Supreme Court of the United States

OCTOBER TERM, 1969

In the Matter of:

FRANK CHAMBERS,

Petitioner

vs.

JAMES F. MARONEY, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTE,

Respondent.

Docket No. 830

Place Washington, D. C.

Date April 27, 1970

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

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C O N T E N T S

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FRANK CHAMBERS,

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Respondent.

Washington, D. C.,
Monday, April 27, 1970.

The above-entitled matter came on for argument at 11:35 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

VINCENT J. GROGAN, ESQ.,
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620 Grant Building
Pittsburgh, Pennsylvania
Counsel for Petitioner

CARL MARY LOS, ESQ.,
Assistant District Attorney,
Allegheny County,
Pittsburgh, Pennsylvania
Attorney for Respondent.

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument in Case No. 830, Chambers vs. Maroney.

Mr. Grogan, you may proceed whenever you're ready.

ARGUMENT OF VINCENT J. GROGAN

ON BEHALF OF PETITIONER

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

This criminal matter is before the Court on writ of certiorari to the Court of Appeals for the Third Circuit. Constitutional questions presented are whether petition was denied effective assistance of counsel where he met his lawyer in the hallway on the way to the courtroom for trial on serious criminal charges.

It also involves the constitutional question of whether a warrantless search of an automobile in which the petitioner was a passenger which was made while he was in custody in a police station, after the car had been moved from the scene of arrest to the police station, and where there had been two previous searches of the same automobile.

It also involves the question of harmless error in connection with the admission into evidence of dum-dum bullets which were illegally seized and then used in trial to connect the petitioner with weapons that were found in the warrantless search of the car, and also used to describe the severity of

impact that could be made by such bullets to petitioner's detriment.

The statement of the case in our bief is extensive, and I will try to summarize it more briefly for the Court.

It opens with the statement: During the first week of September 1963, petitioner and three co-defendants were tried on four criminal charges. I find now, since the time of preparation of my brief -- and I have advised my opponent, Miss Los -- that the record of this trial has become available to me and that that trial did not involve four criminal charges but, rather, two.

It appears that the indictment that was presented to the court and jury in that case involved solely the alleged robbery of a service station on May 20, 1963. And, for reasons that become apparent, this is very important to our case. I would like to offer this to the Court at this time.

At the trial, in early September 1963, petitioner was represented by a member of the Legal Aid Society of Pittsburgh. The trial ended in a mistrial in the withdrawal of a juror for reasons that are not explained in this record.

Later in September, on September 27, 1963, the --

Q Did the trial have several co-defendants, the first trial?

A Yes, Your Honor, all defendants -- four defendants were in each of those cases.

Q All right.

A Petitioner was called again to trial and this time he was again represented by a member of the Legal Aid Society of Pittsburgh. It happened to be another lawyer, not the one that represented him at the first trial. He met his lawyer in the hallway on the way to the courtroom. There is no evidence in the record as to what discussions there were before that, if any, with this lawyer. They proceeded to trial.

Q What is the practice in Pittsburgh when the Legal Aid group represents a defendant? Is the -- there was an appointment here, wasn't there? Was there an appointment or did he --

A The record isn't clear in that regard, whether it was a specific appointment or not. In other words, I cannot tell you whether there was an order of the court entering an appearance or directing the Legal Aid Society to appear. In further answer to your question --

Q Well, can you tell us or can't you when this gentleman he met in the hallway first knew he was going to represent this man?

A He first knew it that morning, Your Honor, apparently.

Q Apparently --

A I say that --

Q Does the record show that?

A No, it does not.

Q All you know is that he met him in the hallway?

A All we know, and we know that because of the statements made by petitioner --

Q Did the Legal Aid Society or whatever the name of it is know that somebody was going to represent him ever since the first trial?

A Yes, I believe we could say that, Your Honor.

Q And does the record show whether anybody had been doing any work on the case until the day of the second trial?

A No, it does not.

Q You are just assuming that they were giving it no attention in the meantime?

A Your Honor, the record doesn't disclose that and that is all we have to deal with at the present time. The --

Q Well, we have another factor, don't we? The ordinary human experience in the practice and habits of lawyers that two lawyers associated in the same organization, whether it be a law firm or the Legal Aid Society, would reasonably be in communication with each other about a case when one is transferred to another and they build up a file on it. Aren't there some assumptions that can be made about

that, on the basis of experience?

A Your Honor, I don't know whether those assumptions warrant in the circumstances of this case.

Q Do you know that they are --

A If I may speak outside the record, I believe so. I have obtained copies of the Legal Aid Society files in connection with the case, and I believe they would show very, very little to assist a lawyer in a second trial in the same charges.

Additionally, we have the problem here that I have been operating under the assumption that the first trial involved all four counts, whereas we find now that it only involved two counts for one of the two robberies that he was charged with and tried, in September.

Q Was there an evidenciary hearing on this, in the --

A There was an evidenciary hearing held in the State Court, Your Honor, but was very brief.

Q Were you at that?

A No, I was not. I was appointed by this court to represent the petitioner.

Q But there has been a habeas corpus petition hearing on the inadequacy of counsel?

A Not in the federal system, Your Honor. Also it is not a full hearing. Part of our contention is that

under Townsend vs. Sain, there was not an adequate factfinding hearing by the State Court, as the material facts are not disclosed in this record. The record of the habeas corpus hearing appears in the appendix. It shows that petitioner took the stand, he was asked when he met his counsel, and testified that he met him in the hallway on the way to the courtroom. He was not asked any questions in connection with what other preparation there was, whether he discussed it with him or not. The only other thing touching on the fact was that petitioner said that at some point in time between the time that he was incarcerated and the first trial that a member of the Legal Aid Society staff apparently came to the prison to talk to him.

Q You do plan to spend some time on the search and seizure?

A Yes, I do.

The trial testimony disclosed that on May 13, 1963, two Negroes walked into a service station and demanded all of the money that the service station operator had. One of them displayed a pistol, a nickel-plated pistol, and they received from the service station operator $66 in cash, some personal cards and his wallet.

