In the

Supreme Court of the United States

HAROLD R. SWENSON,

Petitioner,

v. No. 71-224

JAMES WILLIAM STIDHAM,

Respondent.

Washington, D. C.
October 11, 1972

Pages 1 thru 43

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

HAROLD R. SWENSON,

Petitioner,

v. No. 71-224

JAMES WILLIAM STIDHAM,

Respondent.

Washington, D. C.,

Wednesday, October 11, 1972.

The above-entitled matter came on for argument at 1:15 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

KENNETH M. ROMINES, ESQ., Assistant Attorney General of Missouri, Supreme Court Building, Jefferson City, Missouri 65101; for the Petitioner.

MARK M. HENNELLY, ESQ., 210 North 13th Street, St. Louis, Missouri; for the Respondent.

C O N T E N T S

- - -

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Swenson against Stidham, 71-224.

Mr. Romines.

ORAL ARGUMENT OF KENNETH M. ROMINES, ESQ.,

ON BEHALF OF THE PETITIONER

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

This case is a habeas corpus case which originated in the Western District of Missouri. It involves a question concerning Jackson vs. Denno and Simms vs. Georgia.

In 1955 Mr. Stidham was convicted for the first degree murder of another inmate in a prison riot at the Missouri State Penitentiary. The original conviction was affirmed by the Missouri Supreme Court in 1957.

Mr. Stidham filed for collateral review pursuant to Missouri Supreme Court Rule 27.26. That was likewise affirmed.

Then a second collateral review in 1967 was sought, denied by the Circuit Court of Butler County, Missouri. The Missouri Supreme Court reversed and remanded for an evidentiary hearing, and reinstated Mr. Stidham's direct appeal in the spirit of Swenson vs. Bosler, which required counsel on appeal. They affirmed.

In 1970, Mr. Stidham sought habeas to the Western

District of Missouri through Judge Collinson. Judge Collinson dismissed on five separate grounds. It was appealed.

The appeal was dismissed by Mr. Stidham. He tried to reinstate the appeal and the court did not allow the reinstatement.

He filed a second habeas corpus petition before Judge Collinson. Judge Collinson, relying upon the former opinion, denied it, and also denied a new issue involving Coleman vs. Alabama.

Of the five issues that then went to the Eighth Circuit, four were affirmed. One, the Jackson v. Denno issue, was found, by a two to one vote, to be -- the Eighth Circuit held that their review of Missouri case law demonstrated that the Missouri trial court had frequently used the right to submit the question of voluntariness to the jury without a prior determination independently by the judge of voluntariness.

In essence, I feel that the Eighth Circuit clearly has held that the Missouri rule was the same as the New York rule.

Under Jackson, which was struck down, the judge could not exclude a confession if there were circumstances which indicated testimony on both sides. He was not entitled to exclude a confession merely because he, himself, would have found it involuntary. In essence, he was without

the judicial power to resolve the conflicting evidence on voluntariness.

This Court held that the defendant had a right at some point to a hearing and a determination on the issue of voluntariness. And the court expressed the opinion that to give the jury the dual function of deciding voluntariness and the factual history did not give the defendant the constitutional determination that he was due.

Now, because of the way the Eighth Circuit read the Missouri procedure, we have dealt extensively with old cases, beginning from 1829, when we became a State, Hector (A Slave) vs. The State, all the way through up to the most recent cases.

Basically, I think, distilling those cases indicates that that Missouri procedure contemplated a preliminary hearing outside the presence of the jury. That at that hearing the State had the burden of non-persuasion. After that hearing the court could weigh the evidence and find the confession involuntary and refuse to let it go to the jury.

Or the court could find the confession competent evidence and instruct the jury on their duty to find that the confession was voluntary, and instruct on their duty to find that if they thought it was voluntary they then had the second determination to make, wether they thought it was

true and they believed it.

Now, the Eighth Circuit Court's rather definitely, I believe, with the use of elipses from three different cases in Missouri as their basic reasons for saying the Missouri procedure was bade -- one of those cases is State vs. Bradford. At the part in the opinion just before the court dips into what is admittedly equivocal language, and it's pretty difficult to determine exactly what the procedure is, the Missouri Supreme Court said this:

"... a court is not obliged to submit the issue of voluntariness of a confession to a jury merely because there is substantial evidence tending to show the confession was voluntary however much the evidence of its voluntary character is outweighed by the evidence to the contrary."

Now, that portion follows some equivocal language which the Court sets out, which indicates that: But the better rule is that if there is a real close question, let's let it go to the jury.

Now, the question is: What does it mean? And my answer is: It's pretty hard to tell. I don't believe it means exactly what the Eighth Circuit said. I don't believe that is the exact way the New York procedure worked.

And the other case that leads me to that conclusion is State vs. Gibilterra, which they also quote. The Cout there says that: it is not the law that if there be any

substantial evidence indicating the confession was voluntary, the court must -- and the emphasis in our brief is, the Court's emphasis -- must refer the question to the jury however much it may be outweighed by evidence to the contrary.

If that were true the Court would be doing no more than it always does throughout a trial in ruling on the admissibility of evidence. And there would be no need of such preliminary hearings, except in the rare instances when such evidence is wholly lacking.

