PANEL REPORT

DATE: Wednesday, October 14, 1981 Ctrm 1 1:30 P.M.

PANEL: ENGEL, BROWN & UNTHANK , JJ.

81-1039 Valorus Mattheis v. Charles Anderson

(E.D. Mich. Guy, J.)

In lieu of a panel report there is attached hereto for the special attention of Judges Engel and Unthank a proposed order in the captioned case.

Your comments and suggestions are invited.

BAILEY BROWN

BB:asw

Enc.

CC: All Judges

October 15, 1981

Dear Judge Brown:

I concur.

G. Wix Unthank
Judge

NO. 81-1039

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

| | | |
|---|---|---|
| VALORUS MATTHEIS,<br><br>Petitioner-Appellant,<br><br>v<br><br>CHARLES ANDERSON,<br><br>Respondent-Appellee. | ) | O R D E R |

Before: ENGEL and BROWN, Circuit Judges; UNTHANK, District Judge.*

This cause comes before this court on a petition for a writ of habeas corpus under 28 U.S.C. § 2254 (1976), which was filed in the United States District Court for the Eastern District of Michigan on January 4, 1980. The district court denied relief and dismissed the petition on November 19, 1980.

Petitioner was convicted in 1951 by a Michigan state jury of the first degree murder of Carolyn Drown. He was tried jointly with his codefendant, Ray Olson, who was also convicted, and both received mandatory life sentences. The prosecutor proceeded under two theories: premeditation and felony (rape) murder. Petitioner had an alibi defense. He also accused various individuals, including his codefendant, of committing the murder.

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* The Honorable G. Wix Unthank, United States District Judge for the Eastern District of Kentucky, sitting by designation.

The sheriff interrogated petitioner the evening of the second day of trial without notifying defense counsel. At that time, petitioner, stating that he was willing to talk without his lawyer present, told the sheriff that he doubted that two Indiana men that he had implicated in the crime were actually involved. When petitioner's counsel learned of this interrogation, he complained to the trial judge, who had the sheriff testify to ascertain what had occurred. The testimony was given in the presence of the jury without objection. This statement was one of several made by petitioner, and according to his counsel at argument, 60% of these statements were inculpatory and 40% were exculpatory.

Petitioner received a state trial court review of the voluntariness of a pretrial confession in 1969. Later, the Michigan Court of Appeals affirmed petitioner's conviction in 1976 on an application for a delayed appeal, primarily on the basis of the Michigan Supreme Court's affirmance of codefendant Olson's conviction. The Michigan Supreme Court denied leave for petitioner to appeal on October 15, 1979.

Petitioner has asserted various constitutional errors. He contends that he was deprived of his right to counsel by the sheriff's interrogation without defense counsel being present, and denied a fair trial because certain polygraph evidence was made known to the jury and by introduction without adequate foundation of comparisons

of hair and fiber samples. He also contends that the jury instructions and certain trial procedures violated due process of law and deprived him of a fundamentally fair trial.

District Judge Ralph B. Guy, Jr., who entertained this application for habeas relief, reviewed the record and contentions and wrote a full and careful opinion denying relief. Judge Guy did not, however, determine the effect of the long delay in bringing this application under Rule 9(a) of the Rules governing 28 U.S.C. § 2254 cases, from which we assume that respondent did not rely on Rule 9(a). We agree with Judge Guy that petitioner has not shown that his conviction is tainted by constitutional error.

It is therefore ORDERED that the judgment of the district court be and the same is AFFIRMED.

ENTERED BY ORDER OF THE COURT

_____

Clerk

(5)

81-1039
(Case No.)

Courtroom # 1

10/14/81 PM
(Date)

Style of Case:

Counsel

VALORUS MATTHEIS

ARTHUR J. TARNOW

PETITIONER-APPELLANT

v.

Rule 9.

