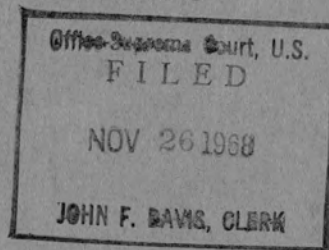


Supreme Court of the United States



In the Matter of:

Docket No. 47

WALTER B. FOSTER,

Petitioner,

vs.

CALIFORNIA,

Respondent.

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Place Washington, D. C.

Date November 19, 1968

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

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Walter B. Foster, :
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Petitioner, :
:
vs. : No. 47
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California, :
:
Respondent. :
:
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Washington, D. C.
Tuesday, November 19, 1968

The above-entitled matter came on for argument at
10:50 a.m.

BEFORE:

EARL WARREN, 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
ABE FORTAS, Associate Justice
THURGOOD MARSHALL, Associate Justice

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P R O C E E D I N G S

CHIEF JUSTICE WARREN: Case Number 47, Walter B. Foster versus California.

ARGUMENT OF KENNETH L. MADDY, ESQ.

ON BEHALF OF THE PETITIONER

MR. MADDY: Mr. Chief Justice, may it please the court?

This matter is before this Court on the writ of certiorari to the 5th District Court of Appeals in California limited to the question of whether the conduct of a police line-up resulted in the violation of the Petitioner's Constitutional rights.

We made two contentions; that the personal confrontation between the Petitioner, Walter Foster, and a witness to an armed robbery unnecessarily was suggestive and conducive to irreparable mistaken identification.

This was a violation of Mr. Foster's rights under due process of law.

The second point is that the personal confrontation between Mr. Foster and the witness violated the privilege against self-incrimination. The first issue is based in *Stovall vs Denno* as decided last year by this Court with the other lineup decisions, *United States vs. Wade* and *Gilbert vs. California*.

I might point out that Foster's trial and the decision in the 5th District Court of Appeals resulted in a conviction. This occurred prior to the decisions in *Stovall*, *Wade* and *Gilbert*.

1 To properly pursue the due process question, I wish
2 to review the events in the case. The crime charge was armed
3 robbery of a Western Union office in Fresno in January, 1966.
4 The victim was the late-night manager. He was the only
5 witness to the robbery; a man by the name of Joseph David.

6 He testified that two men entered the office shortly
7 after midnight on January 25, 1966, and after appearing to
8 make out a money-gram, approached him at the counter with guns
9 pointed at him and handed him a holdup note.

10 He described these two men as one tall individual
11 dressed in coveralls with a hat pulled down over his face and
12 visible under the coveralls, a black leather jacket.

13 The shorter of the men was dressed, as he described,
14 in casual clothes and a suitcoat.

15 The men, after handing the holdup note to him,
16 required him to open the safe and a money box, to hand the
17 money to the taller man at which time the taller man left the
18 office. The shorter man stayed three or four minutes later,
19 making certain threatening gestures to the witness.

20 Without relating in greater detail the facts of the
21 crime, I wish to point out the significance of certain items.
22 First of all, the short time that the tall individual, as
23 indicated in the record, was in the office. This man was later
24 described by the witness to be Walter Foster. He was there
25 three -- or perhaps six -- minutes. Part of the time the

1 witness was facing a gun held by this tall robber.

2 The second is the contradiction in the description
3 of the dress of the shorter man. The shorter individual
4 ultimately testified at the trial and contradicted that description

5 Third is the fact that the witness changed the
6 description of the coloring of the tall individual at the time
7 of the trial because, as he indicated, the background of the
8 office was such that he had to make this change at the time of the
9 trial.

10 All these points go to the one fact that the witness
11 had little chance for observation of the individuals that
12 robbed the office that evening.

13 As pointed out in the Wade decision, Mr. David was
14 a likely suspect for prompting or for the effects of an
15 improper lineup.

16 I mentioned that the witness ultimately described or
17 stated that the tall individual was Walter Foster. This was
18 only after the two lineups and a personal confrontation.

19 To briefly complete the background of the case; J. B.
20 Clay testified for the prosecution at the time of trial. He
21 indicated he was the shorter man who robbed the Western Union
22 office that night. He admitted full participation. The basis
23 of his testimony was that he was ordered to do these things
24 by Foster for \$50. He fully indicated Foster and John Henry
25 Frice were involved. He contradicted Mr. David insofar as the

1 clothing he wore that night.

2 This goes to the lack of chance for observation. He
3 gave a statement one day after the robbery implicating Foster
4 and Grice in this robbery.