Now, here is where the equivocation starts, as it happened in the last case: "On the other hand, when there is substantial conflicting evidence and the question is close, it is better to refer the underlying issue of voluntariness to the jury than to exclude the confession." Then they go on with some language about miscarriage of justice if this is not done.

QUESTION: Is the basic issue in this case, the basic question: What was the law of Missouri in 1955 with respect to procedure in handling alleged coerced confessions?

MR. ROMINES: No, sir. To the extent that that might be the conclusion to be drawn from my question as presented, I don't believe that's it. I go one step further and say that no matter what the law in Missouri might have been in 1955, that we have to determine what this judge did on the facts before him.

That's where I think the Eighth Circuit made the mistake. Because if the Eighth Circuit was correct, had the judge, on the record, said: I make the finding that this confession was voluntary as a matter of law. If the Eighth Circuit was correct, no matter; that would not have been a proper finding.

QUESTION: Even though, as you suggest, the judge very clearly had complied in 1955 with what the -- with Jackson v. Denno, decided many years later, you say that the Eighth Circuit would have said: Well, that doesn't make any difference, because the law of Missouri didn't require it to do that?

MR. ROMINES: Right.

QUESTION: Well, Mr. Rimines, isn't it also perhaps equally a fundamental issue in the case of the proper application of this Court's holding in Jackson v. Denno, to whatever in fact happened in the Missouri trial court?

MR. ROMINES: Yes, sir, that's what I --

QUESTION: That, you say, is the basic issue.

MR. ROMINES: That's what I tried to indicate. That, I believe is the basic issue, not necessarily so much what the Missouri procedure may or may not have been. I mean that might be a nice intellectual inquiry, but, frankly, I'm concerned in this particular case that we hold, or that the Court holds that the procedure that this judge used, the

words this judge used, after the inquiry that was made, was sufficient under Jackson vs. Denno.

QUESTION: Because at that preliminary -- that inquiry, what you say is an interesting intellectual inquiry, to what was the law of Missouri in 1955, showed, I suppose you would agree, normally in our judicial process be left for the determination by the United States Court of Appeals for the Eighth Circuit?

MR. ROMINES: I think that's correct.

QUESTION: We're not in business here to decide what the State law is, or was.

MR. ROMINES: No, and in a particular case where the law is, perhaps, unclear as the court indicates, at least two members of the court indicated they thought this was. Perhaps that is a proper inquiry.

But I think on the particular reason that we're here today that that's not the proper inquiry.

Basically, I guess the most charitable thing, perhaps the worst thing that could be said for all these Missouri cases is a basic general rule cannot be established. The early cases, up to about 1930 clearly indicate the judge made the decision. There's some equivocation in some of the cases after that, and I think -- especially if you read State vs. Laster, you find a case where the attorney comes in and he will not put on any evidence. And so there

up crops what's called a prima facie rule, which that puts languages in the cases that at the next time the judge uses -- I don't think in the correct factual circumstances. In this case Mr. Hennelly, who is a vigorous trial lawyer, as I believe the transcript will indicate, requested of the judge a second judge, coming in from another circuit. The case was being heard on the change of venue, of, I would say, approximately 250-300 miles away from the State Penitentiary, the county that it's in. He requested testimony on the confession, a hearing outside the presence of the jury. That was given.

Now, the language we've specifically set out in the brief.

The first time that one of the officers gets up to testify about the confession, Mr. Hennelly indicates: At this point, Your Honor please, the defendant moves the court to conduct a preliminary hearing and asks the court to inquire into the voluntariness of the statement and to determine whether the statement was given voluntarily, either the oral or the written statement; and we ask that the hearing be had outside the hearing of the jury.

That was done. Evidence that was taken covers 80-85 pages of the transcript. All the officers testified. The defendant testified. And at the end of that, Mr. Hennelly indicates: That is all. That is defendant's motion.

Then the court's language, which is perhaps what ashcaused the confusion, is: Now, at the conclusion of the hearing outside of the hearing of the jury, the request by the defendant for a hearing upon the statement which has been identified as 16161, it is the court's opinion that the matters concerning the statement should be offered in the presence of the jury. Subject, of course, to any attacks as to its credibility by the defendant. The defendant has, of course, the right to proceed to challenge the voluntariness of the statement and confession even before the jury.

But it is the court's opinion that upon the evidence that has been offered before the court and outside the hearing of the jury, that the statement is and should be admissible.

Then he follows with some other non-appropriate language.

Mr. Hennelly immediately jumps up and says: In other words, the court is overruling my motion, and requests the court to hold, as a matter of law, these statements were involuntary. Is that right?

"The Court: That is right." And brings them back in.

Now, of course, if you accept what the Eighth Circuit says the law was, it can be read two ways. The one way, the way that we say it should be read; the other way, the way that Mr. Hennelly says it should be read, to the

extent that: Okay, he's equivocating. If he was trying to make the decision of, well, is there enough evidence here, that maybe I ought not to rule, it goes.

I think it's clear from the judge's actions here that he is saying, "I don't believe a word Stidham is saying." He has decided credibility. That's what we're talking about in Jackson. Has this man ever had the credibility of his voluntariness decided before the jury gets it, and that mixed nature of trying to decide whether it's truthful and whether it happened.

QUESTION: Could I ask a question, please?

MR. ROMINES: Surely.

