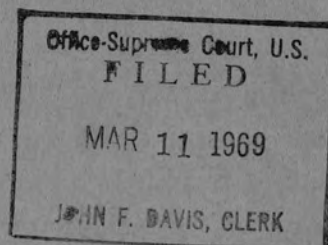


169
Supreme Court of the United StatesOCTOBER TERM

In the Matter of:

----- X
JOHN DAVIS,
Petitioner;
vs.
STATE OF MISSISSIPPI,
Respondent.
----- X

Docket No. 645



Pt. 1

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Place Washington, D. C.

Date February 26 1969

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Melvyn Zarr, Esq., on behalf of
Petitioner

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G. Garland Lyell, Jr., Esq., on
behalf of Respondent

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- - -

1 IN THE SUPREME COURT OF THE UNITED STATES

2 October Term, 1968

3 -----x
4 John Davis, :
5 Petitioner, :
6 v. : No. 645
7 Mississippi, :
8 Respondent. :
9 -----x

10 Washington, D. C.
11 Wednesday, February 26, 1969.

12 The above-entitled matter came on for argument at
13 1:57 p.m.

14 BEFORE:

15 EARL WARREN, Chief Justice
16 HUGO L. BLACK, Associate Justice
17 WILLIAM O. DOUGLAS, Associate Justice
18 JOHN M. HARLAN, Associate Justice
19 WILLIAM J. BRENNAN, JR., Associate Justice
20 POTTER STEWART, Associate Justice
21 BYRON R. WHITE, Associate Justice
22 THURGOOD MARSHALL, Associate Justice

23 APPEARANCES:

24 MELVYN ZARR, Esq.
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New York, New York 10019
(Counsel for Petitioner)

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Assistant Attorney General
New Capitol Building
Jackson, Mississippi
(Counsel for Respondent)

1 P R O C E E D I N G S

2 MR. CHIEF JUSTICE WARREN: No. 645, John Davis,
3 Petitioner versus Mississippi.

4 THE CLERK: Counsel are present.

5 MR. CHIEF JUSTICE WARREN: Mr. Zarr.

6 ORAL ARGUMENT OF MELVYN ZARR, ESQ.

7 ON BEHALF OF PETITIONER

8 MR. ZARR: Mr. Chief Justice, and may it please the
9 Court.

10 This case is here on writ of certiorari to the
11 Supreme Court of Mississippi, to review petitioner's criminal
12 conviction. Particular, John Davis, a 14-year old Negro boy
13 was convicted of raping an 86-year old white woman for whom he
14 had done yard work and he was sentenced to life imprisonment.

15 This court granted Petitioner's petition for writ of
16 certiorari to consider whether the police conduct evidenced by
17 this case contrary to the Fourth and Fourteenth Amendments to
18 the Constitution of the United States and if so, whether the
19 product of that illegal police conduct, Petitioner's finger-
20 prints, was properly admitted into evidence at Petitioner's
21 trial.

22 Briefly the facts are these.

23 Starting December 3, 1965, the police of Meridian,
24 Mississippi, took into custody for investigation some 65 to 70
25 Negro boys. Now what they were investigating was a complaint

1 of rape by an 86-year old white woman who had reported to the
2 police that she had been attacked in her home by a Negro youth,
3 on the evening of December 2nd, apparently around 7 o'clock.

4 The nature of her description is uncertain but its
5 quality can be inferred from the number of suspects it appeared
6 to cover.

7 Two partial fingerprints had been found on the out-
8 side of a window and a partial palm print had been found on the
9 inside of the window sill. On this basis the dragnet began.

10 Particular, a 14-year old Negro boy who had done yard
11 work for the woman was one of the 65 to 70 Negro boys taken
12 into custody. Petitioner was taken to police headquarters on
13 December 3rd, questioned, fingerprinted and released. The
14 others apparently went through a similar procedure.

15 Now it is quite clear from the record that there was
16 no warrant for petitioner's detention. Why? The reason is
17 best capsulized in Respondent's brief at page 2 in these terms
18 and it is quoted that none of these 65 or 70 who were interro-
19 gated or picked up were suspects but were only interrogated and
20 printed by the police in an effort to get leads to establish
21 probable cause to arrest the guilty party.