At the trial, the service station operator identified petitioner as the person who was holding the gun. He made an in-court identification of petitioner, and identified the items as his personal property, the cards and also the wallet.

Testimony further disclosed that around 11:30 o'clock p.m., on May 20, two teenagers saw a car, a light blue station-wagon, parked in a parking lot near the teenage girl's home. In it were seated four Negro gentlemen. They then testified they saw this stationwagon circle the block around the teenage girl's residence and also a Gulf service station. Subsequently, about 15 minutes later, someone ran from the service station explaining that there had been a robbery. They then saw, within a few seconds, this light blue stationwagon leave the parking lot at a high rate of speed.

The record shows that the service station was not visible from the parking area. There is nothing in the record to indicate that at any time anyone ran from the service station to the automobile, got out of the automobile or any other fashion connected with the robbery.

The service station attendant testified that two Negro gentlemen came into the service station, both of them displayed pistols, demanded everything that they had. One of them was wearing a green sweater, the other was wearing a trenchcoat. He took the change that he had and put it in his right-hand glove, the service station attendant's glove, and gave it to the two robbers.

The police were summoned; they came. They interviewed the teenagers and the service station attendant and a description of the car and the four occupants was put on the police

radio. Approximately 45 minutes to an hour later, two neighboring -- two police officers in a neighboring community saw a vehicle that answered the description that had been put on the radio, that is that it was a light blue compact stationwagon, occupied by four Negroes. At that time the stationwagon was being operated back toward the scene of the crime of that evening, or the previous evening.

The police officers pulled the vehicle over on a side street. The Commonwealth has argued that there may be inferences here leading to or could be inferred that the gentlemen were attempting to elude the police at the time, but I do not think that that is a fair inference from the record. But, in any event, they were pulled over in the parking lot, they got out of the stationwagon and the police officers frisked them at that point for weapons. Within moments other police officers from the community where the robbery had taken place came to the scene. At that time those police officers looked through the stationwagon by means of searchlight.

Petitioner and the owner of the vehicle were then taken to the police station in the community where the robbery had occurred. They were again searched and at that time or at that moment money was removed from their persons. The police officers went outside and made a search of the vehicle. The chief of police or the lieutenant who was in charge testified that they went through everything, to indicate the depth of

the search. They went back inside, after finding nothing, and again questioned petitioner and Lawson, one of the other co-defendants, went back out again and in this third search of the car one of the officers opened up a vent in the heater and from this vent he removed two pistols, two cards taken in the robbery of May 13, and the personal wallet of the attendant of that earlier event.

Q Does the record show why the officers discontinued the search and went into the stationhouse and then went back out and continued the search?

A They don't say explicitly, Your Honor, but they do say that they went through everything and found nothing. And it appears as if what they did then was to go back in and further interrogate or attempt to interrogate to disclose information.

Q The record doesn't show what the subject of that interrogation was, does it?

A No, it does not.

Q I couldn't find it in the appendix.

A No, there is nothing in the appendix to indicate that.

Q Then it is your -- of course, you insist here, in opposition, puts it in terms of one continual interrupted search rather than two searches or three searches, as you do, and that is a matter of how you view the facts, I suppose.

A The matter of continuity is a little hard to explain, Your Honor, because of the passage of time that must be inferred from the testimony of the officers as to how the search went on.

Q Does the record suggest that this was the only matter that the officers were then engaged in, or did they have other things to do?

A It appears as if this was the only thing they were engaged in, Mr. Chief Justice.

Later that same morning, then, the chief of police of the community obtained a search warrant and went to the homes of the four defendants and made a search. In the homes of the three other defendants, nothing was found. He went to petitioner's residence and there found a holster, some dum-dum bullets that were matched to one of the revolvers found in the search of the car.

At the trial, petitioner's counsel objected to the introduction of these dum-dum bullets into evidence, on the grounds of relevance, at first. This was overruled. Then the police officer testified on the stand that the dum-dum bullets matched one of the -- matched the bullets taken from one of the weapons, and that the effect of the dum-dum bullet on a human body is to make larger holes and can cause more tissue damage. Petitioner's counsel again objected. This time he objected on the grounds that the search warrant did not disclose or did not

indicate what they were searching for, and it did not specifically say what they were searching for. Unfortunately, this search warrant is not available to us now. It has been lost. It is not a matter of this record. It apparently was lost before the state habeas corpus hearings, and so we are unable to say at the present time exactly what the search warrant did disclose except for the testimony of the police officer when he was on the stand, who said that the search warrant did not indicate that they were looking for bullets.

In any event, petitioner's then counsel's objection to this evidence was overruled by the court, who said that his failure to file pretrial motions meant that the suppression evidence should have been heard earlier; not having been heard, it was overruled on those procedural grounds.

The jury returned verdicts convicting the four defendants of the crimes on May 20, and petitioner was sentenced to six to fifteen years imprisonment.

About two years after his conviction, he filed a petition for a writ of habeas corpus in the state court. An evidenciary hearing was held, and I summarized for you what was disclosed at that time that he met his counsel on the way to the courtroom for the trial. There is no extensive discussion as to what preparation, if any, there was. There is no exploration as to what defenses were available, merely those statements.

Q Do you point to anything in the record that would show that there was ineffective assistance, where there was any dereliction of duty or failure to do some things that should have been done by the lawyer?

A Mr. Chief Justice, if I can, I think the basic proposition would start with the things disclosed by the record, and they would be that, in the first instance, the trial court overruling the objection to the dum-dum bullets on the grounds that there had not been a pretrial motion filed. The failure of counsel to recognize the very valid argument in connection with the search of the automobile, which we submit to the Court at this time, the fact that there is no evidence at all that any pretrial consultation between the lawyer and his colleagues or, as a matter of fact, the petitioner.

Q What does it show about the conduct of the first lawyer and the relations with the client?