QUESTION: Let's assume that Jackson was violated or wasn't followed, or that the procedure that Jackson thinks the trial judge should follow wasn't followed at the trial, the criminal trial. The defendant then is not entitled to a new trial, necessarily, but just to a hearing on the voluntariness of his confession, isn't that true?

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

QUESTION: Now, after he was convicted he was given another full hearing in the STate courts, was he not?

MR. ROMINES: That's true.

QUESTION: And there were no new witnesses called or anything, I take it.

MR. ROMINES: No, there was some changing of

testimony, but --

QUESTION: Change of testimony, but there was full opportunity for a hearing, and the --

MR. ROMINES: That's true.

QUESTION: -- same --

MR. ROMINES: Counsel.

QUESTION: For all intents and purposes the case was submitted on practically the same evidence.

MR. ROMINES: True.

QUESTION: Is that right?

MR. ROMINES: That's true, Your Honor.

QUESTION: And the State trial judge that was conducting that collateral hearing denied relief.

MR. ROMINES: That's true.

QUESTION: Now, if that were a determination that the confession was voluntary, it really wouldn't make any difference what the procedure was at the trial, would it?

MR. ROMINES: No, it wouldn't. The only trouble, Your Honor, is with what the judge said -- we're again hung up in semantics. The judge did not say: I view the evidence, I find it voluntary.

He said: I view the evidence. The judge in 1955 found it voluntary, as he should have.

So it is not just --

QUESTION: But he went on and said there was plenty

of evidence to support that?

MR. ROMINES: Right. He did.

QUESTION: Well, if he thought the judge determined it voluntary, said there was plenty of evidence to support it, do you think that's a determination of voluntary?

MR. ROMINES: I think it certainly is. And we argued that. We also have argued that the determination the Supreme Court made on appeal was sufficient under Jackson.

QUESTION: Yes.

MR. ROMINES: Under the reinstated appeal.

QUESTION: Yes. Because there the court did say it was voluntary.

MR. ROMINES: Right. Judge Collinson said it was voluntary.

QUESTION: Did the trial judge say it was voluntary, or did he say it was not involuntary?

MR. ROMINES: Those words, all of the words in there are Mr. Hennelly's words. The judge only rules. He does not say voluntary nor not involuntary. He doesn't say anything. He says: I'm going to let it go to the jury.

Mr. Hennelly then says: Are you overruling my motion that it is not involuntary as a matter of law?

And he says: Correct. Call in the next witness.

So he actually uses none of the phrases, or the magic rubic as Judge Gibson says, he does not indicate that.

QUESTION: The trial judge could have determined that as a matter of law it was involuntary, could he not?

MR. ROMINES: He could have.

QUESTION: Then he would not have let it.

MR. ROMINES: That is correct. He had that power. That's how we distinguish it from the New York rule which, as I read some of those cases, it seems to indicate that once there is conflicting evidence he didn't have the power to take it away from the jury.

QUESTION: And you say that his words, coupled with his actions, make it clear that he was ruling that he regarded the confession as voluntary, subject only to the jury's right to reexamine that as to credibility and other attack?

MR. ROMINES: And probative value, that's correct, Your Honor.

QUESTION: Mr. Romines, if the case had come here on direct appeal, or certiorari from the affirmance on direct appeal by the Supreme Court of Missouri, and we had concluded that this colloquy between Mr. Hennelly and the trial judge did not satisfy Denno, we would have sent it back to the Missouri courts, I suppose, for much the same type of hearing that Mr. Stidham obtained in his Missouri habeas proceedings.

MR. ROMINES: That's true.

I don't think there's any doubt that the Eighth Circuit recognized, under Sigler vs. Parker, that it had to be a determination that while they sent it back even to the Western District Court, it was only to hold that case until new proceedings should be instituted in Missouri, which evidently indicates a third collateral attack proceeding in Missouri for Mr. Stidham.

Basically, we make the argument that the Supreme Court on appeal, and particularly the judge in St. Louis, on the collateral attack hearing, under 27.26, that made a sufficient determination under Jackson.

In our brief we also indicate that we do not wish to waive those arguments regarding the retroactivity of cases, although it's pretty difficult to fly in the face of Jackson, which apply retroactively to a habeas case. We believe that it should not apply collaterally standards that are not viable at the time the original appellate review of the court.

Perhaps, and I've heard that argument made in two or three other cases in the last couple of days, it's a dog that won't hunt, but we believe that it should hunt.

It's a problem. I've handled -- been in the office three years and I've handled 1475 petitions, responses to show cause.

QUESTION: 1475 petitions, was that --

MR. ROMINES: Responses to show cause, that's right.

QUESTION: -- to federal habeas?

MR. ROMINES: In three years. I went through and -- I didn't believe it. The more docket cards I went through, the more the numbers came up.

QUESTION: Was that just the Western District?

MR. ROMINES: That takes in the Western and the Eastern District.

Four hundred and eighty-one of those have been appealed; 84 have been reversed; and only in one, this case, have I had a gut reaction. And it's fairly difficult to tell exactly what it is, but it's a lot of little things, that I just think it's something wrong that this can go on, after this man has had this number of hearings; and I think it should stop.

We also make an argument in the brief --

QUESTION: Where would you stop it?

MR. ROMINES: I would stop it right here.

QUESTION: You're not denying the function of the federal habeas?