22 That is at page 2 of Respondent's brief.

23 Now at that December 3rd detention which was the
24 Petitioner's first detention, he was fingerprinted and those
25 sets I will show refer to as a first set. They were never

1 analyzed or introduced into evidence and nothing further has
2 been heard of them.

3 Now between December 3rd and 7th, he was taken into
4 custody in the words of the police juvenile officer Keller
5 about four or five times. Officer Keller testified that he
6 was picked up in an attempt to get leads. Those are his words.

7 And on at least one occasion Petitioner was taken to
8 the hospital and exhibited to the prosecutrix for a "gage to
9 go by on size and color." However, there was apparently no
10 positive identification even though the record is clear that
11 the petitioner had done some yard work for her as recently as
12 two weeks before.

13 The last detention from which the fingerprints that
14 were introduced into evidence, the second set was gained, began
15 on December 12th, again without a warrant. He was driven to
16 Jackson and picked up by Officer Keller and Chief Beddingfield,
17 kept overnight in a Jackson jail, given a lie detector test
18 the following day and returned to the Meridian jail.

19 On December 14th this second set was taken and sent
20 off to the FBI laboratory in Washington, together with the
21 prints of approximately 23 other Negro boys who were still
22 under suspicion at that time.

23 On December 14th, although the record does not show
24 it, he was charged with juvenile delinquency for breaking into
25 the woman's home. Three days later his case was certified by

1 the juvenile judge after hearings in the Circuit Court of
2 Lauderdale County, in which court he was indicted and tried.

3 Q What was the -- breaking into the woman's home
4 part of the same offense?

5 A Yes, sir.

6 Q He has now been tried and convicted?

7 A Yes, sir.

8 Q I see.

9 A At the trial the testimony presented by the
10 State -- well, before I get to that, let me first say that
11 preliminarily Petitioner's counsel moved to suppress the intro-
12 duction evidence of the second set of fingerprints as violative
13 of his rights under the Fourth and Fourteenth Amendments. After
14 a hearing his motion was denied.

15 The prosecution's case consisted of the woman's
16 testimony which is capsulized at pages 4 and 5 of our brief
17 to the effect that he had done yard work for her, a description
18 of the attack which is contained, set out in the brief, there
19 was no medical evidence. The second set of fingerprints came
20 in over objection and he was convicted and sentenced to life
21 imprisonment.

22 Q Why were the second set of fingerprints used
23 rather than the first?

24 A I have no idea, your Honor. The testimony in
25 the record when that was asked by Mr. Young of the Detective

1 Skyborough. He merely said that they were very busy and they
2 just never got around to sending the first set out.

3 Q Would it make any difference to you which set was
4 used?

5 A No, sir, except for this: The Respondent argues
6 that even assuming, for purposes of arguing which he is willing
7 to do that the second attempt -- and that is the last attempt --
8 and that is December 12th which yielded the second set, even
9 assuming that that detention was illegal this court should
10 still uphold the conviction because on a retrial this first set
11 which possibly is setting in the file someplace ---

12 Q And the probable cause for arrest applies to the
13 first set of circumstances, too?

14 A Yes, sir.

15 Q Well there might not have been any arrest at the
16 first occasion?

17 A Yes, we contend that there was, your Honor.

18 Q I know you do but the facts are different.

19 A Well, your Honor, the only testimony as to this
20 first detention which we call an arrest, that of December 3rd,
21 was by Officer Griffin on page 6 and Officer Thompson on page
22 6 and 7, he was asked the question, "Did you have occasion on
23 December 3rd, last year, to arrest John Davis?"

24 "I did.

25 "Can you tell the Court whether or not you had a

1 warrant for his arrest?

2 The answer, "I did not.

3 Question, "You did not have a warrant for his arrest?"

4 Almost the identical testimony was conducted by
5 Mr. Young of Mr. Thompson, Officer Thompson, and that is the
6 only evidence in the record about that December 3rd arrest.