CHARLES ANDERSON

THOMAS L. CASEY

RESPONDENT-APPELLEE

20 MIN. PER SIDE
(Time Allocation)

6CA-47
4-80

United States Court of Appeals
For the Sixth Circuit
Ohio — Michigan — Kentucky — Tennessee

16 December 1981

Chambers of
Bailey Brown, Circuit Judge
Suite 630
Commerce Union Square Building
2670 Union Extended
Memphis, Tennessee 38112

HAND DELIVERED

Mr. John P. Hehman
Clerk
United States Court of Appeals
516 U.S. Post Office & Courthouse
Cincinnati, Ohio 45202

Re: # 81-1039 Valorus Mattheis v. Charles Anderson
(Heard 10/14/81 - Order Filed 11/2/81)

Dear Mr. Hehman:

Enclosed for signature and filing is an order in the captioned case which denies the petition for rehearing.

Judges Engel and Unthank have concurred.

Sincerely yours,

Bailey Brown
Circuit Judge

BB:asw
Enc.
CC: Judge Engel
Judge Unthank

United States Court of Appeals
For the Sixth Circuit
Ohio — Michigan — Kentucky — Tennessee

7 December 1981

Chambers of
Bailey Brown, Circuit Judge
Suite 630
Commerce Union Square Building
2670 Union Extended
Memphis, Tennessee 38112



Honorable Albert J. Engel

Honorable G. Wix Unthank

Re: # 81-1039 Valorus Mattheis v. Charles Anderson

(Heard 10/14/81)

Dear Judges:

Enclosed herewith is copy of a proposed order denying the motion for rehearing in the captioned case.

Your comments and suggestions will be appreciated.

Sincerely yours,

Bailey Brown
Circuit Judge

BB:asw

Enc.

Date 12/9/81

Dear Judge Brown
I concur
Albert J. Engel

cc: Judge Unthank

Dear Judge Brown: 12/10/81

I concur.

G. Wix Unthank

United States Court of Appeals
For the Sixth Circuit
Ohio — Michigan — Kentucky — Tennessee

7 December 1981

Chambers of
Bailey Brown, Circuit Judge
Suite 630
Commerce Union Square Building
2670 Union Extended
Memphis, Tennessee 38112

Honorable Albert J. Engel

Honorable G. Wix Unthank

Re: # 81-1039 Valorus Mattheis v. Charles Anderson

(Heard 10/14/81)

Dear Judges:

Enclosed herewith is copy of a proposed order denying the motion for rehearing in the captioned case.

Your comments and suggestions will be appreciated.

Sincerely yours,

Bailey Brown
Circuit Judge

BB:asw

Enc.

NO. 81-1039

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

| | | |
|---|---|---|
| VALORUS MATTHEIS,<br>Plaintiff-Appellant<br><br>v<br><br>CHARLES ANDERSON,<br>Defendant-Appellee | ) | O R D E R |

Before: ENGEL and BROWN, Circuit Judges; UNTHANK, District Judge.*

On receipt and consideration of a petition for rehearing and suggestion for rehearing en banc in the above styled case; and

No judge in active service in this court having moved for rehearing en banc and the motion therefore having been referred to the panel which heard the case; and

The panel having noted nothing of substance in said motion for rehearing which had not been carefully considered before issuance of the court's order,

Now, therefore, the motion for rehearing is hereby denied.

ENTERED BY ORDER OF THE COURT

Clerk

* The Honorable G. Wix Unthank, United States District Judge for the Eastern District of Kentucky, sitting by designation.

United States Court of Appeals
For the Sixth Circuit
Ohio — Michigan — Kentucky — Tennessee

October 30, 1981

Chambers of
Bailey Brown, Circuit Judge
Suite 530
Commerce Union Square Building
2670 Union Extended
Memphis, Tennessee 38112

Mr. John P. Hehman, Clerk
United States Court of Appeals
for the Sixth Circuit
516 USPO & Courthouse Bldg.
Cincinnati, Ohio 45202

RE: No. 81-1039
Valorus Mattheis v. Charles Anderson
(Heard October 14, 1981)

Dear Mr. Hehman:

I am enclosing herewith an order in connection with the captioned case which has the concurrence of Judges Engel and Unthank.