MR. ROMINES: No. I'm not concerned with that. And I'll try to deal with that in the next part.

The other part of our argument was that this man had an original habeas, it went to the Eighth Circuit, he dismissed his appeal, on basically the same issues except for

a Coleman v. Alabama issue, which he brought up later.

But he tried to reinstate his appeal, the Eighth Circuit said no. That should have been the end of it for Mr. Stidham on this issue.

Now, he filed a second habeas corpus in the Western District. Judge Collinson denied him relief, basing it on his prior decision and also denying relief on Coleman vs. Alabama. It goes up. Then the Eighth Circuit, and there have been other cases involving the same Missouri procedure, which they've not felt concerned enough to tell us about in the last few years of Jackson v. Denno. In this case the two members on that panel decided that the Missouri law was incorrectly being applied.

QUESTION: Did you make the same argument in the Eighth Circuit?

MR. ROMINES: We did not have oral argument, Your Honor. Went off on the summary docket.

I would like to reserve some time for rebuttal.

QUESTION: Am I correct that Judge Gibson was the only Missouri judge on the panel?

MR. ROMINES: Yes, sir, and he was the judge that dissented. His basis being that the Missouri Supreme Court is the one to judge what the law of Missouri was. And he was the only Missouri judge on that three-man panel.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Hennelly.

ORAL ARGUMENT OF MARK M. HENNELLY, ESQ.,

ON BEHALF OF THE RESPONDENT

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

I think it is always an emotional thing that we would like to do away with as many appeals as possible. Unfortunately, this is the occupational hazard that the State has to take with respect to innocence. And that's the situation that Stidham has taken for almost twenty years. The question is whether or not we're going to say to Mr. Stidham: The dockets are too loaded. If we coerced this confession out of you, it's most unfortunate, because we've got too much work to do.

And I don't think that that is a proper interpretation of the -- of any of the laws.

QUESTION: Am I correct that this is the seventh time that this case has been before some court?

MR. HENNELLY: It's the seventh time it's been before type of court, Your Honor. And, again, I say that's a result of this man's insistence that he was illegally convicted.

We would not be here -- we would not be here if Judge Godfrey, who heard the case when it came back the second time, if he had done exactly what the court said

should have been done.

Let me read what Judge Godfrey did. Judge Godfrey says: As to paragraph (b) concerning the avarment --

QUESTION: What are you reading?

QUESTION: Can you give us a citation to the record, so we can get it?

MR. HENNELLY: Yes. This is on page 26 of our brief; at the Appendix 686.

QUESTION: Page what?

MR. HENNELLY: It's on page 26 of our brief.

QUESTION: All right.

MR. HENNELLY: "As to subparagraph b concerning the averment that 'the overwhelming evidence was that the statement was involuntary because of coercion exerted on movant' this contention was raised and profusely litigated in State vs. Stidham, and the Court finds it is no longer open to question here."

Judge Godfrey made no finding that we asked him to make. If he had, we wouldn't have had to come here.

QUESTION: Well, didn't he go on in the next paragraph and say that --

MR. HENNELLY: Yes.

QUESTION: -- it was resolved by the trial court in the first instance?

MR. HENNELLY: Yes, he -- well -- but he went on

further than that, too, Your Honor. I'll read the whole thing that he said:

"It should be noted that the evidence concerning the issue of voluntariness was greatly conflicting and was to be resolved by the trial court in the first instance and the jury in the second having regard to the credibility of the witnesses. This issue should now be considered closed -- it should now be considered closed -- and this Court finds it to be so."

In other words, all that he did was to put a stamp of approval on what had been illegally done previously.

QUESTION: What year was he speaking in? That date isn't here?

MR. HENNELLY: It was two years ago, Your Honor. In other words, we tried the case the first time in about 1955, and then the sixth appearance was before Judge Godfrey, and Judge Godfrey clearly did not make the finding that he should have made as a result of the mandate of his own Supreme Court.

Now, as we understand Jackson v. Denno, when a trial is over a defendant ought to be able to say to himself: I am satisfied as to the circumstances under which this jury convicted me with respect to a statement.

And he ought to be able to say: I am satisfied that the court, the court, found that it was voluntary.

And he ought to be able, as a result of Simms v. Georgia, to say that that was found with unmistakable clarity.

QUESTION: Mr. Hennelly, --

MR. HENNELLY: Yes, sir.

QUESTION: -- on the preceding page that you quoted from, page A685, and I take it this is still the opinion of the Missouri habeas judge. The last paragraph there, where it says: "Movant's contention that the trial court failed to find specifically that the confession was voluntary this Court finds is untenable since the Court found specifically that the confession was not involuntary."

Now, if a court finds specifically that the confession is not involuntary, that's tantamount to finding it voluntary, isn't it?

MR. HENNELLY: No. No, Your Honor, all that he is doing is restating what the court did in the first instance. All that he is saying is that: I've read the decision and I see when I read the decision that the court found that it was involuntary.

He's not saying that based upon the evidence that was put before me, that I now find that it was involuntary. And if he did, we'd be dead as far as this case is concerned. But he didn't do that.

QUESTION: But he's at least characterizing the finding of the original Missouri trial judge's finding, that

it was not involuntary.

MR. HENNELLY: No, I don't think that he is.

