In the

Supreme Court of the United States

WILLIAM S. NEIL, Warden,
Petitioner,
v.
ARCHIE NATHANIEL BIGGERS,
Respondent.

No. 71-586

Washington, D. C.
October 18, 1972
October 19, 1972

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Washington, D. C.

Wednesday, October 18, 1972

The above-entitled matter came on for argument at 2:34 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
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

BART C. DURHAM, III, Assistant Attorney General, 211 Supreme Court Building, Nashville, Tennessee 37219; for the Petitioner.

MICHAEL MELTSNER, ESQ., Columbia University, School of Law, 435 West 116th Street, New York, New York 10027; for the Respondent.

C O N T E N T S

* * * * *

Session of Thursday, October 19, 1972 begins on page 21.

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 71-586, Neil against Biggers.

Mr. Durham.

ORAL ARGUMENT OF BART C. DURHAM, III, ESQ.,

ON BEHALF OF THE PETITIONER

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

This case here is on a petition for writ of certiorari to the Sixth Circuit in which two questions are raised. The first one is with respect to the case that was here before and affirmed four to four by this Honorable Court. And the second one is the Stovall question as to whether or not this defendant had a fair pre-trial confrontation. In order to give Your Honors the background, I'll state the chronology of the case.

It was here in 1967 and 1968. The crime occurred in January of 1965. The defendant was identified at the police station that year and his subsequent trial and conviction was affirmed by the Tennessee Supreme Court in March of 1967. This Court granted certiorari, and the case was argued before this Court in January of 1968.

Mr. Justice Marshall excused himself and the Court, after hearing plenary argument, affirmed the Tennessee Supreme Court, which had affirmed the rape conviction by a

vote of four to four. There was no written opinion from the Court, but Mr. Justice Douglas recorded in the reasons for his dissent as one of the four dissenters.

Shortly after the case was affirmed in March, 1968, this defendant went right back into the federal court system, filing a petition for writ of habeas corpus, seeking to relitigate what the cite contends was the same issue before the federal district judge in Nashville.

A limited evidentiary hearing was held and the Court found that the pre-trial confrontation was violative of this Court's principle in Stovall and ordered a new trial unaffected by the identification.

The state took an appeal to the Sixth Circuit from the United States District Judge opinion, the Honorable William E. Miller who is now a member of the Sixth Circuit, and the Sixth Circuit, by a two-to-one division, Judges McRee, and Edwards in the majority, with a lengthy dissent by now in the Sixth Judge Brooks.

That court affirmed the district court from whence this Court has granted certiorari.

So, the two questions are: What is the effect of the four-to-four affirmance with respect to habeas corpus, and did the defendant have a fair pre-trial identification?

With respect to the first question, we think the law is quite clear and possibly conceded by our adversaries

that with respect to any other case except the habeas corpus case, a four-to-four affirmance ends the case as between the parties and as to that matter.

Some distinction has been made by the federal district court because this is not an ordinary civil case. It involves human liberties. And we think of the high position in our jurisprudence which habeas corpus holds. But we say that historically and traditionally there has to be an end to litigation and that it should have ended this case. But our primary contention with respect to this is an act of Congress, 28 USC, Title 2244C. That statute provides--and that's what we're relying on here--that is found at page 3 of my brief. That statute was drawn specifically to provide for finality of determination. When a case has been to this Court and a judgment of this Court, it says, shall be conclusive as to all issues which come before this Court, and we cite the legislative history of that statute as well as commentary in the Harvard Law Review and others in which we feel it's clear that Judge Oren Harris in the Tenth Circuit in his letter--

Q Mr. Durham, I gather you have to argue the significance of the word "actually" or"adjudicate."

MR. DURHAM: That's right, Your Honor.

Q And really, I suppose, under the statute, is a four-four--did that disposition actually adjudicate?

MR. DURHAM: Yes.

Q I have not been able to find much help in the legislative history, this Court, your argument. Do you find any?

MR. DURHAM: No, sir, I don't find anything in particular.

Q It does indicate between the parties.

MR. DURHAM: We think it ends the case--

Q There is an adjudication as to that. It is an adjudication between the parties.

MR. DURHAM: As to that issue. If that be the law, then our argument is won. But we say it ends the case between the parties as to that issue.

Q You say that it is just like a five to four or a nine to nothing, except as to the precedential value of the reason.

MR. DURHAM: Yes, Your Honor.