Sincerely yours,

Bailey Brown

BB:cbm
Enclosure
cc: Judge Engel
Judge Unthank

Dear Al:

I think your additions to the order, though they do not change its substance, make it a better one and therefore the order that I am sending to the Clerk contains your version. I appreciate your effort in this regard. Since there was no change in substance, I did not believe it was necessary to consult Judge Unthank again, he having concurred in my version.

BB

Edwards
Weick
Lively
Engel
Keith
Merritt
Brown
Kennedy
Martin
Jones
Cecil
Phillips
Celebrezze
Peck

fell

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

December 3, 1981
(Date)

TO: Judges Engel, Brown and Unthank

FROM: Chief Judge George Edwards

RE: No. 81-1039 - Valorus Mattheis v. Charles Anderson

Argued/~~Submitted~~ 10/14/81 ~~xOpinion~~/Order/~~Per Curiam~~ filed: 11/2/81
Before: Above panel Writing Judge: Brown

The Court has not favored rehearing en banc in the above case. Accordingly, the petition for rehearing is referred to your panel for consideration.

George Edwards
Chief Judge

cc: All Other Active Judges
John P. Hehman, Clerk

Form 6CA-43
1/80

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT
MICHIGAN-OHIO-KENTUCKY-TENNESSEE

CHAMBERS OF
ALBERT J. ENGEL
640 FEDERAL BUILDING
GRAND RAPIDS, MICHIGAN 49503

October 28, 1981

Hon. Bailey Brown
Judge
U. S. Court of Appeals

Re: 81-1039 Valorus Mattheis v. Charles Anderson
(Heard October 14, 1981)

Dear Bailey:

You will recall that at the time of our post-hearing conference, I indicated that I might come up with some suggestions concerning the order which we proposed to enter in the above case affirming Judge Guy's decision. I hope you will not regard my suggested revisions as nit-picking, but I have made some changes, primarily additions, which I hope may make our decision more meaningful or at least palatable for the appellant and his counsel. If nothing else, I think that the delay in rendering the decision may at least satisfy them that we have, in fact, given careful consideration to their appeal, even though we did not ultimately find it meritorious.

If you and Judge Unthank prefer the original language, please know that you have my concurrence in that as well because, basically, all I have done is to add a little window dressing.

Very truly yours,

Albert J. Engel

enc.

CC: Judge Unthank

Dear Judge Engel:

I concur.

G. Wix Unthank

G. Wix Unthank, Judge
11/2/81

The sheriff interrogated petitioner the evening of the second day of trial without notifying defense counsel. At that time, petitioner, stating that he was willing to talk without his lawyer present, told the sheriff that he doubted that two Indiana men that he had implicated in the crime were actually involved. When petitioner's counsel learned of this interrogation, he complained to the trial judge, who had the sheriff testify to ascertain what had occurred. The testimony was given in the presence of the jury without objection. This statement was one of several made by petitioner, and according to his counsel at argument, 60% of these statements were inculpatory and 40% were exculpatory.

Petitioner received a state trial court review of the voluntariness of a pretrial confession in 1969. Later, the Michigan Court of Appeals affirmed petitioner's conviction in 1976 on an application for a delayed appeal, primarily on the basis of the Michigan Supreme Court's affirmance of codefendant Olson's conviction. The Michigan Supreme Court denied leave for petitioner to appeal on October 15, 1979.

Petitioner has asserted various constitutional errors. At the outset we note that the district court did not determine the effect of the long delay in bringing this application under Rule 9(a) of the Rules governing 28 U.S.C. § 2254 cases. We assume from this that respondent did not rely on Rule 9(a) below, and we likewise do not reach the issue.

Petitioner contends that he was deprived of his right to counsel by the sheriff's interrogation without defense counsel being present, and denied a fair trial because certain polygraph

evidence was made known to the jury and by introduction without adequate foundation of comparisons of hair and fiber samples. He also contends that the jury instructions and certain trial procedures violated due process of law and deprived him of a fundamentally fair trial.