I think that what he is doing is going back to -- and while I realize that an interpretation as to what was the law in Missouri at the time is only a factor to be considered as to what was in the mind of the late Judge Weber when he made this finding, I think that all that he is doing is saying that at that time they lived up to what the law was in Missouri.

And the fact of the matter is, with respect to the material that Mr. Romines read, at the time that I asked for the hearing, I asked for a hearing based upon both the oral and the written confession. And you will note, if Your Honors will, that when we got down to the colloquy as to "Are you finding as a matter of law?", we were talking about the State's Exhibit 16 and 16-1. There is no place in this record, there is no court that has ever decided that the oral statements, which were objected to, and the record saved at each instance on the oral statements, there is no finding any place in this record that the oral statements were voluntary.

Now, again, with respect to the statement of the court, and my statement "you're not finding as a matter of law", when I say "you're not finding as a matter of law", I'm saying the law as it existed then. It is for that

reason that it is of some importance. It's the case law that we've been following in Missouri all the time. And the case that we had been following in Missouri was chiefly -- it was clearly an opposition to the finding that this Court made in Jackson v. Denno. It was that if the question was close, the court didn't have to put a stamp of approval on it, the court didn't have to make a positive finding, the court passed it on to the jury.

And, as a matter of fact, at page 703 of the Appendix, that's exactly what the Supreme Court said. When we originally tried Stidham and he went up to the Supreme Court for the first time, the Supreme Court said: "There is no merit in defendant's contention that his written confession" -- his written confession; they don't even worry about the oral statement -- "we coerced and involuntary and was admitted in evidence before the State established that it had been voluntarily given. The court conducted a full preliminary hearing on the issue, found the issue was for the jury, and later, after hearing evidence before the jury, submitted the issue to the jury for determination. The testimony was to like effect at each hearing." So on and so forth.

The last thing it says: "On the conflicting showing the issue of the voluntariness of the confession was for the jury." Which is totally inconsistent with what this Court has

held the court should have done with respect to Jackson v. Denno, and the Sims case. The court should have made a positive unquestioned finding. And, quite frankly, if Judge Godfrey, when the case went back to him, if he would have done it, that would have been the end of it, too.

But to this day nobody has made that finding, except that the Eighth Circuit Court of Appeals has strongly suggested that it was totally involuntary, and that it was taken, and that if we took the uncontradicted testimony, that the confession was involuntary and should have been excluded as a matter of law.

QUESTION: What's the consequence now of the holding of the Eighth Circuit?

MR. HENNELLY: The consequence is that it's now here, that you --

QUESTION: No; other than here.

MR. HENNELLY: Well, the consequences --

QUESTION: If it had not come here, what then?

MR. HENNELLY: If it had not come here, and if -- I'm sorry -- if the State had not applied for cert, it would have gone back for another hearing, to determine the voluntariness of the statement, and I presume that some other judge, realizing that he had to confirm with Jackson v. Denno and the Sims case, would have said: I have heard this evidence, I find it to be voluntary. And that would have been

it.

QUESTION: May I ask, Mr. Hennelly: It goes back under the Eighth Circuit's disposition. It goes back to another State court hearing?

MR. HENNELLY: To another State court.

QUESTION: And, meanwhile, the conviction does not stand vacated pending that hearing?

MR. HENNELLY: No, it does not.

QUESTION: Does not -- it's not been vacated?

MR. HENNELLY: No.

QUESTION: Why wouldn't it go back for a hearing before Judge Collinson, or one of the other judges in the Western District, since presumably the petitioner has exhausted his Missouri route?

MR. HENNELLY: I don't know, to be quite frank with you, Judge.

Now, I think that we can look at this record --

QUESTION: Well, Mr. Hennelly, --

MR. HENNELLY: Yes, sir?

QUESTION: -- isn't the answer to Mr. Justice Rehnquist's question that if in fact Jackson v. Denno was not followed, then the Jackson v. Denno remedy is to go back to a State judge and have a State judge -- not vacating the conviction -- have a State judge have a new hearing and the question concerning the voluntariness --

MR. HENNELLY: Only of voluntariness --

QUESTION: -- and if he finds that it was voluntary, then the conviction remains undisturbed.

MR. HENNELLY: That's right.

QUESTION: If he finds it was involuntary, then he sets the conviction.

MR. HENNELLY: We get a new trial, we try it, and they try it with whatever evidence they have, independent of the confession.

QUESTION: Well, then, I gather, under Jackson v. Denno, that it couldn't go back to Judge Collinson in the Federal District Court, it had to go back to a State judge?

MR. HENNELLY: That's right.

QUESTION: What was the date of the indictment?

MR. HENNELLY: It was in -- he was indicted in about November of 1954, Your Honor.

Now --

QUESTION: The criminal act was within a year of that time, just a short time?

MR. HENNELLY: Yes. Yes, he was -- the riot -- this was a penitentiary riot in September of 1954, and he was -- there was, first, an information issued against him, and then they indicted him.

Now, it is our contention --

QUESTION: May I ask one more question?

MR. HENNELLY: I'm sorry.

QUESTION: Thank you. I gather, then, that -- how did this case get back to -- Judge Godfrey is a State court?

MR. HENNELLY: That's right.

QUESTION: How did they get back to him?