Q Even if that were true in an ordinary litigation, in the absence of this statute you would be faced with a proposition, would you not, that there is no res judicata in habeas corpus.

MR. DURHAM: Yes, sir, there is no res judicata in habeas corpus except that Congress has said there is.

Q I said absent this statute.

MR. DURHAM: Oh, excuse me. Yes, sir. Yes. That

is because in common law there was no appeal.

Q Whatever the reason is, it is well settled, I had thought.

MR. DURHAM: Yes, sir.

Q Tell me if I am wrong, that ordinary concepts of res judicata are simply inapplicable to habeas corpus proceedings.

MR. DURHAM: Yes, sir.

Q And that is the reason, as I understand it, that you are relying so heavily on this statute.

MR. DURHAM: Yes, sir. And I am going behind it and saying the reason the law is that there is no res judicata was because there was no appeal.

Q Right.

Q Mr. Durham, supposing in this case instead of the four-to-four affirmance there had been, as the Chief Justice suggested a moment ago, an affirmance on the merits by a nine to nothing, eight to one, some other lopsided majority. What is your opinion as to whether federal habeas on these same issues would then lie in the district court for this particular position?

MR. DURHAM: My opinion, Your Honor, is that the district judge would have recognized this Court's case law and would have refused to entertain the case as well as it is controlled by the same statute.

Q So, you say then, in effect, that although as between lower court decisions there may be no res judicata in federal habeas, if this Court has once affirmed on the merits, that ends not only the direct litigation but further habeas corpus?

MR. DURHAM: Yes, sir.

Q In the absence of new plaint.

MR. DURHAM: Yes.

Q Even though between the same parties.

MR. DURHAM: Yes.

Q And even though the same constitutional provision is invoked.

MR. DURHAM: Yes. There can be a new--like Ruten Rule or something may come out which Your Honor suggests a new case law maybe, change it.

As Mr. Justice Brennan said, the legislative history to the extent that there is any, and there is not much, is exactly clear. We do feel that what little there is does support our position. However, if I succeed in doing nothing more in my oral argument today, I do want to stress the second point of our contention, and that is that on the facts the district judge grievously erred in finding that there was a bad confrontation.

Ordinarily I am aware that this Court would not want to go into the facts, but the district court has found

the facts and the appellate court has affirmed it, and I am asking Your Honors to look again at the facts. The point is that the district judge didn't hear any new facts and he did not weigh the credibility of evidence. We say that he made seven grievous sins. We cite five of those at page 34 of our brief, and in addition to those five, earlier we mentioned the error that the district judge made when he said that the victim changed her story between the time of the trial and the habeas corpus hearing and that the police officer changed his story between the time of the trial and the habeas corpus hearing, and that just is not simply so.

The fact of the matter is the lineup was held; there were only three people who testified about the lineup. I am talking about the original trial record now. Those policemen were Detective Smith, Lieutenant McDaniel, and Detective Bailey. Detective Smith at page 40 of the record and Detective Bailey at page 48 of the record said that this victim identified the man before she heard him speak, and then she asked him thereafter to speak merely to confirm her identification.

I make an analogy in my brief, as one of the judges in the lower court did in Stovall, what would be the argument had that lady in the Stovall case died and they had not taken him in over there to view Mrs. Berry, the victim in that case?

Q I suppose there was a difference. As I recall it, in Stovall the victim was in extremis. They did not think she was going to survive the night.

MR. DURHAM: Yes, sir.

Q But I gather that was not the case here, was it?

MR. DURHAM: Oh, no, sir.

Q No. The victim, as I remember the facts, viewed the young man at the police station many, many months, was it not, after the actual crime.

MR. DURHAM: Yes, sir.

Q And there was no problem about her health or anything else was suggested then, was there?

MR. DURHAM: That is right.

Q Yes.

MR. DURHAM: At the time this case was decided, no American court that I am aware of had ever held that the identification was anything other than a question of weight and not admissibility. Even lower court cases were to come later. This was in August of 1965.

So, the state believes that the record is uncontradictory, that the facts were that she identified him first. All the parties were black. The defendant was in the company of two black officers. The victim made this identification. Then she requested that he speak. Even the

victim himself in his affidavit at the federal habeas hearing does not--his affidavit, we say, does not contradict that.