District Judge Ralph B. Guy, Jr., who entertained this application for habeas relief, reviewed the record and contentions and wrote a full and careful opinion denying relief. The observation of the Supreme Court of Michigan in codefendant Olson's appeal is equally relevant here:

> Our standards of criminal procedure, and our notion of what constitutes a "fair trial" have changed in the quarter century since this trial occurred. Many practices considered acceptable in 1951 would not be countenanced in 1976. More importantly, they would not be employed by law enforcement agencies today.
>
> We have made a thorough review of the issues presented. We have considered appellant's arguments in light of the law existing in 1951, and have considered application of rulings made since that time. We are not persuaded that this defendant did not receive a fair trial.

People v. Olson, 396 Mich. 30, 31-32, 237 N.W.2d 463 (1976).

We agree with Judge Guy and with the Michigan Supreme Court that petitioner has failed to show that his conviction was tainted by constitutional error when judged by the standards prevailing at the time of the trial and that petitioner has failed to show that the intervening decisions upon which he relies, particularly Massiah v. United States, 377 U.S. 201 (1964), have been given such retroactive effect as to require a grant of habeas corpus relief. Accordingly,

IT IS ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

_____

Clerk

PETITION FOR REHEARING EN BANC

November 16, 1981
Date

Re: 81-1039 Valorus Mattheis
v. Charles Anderson

TO: All Active Judges
and Judge Unthank
FROM: Clerk's Office

Argued/~~Submitted~~ 10/14/81 ~~Opinion~~/Order/~~Per Curiam~~ filed 11/2/81
Before: Engel, Brown and Unthank, JJ.
Writing Judge: Brown

Enclosed is a petition for rehearing en banc and ~~slip opinion~~/type-written order in the above case.

If a poll of active Judges is desired, notify Chief Judge Edwards by endorsement hereon not later than November 30, 1981

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TO: Chief Judge George Edwards

This is to request that the active Judges be polled on whether to grant the petition for rehearing en banc.

(Date) (Signature)

cc: All active Judges

I do not desire that the judges be polled.

DWU.
11/20/81.

Form 6CA-40
1/80

NO. 81-1039

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
NOV - 2 1981
JOHN P. HEHMAN, Clerk

VALORUS MATTHEIS,
Petitioner-Appellant,

v

CHARLES ANDERSON,
Respondent-Appellee.

O R D E R

Before: ENGEL and BROWN, Circuit Judges; UNTHANK, District Judge.*

This cause comes before this court on a petition for a writ of habeas corpus under 28 U.S.C. § 2254 (1976), which was filed in the United States District Court for the Eastern District of Michigan on January 4, 1980. The district court denied relief and dismissed the petition on November 19, 1980.

Petitioner was convicted in 1951 by a Michigan state jury of the first degree murder of Carolyn Drown. He was tried jointly with his codefendant, Ray Olson, who was also convicted, and both received mandatory life sentences. The prosecutor proceeded under two theories: premeditation and felony (rape) murder. Petitioner had an alibi defense. He also accused various individuals, including his codefendant, of committing the murder.

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* The Honorable G. Wix Unthank, United States District Judge for the Eastern District of Kentucky, sitting by designation.

The sheriff interrogated petitioner the evening of the second day of trial without notifying defense counsel. At that time, petitioner, stating that he was willing to talk without his lawyer present, told the sheriff that he doubted that two Indiana men that he had implicated in the crime were actually involved. When petitioner's counsel learned of this interrogation, he complained to the trial judge, who had the sheriff testify to ascertain what had occurred. The testimony was given in the presence of the jury without objection. This statement was one of several made by petitioner, and according to his counsel at argument, 60% of these statements were inculpatory and 40% were exculpatory.

Petitioner received a state trial court review of the voluntariness of a pretrial confession in 1969. Later, the Michigan Court of Appeals affirmed petitioner's conviction in 1976 on an application for a delayed appeal, primarily on the basis of the Michigan Supreme Court's affirmance of codefendant Olson's conviction. The Michigan Supreme Court denied leave for petitioner to appeal on October 15, 1979.

Petitioner has asserted various constitutional errors. At the outset we note that the district court did not determine the effect of the long delay in bringing this application under Rule 9(a) of the Rules governing 28 U.S.C. § 2254 cases. We assume from this that respondent did not rely on Rule 9(a) below, and we likewise do not reach the issue.