MR. HENNELLY: It got back to him because the Supreme Court found, the Missouri Supreme Court found that as a matter of fact he should have a hearing on a 27.26 motion, which is our post-conviction device, to determine whether or not that confession was voluntary; together with some other matters.

QUESTION: And your submission is that Judge Godfrey did not in fact make a finding on the voluntariness?

MR. HENNELLY: He did not.

QUESTION: Had he made one, then Jackson v. Denno, you agree, would have been satisfied?

MR. HENNELLY: Would have been satisfied.

QUESTION: But all he did was go back to -- who was the original judge?

MR. HENNELLY: It was Judge Weber.

QUESTION: And what -- you point out to us that at 685 and 686 is Judge Godfrey's characterization of what happened before Judge Weber, is that it?

MR. HENNELLY: In effect, he says, I cannot, that's res adjudicata's part in this.

QUESTION: That's what it is.

MR. HENNELLY: That's what it is.

QUESTION: And your submission is that that's the characterization of what happened before Judge Weber?

MR. HENNELLY: That's right.

QUESTION: Instead of doing as he should have done, both as the Supreme Court required him to do and to satisfy Jackson v. Denno, to make his own independent determination of voluntariness?

MR. HENNELLY: That's right.

QUESTION: The difficulty is, the Supreme Court told him to hold a hearing and determine voluntariness?

The judge held a hearing, and he said whatever he said, and you appealed again. And the Supreme Court of Missouri found no error in his --

MR. HENNELLY: That's right.

QUESTION: -- in his activity. Apparently the Court thought he had complied completely with the prior order.

MR. HENNELLY: That's right.

QUESTION: Well, whether it did or not, whatever he found didn't entitle anyone with any relief with respect to the confession.

MR. HENNELLY: Well, Your Honor, --

QUESTION: And you still have to deal with the Supreme Court of Missouri, after this hearing.

MR. HENNELLY: Yes. Yes.

QUESTION: You would agree, wouldn't you that once you've had -- you would agree that there's no need for a further hearing? I mean evidentiary hearing. There is full opportunity to put everything in the record that anybody wanted to.

MR. HENNELLY: Well, except, Your Honor, that -- I can't recall the case, but I understand that one of the cases indicate that another judge cannot read a record and determine the demeanor of the witnesses, et cetera. It may well be that the case could be remanded to Judge Godfrey, and ask Judge Godfrey to correct his --

QUESTION: You wouldn't say, for example -- let's assume the Supreme Court of Missouri had come out in plain words and said, "We've ex amined this record; the evidence is overwhelming", that the confession was voluntary?

MR. HENNELLY: Yes.

QUESTION: You would say that would be unconstitutional? I mean, that would not be of sufficient --

MR. HENNELLY: I don't think that would conform with Jackson v. Denno because I think that the trial judge, who has the demeanor of the witnesses and has the atmosphere of the case, it is he who has to determine whether or not that confession is voluntary. He's the one that has to do it.

QUESTION: Well, at any rate --

QUESTION: It was the trial judge that did.

MR. HENNELLY: I'm sorry.

QUESTION: Wasn't it Judge Weber that did?

MR. HENNELLY: Yes, he is.

And, believe me, Judge Weber, with all due respect, --

QUESTION: No, I mean, you said the only way to settle this would be for him to settle it.

MR.HENNELLY: No, no, I don't. I say that you could send it back to another judge who can hear the demeanor of the witnesses now. Just as I say Judge Godfrey could have done it.

QUESTION: That is, presuming that after eighteen years the witnesses still remember all the details.

MR. HENNELLY; Wel, we put -- it was just a year and a half or two years ago that there was a reasonably full hearing, after eighteen years.

But I think that we are losing sight of what is the main thrust of Stidham's position in this case, and what is suggested by the Eighth Circuit Court of Appeals. And that is that this confession should have been thrown out completely.

QUESTION: All right, now let me go back to this a minute. The Supreme Court of Missouri, when you appealed after the second -- after the hearing before Judge Godfrey.

MR. HENNELLY: Yes, sir.

QUESTION: The Supreme Court of Missouri said: And finally the court found -- referring to Judge Godfrey -- the court found -- ought to say, Judge Godfrey found, as had the previous court, that the oral written confessions were voluntary.

MR. HENNELLY: Yes.

QUESTION: And needless to add, the latter finding is overwhelmingly supported in procedure and factually, the cause meets all the requirements in the federal cases.

Now, at least the Supreme Court of Missouri disagrees with you as to what Judge Godfrey found. And, in any event, it reads it that way and finds it supported by the evidence.

MR. HENNELLY; Well, I --

QUESTION: Now, you say that a sufficient --

MR. HENNELLY: I say that is not sufficient --

QUESTION: You say that is not a sufficient satisfaction to Jackson?

MR. HENNELLY: No, I don't. I don't. And, really, with all due respect, I think that we have got to realize that Mr. Stidham, as is characterized in this, in the Supreme Court opinion, is a litigious convict. And again that litigiousness is but a byproduct of innocence, perhaps.

QUESTION: Your table of cases would indicate that.

MR. HENNELLY: Yes. He is litigious. I make no

bones about that. And when I was first appointed to defend this man, the first thing that he asked me to do was to file a motion for a lie detector test. He has maintained his innocence from the very beginning. That was eighteen years ago. He's asked for every kind of relief.

QUESTION: Have you been in this case for eighteen years?