A It doesn't disclose anything except in this record, that I now have before the Court, it shows there that there were other objections made that were not made at the second trial, for other reasons. They were apparently not known to the lawyer at the second trial.

Q Were they objections which were successfully made the first time?

A Yes.

Q And you think they are material?

A I believe they are material. In connection with their argument, we submit that the late appointment of counsel for petitioner in this case was so prejudicial to him as to warrant reversal. This Court, in Gideon vs. Wainwright, held that the right to counsel, one charged with a serious crime has a fundamental right essential to a fair trial.

The Court reaffirmed the principles of Powell vs. Alabama, where the Court said that this right was not a hollowed one, that it meant appointment at such time and under such circumstances as to give effective aid of counsel in the preparation and trial of the case.

Q As I understand the Third Circuit, they apply the same rule as the Fourth Circuit

A No, Your Honor, I believe initially we argue in the alternative, but I believe that it is not necessary in Powell vs. Alabama, in Gideon and in other cases decided by this Court, to show specific prejudice, that it is not necessary where you have the issue of the right to counsel to show specific prejudice.

Q I have some problem of second-guessing by a lawyer, because so far as I am concerned, and I went back over records of cases I have tried, I found considerable fault with my procedure.

A Yes, Your Honor, I believe that that --

Q That is the problem I see here, the second-guessing.

A Well, what we are really concerned with here, though, Your Honor, is not so much second-guessing in the techniques of trial, but we are talking about those factors that are extrinsic to the trial itself, in other words appointment at such a time that he could prepare, he could do those things that would lead to effective assistance of counsel.

Q He was appointed all the way back, wasn't he?

A I don't believe we can say that, Your Honor.

Q Well, isn't it the normal procedure to appoint a lawyer or legal aid for all purposes of being there by order of the court until he is removed?

A It is not necessarily the same lawyer. As a matter of fact, it is not necessarily --

Q I didn't say the same lawyer, only to appoint the Legal Aid group, isn't that the way it is done in the court?

A Generally speaking, yes, I believe it is.

Q And then he assigns it to one of his other lawyers.

A That's correct, Your Honor.

Q And would you assume that that was done here?

A Yes.

Q Wouldn't you assume that the lawyer was appointed

before the day of the argument -- I mean the day of the trial?

A The Legal Aid Society, Your Honor, they have been appointed as such but he never met the lawyer who was to represent him, his personal counsel, until the morning of the trial. This is what the record discloses.

Q I understood you to say you didn't know. You said he saw him in the hallway. He didn't say, "I saw him for the first time in the hallway," did he?

A I think he did, Your Honor, yes. I believe he did.

We submit that under Powell vs. Alabama that the components of the effective assistance of counsel should have been provided, and those would be the opportunities to prepare, the opportunities to develop the defense, to interview witnesses, to file pretrial motions. None of these things could have been done by petitioner here. We can say that the Legal Aid Society has been appointed, but what we have to speak in terms of is the effectiveness of the personal counsel that was furnished to him.

Q What about pretrial motions for the first trial?

A There were none filed.

Q There was plenty of opportunity?

A There would have been plenty of time for it. In other cases this Court has not considered the possibility of prejudice in connection with the appointment of counsel.

In Glasser vs. United States, for example, where the Court determined that it would not inquire into the degree of prejudice sustained by one who had not had the assistance of counsel, unimpaired by a conflict of Interest.

MR. CHIEF JUSTICE BURGER: We will suspend for lunch and continue after lunch, Counsel.

(Whereupon, at 12:00 noon, the Court was in recess, to receonvene at 1:00 o'clock p.m., the same day.)

AFTERNOON SESSION

1:05 p.m.

MR. CHIEF JUSTICE BURGER: Do you want to keep the remaining time for rebuttal or do you want to continue?

MR. GROGAN: I would like to continue, please.

Before the luncheon recess, Mr. Justice Marshall asked me a question in connection with when petitioner first met his counsel. I find in the appendix, page 256, the testimony at the state habeas corpus hearing indicates that he first met his counsel on the morning of trial. It states it quite clear.

In my remaining time, I would like to point out to the Court that our argument in connection with the rule of the Third Circuit as adopted in this case is erroneous that for the reason that we do not believe that you must show specific prejudice in order to warrant reversal. We point to the case this Court is considering in connection with recidivist proceedings in connection with the pretrial procedures. But, in any event, if you assume the validity of the rule adopted by the Third Circuit in this case, which shifts the burden to the prosecuting authorities to show that there was not a prejudice from the appointment of counsel, that this rule doesn't follow the teachings of this Court as indicated in the case of Chapman, because in Chapman this Court said before you can declare a constitutional error to be harmless, the court must

express a belief that it was harmless beyond a reasonable doubt. And this rule, as adopted by the Third Circuit, talks in terms of overcoming this prima facie case of the ineffectiveness of counsel solely by adequate affirmative proof, and we submit that adequate affirmative proof in this case is not the same thing as proof beyond a reasonable doubt, as in this case we have nothing but the trial record before us, and all that that trial record discloses is what was done or what may have been -- what counsel may have been able to do within the confines of the record as stated.

There is nothing here to indicat what could have been done that was not done, what counsel may have had to consider and yet did not take any action upon. We pointed out in our brief that there are instances where even if you assume the validity of the rule and ignored the dictates of Chapman, that there is specific prejudice indicated, indicated by the failure of counsel, for example, for forcibly argue for severance of the indictments of the two counts in connection with the two separate robberies. There is no common scheme.

The only thing in common about them was the fact that the fruits of the robberies were found at the same time. There are other things to consider. In this case, the Third Circuit went beyond the rule of the Fourth Circuit and inquired into the adequacy of counsel solely by reference to the record of the trial. Nothing was done here to develop what counsel

could have done through his own testimony. This case, unlike any other case we could find, counsel did not testify. Counsel was not called to testify either in the habeas corpus hearing or in the habeas corpus hearings in the Federal District Court.