The third officer who testified about the lineup was the supervising officer, Lieutenant McDaniel, and it is unclear from his trial testimony whether she identified him first or heard him speak first. But at the habeas hearing his memory had been refreshed. But we say it was not a point at the trial testimony. Who cares? Nobody asked on cross-examination, nobody brought it up, whether she heard him speak first or she did not. And those other five errors, as I say I have listed beginning at page 34 of my brief, as just factual errors which the district court made an error on. In defense of the district judge, let me say that I am the fifth or sixth attorney who has handled this case for the state, and when the habeas petition was filed, the factual aspects were shuckled off in such a place because the state felt that it was a matter of law that we should prevail, based on my first argument.

So, these facts were never really strenuously argued in the district court. But they are uncontradicted in the 1965 transcript, and we point out that by analogy to some of the other lineup--or, rather, one-on-one confrontation cases, which this Court has made, that we believe this lineup is far less constitutionally impermissible than others.

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

Mr. Meltsner.

ORAL ARGUMENT OF MICHAEL MELTSNER, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. MELTSNER: Thank you, Mr. Chief Justice. May it please the Court:

It is far from accidental that the--with respect to the consequence of a four-four affirmance that state relies on the statute here, because its position that a four-four affirmance would bar an initial federal habeas corpus petition claiming a denial of due process fails to come to terms with several principles which have been quite prominent in this Court's decisions in the area.

The first is that a state court's disposition of a state prisoner's federal constitutional question is not a conclusive determination of that question and that each state prisoner will at least have one opportunity to obtain a resolution of his federal constitutional claim in a federal forum.

When this Court affirms by an equal division, it merely leaves standing a state court determination of a federal question, whatever it is. Indeed, one can imagine quite easily the Court affirming by equal division two totally inconsistent lower court decisions. Yet, the position

taken by the state here would convert this state court disposition of a federal constitutional question into an absolute bar of federal habeas corpus.

Q Would the situation be any different, Mr. Meltsner, if suppose there were a grant here on direct review of a state court decision and we divided four to four to affirm the conviction brought here by the state prison, is there a difference in that situation as to the availability of federal habeas from the situation we have here, which is a four-four affirmance, act or grant and a federal habeas?

MR. MELTSNER: If I understand your question correctly, Mr. Justice Brennan, the difference is that in this situation Congress has decided to make federal habeas corpus available to the petitioner for collateral attack.

Q And somewhere this Court has actually--

MR. MELTSNER: Actually decided.

Q That is my question. Assuming this actually would apply, I take it, whether or not--it would require a determination whether it was an actual adjudication, whether or not our four-four division was on direct review of the state conviction, or was our four-four division on one federal habeas review?

MR. MELTSNER: The only difference would be that--again, if I understand your question--that in the latter situation, suppose this Court were to four-four affirm this

case at this point--

Q Was it not here before on habeas, was it?

MR. MELTSNER: No, it was here on direct review.

Q Oh, was it direct review?

MR. MELTSNER: Direct review.

Q I beg your pardon.

MR. MELTSNER: But if this Court were to four-four affirm now, at least there would be a federal court's determination of the federal question's standing. And one of the statutes involved in the case, 2109 of the Judicial Code, makes quite clear that in Congress's contemplation, at least, the highest court that can determine this question ought to determine it where this Court is disabled because of a four-four split from hearing it.

Q Mr. Meltsner, are disabled from hearing it?

MR. MELTSNER: From deciding it, Mr. Chief Justice; from deciding it. This Court has consistently said that what a four-four affirmance is is but a technical rule of judicial administration, it is an action out of necessity, it is something that the Court does because it cannot do anything else.

Q I guess that was Chief Justice Marshall's very language, was it not?

MR. MELTSNER: It is close to it. In the first case--

Q Inability to decide requires the four-four affirmance.

MR. MELTSNER: Yes.

Q Mr. Meltsner, do you feel then that the four-four affirmance in the circumstances is a different situation than, say, a seven to two affirmance with an opinion on the merits?

MR. MELTSNER: Unquestionably. Unquestionably. The Court has made its decision by a majority in that case.

Q If habeas corpus is not res judicata, why should a decision on the merits by this Court foreclose a potential habeas petitioner any more than a decision of the lower court?

MR. MELTSNER: I think using the res judicata is somewhat misleading. In even Sanders v. United States the Court said there were some principles of finality which governed the habeas corpus jurisdiction. But they would be employed by use of equitable principles. And Sanders sets forth situations where, let's say, abuse of the writ is involved where a federal district court can say: "No, I am not going to determine this question because another court has heard and decided it."