MR. HENNELLY: Yes, I tried the case in the first instance, Your Honor.

QUESTION: At the original trial?

MR. HENNELLY: Yes. I was appointed by the court, and I tried the case eighteen years ago. And I've been with him for eighteen years.

But the real thrust in this case --

QUESTION: You are from Missouri.

[Laughter.]

MR. HENNELLY: The real thrust in this case is whether or not this confession was in fact involuntary. Now, let us --

QUESTION: We certainly didn't bring the case to the Supreme Court of the United States for a factual determination as to whether this particular confession was involuntary, Mr. Hennelly.

MR. HENNELLY: Well, I certainly think that it's a proper place to determine it for once and for all, as to

whether or not they didn't violate the Fourteenth Amendment, in being a confession out of this defendant.

QUESTION: Well, the Eighth Circuit didn't make any factual determination. All it --

MR. HENNELLY: Well, the Eighth Circuit -- I'm sorry, Your Honor.

QUESTION: All it said was it should go back for a hearing.

MR. HENNELLY: The Eighth Circuit also said that if the uncontradicted testimony in this case is true, that that confession was involuntary. Now, I say that they should have gone further. They should have said, in fact, that -- they shouldn't have said it looks like it's involuntary; they should have said, as a matter of law it is involuntary. And we don't -- we won't put our stamp of approval.

QUESTION: Well, you didn't cross-petition for certiorari, did you?

MR. HENNELLY: No, I did not. And I'll tell you, Your Honor, --

QUESTION: Well, doesn't that foreclose you from arguing for any relief that the Eighth Circuit didn't grant you?

MR. HENNELLY: I leave it to the Court; I don't think so. I don't think so.

QUESTION: But you can argue, at least to the extent

that it would justify affirmance?

MR. HENNELLY: Yes.

Now, with respect to the -- as to whether or not, even if this Court -- even if this Court had satisfied Jackson v. Denno, if the original court had satisfied Jackson v. Denno, if we tried this case yesterday, and this Court had -- and the judge that tried that case, as a trier of the facts, if he had found that the confession, under these circumstances, was in fact voluntary, we would be here today under the Fourteenth Amendment, under a writ of habeas corpus, asking you to find it involuntary, for the following reasons:

This is the uncontradicted testimony in this case.

The uncontradicted testimony in this case, when taken in the light of a long line of cases which this Court has already ruled on, Brooks, Clewis, and a number of other cases, is as follows --

QUESTION: What page is this, Mr. Hennelly?

MR. HENNELLY: This is on page 3 of my brief.

During the last two months, from July 12, 1954, until September 24th, Stidham was confined on Death Row under substantially the same solitary confinement conditions he had previously undergone with the exception, he stated, that on Death Row he was not provided with a bunk, but slept on a straw tick -- excuse me, I want --

I'm sorry. If the Court would turn to page 9. I apologize. Page 9, the bottom of page 9.

Prior to giving a statement, Stidham had been confined in solitary confindement continuously for 20 months.

This is the undisputed testimony.

Two, the solitary confinement had for the most part been in a cell measuring five feet by seven feet with furnishings consisting of a wash basin, toilet, steel bunk and straw tick in an area infested with cockroaches and rodents, and with ventilation so poor that Stidham passed out on several occasions.

And I might tell the Court that in the original trial he told the court that the conditions in that penitentiary were so bad that the FBI had come to investigate it, and at the time that we tried the first conviction motion in front of Judge Godfrey he said it again, and during all of that time there never was any attempt made to contradict that testimony.

QUESTION: Just as Justice Rehnquist suggests, you did not cross-petition, and we aren't about to examine the factual basis at this time.

Seven courts having dealt with these problems in one way or another, your case has got to stand or fall on --

MR. HENNELLY: On Jackson v. Denno.

QUESTION: -- on Jackson v. Denno. Don't you agree

with that?

MR. HENNELLY: No, I don't, Your Honor.

But I've had this poor guy for eighteen years, so I naturally -- I may be a little bit prejudiced. But I don't think so. Because, I tell you, the distinguished Judge Gibson, who was a fine judge and who made mention of the fact that the courts are loaded down, just as Mr. Romines made mention of the fact that the courts are loaded down, I will tell you, in no uncertain terms, that if all we do is go back to a trial court and have Judge Godfrey or some other judge listen to this testimony and make the finding that this is not an -- that this confession was given voluntarily, then I tell you that your courts will be burdened again, because we will take it again through a whole series of steps because of the fact that these particular findings, and the way this man was treated so shocks the conscience of anybody who wants to give a man a fair trial that we'll be back up here again in a couple of years with it. And I submit to the Court that the best way to do it is to make that determination today, with respect to whether or not the facts in this case constitute a violation of the Fourteenth Amendment, and whether or not this confession was involuntary.

MR. CHIEF JUSTICE BURGER: Thank you.

Mr. Romines.

REBUTTAL ARGUMENT OF KENNETH M. ROMINES, ESQ.,

ON BEHALF OF THE PETITIONER

MR. ROMINES: I told the Court that he was an impressive trial lawyer, which he is.

Two things I might mention: One on exactly what the Eighth Circuit did with the case.