7 Q Well, they didn't take him to the station house
8 did they? The first occasion?

9 A Yes, they did.

10 Q Oh, they did?

11 A Yes, they did. On December 3rd.

12 Q And then on December 12th which you now tell us
13 was the time that the fingerprints were taken that were actually
14 used, where is the testimony about that episode, I mean the
15 circumstances of the arrest?

16 A It is scattered throughout the record, your
17 Honor. On page 8 the Police Chief Beddingfield testified near
18 the middle of the page that he went with the Petitioner to
19 Jackson on the 12th. On page 10 Officer Kelbr testified near
20 the bottom of the page,

21 "Question: Now when you picked him up, did you have
22 a warrant at that time for his arrest?

23 "Answer: No."

24 A few lines previous to that his testimony was to the
25 effect that they in fact did pick him up on the 12th. The

1 Mississippi Supreme Court held that on the 12th he was arrested.
2 Page 58 of the appendix, about ten lines down, it says, "However,
3 on December 12th, appellant after he was arrested, brought to
4 Jackson and subjected to a lie detector test" of course that is
5 supported by the record.

6 Let me back up for one moment and discuss what the
7 Mississippi Supreme Court held. Two things.

8 One, that the detention yielding the prints was not
9 an arrest. This apparently based on the mistaken assumption
10 that the prints had been taken as a result of the first
11 detention. Those that were introduced in evidence were the
12 product of the first detention, and secondly, apparently
13 alternatively, the prints should not be excluded because they
14 are authentic.

15 Now, Respondent argues and I better complete this
16 argument that even though, even assuming arguendo that the
17 prints, the second set of prints, are to be excludable as a
18 result of an illegal arrest, the conviction must yet be
19 affirmed, because on an assured retrial the first set which is
20 presumably lying around someplace hasn't been used, could be
21 introduced and, therefore, to reverse this conviction would
22 be a "useless gesture".

23 Quoting from the brief at page 8 to reverse this
24 conviction only to permit the first set of prints to be intro-
25 duced in evidence at John's retrial. This argument, of course,

1 assumes that the first detention was legal and we maintain quite
2 the contrary and urge the court to set at rest the constitu-
3 tional salients of both sets of prints in order to forestall
4 the necessity of further review by this court.

5 Q What if both sets were excludable, what about
6 still another set?

7 A Well, your Honor, we assume that traditional
8 scope of taint principles will apply and the petitioner would be
9 free at some subsequent time if there is a trial to challenge
10 a new set of prints as the product of the original taint.

11 Q What if the police just go around to his house
12 and ask him for his fingerprints? And he says no, and they
13 say well we want them anyway and we are going to take them and
14 they get his fingerprints?

15 A You mean not in this case, your Honor, but just
16 in some hypothetical ---

17 Q No, in this case. Assume it is reversed.

18 A Yes.

19 Q And they say, well, we will go around and get
20 his fingerprints now. They go around to his house and say, "Give
21 us your fingerprints," and he says, "No." And they take his
22 fingerprints. That is all they do is take his fingerprints.

23 A I would assume, your Honor, that they would have
24 to go to his house if they were willing to do this legally this
25 time, with a warrant, and it would depend upon what that warrant

1 was based on. If, in fact, it was based on her affidavit,
2 Mrs. Key's affidavit, the prosecutrix' affidavit, and that
3 affidavit was in fact tainted by this price of the fingerprints,
4 then we would assume the Scope of Taint Principles would apply
5 and actually be excluded.

6 But it would upon what the facts at a later hearing ---

7 Q But you say there is no way, no legal way that
8 officers may, or the police or investigators may get a set of
9 fingerprints of a suspect until and unless they have probable
10 cause to arrest as long as he objects to it?

11 A That is right, your Honor, and I think that there
12 may be a narrow exception for true voluntary detention. I
13 think that it is possible that one could conceive of a situation
14 which a citizen actually voluntarily gave his prints in order
15 to eliminate any suspicion of himself.

16 But, of course, this court's voluntariness test would
17 have to apply. He would have to knowingly and freely and
18 voluntarily give up his prints and knowing that he could refuse
19 and nothing would happen to him that he would have to knowingly
20 give up his prints.