The Legal Aid Society records were never introduced. The petitioner was never examined in detail as to what defenses he may have had. The testimony of the petitioner, at the place I have indicated in the record, covers just a few pages and centers around the fact that he met his counsel on that morning. There is no explanation of the failure of the counsel, for example, to file the pretrial motions as indicated by the record. These things should be determined and can only be done so by following the dictates of Townsend vs. Sain and having a preliminary hearing.

Turning to the search and seizure problem, we have argued in the brief that there was not probable cause for arrest, and I believe that argument is set forth adequately in the brief. I would like, however, in the remaining time to call the Court's attention to what the Third Circuit did in this case in connection with the application of the doctrine of Preston vs. United States.

Q If we accept your view on the necessity for a hearing, that that was the error in this case, you don't reach any of these other questions, do you?

A That's correct, Your Honor.

In Preston, this Court decided that where a person is lawfully arrested, a warrantless search can be made for two purposes: to find weapons to prevent the person from escaping or from injuring the apprehending officer, and also to prevent destruction of any evidence.

The Third Circuit, in its case of United States vs. Dento, placed two additional distinguishing features into that test and said that you can nevertheless validate a warrantless search where the search was substantially contemporaneous and there was a reasonable nexus between the offense and the search. Neither of these matters were a part of the Preston test and should not become a part of our law.

We have indicated to the Court in our brief that the case of Wood vs. Crouse, decided by the Tenth Circuit, ably distinguishes Dento and indicates its failure to follow the dictates of Preston.

Q How was this car taken to the police station?

A It was driven by the owner, Lawson, one of the co-defendants.

Q One of the co-defendants; and was a policeman in the car with him?

A A policeman was in the car with him.

Q Do you think he had probable cause to arrest a man by finding him in his car somewhere, and he arrests him -- do you think -- you put him in the patrol car and take him

to the -- do you think the police have the right to seize the car and take it to the station or anywhere else?

A I believe they have the right to take the car some place else, Your Honor, to the station perhaps.

Q Why?

A I question whether they have --

Q Well, what probable cause have they got to seize the car?

A If we assume that the --

Q Other than just to get it off the street?

A That is my reason for saying it, to get it off the street.

Q Well, they can just park it somewhere where it doesn't say "no parking."

A Yes, sir. That would be all that they could do.

Q They couldn't take it to the station?

A I don't believe so, Your Honor, nor could they do the things that they did in this case, which was to conduct after they had taken it to the station or it had been driven to the station --

Q Let's assume they could take it to the station.

Q Do you agree that they can take it to the station?

A I don't believe, Your Honor, that they can just take it to the station for any other purpose than to get it off

the street. I am not sure they can move it.

Q Do you think they could impound it?

A It depends on the circumstances of --

Q Could they tie it up so that the defendant's wife couldn't come and drive it away?

A I don't believe so, without some further action.

Q Or impound it so that no one could remove heroin from the gas tank or some such thing, or pistols from the heater even?

A If they had a reason to believe it, they could have gone out and gotten themselves a warrant at the time or left someone there in custody of the car, have a police officer remain with the car.

Q I know, but somebody shows up with the car -- they park the car in a legal parking zone, take the man to the police station and leave an officer with the car and the wife shows up at the car and says, "I want the car and I am going to drive it away." They couldn't hold it, could they?

A I don't believe so.

Q Can they search the car? I want to be sure to get that clear. Put them in the setting where they stopped the car and they pulled it onto the side of the street. Can they search the car from top to bottom right then and there?

A I don't believe so, under the dictates of Preston, Mr. Chief Justice.

Q Isn't that their duty to search then and there?

A Preston permits the search then and there for the purpose of preventing the destruction of evidence or to prevent the suspects from getting to weapons.

Q Wasn't it the Harrison or Harris case that came after that that shed a little bit more light on the subject --

A I don't think it would permit --

Q -- in the District of Columbia Circuit?

Q Cooper.

Q Cooper?

Q Cooper.

Q No, I think it was Harris. I think it was Harris. Well, no matter.

Q Oh, yes, Harris, that's right.

Q Well, I don't want to interrupt your argument any longer.

A Your Honor, I believe my time is up. Thank you very much for the opportunity of preventing the case to the Court.

MR. CHIEF JUSTICE: Miss Los?

ARGUMENT OF CAROL MARY LOS

ON BEHALF OF RESPONDENT

MISS LOS: Mr. Chief Justice, may it please the Court:

The Commonwealth of Pennsylvania will readily agree that certainly no man should be asked to stand trial on serious

criminal charges or on any charges unless he has had adequate opportunity to discuss his case with counsel. And certainly counsel shouldn't be forced to represent a man with only a few moments notice. This we feel destroys any semblance of the attorney-client relationship, because not only does it lend itself to the fact that the attorney might not be adequately prepared but also he may lack the inclination to act on behalf of his client. Fortunately, that did not happen to Frank Chambers.

As the record shows, we know that he was visited during the five-month period that he was lodged in the county jail by an investigator from the Legal Aid Society, that the investigator did prepare a report that was reduced to writing and was placed in the file, that the file was subsequently turned over to Mr. Tamburo, who was to represent Chambers on the day of trial.

Q Is that all in the record?

A Your Honor, it is in the record by virtue of allegations made in response to habeas corpus petition filed in the state court. Unfortunately, what happened in the state habeas corpus hearing was that counsel for the petitioner then withdrew the allegation of ineffective assistance of counsel. Consequently, the matter was never before the court, the Commonwealth was not required to go forward with its burden of proof or to present Mr. Tamburo or to offer in fact any files

or records from the Legal Aid Society. Consequently, there is nothing actually on the record before your Court --

Q Was this evidence ever presented to a state court?

A It was presented to a state court --

Q But it was withdrawn.

A -- and withdrawn. However, Your Honor, in the federal district court the judge there felt that since the petitioner himself had raised it, that it should be considered again by him.

Q He thought that exhausted state limits?

A He did, Your Honor.