5 California Penal Code Section 1111, which appears in
6 Appendix B of the Respondent's brief, requires corroboration
7 of an accomplice's testimony. Now, the situation that this placed
8 the police in at the time they received the statement by Mr.
9 Clay was that they had one man, one participant in the robbery.
10 They knew who the second one was or they felt they knew who the
11 second one was and, as we pointed out, Mr. Foster was a likely
12 man for the police. He had a previous record. The problem they
13 had was to have Mr. David identify Mr. Foster, since he was the
14 lone witness.

15 This is not like the situation in Palmer vs. Peyton
16 which is referred to in Stovall vs. Denno, where they talked
17 about the understandable zeal of the police. They believed that
18 Foster was their man. The question was whether the witness
19 would identify him.

20 Turning to the lineup, two or three days after the
21 robbery the witness was called to the police station to review
22 a lineup. There were three men present. The witness testified
23 that the one man was approximately six feet tall who was in the
24 lineup, hatless, wearing a black leather jacket similar to what
25 he said he saw under the coverall on one of the men who robbed

1 him. The other two men were shorter men, 5 foot 5 to 5 foot 6.
2 They were both required to wear hats and one had a mustache.

3 In evaluating this lineup in terms of the consideration
4 outlined in Wade, we would have to say that Foster; one, was a
5 lone tall suspect. He was the only one wearing clothes
6 similar to those which were allegedly worn by one of the men
7 who robbed the Western Union office. Both of these things, as
8 outlined in Wade, are part of the problems in lineups and part
9 of the problems of the police making suggestive factors available
10 to the witness at the time of the lineup.

11 Now, assuming that the witness gave a description of
12 the men who robbed him to the police, indicating the dress that
13 they wore, this first lineup, the composition of it, clearly
14 made Foster stand out. Yet, Mr. David did not make any
15 identification at that time.

16 At the time of the lineup, he requested to speak to
17 the individual later identified as Mr. Foster. This was the
18 personal confrontation I spoke of. Mr. Foster, the witness,
19 a policeman, and a Deputy District Attorney went to a private
20 room where a conversation was held between Foster and David.

21 I will point out that no part of the conversation was
22 introduced into evidence; merely the fact that a conversation
23 did take place.

24 We analogize this to the widely disputed practice of
25 a single suspect conversation. The evils of this single suspect

1 confrontation have been elaborated on. It is clear that the
2 witness has no alternative but this one individual he is look-
3 ing at. The police are saying in effect, that "This is the man."

4 The second aspect related to our particular case is
5 that this was a special procedure or an isolation of Foster
6 versus the other two men in the lineup. They handled him
7 differently. It is very hard to imagine a more suggestive
8 situation than for the police to take one man, isolate him and
9 treat him differently insofar as the witnesses are concerned.

10 They could do nothing more than if they turned
11 around and said: "This is the man we believe is guilty of the
12 crime."

13 I will note the case of Crume vs Beto, 383 F 2nd 36,
14 which presented a similar situation insofar as isolating an
15 individual from a lineup at the request of one of the witnesses.

16 Now, the Court there looked at the situation and
17 stated that this is very well a situation that violates due
18 processes to do this, to pull the man out, to suggest to the
19 witnesses that this is the man. The distinguishing feature in
20 the Crume case was the fact that there the witness said: "I am
21 sure it is the man." The Court pointed out that if the
22 positive identification had not been made by the witness, this
23 very well would not have been due process.

24 After that, the witness, David , still made no
25 identification of Foster. Ten days later the police presented

1 the crowning blow. They called Mr. David back to a second
2 lineup. There were five men present, dressed similarly in jail
3 dungarees, yet the only man present in the second lineup who had
4 been seen by David and present in the second lineup was Walter
5 Foster.

6 We ask the question: What more could the police do to
7 suggest and implicate Foster as the one they were asking David
8 to identify?

9
10 The Respondents indicate this is a situation where we
11 have just had a super cautious witness. I think the record
12 clearly shows that it is a situation where the witness could not
13 identify the individual who was there until forced upon my by
14 suggestion.

15 Now, if it please the court, we contend that each step
16 taken by the police and prosecution can be criticized as
17 suggestive and unfair and pointed to Foster. But more important
18 is the scumulative effect of each of these three steps. They
19 made it virtually impossible for the witness to make any
20 identification other than that of Foster.

21
22 I think that one other aspect of this is the question
23 of necessity or as pointed out in Stovall vs. Deno, by Justice
24 Brennen, that the totality of the circumstances surrounding the
25 lineup. The Respondents seem to tie this question of

1 totality of circumstances with the harmless error rule and
2 ask the Court in their brief to review all of the facts of the
3 case whiel deciding the due process issue.

4 We think this should be the events and circumstances
5 surrounding the lineup alone, what prompted the action of the
6 police to bring about the lineup as they did.