21 Q Didn't this lady identify him at the trial?

22 A Yes, she did, your Honor.

23 Q And on sworn testimony that is the man?

24 A Yes, sir. She said she was pretty sure.

25 Q And do you suppose a warrant could issue on that

1 kind for his arrest now?

2 A It might very well, your Honor. And then we
3 would be free to argue, we contend, that the affidavit with
4 that warrant was tainted.

5 Q By what?

6 A By the fact that he had already been convicted
7 and apparently her testimony ---

8 Q Yes, but she testified at the trial?

9 A Yes, sir, but her testimony at the time was
10 influenced very much by what the police had done to him, in-
11 cluding this statement he confessed it all. I think that we
12 would be free to argue. This would be open, a retrial, I
13 think your Honor that was tainted. I am not sure the court has
14 to get into it at this point.

15 It seems just sufficient to say the petitioner would
16 be able to argue at some subsequent proceeding that a new set,
17 however obtained, was tainted.

18 Q I assume that she is still living?

19 A I believe so.

20 Q She would be 90 now?

21 A Just about, your Honor.

22 Q But you do have, what appears to be, her positive
23 identification of him made under oath occurring at page 5 in
24 your brief and certainly now if this conviction is reversed,
25 there would be plenty of probable cause to arrest him, wouldn't

1 there be?

2 A Your Honor, yes, and that is what you put your
3 finger on what is essentially fishy about this case. That is,
4 her original identification was apparently so fuzzy that it
5 covered these 65 to 70 at the hospital, sometime prior to the
6 12th and after the 3rd, she wasn't able to identify positively
7 the petitioner and now a year later she is able to say that
8 she is pretty sure that it was Johnny.

9 Q No, she says, no doubt in my mind about it.
10 Page 5 of your brief.

11 A Well, she says at another point that she is
12 pretty sure.

13 Q "Over yonder in that white shire, yes sir, that's
14 him. No doubt in my mind about it."

15 A On page 30 of the ---

16 Q Wasn't she cross-examined about her previous
17 identification for her failure to identify?

18 A No, no, she was not.

19 Q She wasn't?

20 A No, she was not, your Honor. The only testimony
21 by the hospital, failure to identify positively in the hospital
22 was by a juvenile officer Keller on page 51.

23 He questioned did Mrs. Key identify him? The answer,
24 "Not positively."

25 "Question: Mr. Keller, did you say that Mrs. Key did

1 not identify the defendant at the hospital?

2 "Answer: That is right."

3 That is all that is in the record about that hospital
4 identification.

5 Q I have a great problem with your point that if
6 a statement is made under oath that this man is guilty of raping
7 me the fact that she wasn't sure before makes that statement
8 under oath insufficient for probable cause for warrant. I
9 have great problems with that.

10 A I do, too, your Honor.

11 Q You did seem to know ---

12 A My point, your Honor, is this ---

13 Q The point that was asked was on the basis of her
14 testimony if a new trial is granted couldn't they get a new
15 set of fingerprints and you said no.

16 A I was willing to assume they might. And my only
17 point was that if there were a new warrant that this court need
18 decide nothing about that at this time, my only point was that
19 the petitioner would be free to argue at some future time that
20 a new set was tainted. That is all my point was, your Honor.

21 Q Where does it appear in the record about her
22 previous inability to identify the defendant?

23 A Your Honor, the only testimony that I cited was
24 on page 51 of the appendix where the police juvenile officer
25 in describing one of those detentions between the 3rd and the

1 12th he said it was somewhere around the 5th, 6th or 7th,
2 referred to that hospital short.

3 Q And yet she was never cross-examined about that?

4 A That is right, your Honor.

5 Q Nor was the gentleman called the witness, well
6 I guess he was. Yes, he was.

7 A Now we assert that both arrests, the first and
8 the last are illegal. But first we have to deal with the
9 decision by the court below that although the second detention
10 was an arrest the first detention was not. And why?

11 Well, both times that he was taken into custody,
12 detained at the station house, interrogated and fingerprinted,
13 but the difference the court below holds is that the first time
14 the police had no intention of charging the crime but merely
15 wanted to investigate it.