Q Do you agree?

A I feel that if that is the case, if the petitioner was not waiving it at the time, that it did not exhaust the state --

Q How did he -- he withdrew it?

A By virtue of his counsel when the Commonwealth attempted to cross-examine Chambers about the length of time that he had no chance to speak with Mr. Tamburo --

Q Well, if there wasn't an adequate hearing by the state, it was because they withdrew that issue?

A Yes, that is our point, Your Honor. We are saying that they withdrew it. If there is anything lacking on the record, then it is lacking by virtue of counsel for the

petitioner at the time withdrawing the allegation, and consequently the Commonwealth then stopped its line of questioning of the petitioner on these lines and did not present any affirmative evidence to show that the petitioner had had an opportunity to discuss this case with Mr. Tamburo.

In any event, I think we can tell from the record that Mr. Tamburo was very much aware of the facts of the mistrial that had occurred three weeks prior, and was certainly very much aware of the evidence that had been admitted at the previous trial.

Chambers says that the mere fact that he didn't get to consult with Mr. Tamburo for a longer period of time warrants a new trial. In the past, in an early circuit, in the state courts, when an allegation of this nature is made, it is merely one factor to be considered in the overall test of the effectiveness of counsel. In other words, the burden remains with the petitioner to prove that he was prejudiced because of the belated appointment.

Q Excuse me, Miss Los. Do we have the state hearing record here?

A Yes, you do, Your Honor.

Q I mean is it in print or is it in the --

A It is in print --

Q Thank you. Don't bother with that. And that will tell us all the facts of the withdrawal of the counsel

point during the hearing?

A Yes, it does, Your Honor. It sets it forward for you. Now, generally, this is the Pennsylvania rule. In other words, the petitioner would have to show that the appointment was made in bad faith as being really perfunctory prior to trial, or that he was actually prejudiced. This is the position, I believe, that the Attorney General of New York seeks to bring before you in the amicus brief in this case.

This position -- while we are certainly happy to have the work by the Attorney General of New York -- goes beyond the position that we are taking, because we feel that as far as the facts and the practice of criminal law in Allegheny County is concerned, that the facts especially in this case might warrant the presumption that the Third Circuit has given in cases of belated appointment.

For one thing, there is certainly a great hesitancy among the judiciary to judge defense counsel's work, especially if the judge has himself appointed defense counsel to represent an instant defendant. And, again, there is a hesitancy on the part of the defense counsel to say that he actually was ineffective or was inadequately prepared. Of course, where he has not asked for a continuance of the case, based upon these facts, it would be, I think, more embarrassing for him to admit that he was inadequately prepared. And, third, of course, the prisoner, lacking any legal knowledge, would not be

in a position to judge his attorney's competence.

Now, the problem is aggravated in Allegheny County, in Pittsburgh, because there unless the case is a murder case, or involves an extensive string of armed robberies, counsel is appointed ahead of time -- it is the public defender's office who is appointed -- and an investigator does the preparatory work, but unfortunately the prisoner does not have an opportunity to speak with his counsel sometimes even just prior to going into the courtroom. Usually counsel, defense counsel will visit the prisoner in the bullpen, which is located below the courtroom, on the morning of the trial, but unfortunately in most situations, I must admit, counsel does not have an opportunity to speak with his client until just moments before the trial begins. He does, of course --

Q Miss Los, the petitioner says that under those circumstances, there is no way under the sun to file a pretrial motion.

A Well, that is true, Your Honor. That is very possible, that that particular counsel did not file one. The investigator, of course, prepares the facts and these facts are available to trial counsel. He does not get to confer with his client, but there was a previous conference done by the investigator from the public defender's staff. Here the trial judge --

Q Well, who made the decision as to whether or

not to file pretrial motions in this case?

A The record is unclear on that. I would presume that it was done by counsel --

Q The record is clear that counsel from the Legal Aid Society could not have done so because he did not get it until that morning.

A All we know, Your Honor, is that he did not confer with his client prior to that morning. He may possibly have had the case prior to that, but I don't think that is relevant in this situation, Your Honor, because here the state judge as well as the federal judges all ruled on the admissibility of that evidence anyway, despite the fact that no pretrial motions were filed. In other words, they granted the fact that they should have been filed, but no one said we will rule specifically on the admissibility of the evidence.

Q What about the first trial?

A At the first trial, Your Honor, I believe the bullets were not admitted into evidence, and I presume the counsel then -- Mr. Tamburo, that is -- would have relied upon that.

Q Did they offer anything seized in the car?

A I am not familiar with that because we did not have a copy of that until --

Q I got the impression from the record that they put the pistols in, they put the weapons in --

A Right.

Q -- but not the bullets.

A Right. But not the bullets.

Q Well, was there objection to the -- certainly, the petitioner had consultations at his first trial with the Legal Aid Society representative?

A Yes, of course.

Q And there was ample time there for pretrial motions?

A As I say, Your Honor, we don't have anything as a matter of record to bring before you on this point, and I would presume there was --

Q Well, the record then wasn't fully developed on this counsel point?

A That is very true, it is not, Your Honor. And, again, I say that the Commonwealth did not have to go forward with the evidence in this particular matter. We will concede, though, that the ruling circuit which raises the presumption should be applicable to cases of this nature, especially in lieu of the Allegheny County situation, and the circuit judge, David Stalt, who ruled on this case, was from Allegheny County, and was quite familiar, I believe, with the situation.

Q What did you say, raised the presumption of what?

A It raises the presumption of ineffective

assistance of counsel from the fact that counsel did not have an opportunity to confer with his client prior to trial, Your Honor.

Q Does the record show how long the lawyer had been practicing law?

A No, it does not, Your Honor. There was no investigation at all into this matter.

Q That is because, you say, that they withdrew it?

A Yes, they did, Your Honor. Counsel specifically stated, when an Assistant District Attorney attempted to cross-examine Chambers, his defense counsel got up and said, "We want it to be made clear to the court that we are not challenging the effectiveness of counsel."