7 In Stovall vs. Deno there was a dying witness who
8 brought about the single suspect confrontation. That single
9 suspect confrontation was criticized but it was said under the
10 circumstances there was not undue process.

11 Under United States vs. Simmons, it was said that the
12 suspects were at large and there was a need for the use of
13 photographs.

14 In People vs. Ford and State vs. Sears there were
15 situations of on-the-spot apprehensions of individuals
16 suspected of crime and on-the-spot identification which again
17 are situations, I believe, which are involved in the total
18 circumstances surrounding the circumstances.

19 When the lineups were considered as a whole, they
20 ere not a violation of due process. I believe that in our
21 case we had none of those circumstances. There are not impera-
22 tive circumstances. Foster was under arrest. There was no
23 necessity to proceed or to deviate from established procedures,
24 no excuse.

25 Q There was no question about Clay's identification?

1 A Only, Justice Harlan, that the witness did not at
2 the time he testified at the trial properly identify Mr. Clay's
3 clothing that he wore that night. There was a contaadiction
4 between Clay and the man. There was no testimony concerning
5 whether the witness was ever required to identify Clay.

6 Q But I mean Clay's identification.

7 A No. At the time of trial Clay said, "This is the man
8 who was with me." He also said John Henry Grice was with him.

9 Q And these factors were all identification procedures?

10 A The identification procedures were brought out on
11 cross-examination. I think it is one of the dangers because the
12 witness had made his identification sometime prior. This as
13 the case with David. It took him the two lineups and the
14 personal confrontation before he ever said Walter Foster was
15 the man who robbed him.

16 At the time of trial when he was testifying, at
17 Page 27 of the brief, he said "I made hard looks at these men
18 and impressed it in my memory so I would always remember them."

19 This is one of the dangers, so it was necessary to
20 present the lineups to the jury under cross-examination and
21 they were presented to the jury on a liminted extent.

22 Q Is it your position that even though Clay identified
23 Foster at the trial as the man with him, California rule is
24 that there must be corroboration and the State offered David
25 as the corroborating witness?

1 A That is correct. It is our position that Clay may
2 never have testified, the corroborating testimony was required
3 and that David presented that.

4 Q And you claim that there was an infirmity in his
5 identification testimony which entitles you to a reversal?

6 A That is correct. We feel that the identification
7 of David was tainted and it was made only after the suggestion
8 of the police. We feel that despite whatever evidence was
9 introduced by Clay or by the prosecution.

10 Q You are saying in effect it is not Constitutionally
11 admissible corroborating testimony?

12 A That is correct.

13 Q There is no corroborative testimony in the case?

14 A That is correct.

15 Q Grice was a fellow defendant and he was acquitted?

16 A That is correct. We think it is significant insofar
17 as the question of harmless error. We feel that this Court
18 must look at the procedures set forth insofar as the
19 events and circumstances of the line up, to decide whether or
20 not the lineups were so suggestive and, as I said, "conducive
21 to mistaken identification," that they violated Foster's rights
22 of due process of law.

23 Once that is considered, we feel that is a basic
24 right as indicated in Chapman vs. California and would require
25 reversal. However, if the Court thinks the rest of the facts

1 of the case can be looked at to determine whether denial of due
2 process was contributive to the conviction, then we point to
3 the fact that Number One, in the law of the State of California
4 was perhaps Clay's testimony never would have been admissible
5 thus the State would have had no case at that point. And the
6 second point is, to determine whether or not the testimony of
7 David contributed to the conviction. We point to the fact that
8 John Henry Grice, who was as fully implicated in this case as
9 Foster was, by Clay, the only difference in the case between
10 Grice and Foster was the "witness identification" and he was
11 acquitted.

12 Q Grice was acquitted and since he did not enter the
13 Western Union office there was no identification testimony by
14 David. There was simply Clay's testimony, but there must have
15 been some corroboration or else there would have been a
16 directed acquittal.

17 A To review the record, I seriously question whether
18 there was any corroboration. The Court allowed the matter to
19 proceed to jury.

20 Q Then the trial court did not understand the California
21 law the way you are telling us it is.

22 A I would say that the trial court determined at that
23 time that there was some corroboration for Mr. Grice.

24 Q What was it?

25 A If the court reviews the record like I have, I don't

1 believe it is there. I don't see it. I don't believe the
2 question of Grice being in this case should every be in the
3 jury.

4 Q You don't really have to rely on this corroboration,
5 do you? Let's assume there was not any corroboration required
6 under the California law at all; that an accomplice's testimony
7 was enough to convict. The fact is that not only the accomplice
8 testified to the identification, but David did. The jury might
9 not have believed the accomplice on its own, but here is a
0 witness who testified and there is some constitutional question
1 about his testimony.