16 There are two answers to this. The first is that
17 there was no testimony about police intention as to December 3rd.
18 The only testimony as to the arrest of December 3rd is that
19 which I have quoted from earlier, pages 6 and 7 of the record,
20 by the arresting officers.

21 There is a sharper answer called for in this case.
22 The fact is this. The fact that the officers had an investi-
23 gative intent only in taking him to the station December 3rd,
24 does not dispense with the constitutional requirements in
25 obtaining a warrant or under circumstances where a warrant may

1 be excused, showing a probable cause.

2 To the contrary, and this is our central point in
3 the case, to the contrary the fact that there was an investi-
4 gative intention only reinforces the illegality of the detention,
5 reinforces the conclusion that there was a violation of
6 constitutional safeguards.

7 Because you can't get a warrant under the law of the
8 land for an investigative arrest and you can't show probable
9 cause or you can't take someone down to the station in order to
10 get probable cause to detain him further.

11 Q Your argument is this: It is entirely based on
12 the Fourth Amendment aspect or the Fourteenth Amendment, isn't
13 it?

14 A Yes, sir.

15 Q Entirely?

16 A Entirely.

17 Q Not at all on the Fifth Amendment aspects nor
18 on generalized due process?

19 A No, your Honor.

20 Q Explicitly on the Fourth on the illegal arrest?

21 A That was compelled by Schmerber.

22 Q What else happened during this period of the
23 detention?

24 A Well, your Honor, let me capsule and go over it
25 again and see if we can narrow it down.

1 There was the arrest of December 3rd, the number of
2 pickups by Keller between the 3rd and the 12th, he said four
3 or five times in attempts to get leads and the final detention
4 of December 12th from which he has never been released and that
5 simply is it.

6 Do you want to direct my attention to ---

7 Q No, I just wondered -- these fingerprints were
8 not the result of the arrest necessarily. Those are his finger-
9 prints whenever they had been taken. I just wondered what else
10 happened at the time his fingerprints were taken on the 12th.

11 Was he interrogated?

12 A Well, he was taken 90 miles, given a lie detector
13 test.

14 Q That was later?

15 A Yes.

16 Q Over to Jackson?

17 A Yes. And then brought back, kept some more in
18 the jail and finally his prints were taken the 14th and those
19 were sent out to Washington and those were introduced in evi-
20 dence. That was called the second set.

21 Q And fingerprints of what, 23 or 24 other young
22 Negroes were sent to Washington in connection with this case?

23 A Yes, your Honor.

24 Q The record shows?

25 A On the 14th. The same day that the second set

1 were taken.

2 Q Had all those 23 or 24 been arrested? Does the
3 record show?

4 A It is best one refer to it. It is a very skimpy
5 record, your Honor. The best I can tell, though, the same kind
6 of treatment had been meted out to them. They were taken to
7 the station house ---

8 Q Taken over to Jackson and given a lie detector
9 test?

10 A Oh, no, I don't think ---

11 Q Not that?

12 A No, I don't think that.

13 Therefore, to return to the thread of my argument the
14 failure to obtain a warrant or to make any attempt to show
15 probable cause for the two arrests is explainable by the fact
16 that this is just an investigation, an investigative arrest but
17 is not excusable.

18 Now, I turn to the warrant point. The record is
19 clear that there was no warrant for his arrest, both on the
20 3rd and 12th. As I indicated the police can't get a warrant
21 under the law of the land for such an investigative attempt
22 so that we can understand why no warrant was obtained, even
23 though we cannot excuse it.

24 I see my time is running short so I will ---

25 Q What if they just hadn't arrested him at all,

1 but what if they had just gone to a neighborhood and said we
2 want to take the fingerprints of all young Negroes in this
3 neighborhood between the ages of 15 and 20?

4 A Your Honor, I think that under most circumstances
5 you would actually have to have an arrest warrant in order to
6 take their fingerprints except ---

7 Q Why? My fingerprints are on file with the FBI
8 just because I was in the military service.

9 Q The boy that refuses to give them voluntarily?

10 A Well, that is like the stop and frisk problem,
11 they escalate into a situation where he then becomes under
12 greater suspicion.