Q Which defense counsel was that?

A This is Mr. Dixon, who was specially appointed at the state habeas corpus hearing.

Q Now, are you telling us that this is standard operating procedure in Pittsburgh?

A Yes, I am, Your Honor.

Q And happens in every case except for first degree murder case or something like that?

A Or a serious case of armed robbery.

Q Or a serious case of armed robbery.

A Or large narcotics --

Q But in felony cases your representation is that

it is standard procedure in Allegheny County, Pittsburgh, for the actual lawyer who is going to be in the courtroom representing the indigent not to see him until the morning of the trial, usually in the bullpen? Is that it?

A Yes, that is true, Your Honor. However, an investigator from the public defender's office has previously conferred with him and has prepared a file of those matters that should be raised and, in addition, if there are defenses which must be raised, the subpoena the witnesses. Now --

Q Did the lawyer raise any objections of the sort at the time?

A No, he did not, Your Honor. He did not in this case.

Q How long was it before that was raised?

A It was not raised until the state habeas corpus and I believe that was two years later, it was not raised.

Q How long later?

A It was approximately, I believe, two years later that it was raised. It was not raised by way of post-trial motions, it was not raised on a direct appeal.

Q At the time of the sentencing, does the state procedure allow a right of allocution and, if so, was it exercized? Did the defendant make any statement of his own to the court at the time of sentencing?

A We don't have a record of that, Your Honor. I

would presume that our state procedure does call for that right, and he would be allowed certainly to say anything that he wished in his own behalf.

Q I suppose it would be reasonable to assume that if, in exercising that right, he complained about the performance of his counsel, that someone would have brought it to our attention and to yours by now?

A Yes, and I presume then that it would have been a matter of record so that we might have it to bring before the Court.

Q I wasn't sure about the presumption. Do you suggest that there is some kind of presumption that there is ineffectiveness of counsel if the lawyer doesn't see the client until the day of the trial?

A Yes, the Third Circuit has adopted a rule wherein they grant presumption to the defendant, if he can prove that he only met his counsel very shortly before trial, that a presumption of ineffective assistance of counsel would be raised.

Q On that basis, half of the cases of England would be presumed to be ineffective for they rarely ever see their client.

A And in Allegheny County, I am afraid the percentage would be even greater, Your Honor.

Q Well, I would say at least half. But an

associate mainly under the British system, a solicitor, and in Allegheny County an investigator for the public defender's office sees the man and does the investigating. Is that right?

A Yes, that is correct, Your Honor. That is correct.

Q So it is an institutional defense that he has. It is as though he hired a law firm and had the services of several people instead of one?

A Yes, that is correct. Now, he says that he was actually prejudiced by the failure to file these post-trial motions, these pretrial motions and, as I suggested to you, he was not prejudiced because in fact the trial judge as well as the federal district court judge and the circuit court judge discussed the admission of the evidence right on the merits, that he could not have possibly been prejudiced by that. He says he is prejudiced because he did not receive a severance from the other defendants, and he cites the fact that Raymond Lawson had previously been tried on a murder charge.

In fact, I would venture to say that the other defendants were prejudiced by being tried with him, because he was the one that was identified as being the gunman at the two robberies.

Q I take it the state court judge who passed on the habeas corpus decision actually reached the counsel point, didn't he?

A Yes, he did, Your Honor.

Q Why did he do that if the point had been withdrawn?

A Well, I believe that in answering the petition of --

Q It raises it on the basis of the petition?

A -- it was raised there -- so he answered it.

Q Where do we stand on exhaustion, then, if the state court actually purported to dispose of the point?

A If you should find that indeed the petitioner had not waived his right to raise that point and that the record -- and even though his counsel might have done so, if he had not joined in this, that the allegation would still stand and the record was inadequate for either the state habeas corpus judge to rule on it and any of the federal judges, then I feel I am forced to say that it must be remanded for an evidentiary hearing.

If you find that there was sufficient evidence for the state judge and the federal judges, even if he had not waived it, then a hearing is unnecessary.

Q When was this circuit court rule adopted by the prima facie evidence?

A The circuit was adopted, I believe, prior to this in the case of Mathis -- United States ex rel. Mathis vs. Rundle, which we have cited for you in our brief. It has been

cited by the petitioner as well as by ourselves.

Q That was before he was tried the first time?

A No, Your Honor, it is not.

Q It was not in effect?

A No, it was no in effect until 1967, and --

Q What does it have to do with this case, then?

A Well --

Q That is so-salled presumption.

A I believe it is their position that the effectiveness of counsel is a question which does not depend upon retroactivity for its existence. In other words, this is fundamental to a defendant's due process of law and an indigent defendant's equal protection under the laws, consequently it would not --

Q I presume that many lawyers have walked into a courtroom in many cases, civil and criminal, and didn't know anything about the case until they started.

A Well, that may very well well be true, Your Honor. I would suggest that certainly as far as their client is concerned, they are in a rather precarious position. In other words, once the state has appointed counsel for someone and that particular counsel chooses not to prepare the case and in effect renders ineffective assistance to counsel, or counsel is appointed by the state merely as a perfunctory gesture so that there is not sufficient time to prepare, then

certainly I think it is our duty, whether it is a prosecutor saying it or a defense counsel or the court, to step in and to rectify that situation.

Q Is there anything whatever in the record concerning the way the man tried the case or concerning any other facts that were established to show the court that he wasn't an effective lawyer?

A No, Your Honor, there is absolutely nothing to show that he was not an effective lawyer.

Q Nothing except that he was appointed that morning?

A That is correct, Your Honor. There are the allegations --

Q Well, the petitioner doesn't agree with you about that at all.

A No, there are, of course, allegations made that they should have filed these pretrial motions --

Q Yes.

A -- and they should have argued for severance. They should have filed the pretrial motions to suppress evidence.

Q Argued for severance?

