. I think that is it. "At no time during Gary's testimony did Gary directly state that Linda gave Misty the fatal beating on April 14th. He agreed that they were in the house together." And what I want to know is whether you can refute that statement.

MR. BRUMMER: I don't believe that the petitioner knew for certain or was willing to testify that for certain Linda had done that. But he did directly accuse his wife. There are a number of places in the record, and I can refer the Court to those places, if the Court wishes.

QUESTION: Did he introduce evidence of any other witness supportive of that view?

MR. BRUMMER: He offered the testimony of Dana Maness to the extent that Linda said that the petitioner did not do it, and that Linda had not gone to the store at the time the baby was injured, as she had testified from the stand. Additionally, petitioner's counsel, in opening statement, in the five sentences of his opening statement, he said that the petitioner did not do it and "we will show who probably did." He had previously stated that Linda would be the defense's chief

witness.

The petitioner had denied killing the baby on the stand. There were only two suspects in this case. He testified that Linda discovered the baby comatose and that the baby was injured while he was in the front yard outside the house. He testified that Linda was lying whe she left the house. I will give you the references for this, if you like. The opening statement regarding the fact that defense was going to show who probably killed the baby appears at appendix 25, that Linda would be the defense's chief witness at appendix 17. The petitioner denied killing the baby at 100. Linda discovered the baby, according to Gary, at 102. Gary testified that the baby was injured before the petitioner returned from work, at 101; that Linda was lying when she said that she left the house, 117; the petitioner testified that he lied to the police to protect Linda from jail, 108 through 109, 114, 117, 120.

Additionally, he testified that an inspector at the hospital had told him that one of them would go to jail if the baby died. That appears, I believe, at 108 and two times on 120. The petitioner further testified that he had never struck the child on the face, contrary to Linda's testimony, and also contrary to their proffered testimony in Dana's -- in Dana's testimony, where Dana said that Linda said that the petitioner never touched the child; and also that the petitioner only knew what Linda had told him about how the child was injured, and

this appears at numerous places in the record, at 120, at 118 through 119, at 115, and at 103 through 105.

I would also, in terms of whether he was successful in pointing the finger back at Linda, I would also point out to the Court that the state requested a jury instruction to convict Gary as an accomplice. He could only have been an accomplice to one person, and they made that request at page 134 of the appendix, and of course that request was denied by the trial court.

MR. CHIEF JUSTICE BURGER: You have answered the question abundantly.

MR. BRUMMER: Thank you, Your Honors.

MR. CHIEF JUSTICE BURGER: The case is submitted.

[Whereupon, at 11:23 o'clock a.m., the above-entitled case was submitted.]

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