13 I am willing to concede that there may be a very
14 narrow category of cases called voluntary giving of fingerprint
15 cases in which the person knows that nothing will happen to
16 him if he refuses to comply. But that is not this case.

17 Q Well, my question really is, is it your claim
18 at all that the taking of his fingerprints as such violated
19 any provision of the Constitution?

20 A No, your Honor.

21 Our contention is grounded upon the fact ---

22 Q It is only at the time and place when they were
23 taken he was under you say illegal arrest?

24 A Yes, sir. Our contention is grounded upon the
25 fact that it was illegal police conduct, outrageously illegal

1 police conduct and the fact that these fingerprints were the
2 product of this illegal police conduct means that if the
3 exclusionary rule means anything that these fingerprints should
4 be excluded.

5 Q Yes, but in the argument saying that if they
6 did go around the neighborhood and take the fingerprints and
7 he says no and they say we are going to get them anyway and
8 they take his fingerprints right there on the spot and turn him
9 loose.

10 A You have to have a warrant for that.

11 Q That is right. So you do say that to take
12 involuntary taking of fingerprints violates the Fourth Amendment?

13 A Yes, sir, without a warrant.

14 Q Without a warrant?

15 A Yes, sir.

16 Q Or without a legal arrest?

17 A That is right unless there is one of these narrow
18 category cases that is really voluntary giving of fingerprints.

19 Q I know but I thought everybody was involuntary.

20 A Let me continue quickly to the point that there
21 was no attempt to show the cause for either arrest, that of
22 December 3rd or December 12th, again it was impossible for the
23 police to do so. It is clear from the record that all they
24 wanted to do was to investigate.

25 Well finally I come to the court below's ruling that

1 fingerprints are excluded from the operation of the exclusionary
2 ruling in the Fourth Amendment.

3 I start with this Court's landmark ruling in Napthe,
4 Ohio that all evidence obtained by searches and seizures in
5 violation of the Constitution is inadmissible in State pro-
6 ceedings.

7 I do want to save some time for rebuttal and so I
8 think I will stop here.

9 The argument on fingerprints and their subjection to
10 the exclusionary rule is contained in our brief and I will save
11 the remaining time for rebuttal.

12 MR. CHIEF JUSTICE WARREN: Mr. Lyell.

13 ORAL ARGUMENT OF G. GARLAND LYELL, JR., ESQ.

14 ON BEHALF OF RESPONDENT

15 MR. LYELL: Mr. Chief Justice and may it please the
16 Court.

17 I will be as brief as possible. I concede that most
18 of the things that counsel has argued and that no probable cause
19 appearing in this record of the second arrest and I really am
20 not concerned with the second arrest. And I don't mean to use
21 that word second arrest in the sense that there was a first.

22 Because the State's position is this: That there is
23 a heinous crime, unsolved. The only leads they have got is two
24 latent fingerprints from the window sill and the window pane
25 with a big component.

1 This has got nothing to do with the merits of the
2 case but the Court might be interested to know that this
3 Mrs. Key is the mother of Al and Fred Key, who in the 30's
4 set the world's endurance flight plane record, plane flight
5 record which still stands. They kept a light in the air over
6 something 30 some days.

7 Now here we have this crime. Now the record is slim
8 as to what led the police to pick this boy up but evidently he
9 was one of the first, if not the first picked up, and interro-
10 gated.

11 I tried him on the proposition to please the court
12 generalized statements from cases like Culombe versus
13 Connecticut, which was reversed for other reasons that this is
14 a general inquiry into an unsolved crime.

15 And often there is little else the police can do
16 than to interrogate suspects as an independent part of a
17 criminal investigation and to further quote from the opinion
18 and probable the most restricted case this court has ever
19 handed down on a criminal investigation, Miranda, general on-the-
20 scene questioning as to facts surrounding a crime.

21 I wish to emphasize this language, or other general
22 questioning of citizens in the fact-finding process is not
23 affected by a holding. And further, that fingerprints for all
24 the different categories, testimony levels, is held in Schmerber
25 versus California, that even the taking of blood over objection

1 was declared proper as long as it is done in clinical condi-
2 tions as it was done in that case.