A And argued for severance. They joined in the motion for severance. They did not make a specific -- that particular counsel did not make a specific --

Q Well, is there any reason, any evidence shown here that severance would have been granted, or is there any reason --

A Absolutely none. There is absolutely none, Your Honor.

Q Sometimes a severance is not desired, not a desirable thing, sometimes. And they have nothing here to show that a severance would have helped him?

A No, Your Honor, there is nothing that shows that at all.

Q Did they argue that there was anything that would have helped him in a severance?

A Well, they argued that Raymond Lawson, a co-defendant, had been previously tried on a murder charge and that if they had known this they never would have wanted Lawson to be able to testify in his own behalf, because he apparently does not make a very credible witness. It is our position that any one of the co-defendants might have been more prejudiced by being tried with Chambers than vice versa because of the four of them, Chambers was the one that was absolutely identified as the gunman in the two different robberies. Consequently, we don't think there is anything at all that would have aided Chambers by being severed from the two cases.

Q Petitioner refers primarily to the pretrial motions to suppress.

A Yes, Your Honor, that is true.

Q And he says that if counsel had known about the situation, the lawyer, the individual lawyer had known about this situation, he would have filed the motions to suppress and therefore wouldn't have been prejudiced by the later action of the court admitting the evidence on the basis of the fact that the proper procedures hadn't been followed to suppress the evidence. Isn't that his argument?

A That is his argument, and our answer to that, of course, is that the judge actually -- the trial judge ruled on the merits, as did the federal judges who later had an opportunity to review this.

Q Was there any motion made?

Q No.

A There was a motion, yes, Your Honor, at trial --

Q By defense?

A -- yes, at trial a motion was made, an objection.

Q And it was denied on the ground that it was too late?

A The trial judge, in answering, said you should have filed a motion to suppress, and then he said, however, I don't feel that this is evidence which should be suppressed and, consequently, I will overrule your objection.

Q He overrules the objection to the motion to suppress?

A That is correct, Your Honor, he overruled the objection.

Q But he did so on the merits?

A I believe he did so directly on the merits.

Q Miss Los, in Pennsylvania, in a motion to suppress, is the defendant allowed to put on evidence?

A Yes, he is, Your Honor. The burden shifts to the Commonwealth to prove the admissibility of the evidence, then the --

Q Well, the motion is made during the trial in this case, and the judge said there is no evidence, right, about the seizure?

A As far as the bullets were concerned, that was not in evidence at that time.

Q And the judge said he should have made his motion but, since he didn't make it, I will rule on it that the motion is denied?

A If I may explain, Your Honor, initially there were two objections made at trial, one was as to the evidence found on the car at the search of the car; the other was made to the bullets that were seized at the petitioner's home. As far as the original one was concerned, an objection was made to the admission of that at trial, not a formal motion to suppress but, instead, an objection to the evidence that had already been admitted into evidence.

Q Did they have voir dire on that?

A No, they did not, Your Honor. They did not.

Q What I am trying to get is you are not telling us that that is the motion at trial is the same as a motion before trial?

A No, I'm not, Your Honor. I am saying, though, that if the judge has an opportunity to rule on the merits as to whether or not it is admitted --

Q As far as any of the merits, does there have to be testimony at that stage as to how the court can proceed?

A At the time the judge ruled on them, yes. The motion was made before the court. The trial judge said I will hear the evidence as far as the bullets are concerned. And further when he heard the evidence he ruled that they were admissible.

Q Did he hear the defendant?

A No, he did not at that particular time.

Q Did he hear the defendant's witnesses?

A No, he did not, Your Honor.

Q How could he rule on the merits without hearing -- with only hearing one side?

A Because, Your Honor, he has before him the warrant and the testimony of the police officer who served that warrant, who searched the house.

Q That is merit?

A Yes, Your Honor, I feel that he can make a judgment as to the admissibility of the evidence based upon that.

Q Well, was the defendant precluded at that time from putting in any evidence he wanted to on the subject matter?

A Your Honor, he did not make an attempt to do so, and later he didn't offer any defense. Consequently, I would presume that he didn't have anybody available to --

Q What was the evidence that they moved to suppress?

A An objection was made initially to the evidence that was found when the car was searched at the police station. It was --

Q What was the evidence?

A Two revolvers, two guns, that were loaded. There was a glove full of change that was later identified as being taken from the Gulf service station robbery. There was several cards, identification cards, drivers' licenses, that were taken, and credit cards that were taken out of a robbery one week previous to that. It was a Boron station robbery. That was objected to at trial and was admitted into evidence. Then counsel, Mr. Tamburo, suggested to the court that bullets were going to be introduced and he wanted to preclude the court --

Q What bullets?

A These were bullets that were found after a warrant had been served at the petitioner's house the day after the robbery. It was on the morning of the robbery, a police officer went to the house -- he went to the houses of all of the defendants -- that it was --

Q What do the bullets show?

A The bullets were of two character: they were short and long, .38 caliber bullets, a good number of those bullets were dum-dum bullets, which a police officer testified were rather rare in his experience. The prosecution then placed into evidence the two revolvers that were seized from the car in which the petitioner was riding. These two -- the bullets from those guns matched, in other words they were .38 caliber, long and short dum-dum bullets.

Q Was it shown that they could have been fired in those pistols?

A That was true, Your Honor.

Q That was the object?

A That was the object of admitting them into evidence.

Q And where were the bullets found?

A They were found in petitioner's home, in his apartment.

Q In what?

A In his apartment.

Q As to the merits, I don't recall the record at the moment, but you spoke of eyewitnesses. How many eyewitnesses identified this appellant -- petitioner?

A At the first -- involving the first robbery, there was only one witness, the fellow who was robbed, the gas station attendant. He positively identified him. For the second robbery, the fellow who was robbed stated that he was unable to identify him in court because his physical characteristics were somewhat changed. He had a different -- it was different clothing, he was now wearing glasses, and had shaved, and the scarf he was wearing at the time of the robbery. However, he did identify him within hours of the robbery as being the person who -- the gunman who had come in to rob him. So this is the eyewitness testimony that we have.