2 A That is our position.

3 Q How could you really tell? The question would be
4 whether or not this allegedly tainted testimony of David, how it
5 might have affected the jury, when the jury should not have
6 heard it at all.

7 A I believe we are understanding each other, Justice
8 White. I believe that if the testimony of David was tainted by
9 these lineups, so improperly conducted, that this testimony
0 should be excluded because it was a violation of due process.

1 The only point we make concerning Grice and the Penal
2 Code, Section 1111, is the rule of harmless error which was
3 raised by the Respondent. I think whether or not these lineups
4 and the procedures followed by the police violated due process.

5 Q What did you say?

1 A The conduct of the police.

2 Q I thought you said there was no corroboration.

3 A Our basic point is that the conduct of the police in
4 the two lineups and the suggestions implied in the two lineups
5 violated the due process as indicated in Stovall vs. Deno.

6 The corroboration only comes in with the question of
7 what happened to John Henry Grice and the question of corrobora-
8 tion is, if this court feels that the harmless error applies.

9 Q What about Mr. David's direct testimony?

10 A Yes. On Page 33 of the record the prosecution did
11 review the fact that he had reviewed two lineups and was
12 identified after the second lineup. The question is about the
13 manner the lineups were held and this came about in cross-
14 examination.

15 Q What was the purpose of the personal confrontation?

16 A It was merely indicated in the record that the
17 witness David wished to speak to the suspect Forster.

18 Q Nothing more?

19 A Nothing more. What was said at the confrontation was
20 not brought out.

21 Q I think you said that there were three in that first
22 lineup, two shorter men and Foster?

23 A Yes.

24 Q And I gather David was not able to say, looking at the
25 three of them, that Foster was the one, is that it?

1 A That is correct.

2 Q Then David asked the officers if he could see him?

3 A That is correct.

4 Q What did they talk about?

5 A It was not brought out and it was not in the record.

6 It is merely that they had a conversation in the presence of the
7 District Attorney and a police officer in a private room.

8 Q Was there some testimony in there that during the
9 course of the holdup that the witness, David, had talked to
10 the taller man in the group?

11 A David testified that the taller individual uttered
12 approximately four phrases comprising of 18 words. He did
13 make some reference in the testimony as to the softness of the
14 voice.

15 Q Didn't David tentatively identify the man before he
16 spoke to him?

17 A There is a reference that David indicated "I thought
18 this was the man."

19 Q And then he wanted to talk to him to make sure?

20 A That is correct. The point is that he did not make
21 a positive identification. He said, "I thought it was the man."
22 We are pointing to the fact of the composition of the first
23 lineup which could only bring about that the individual would
24 think that it was the man. He was taller, a lone tall suspect,
25 and dressed similar to the dress of the man who robbed David.

1 Q What exactly did David say after he had talked to
2 the defendant?

3 A He was unable to make an identification.

4 Q Is his precise language in the record?

5 A Yes. He said, "I was not sure." I could not make a
6 positive identification." That was the answer on cross-examination.

7 Again, the second lineup was ten days later. Now, we have made
8 a second contention concerning the violation of privilege
9 against self-incrimination, mindful of the Court's decision
10 in Wade. Also, we note the dissent in Wade.

11 We believe this case may present a factual situation
12 that the Court can again review, voice identification, compell-
13 ing a person to speak in the lineup in relation to the Fifth
14 Amendment.

15 Q There were no statements used?

16 A No. It is clear in the record that a conversation
17 took place. We asked the Court if there were certain considera-
18 tions and points that we have made in our brief concerning this
19 point which we believe are clear. I believe that there are
20 certainly theories, whether you use active volitional versus
21 passive theory or requiring a man to speak is sufficient to
22 violate his rights.

23 Q The conversation the Chief Justice spoke of appears
24 on Page 40 of the record.

25 A Yes. There was nothing in the direct examination. It

1 was brought out on cross-examination, the fact that he was
2 unable, after the conference, to make an identification.

3 Q It is a question, "You were not sure at that time?"

4 Answer: "Truthfully, I was not sure." That is what you are
5 referring to?

6 A That is correct.

7 We will reserve a moment or two for rebuttal. We
8 respectfully request and submit that the fact and circumstances
9 of these lineups violated Mr. Foster's rights of due process of
10 law and we respectfully request that the matter of the Fifth
11 Amendment rights also be reviewed.