They sent it back for a hearing in the STate court, under Sigler vs. Parker. I'm not sure that was correct, because they do not indicate what new facts there are to be determined. It looks to me like there is sufficient record on both the original trial and the 27.26, to determine what all the facts were. I'm not convinced, as is Mr. Hennelly, that some judge, perhaps even this Court under Boulden vs. Holman could not just sit and look at the facts.

I think clearly the Supreme Court of Missouri could take that cold record and, under the authority of Boulden vs. Holman and Jackson itself, say this confession is voluntary.

Now, as to what the Eighth Circuit said concerning the testimony, I believe, at pages 770 and 771 of the Appendix, the court indicates that they are merely indulging themselves in Procunier vs. Atchley, which says that: if we were to believe Mr. Stidham's facts, clearly he would be due some relief. They've not said they believe him.

All they've said is that: for the purposes of testing whether the five or six allegations he makes, on their

face, would grant him relief if it were true, we will not apply Procunier, we will send this back, we will not say it was involuntary, and we will also not say that it was voluntary.

QUESTION: Well, they did also say, didn't they, that "we've examined the transcripts and other relevant materials and found that several of Stidham's allegations have not been contradicted in the record"?

MR. ROMINES: Right, they --

QUESTION: The majority did say that.

MR. ROMINES: They requested a letter of me sometime in early April, specifically referring to the fact that he had not had anything to eat or drink, and requested transcript references. And I sent what I thought were appropriate transcript references back to them, and also some fairly explanatory argument as to exactly what they wanted. They were concerned about his testimony as to loss of weight. He testified that -- and this is at the 27.26 now -- he testifies that he lost 25 pounds during a six-day period.

Then he testified that he was not given anything to eat. Other than that, they did not indicate in their letter, other than those two things, exactly what these other loose ends are. And of course, as we indicated in the footnote, you are going to have loose ends in every case that's tried, and certainly it's not the law that you have to present rebuttal testimony to every allegation a man makes before you can

determine credibility. And that's all that I think is basically involved there.

Judge Collinson was able to determine credibility with these loose ends, as were all the other courts.

QUESTION: Well, what is there that would give you a right not to believe the facts that he said about the cell?

MR. ROMINES: About --

QUESTION: In Death Row.

MR. ROMINES: You mean, what do I know or what does the record indicate?

QUESTION: What did the judge know?

MR. ROMINES: The judge, at the 27.26 --

QUESTION: Why did the judge not accept that as being the truth?

MR. ROMINES: Okay. One of the officers at the 27.26 testified, one of the police officers or highway patrolman, I forget which, --

QUESTION: Oh, then it was not -- it was contradicted?

MR. ROMINES: Oh, yes. He said that the cell did not contain water; that when he went there, there was a bunk, the man did not look like he was hungry, he did not show any signs of beating, as the doctor indicated that he had subjective complaints but nothing objective other than a ragged scar between this finger and this finger, of his ring hand.

QUESTION: How long was he in solitary?

MR. ROMINES: I believe the record indicates he had been there twenty months, but --

QUESTION: Twenty months?

MR. ROMINES: Right. For escape.

QUESTION: And is there anything in evidence that says there weren't cockroaches in there?

MR. ROMINES: No. There is nothing that indicates there were no cockroaches. I mean, no one was asked the specific question: Did you see cockroaches?

Stidham volunteers it.

QUESTION: Well, then it's uncontradicted?

MR. ROMINES: Right.

QUESTION: And you have no reason to deny it?

MR. ROMINES: Oh, if I were bringing it, I think the first question I would ask somebody, if I could find somebody, would be that question. But there is nothing in the record that we have here today that indicates that there were not cockroaches. That's right.

QUESTION: Well, is the rule in Missouri, as it is elsewhere, that the finder of fact is entitled to disbelieve an interested witness, without the necessity of contradicting testimony, if that is the conclusion of the trier of fact that he's not telling the truth?

MR. ROMINES: That is the law.

Now, the twenty-month period that he was in maximum security, he was in maximum security for an attempted escape. Now, the record indicates twenty months, I have not done any independent research that indicates anything different. Clearly, he had been done there a substantial period of time.

Where this differs from some of the other cases involving this, he was not in maximum security looking toward an eventual confession, as was in the other cases. He was there for a legitimate concern: escape.

As the first few words in Judge Barrett's opinion indicate, this man's name is "Slick" Stidham, and he's not called "Slick" Stidham because he's straight. They had him in maximum security for an escape; he was not there looking toward anything that's involved in this particular case.

QUESTION: But, Mr. Romines, his claims were having this business of being lifted off the floor by handcuffs, isn't that it?

MR. ROMINES: That's right. Behind his back.

QUESTION: The other prison business is just background, isn't it?

MR. ROMINES: Right.

QUESTION: The actual brutality of coercion and tortue was being lifted off --

MR. ROMINES: And he testified as to being beaten with --

QUESTION: -- the floor with his hands handcuffed behind him. Isn't that it?

MR. ROMINES: Right. And being beaten with corkball batts.

QUESTION: Right.

MR. ROMINES: Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Romines.

Mr. Hennelly, you took this case by Court appointment?

MR. HENNELLY: Yes, Your Honor.

MR. CHIEF JUSTICE BURGER: Thank you for your assistance to your client and your assistance to the Court.

The case is submitted.

[Whereupon, at 2:05 o'clock, p.m., the case in the above-entitled matter was submitted.]