The teenagers who observed the car circling the area, the car which contained four Negro occupants. One was wearing a dark green pullover V-neck sweater; another was wearing a white trenchcoat, and we know from the fellow who was robbed that one of the gunmen was wearing a V-neck sweater and another was wearing a light tan trenchcoat. Of course, we have no eyewitness testimony from the two teenagers who observed this car because they couldn't identify anyone who was in the car other than their race and their dress, and they did not observe the robbery.

I would like just for a moment, if I may, to reach

the question of the search that was conducted at the police station. Certainly, if Chimel is retroactive, then I must concede this argument, but it is our position that at the time that the police officers acted, that the test must be the reasonableness of the search that they made. They couldn't search the car --

Q What do you do with Preston?

A Pardon?

Q What do you do with Preston?

A We believe that Preston is merely an extension of the reasonableness rule. In other words, our facts, if we can differentiate them from Preston, would be acceptable as far as the reasonableness --

Q How do you do that?

A Well, by saying this, Your Honor: For one thing, we maintain that this was a search instant to lawful arrest, that the search that was made at the police station was substantially contemporaneous with the arrest --

Q Was there any time interval indicated?

A A very short time interval, Your Honor.

Q But nothing in the way of minutes or --

A We don't know precisely.

Q But, in any event, was it after they had been put in safe-keeping?

A Taken to the police station.

Q Well, had they been locked away or something?

A Yes, you're right, Your Honor. They were inside the police station. I can't make a true argument and say well, the police were just attempting to inventory the car or to --

Q They were in no position where they could reach the car, were they?

A No, they could not reach the car, I will admit that. But we are saying that the police officers would have placed themselves in danger because of the dark circumstances in this parking lot, the fact that it adjoined a bar where friends of the petitioner and his co-defendants did frequent.

Q Where was the car when they searched it?

A When they searched it, it was at the police station. They took it by virtue of having Lawson drive it with a police officer to the station, and it was there that they searched it. We are saying, if I may, Your Honor, that they couldn't have searched it in the dark parking lot. It was too dangerous for them. The number of policemen that they had there -- it was too dark to be able to search the car effectively.

Q Well, I don't quite understand, what is your position -- once they got it to the station and they had the four men safely locked away, they then had the car, where, in the station house garage or something?

A They had it in the driveway, which is --

Q In the driveway along side the station?

A Yes, Your Honor.

Q Why would Preston not apply notwithstanding they could not have searched it where initially they arrested these people?

A Because, Your Honor, we feel that there is a reasonable nexus between the crime charged here, the fact that this was the escape automobile, whereas in Preston there was no connection between the search of the car and the vagrancy, the reason why the --

Q Except, as I understood it, here is the car safely in the station house driveway.

A It is, Your Honor.

Q Entirely in the custody of the police. So I take it that nothing could have happened had they gone to a magistrate to get a warrant to search it? But the --

A If that is the test, Your Honor. We don't feel that at that particular time it was the test.

Q What made your custody of the car legal?

A The car was taken, Your Honor, because it was suspected as being the escape vehicle. Certainly, if someone had come to claim the car, the police officers could not have detained it.

Q If the wife or a confederate or anybody else

had shown up to take the car, just when they wanted to search it, they would have had to let it go, wouldn't they?

A You're right, Your Honor, I would say --

Q Do you really say that?

A I am saying that if --

Q Why couldn't they have held it?

A If they had searched the car --

Q If they could search it, I would think they could hold it to search it.

A If they had not begun search by the time members of the family had come to take the car, I would presume, because of the time lapse there, it could not be substantially contemporaneous with the arrest. If they had the right to search the car, the right extends, as I --

Q Do you think the car was in the category of evidence? You suggested that it may have been the getaway car from the robbery, you are speaking of now, that it might have been evidence, that this was the car that was used in the robbery?

A Well, Your Honor --

Q You don't rely on that?

A I don't rely on that, because I know that the witnesses could not specifically identify this particular automobile.

Q Thank you. I see.

Q But this was the automobile they were found in?

A Excuse me?

Q It was the automobile, whether it was identified or not, wasn't it?

A Yes, it was, but as far as seizing it for purposes of evidence, in other words had it been identified as being the getaway car by someone, we could not do that because we know --

Q Whose car was it?

A It belonged to Raymond Lawson, who was a co-defendant. He was driving the automobile.

Q Your time is up, Miss Los, but I have one question for you. Neither you nor your friend seems to cite the Harris or Harrison case out of the District of Columbia Circuit, which at least a great many people read as a considerable clarification of the Preston doctrine, where the automobile was searched by the police without a warrant substantially after the time of the arrest and several miles away.

Are you familiar with the case?

A I am, Your Honor. Unfortunately, it does escape me at the moment. I know that we did consider it. We chose to rely on Dento, which the circuit relied upon.

Q I just wondered if there was any reason to think that it was not in point, as I sat on the case in the Court of Appeals and my recollection is that it is very much

in point here. Perhaps Mr. Grogan will shed some light on it, if he wishes to.

REBUTTAL ARGUMENT OF VINCENT J. GROGAN

ON BEHALF OF PETITIONER

MR. GROGAN: We also considered it. I frankly at this point don't recall what our reasons were when we prepared the brief for not including it.

If I may, there was one thing I would like to call to the Court's attention. In connection with the waiver of the argument on the ineffectiveness of counsel, I think the case of Fay vs. cited by this Court would have to indicate that there had been a knowing waiver, and here counsel made this gratuitous statement in the course of discussion, that it was not participated in by the defendant in any fashion.

Q You have a substantial amount of time left, if you wish for rebuttal.

A I am out of time.

Q Are you out? Excuse me, I am looking at the wrong sheet on the wrong case. I showed nine minutes, but I was mistaken.

A Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you for your submission, and for yours. The case is submitted.

(Whereupon, at 1:45 o'clock p.m., the argument in the above-entitled matter was concluded.)