12 CHIEF JUSTICE WARREN: Mrs. Maier.

13 ARGUMENT OF MRS. DORIS H. MAIER, ESQ.

14 ON BEHALF OF THE RESPONDENT

15 MRS. MAIER: Mr. Chief Justice, and may it please the
16 court. We would also call the Court's attention at this point to
17 the language in Page 33 of the Appendix. Mr. Justice Stewart
18 read from Page 39. This is the identification of Mr. David of
19 Mr. Foster at the first lineup where he states in answer to a
20 question "Now, at the first lineup, did you identify any
21 person? Was the defendant Foster in the lineup?" Answer: "I
22 did not specifically." "Was he in the line up? Did you identi-
23 fy him?" "I didn't specifically say he was the man. I thought
24 it was."

25 We believe that is the answer to the reason and why,

1 after that the witness asked for the second lineup. In this
2 case the rule of Stovall vs. Deno should apply. The case was
3 tried prior to Wade or Gilbert, therefore, the basic question
4 of counsel prior to lineups as a critical stage of the
5 proceeding is not of first importance under this particular
6 case.

7 Under the rule of Stovall, it would not be retroactively
8 applied. However, in Stovall this Court permitted a consideration
9 of the confrontation depending on the totality of the circum-
10 stances surrounding it to consider a claim of lack of due
11 process of law.

12 The Petitioner, in this case, urges that the term
13 "totality of circumstances" be limited solely to the exact
14 circumstances of the lineup and not take into consideration the
15 entire case.

16 It is the position of the Respondent that we would
17 at least broaden the scope of this to take into consideration
18 the facts involved prior to the time of the lineup proceedings.

19 Now, some of the criteria which may be used to
20 determine whether the action of the police have been suggestive
21 in tending to establish mistaken identification have been set
22 forth as whether any preliminary information about the suspect
23 was given to the witness or the victim prior to the time of
24 lineup. Whether the victim knew the members of the lineup except
25 to the suspect, whether there was a prior identification by the

witness or the victim of another individual, whether there was a discrepancy between the preliminary lineup description and the actual one, whether the witness or victim had an opportunity to observe the defendant at the time of the criminal act, the time that had elapsed between the crime and the lineup and then the facts pertaining to the actual lineup.

If we apply this criteria to the instant case, then we have in the first lineup, it took place shortly after the robbery and after the co-defendant Clay had turned himself in to the police. He then had apparently designated Foster as his co-defendant. Foster was apprehended.

At that time the victim, Mr. David, was asked to come to the police station. He was not told that they had apprehended any suspects. He was just asked to view a lineup.

In this lineup, there were three men. They were all Negroes. The Petitioner admittedly was the tallest, by Mr. David's testimony. However, two of the other participants in the lineup, who were shorter, both had hats on which the robber did at the time of the robbery.

Petitioner says Mr. Foster had on a leather jacket but this apparently was his own leather jacket because he wore it at the time of the robbery underneath the coverall that was the distinguishing feature of the identification of Mr. David. This lineup was not like Wade or Gilbert, subsequent to the appointment of counsel. It probably was prior to arraignment of

1 Petitioner since it was probably immediately after the
2 Petitioner's apprehension. There was no prompting of Mr.
3 David, the witness, prior to this lineup, by the police.

4 Q Was there anything about the clothing of these men
5 in the first lineup that would distinguish this man from the
6 others in relation to the crime?

7 A No, Your Honor, except for the fact that the
8 Petitioner, Mr. Foster, had on his own black leather jacket.

9 Q It doesn't make any difference whether it was his own
10 or whose it was. Was there anything in the way these men were
11 dressed to separate him from the others?

12 A There was no showing that all of the men were dressed
13 alike in the first lineup, no showing specifically as to what
14 the other men wore, just Mr. David's testimony that the
15 Petitioner, whom he tentatively identified at that time, had
16 this black leather jacket on.

17 Q Is that the kind of jacket that the robber was
18 supposed to have on?

19 A Yes, underneath the coverall.

20 Q But it was observed at the time of the robbery?

21 A Yes, by Mr. David.

22 Q Did any of the others have on such a coat?

23 A It doesn't show that they had on such a coat and
24 jacket.

25 Q What was the relationship of size of these three men?

1 A The other two were smaller at this time, but the
2 other two had hats on. At the time of the robbery, the robbers
3 both wore hats and the Petitioner did not have a hat on at the
4 time of the lineup.

5 Now, this lineup was apparently at the City Jail and
6 there was no showing that other people were available at
7 that time who could have been used for purposes of a lineup.

8 Q What City Jail is that?

9 A Fresno.

10 Q It is a rather large jail, isn't it?

11 A I don't believe so.

12 Q It is a large community.

13 A It is larger than some, but it is not a really
14 metropolitan area of California.

15 Thenk as far as the circumstances of this lineup,
16 there was now showing of any brutality of police, misconduct
17 with relation to this and there was no showing that the
18 Petitioner or any of these men were asked to take any affirma-
19 tive action at this lineup.