Petitioner contends that he was deprived of his right to counsel by the sheriff's interrogation without defense counsel being present, and denied a fair trial because certain polygraph

evidence was made known to the jury and by introduction without adequate foundation of comparisons of hair and fiber samples. He also contends that the jury instructions and certain trial procedures violated due process of law and deprived him of a fundamentally fair trial.

District Judge Ralph B. Guy, Jr., who entertained this application for habeas relief, reviewed the record and contentions and wrote a full and careful opinion denying relief. The observation of the Supreme Court of Michigan in codefendant Olson's appeal is equally relevant here:

> Our standards of criminal procedure, and our notion of what constitutes a "fair trial" have changed in the quarter century since this trial occurred. Many practices considered acceptable in 1951 would not be countenanced in 1976. More importantly, they would not be employed by law enforcement agencies today.
>
> We have made a thorough review of the issues presented. We have considered appellant's arguments in light of the law existing in 1951, and have considered application of rulings made since that time. We are not persuaded that this defendant did not receive a fair trial.

People v. Olson, 396 Mich. 30, 31-32, 237 N.W.2d 463 (1976).

We agree with Judge Guy and with the Michigan Supreme Court that petitioner has failed to show that his conviction was tainted by constitutional error when judged by the standards prevailing at the time of the trial and that petitioner has failed to show that the intervening decisions upon which he relies, particularly Massiah v. United States, 377 U.S. 201 (1964), have been given such retroactive effect as to require a grant of habeas corpus relief. Accordingly,

IT IS ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

John A Ithmann

Clerk

No. 81-1039



IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

VALORUS MATTHEIS,

Petitioner,

vs.

CHARLES E. ANDERSON, Warden,
State Prison of Southern
Michigan at Jackson, Michigan

Respondent.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

# PETITION FOR REHEARING WITH SUGGESTION OF REHEARING EN BANC

ARTHUR J. TARNOW (P21270)
Attorney for Petitioner
1405 Lafayette Building
Detroit, MI. 48226
(313) 963-4090

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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No. 81-1039

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VALORUS MATTHEIS,
Petitioner,

vs.

CHARLES E. ANDERSON, Warden,
State Prison of Southern
Michigan at Jackson, Michigan
Respondent.

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

---

PETITION FOR REHEARING WITH
SUGGESTION OF REHEARING EN BANC

---

NOW COMES VALORUS MATTHEIS, by his attorney, ARTHUR J. TARNOW, pursuant to Rule 40 of Federal Rules of Appellate Procedure, respectfully petitions for rehearing with suggestion of rehearing en banc of the November 2, 1981 decision of this Court in the above-captioned case.

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the United States Supreme Court: Powell v Alabama, 287 US 45; 53 S Ct 55; 77 L Ed 158 (1932); Massiah v United States, 377 US 201, 84 S Ct 1199, 12 L Ed2d 245 (1964); Arsenault v Massachusetts, 393 US 5, 89 S Ct 35; 211 L Ed2d 5 (1968); Doughty v Maxwell, 376 US 202, 84 S Ct 702, 11 L Ed2d

650 (1964); Holloway v Arkansas, 435 US 474, 98 S Ct 1173, 55 L Ed2d 426 (1978); Sandstrom v Montana, 442 US 510, 99 S Ct 2450, 61 L Ed2d 39 (1979).

I express a belief, based on a reasoned and professional judgment, that the appeal involves one or more questions of exceptional importance:

I. IT WAS A DENIAL OF MR. MATTHEIS'S CONSTITUTIONAL RIGHT TO COUNSEL AND TO DUE PROCESS OF LAW TO ALLOW OVER OBJECTION TESTIMONY OF SHERIFF BUDER AND POLICE OFFICER REID TO AN INTERROGATION HAD WITH MATTHEIS AFTER COMMENCEMENT OF TRIAL, OUTSIDE THE PRESENCE OF COUNSEL.