Whether it is called res judicata, stare decisis, or principle of finality, I do not think there is a district judge in the land who would relitigate a question which was

fully considered by this Court and decided by this Court unless there were either a change in law or new material factual matter that was presented which made the federal constitutional question a different one in kind from the one this Court decided.

I do not believe that res judicata or any principle of finality would jurisdictionaally bar a federal district court from considering a habeas petition in that circumstance. But absent those circumstances, it is plain to me that there would be no equity in the petition and it would not be heard.

It is interesting that the statute which the state here relies on heavily in light of the principle I mentioned and also in light of the general principle that technical adjudications short of the merits are not sufficient to bar federal habeas corpus, that the procedural rules emanating from the process of direct review do not bar federal habeas corpus unless they amount to a deliberate bypass or an actual determination of the federal question. The state comes to the statute. There is nothing in the legislative history that suggests that Congress sought to deal with this problem, and there is a good deal, in my judgment, that suggests the contrary.

Q Is not an actual judgment as a result of a court or a division of the court?

MR. MELTSNER: Yes. My understanding is the

judgment of the court below was affirmed in the same way that the process of direct review is ended when this Court denies certiorari.

Q In the language of the statute, it is actually adjudicated.

MR. MELTSNER: Actually adjudicated.

Q If there is an actual judgment, is it not actually adjudicated?

MR. MELTSNER: No, I think what is clearly intended is that there is a decision on the merits of the question. And the statute would make little sense if that language was not read that way because in the statute, after saying that an actual adjudication will bar subsequent relief by habeas corpus, the statute goes on to define that situation where a new material fact has been alleged and it was not avoided in the past because of lack of due diligence and describes that in that situation federal habeas corpus will lie.

Q What if the statute just said a judgment instead of actually adjudicated?

MR. MELTSNER: If it said a judgment, at least as far as the statute is concerned we would have a somewhat different case, because there is no explanation for the use of the word "actual" in this statute unless Congress meant something more than technical affirmance of the sort we are

dealing with here.

Congress has passed in 2109 of the Judicial Code a statute which expressly equates the lack of a quorum by this Court with a four-four affirmance. There is nothing whatsoever in the legislative history of this statute which suggests that Congress sought to change its understanding of what a four-four affirmance meant.

Q Would it not have been suggesting, perhaps, that a denial of certiorari was not an actual adjudication?

MR. MELTSNER: I think that is clearly what the draftsmen of the statute had in mind.

Q There is a legislative history supporting that, Mr. Meltsner.

MR. MELTSNER: Of course there is. And a denial of certiorari, as I have indicated, has no precedential value. It ends the process of direct review and it does not bar a subsequent habeas corpus position. And I think the functional effect of a four-four affirmance is and ought to be the same.

Additionally, the legislative history, scanty as it is, suggests that the problem that the Congress is concerned with was abuse of the writ, was relitigation of the questions that had actually been decided. There is nothing of that sort here. Cases arising out of four-four affirmances are hardly flooding federal courts. And, additionally, I attempted to point out that there is nothing in the legislative history

that shows any intent to modify the interests of justice standard which has long been attached to habeas corpus jurisdiction. And the district judge in this very case, in deciding why he would determine the due process issue, indicated that it was in the interests of justice to do so.

In other words, both the language, the policy, and the legislative history of this statute failed to suggest that Congress had any intention to change what had generally been understood to be the meaning of a four-four affirmance, a technical sort of response, which is simply a way of disposing of the case that this Court could not decide.

Q You would say, then, that it falls in the same category as a petition dismissed as improbably granted?

MR. MELTSNER: That question has long troubled me, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: We will resume at ten o'clock in the morning.

[Whereupon, at 3:00 o'clock p.m., the Court was adjourned until the following day, Thursday, October 19, 1972, at 10:00 o'clock a.m.]

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IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM S. NEIL, Warden, Petitioner,	:	
v.	:	No. 71-586
ARCHIE NATHANIEL BIGGERS, Respondent.	:	

Washington, D. C.

Thursday, October 19, 1972

The above-entitled matter came on for argument at 10:03 o'clock a.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
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

BART C. DURHAM, III, Assistant Attorney General, 211 Supreme Court Building, Nashville, Tennessee 37219; for the Petitioner.

MICHAEL MELTSNER, ESQ., Columbia University, School of Law, 435 West 116th Street, New York, New York 10027; for the Respondent.

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Mr. Meltsner, I think you have 19 minutes remaining.