20 Right immediately after that, when the victim, Mr.
21 David had made his tentative identification, he asked the
22 police officer if he could hear or speak to Mr. Foster.

23 Q Where do we find the tentative identification you
24 just mentioned?

25 A That is in the Appendix, Page 33.

1 Q Let us see just what he did say. Are we taking now
2 his testimony at the trial?

3 A Yes, sir, his testimony at the trial as to this.

4 Q Now, that tentative identification, that is what I
5 wanted.

6 A That was A-33.

7 Q What is the language?

8 A That is what I read at the beginning, Your Honor.
9 "I didn't specifically say that this was the man. I said I
10 thought it was."

11 Q I see.

12 A That is the position that Mr. David has taken through
13 the course of this.

14 Now, right after that, then, in accordance with Mr.
15 David's request, Mr. Foster was brought into a room in which
16 Mr. David was. A police officer was there, as well as the
17 Deputy District Attorney. The record shows they had a
18 conversation at that time. No contents of any conversation were
19 used. In fact, this conversation was brought out solely by
20 the defense counsel on cross-examination. It was not introduced
21 by the prosecution as part of its case.

22 At the conclusion of this, Mr. David still did not
23 make a positive identification, but about a week or ten days
24 later he was asked to view another lineup. This lineup was
25 apparently at the County Jail. There were five men there, all

1 dressed alike in jail fatigues. The accomplice Grice was
2 in this lineup. The Petitioner was the only one present who
3 had been present in the first lineup. The victim identified
4 Petitioner at this time, but there was no showing that the
5 victim had been primed between the first lineup and this last
6 lineup.

7 Nevertheless, as far as the victim, Mr. David, was
8 concerned, his memory improved and he was certain in his own
9 mind that as of that time it was Foster who was one of the
10 robbers.

11 Q Was there any distinction as to dress or size of
12 these particular men?

13 A Not in this lineup, Your Honor.

14 At the trial, Mr. David and the accomplice identified
15 Petitioner and Mr. David then explained that at the time, at
16 the scene of the robbery, that he had taken a good look, a good
17 hard look at the robbers so that he would know and impress on
18 his mind later. On Page 27 of the Appendix, he said, "I stopped"
19 and this is the time of the robbery, "I stopped and looked
20 back at them. I was about ten or twelve feet from them and
21 the place was well lit. I could see clearly and I gave them
22 what you call a hard look. I wanted to know in my mind and
23 impress in my memory who these two men were."

24 Q Why would you think he would fail on this first lineup
25 after he took another good, hard look at him and then talked to

1 him and then seven days later when they put him in another one,
2 he identified him?

3 A I think the man was an extremely cautious individual,
4 that he wanted to be absolutely certain in his own mind that he
5 was accusing the right man; that we have witnesses who desire
6 to protect individuals and that they do not want to be guilty
7 in any way, of mis-identification, and that caution, I think,
8 in this case, Mr. David displayed.

9 We have several other facts with relation to the
10 trial that I would call to this Court's attention. The first
11 one was the fact that at trial no objection was raised as to
12 the introduction of any of the evidence on any Constitutional
13 ground. No motion was made to strike. Admittedly, this case
14 was tried prior to the Court's decision in Wade or Gilbert, but
15 it was subsequent to the Court's decision in Malloy vs. Hogan.

16 Therefore, any question should have been raised by
17 objection in the trial court. This was not raised, nor was
18 any of the objections raised in motion for a new trial. This
19 fact appears in the Opinion of the 5th District Court of
20 Appeals in the case.

21 It should be noted at the time of the trial neither
22 of the robbers were masked so that there was no question such
23 as Palmer vs. Peyton, that the question of voice identification
24 was the only one. At the time of the robbery Mr. Foster spoke
25 demanding the victim "Go get the money from the safe." He told

1 him to do it in a hurry"and get the particular box.

2 Now, this request to get the particular box would tie
3 in with his identity in which there was evidence brought forth
4 at the trial of a prior conviction of Mr. Foster for a robbery
5 of a Western Union station in which it was brought forth on the
6 grounds of similarity of modup operandi and for purposes of
7 identity.

8 Q At the second lineup, was this co-defendant of the
9 Petitioner present when Mr. David made the identification?

10 A Yes.

11 Q They were both there together?

12 A He did not identify Mr. Grice, the co-defendant,
13 because Mr. Grice had been the driver of the get-away car. He
14 had never entered the establishment. They were three indivi-
15 duals participating in the robbery, Mr. Clay and Mr. Foster were
16 the two who had entered the Western Union office and participated
17 in the robbery.