II THE INSTRUCTIONS OF THE TRIAL COURT DENIED MR. MATTHEIS DUE PROCESS OF LAW IN THE FOLLOWING WAY:

A. THE TRIAL COURT IMPROPERLY SHIFTED THE BURDEN OF PROOF TO MR. MATTHEIS.

III. MR. MATTHEIS WAS DENIED A FAIR TRIAL BY THE COURT ALLOWING OVER OBJECTION TESTIMONY CONCERNING HAIR AND FIBER SAMPLES TAKEN FROM THE DECEASED AND THE CAR OF CO-DEFENDANT BEING SIMILAR.

A. MR. MATTHEIS WAS DENIED A FAIR TRIAL BY THE TRIAL COURT ALLOWING INTO EVIDENCE OVER OBJECTION TESTIMONY CONCERNING MICROSCOPIC SIMILARITIES OF HAIR AND FIBER SAMPLES.

B. IT WAS A DENIAL OF FAIR TRIAL TO ALLOW INTO EVIDENCE TESTIMONY THAT THE MATHEMATICAL PROBABILITIES OF THE DECEASED NOT BEING IN CO-DEFENDANT'S CAR, GIVEN THE HAIR AND FIBER FOUND IN CO-DEFENDANT'S CAR BEING SIMILAR TO THE HAIR AND FIBERS FOUND ON DECEASED, WERE 1 IN 400,000,000.

VII. THE FAILURE OF THE COURT REPORTER TO TRANSCRIBE THE CLOSING ARGUMENT OF COUNSEL DENIED MR. MATTHEIS EFFECTIVE ASSISTANCE OF COUNSEL.

## ARGUMENT

I. IT WAS A DENIAL OF MR. MATTHEIS'S CONSTITUTIONAL RIGHT TO COUNSEL AND TO DUE PROCESS OF LAW TO ALLOW OVER OBJECTION TESTIMONY OF SHERIFF BUDER AND POLICE OFFICER REID TO AN INTERROGATION HAD WITH MATTHEIS AFTER COMMENCEMENT OF TRIAL, OUTSIDE THE PRESENCE OF COUNSEL.

The Order of the panel concluded:

> "We agree with Judge Guy and with the Michigan Supreme Court that petitioner has failed to show that his conviction was tainted by constitutional error when judged by the standards prevailing at the time of the trial and that petitioner has failed to to show that the intervening decisions upon which he relies, particularly Massiah v. United States, 277 U.S. 201 (1964), have been given such retroactive effect as to require a grant of habeas corpus relief." At slip op. 3.

The panel neglected to discuss the established law set forth by the United States Supreme Court prior to the trial in this case. E.g., Powell v Alabama, 287 US 45, 53 S Ct 55, 77 L Ed 158 (1932).

It was only the decision of the district court that raised for the first time the possibility that the constitutional deprivation raised by Mr. Mattheis was within the decision of Massiah. However, the conduct of the State here of interviewing the defendant in the middle of trial without even attempting to secure the waiver of counsel, when there was already counsel representing him, was a denial of the right to counsel at trial guaranteed by Powell, supra.

Even if the district court and the panel of this Court was correct in characterizing the error here as a violation of the rights set forth in Massiah, their conclusion that Massiah should

not be held retroactive is in conflict with the importance placed upon the right to counsel by the United States Supreme Court. See, e.g., Arsenault v Massachusetts, 393 US 5, 89 S Ct 35, 211 L Ed2d 5 (1968), and Doughty v Maxwell, 376 US 202, 84 S Ct 702, 11 L Ed2d 650 (1964). This Circuit has not decided the retroactivity of Massiah.

The denial of the right to counsel in the midst of trial cannot be considered as harmless error in a capital case. Holloway v Arkansas, 435 US 474, 98 S Ct 1173, 55 L Ed2d 426 (1978). Even if a harmless error analysis would be appropriate, in this case the statement obtained could not be said to be harmless as it was in direct contradiction to the theory of defense presented to the jury.

II. THE INSTRUCTIONS OF THE TRIAL COURT DENIED MR. MATTHEIS DUE PROCESS OF LAW IN THE FOLLOWING WAY:

A. THE TRIAL COURT IMPROPERLY SHIFTED THE BURDEN OF PROOF TO MR. MATTHEIS.

The trial court instructed the jury:

> "The law implies malice from the unprovoked, unjustifiable or inexcusable killing and the existence of that wicked disposition which the law terms malice aforethought." (Vol IV, T. 2286; App 689a).