3 Q While you are on Miranda, didn't Miranda also
4 say when a person was being held in restraint?

5 A Mr. Justice Marshall, if the State possesses
6 that in a case of this kind where you have got no positive
7 identity and the record is slim as to what leads the police
8 could get from Mrs. Key.

9 I believe the original Mississippi Supreme Court
10 record is here and you will see pictures of Mrs. Key in her
11 hospital bed with bruises about the face and I think on the
12 neck, and it is just my conjecture that in her age and having
13 gone through what she had she was not in a position to give very
14 much information.

15 But suffice to say, our State Supreme Court went along
16 with my argument that this boy, and incidentally he was only
17 14 at the time of this, and I am satisfied that because of his
18 youth that he didn't get the death penalty. His youth and the
19 age of the victim.

20 Q My question was, was he in restraint when the
21 fingerprints were taken?

22 A My answer, sir, is this: He was in restraint,
23 but not under arrest in the legal sense of the word.

24 Q Well, doesn't restraint put him under Miranda?

25 A Well, Miranda has only to do with testimonial

1 evidence, Mr. Justice Marshall.

2 A Yes, well you have said that this was distinguished
3 from Miranda. I was waiting to get to where you were going to
4 distinguish.

5 Q The distinction is set out in Schmerber versus
6 California and other cases cited therein.

7 Q Your adversary is not relying one bit on Miranda.
8 That is the Fifth Amendment.

9 Q That is right.

10 A But I am getting back to the Fourth Amendment
11 now on the arrest and it is our position that it was not an
12 arrest in the legal sense of the word that it was part of a
13 fact-finding process.

14 Q Do you contend that his appearance at the police
15 station was voluntary or that he was brought there involuntary?

16 A Mr. Justice, I wouldn't say it was voluntary. I
17 don't know.

18 Q So they would have brought him down there ---

19 A Fourteen year-old boy?

20 Q Yes.

21 A I can say but I wouldn't say it was voluntary.

22 Q How many did they bring down there voluntarily?

23 A Mr. Justice Marshall, I think the record shows
24 they interrogated between 60 and 70. Nobody remembers for sure
25 and I think they brought ---

1 Q And they interrogated them all at the police?

2 A No.

3 Q Where did they interrogate the other one?

4 A The record doesn't show. Apparently home,
5 school.

6 Q Well, why did they bring this one down there?

7 A They brought this one and around 26 -- twenty
8 some odd others.

9 Q Well, twenty-some odd others, the police went up
10 and said would you mind coming along with me or did they say
11 come on boy?

12 A It doesn't show.

13 Q What do you think?

14 A Well, Mr. Justice Marshall, that is pure con-
15 jecture on my part ---

16 Q Very well.

17 A I know at least there is no indication in this
18 record that anybody was intimidated. I am sure that is what
19 you are getting at and as a matter of fact what little there is
20 in the record about the trip to Jackson, I believe the record
21 shows -- I am almost positive -- that the boy's mother approved
22 it.

23 But I am trying to forget the second, the part what
24 actually is the first legal arrest and the trip to Jackson
25 because nothing as a result of his arrest and the trip to

1 Jackson was used at the trial.

2 Q Do you think that the question whether that was
3 an "arrest" is crucial in the case?

4 A I think it does. I think that is the question.

5 Q You think that is the case they presented?

6 A In my way of thinking that is the question, was
7 he arrested when he was first interrogated and printed at
8 police headquarters.

9 Q Well, the fingerprints taken at Jackson were
10 used in the trial?

11 A Well, there in ---

12 Q But you are just saying that they were the same
13 fingerprints as that taken before?

14 A It was sort of a clerical error and the officer
15 of the police department over there in Meridian and it is
16 certainly under check in Schmerber versus California beyond
17 a reasonable doubt.

18 MR. CHIEF JUSTICE WARREN: We will recess now,
19 Mr. Lyell.

20 (Whereupon, at 2:30 p.m. the Court recessed, to
21 reconvene at 10 a.m. Thursday, February 27, 1969.)
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25

Lyell