18 Mr. Grice, the other accomplice, had driven the
19 get-away car. He testified at the time of trial and produced
20 an alibi which apparently was believed by the jury. At the
21 time of the trial in this case Petitioner Foster did not take
22 the stand or produce any evidence of an alibi. There was no
23 conflict in the evidence in that respect.

24 Q When, with relation to the first lineup, did the co-
25 defendant of this Petitioner make his confession, before or

1 after?

2 A The record is not clear on that, Your Honor. I would
3 assume it was before, but the record does not show that.

4 We submit that in this case the Petitioner has not
5 borne the burden of proving that there was a violation of his
6 constitutional rights in the conduct of this lineup. The
7 Petitioner had no constitutional right not to participate in
8 the lineup, that he also had no constitutional right not to
9 speak for voice identification.

10 This, we believe, has been established in both
11 the Wade, Gilbert, and Schmerber cases, as well as the earlier
12 ones of Holt and Breithaupt, decided by this Court. The
13 voice identification would only have been used as one factor.
14 It was the sound characteristic and not the context of the
15 word spoken that was important here. It was the actual sound
16 of the Petitioner's voice to the victim.

17 We ask this Court that if there should be any
18 error found in any lineups, then the application of a harmless
19 error rule should be applied. This Court in Chapman vs. Cali-
20 fornia recognized that you could apply a harmless error rule to
21 a Constitutional error.

22 Q What standard do you think this Court set up in
23 Chapman?

24 A The standard of the error must be such that the
25 Court could say beyond a reasonable doubt that the judgment

1 would have been other than this, had this particular error
2 not been committed, notwithstanding this error.

3 Q In this case, according to the California rule, what
4 corroborating evidence was there of the co-defendant that would
5 go to make this sustain a verdict beyond exclusion of a reason-
6 able doubt?

7 A I believe you have not only the testimony of the
8 accomplice, but the identification and description. If we
9 eliminate all the lineup identification by the witness, Mr.
10 David, it still would leave his testimony as to the evidence
11 of the corpus delicti and certainly the description of the
12 clothing taken at the time at the scene of the robbery.

13 He still would corroborate the accomplice's testimony
14 and I think you could use the limited testimony for identifi-
15 cation purposes.

16 Modus Operandi could be used to aid the testimony
17 of the accomplice. Under California law, the testimony of
18 the accomplice must be corroborated, but the corroboration is
19 required to be very slight. It is not necessary that it go to
20 all of the elements of the offense. But, we submit that in
21 this case we have that corroboration.

22 Q I would like to know just what that corroboration
23 is. Leave out the modus operandi. Just as applied to this
24 Petitioner, what corroborating evidence is there outside of
25 the testimony of his co-defendant?

1 A You have the testimony of the victim as to the
2 corpus delicti, the elements of the robbery, the fact of the
3 description of the individuals at the scene of the robbery at
4 that time which would fully corroborate the testimony of the
5 accomplice.

6 Q There has to be corroboration over and above the
7 corpus delicti?

8 A That is right.

9 Q What is there over and above the corpus delicti that
10 attaches itself to this?

11 A The identification of the clothing of one of the
12 robbers. I am not talking about the identification at the lineup
13 but separate and apart from the victim himself, the fact that
14 the clothing worn by one of those individuals would corroborate
15 the accomplice's testimony.

16 Q What was that that was distinguished?

17 A The coverall, the hat with the brim turned down. The
18 black leather jacket showing out from underneath and the gray
19 suede shoes. The accomplice testified as to the clothing.

20 Q Let's leave out the accomplice. I want the
21 corroborating evidence.

22 A It was that, I believe, Your Honor, the description
23 of the clothing.

24 Q Was that clothing in the court?

25 A It was not introduced as an exhibit.

1 Q Then how do you apply that to this?

2 A It came in through the testimony of Mr. David.

3 Q But assuming that Mr. David's testimony is out by
4 reason of being an unconstitutional identification, what
5 corroborating evidence is there?

6 A Your Honor, Mr. David's testimony, only because of
7 his testimony with relation to the evidence developed at the
8 lineups, would be out. It would not strike his testimony as a
9 witness entirely from the trial. The lineup, if assumed that
10 the evidence with relation to the lineups was improperly
11 adduced, that would not of necessity eliminate Mr. David as a
12 witness in the case.

13 Q Do you mean to hwat he testified he saw and heard at
14 the scene of the robbery?

15 A Yes, Your Honor, at the scene of the crime.

16 Q In my mind, could I ask you what corroboration was
17 there with respect to Mr. Grice, the man who was acquitted by
18 the jury?