The instruction improperly shifted the burden of proof on the element of malice to Mr. Mattheis. Sandstrom v Montana, 442 US 510, 99 S Ct 2450, 61 L Ed2d 39 (1979).

The cases relied upon by Sandstrom v Montana, supra, have all been held to be retroactive. E.G., Hankerson v North Carolina, 432 US 233, 97 S Ct 2339, 53 L Ed 306 (1978).

Therefore, it is not possible to simply conclude, as the panel did, that intervening cases relied upon should not be applied to this trial.

III. MR. MATTHEIS WAS DENIED A FAIR TRIAL BY THE COURT ALLOWING OVER OBJECTION TESTIMONY CONCERNING HAIR AND FIBER SAMPLES TAKEN FROM THE DECEASED AND THE CAR OF CO-DEFENDANT BEING SIMILAR.

A. MR. MATTHEIS WAS DENIED A FAIR TRIAL BY THE TRIAL COURT ALLOWING INTO EVIDENCE OVER OBJECTION TESTIMONY CONCERNING MICROSCOPIC SIMILARITIES OF HAIR AND FIBER SAMPLES.

B. IT WAS A DENIAL OF FAIR TRIAL TO ALLOW INTO EVIDENCE TESTIMONY THATTHE MATHEMATICAL PROBABILITIES OF THE DECEASED NOT BEING IN CO-DEFENDANT'S CAR, GIVEN THE HAIR AND FIBER FOUND IN CO-DEFENDANT'S CAR BEING SIMILAR TO THE HAIR AND FIBERS FOUND ON DECEASED, WERE 1 IN 400,000,000.

As in the prior issue the Petitioner relied upon authority that was decided prior to his trial. Frye v United States, 293 F2d 1014 (D.C. Cir, 1923); People v Becker, 300 Mich 562 (1942).

In addition the errors were so basic that the trial court should have known they denied Mr. Mattheis his right to Due Process and a Fair Trial.

VII. THE FAILURE OF THE COURT REPORTER TO TRANSCRIBE THE CLOSING ARGUMENT OF COUNSEL DENIED MR. MATTHEIS EFFECTIVE ASSISTANCE OF COUNSEL.

The failure of the State to provide transcripts of closing argument of counsel denied Mr. Mattheis of the effective assistance of counsel on appeal required by the United States Constitution. Anders v California, 386 US 738, 87 S Ct 1396, 18 L Ed2d 493 (1967).

As set forth in the original brief Mr. Mattheis asked timely and repeatedly for his transcript and counsel to aid him on appeal. The full transcript was never supplied and the counsel request was not granted until 1965. Counsel only filed a delayed motion for new trial and conducted hearings at the trial court. He never pursued an appeal. It was not until present counsel was retained

in 1978 that the issues were presented to the State Court of Appeals.

The issues set forth herein as well as those raised in the full appeal may have in fact been exacerbated by the prosecutor's arguments to the jury. However, Mr. Mattheis has to only speculate as there is no way to construct the missing arguments. The appropriate relief is granting habeas relief. Sutton v Lash, 576 F2d 738 (7th Cir, 1978).

## SUMMARY

Mr. Mattheis was denied Due Process of Law and a Fair Trial by the State interviewing him in the middle of trial without either counsel present or the waiver of counsel. The deprivation was magnified by the error fo the trial court's instructions, the use of psuedo-scientific material and not requiring a foundation for that material.

The authority relied upon by Mr. Mattheis was either the law at the time of trial (Powell - right to counsel, Frye - scientific foundation) or has been held retroactive (Winship - burden of proof). The treatment of the issues by the panel and the Court below is not in accord with the decisions of the United States Supreme Court and present questions of exceptional importance for this Court.

## CONCLUSION

WHEREFORE, it is respectfully requested the rehearing en banc be granted and the Writ issued.

ARTHUR J. TARNOW
1405 Lafayette Bldg.
Detroit, MI. 48226
963-4090

Dated: November 11, 1981