19 A The only corroboration that would have been in the
20 record was Mr. Grice.

21 Q Whne Mr. Grice said he sat in the automobile?

22 A He was only living in the same building with or next-
23 door to Mr. Foster in the room. That was the testimony of the
24 landlayd who said they were associated there. She had seen them
25 as friends at that time. That was about the sum total of the

1 corroboration as to Mr. Grice. Mr. Grice himself testified
2 as to an alibi defense.

3 Q That certainly wasn't proof against him.

4 A No, but that was the corroboration.

5 Q Very thin, in other words.

6 A Very thin. The judge left it as a question of fact
7 to the jury.

8 Q Left what as a question of fact?

9 A Whether it was sufficient. The jury was advised that
0 Clay was an accomplice as a matter of law and therefore, his
1 testimony had to be corroborated.

2 Q The only corroboratory evidence was the fact he had
3 lived nearby in the apartment?

4 A With Foster. We will draw one further point to the
5 Court's attention and that is, at the time of this trial and
6 under California law, the petitioner would have the right or had
7 the right to have discovery proceedings in a criminal case, that
8 this Petitioner would have had full opportunity to ascertain all
9 the facts and circumstances of the lineup by a motion to attain
0 the statements of witnesses to that lineup, the police officers
1 present, and including any photos that may have been taken of the
2 lineup by the police.

3 The California case of Norton vs. Superior Court,
4 decided in 1959, some six or seven years prior to the trial of
5 this case, would have given counsel for the Petitioner the

1 right to obtain all of this material prior to his cross-
2 examination for purposes of testing the identification.

3 Therefore, we have a rather unusual situation in this
4 respect since the information was available to him and no show-
5 ing was made in the record of whether Petitioner did or did not
6 avail himself of it, but he could have.

7 Q What does that do so far as this case is concerned?

8 A We are referring in this to the effect on this case
9 where the question, the primary question, is the identification
10 of Petitioner. The Petitioner had full opportunity to develop
11 any discrepancies in this case. He was not stopped. The
12 goal was correct identification. The utilization of these
13 procedures afforded by California would have given him full
14 opportunity to explore these rights and we submit in light of
15 the whole case the Petitioner has not borne the burden of proof
16 in showing there was a lack of due process in his trial and
17 conviction. We ask that the judgment of the California court
18 be confirmed.

19 CHIEF JUSTICE WARREN: Mr. Maddy.

20 REBUTTAL ARGUMENT OF KENNETH L. MADDY, ESQ.

21 ON BEHALF OF THE PETITIONER

22 MR. MADDY: Just one or two comments on the statements
23 of Mrs. Maier. First of all, in answer to two points concerning
24 discovery rules in California and concerning what Mr. David, the
25 witness, said at the time of trial, I think they are both

significant because they both point out two of the real dangers involved with lineup situation. First of all, discovery is not going to do the attorney any good except in the manner that he can bring things out in cross-examination. As an attorney, you are faced with a problem of how far you are going to push on cross-examination because your first intent at that time is to win your case at the time of trial.

You cannot try the case and hope for the prospect of Mr. Foster to sit in prison two years to wait for a court such as this to wait for the record to be established. The prosecution is not going to bring out all the events in the lineup. They are going to put a witness on the stand to say, as Mr. David did, "I am positively sure that is the man as I see him sitting here today."

The problem is, he made that identification before he got to court. I think the majority of the indications do not show that the prosecution goes into higher lineups unless the witness cannot say for sure at the time of trial. He has to refer back to the lineups. I think the two points that the Respondent makes both point out dangers involved with the lineup situation.

The second point I want to make is that Mrs. Maier made reference to certain factors that should be considered by the court in reviewing the lineups. She mentioned, had the witness seen the man before, was he seen in the custody of

1 police before, did he know anyone in the lineup? We felt and
2 I contend that the second lineup was the most important lineup
3 here because all of the things she mentioned were violated in
4 the second lineup.

5 As far as the composition of the second lineup is
6 concerned, it could have been perfect as far as light and
7 clothing of the witness, but the significant point is that Walter
8 Foster was the only man in the second lineup who was in the
9 first lineup.

0 There could not have been any more suggestive situation
1 than that presented by the prosecution at the second lineup.

2 Q Mr. Maddy, before you sit down, I would like to say
3 the court appreciates your representation of this indigent
4 defendant. You were appointed by this court to represent him
5 and we believe that such representation is a public service.

6 We get comfort out of the fact that lawyers are
7 willing to assume that in the interest of justice. So, we
8 thank you.

9 Mrs. Maier, we thank you for the diligent manner in
10 which you have represented the interests of your State.

11 (Whereupon, at 11:50 a.m., the arguments in the
12 above-entitled matter were concluded.)