ORAL ARGUMENT OF MICHAEL MELTSNER, ESQ.,

ON BEHALF OF THE RESPONDENT, RESUMING

MR. MELTSNER: Thank you, Mr. Chief Justice. May it please the Court:

In the time remaining, I would like to discuss petitioner's challenge to the factual findings made by the district court with respect to the due process issue, findings which were affirmed by the entire court of appeals below, that court dividing solely over the question of the consequence of the prior four-four affirmance in this case.

But first I would like to reply briefly to a question asked yesterday by Mr. Justice Rehnquist which I either misheard or misunderstood. Justice Rehnquist asked me whether if this Court had in this case previously decided seven-two or nine-nothing against respondent's claim, whether res judicata would in that have barred a subsequent federal habeas corpus petition. And I answered yes, but I do not think I gave a sufficiently distinct answer. I think the answer is plainly that the statute involved in this case, 2244C, would in that event bar relitigation, and that is indeed the very situation and very abuse of the writ which Congress was addressing itself to.

Q You were addressing yourself, I suppose, to the situation before the statute--

MR. MELTSNER: Yes, I was. That is correct. I was answering you in terms of the Sanders opinion which was, of course, the backdrop against which 2244C was drafted.

As I read the petitioner's brief here and understand its argument yesterday, the state does not seriously contend that the district court defined the standard of law, which it applied in this case, incorrectly. What the district court did was treat the showup as a suggestive and potentially dangerous identification device but not one which was per se unconstitutional. It weighed the showup in aggravating circumstances in this case against its necessity in this case and external indicia of reliability, whether it was anything which justified the use of the showup. But I think this conforms to what the Court in Kirby last term called weighing the prejudice to a defendant against society's interest in law enforcement. And it conforms almost identically to the analytic process which the Court itself used in Simmons v. United States several terms ago.

Nor, as I understand the state's argument yesterday and its brief, nor does the state seriously challenge the application of this standard to the facts found by the district court. And I will have hopefully something to say about that later.

The state concentrates its attack here on the findings of fact made by the district court. And, as this Court generally does not reverse findings of historical fact, it seems to me quite plain that the state has a very heavy burden to carry.

Q We do not hesitate to reverse them if they are clearly erroneous, do we?

MR. MELTSNER: Correct, Mr. Chief Justice.

Q Are you going to deal with glaring inconsistencies here?

MR. MELTSNER: The question of support for the district court's findings of fact is what I turn to now. A preliminary matter, however, as I understood Mr. Durham yesterday, he said or implied that the district court's findings were based on a cold record. They were based on the record made on direct review. That is simply not the case.

The district court heard testimony from two police officers, including the police officer who is in charge of the investigation of this case. He heard testimony from the prosecutrix. He heard testimony from respondent's mother. And he heard expert testimony directed to the procedures used in this case. The testimony appears in the Appendix from pages 66 to 134. It amplified the record made on direct review. But it did more than that. It supplied the answers to many questions which this Court asked me in 1968, and I

think that is apparent from the reading of that section of the Appendix.

For example, the officer who was in charge of the investigation, Captain McDaniel, testified to the efforts he used to put together a lineup in the four or so hours that he tried to do that. The district court, after hearing his testimony which was directed to showing that he could not put a lineup together, rejected it.

The testimony before the district judge dealt with the initial description given by the prosecutrix to the police shortly after the crime. That appears on page A74. It deals with the question of voice identification where the prosecutrix, according to the district judge and as I will indicate later, I hope to show later, there was a conflict between what she had testified to at trial and testified to before the district court.

And, finally, the expert witness gave his opinion of the procedures used in this case and clearly indicated that even an imperfect lineup, one where every trait of the person who was to be seen by the witness was not identical, was far preferable than showup.

The district court relied on a good deal of this evidence, and that appears on pages A41 and A42 of the record. So that there can be no question that the district court here was not hearing oral testimony and weighing credibility.

Before again talking about the factual findings that the state challenges, I think I have to put it in perspective by indicating simply what the state does not challenge. The state does not challenge most of the factual conclusions reached by the district court. The state does not dispute that the evidence of the showup identification was admitted at trial, that the showup took place between six and seven months after the crime, that the police described respondent to the prosecutrix as a suspect before the identification, that the respondent was alone made to speak inflammatory words which were spoken by the assailant at the time of the crime--"Shut up or I'll kill you"--and that the prosecutrix relied to some extent on this voice identification. She testified before the district court that she identified him first before he spoke, but even she conceded that her identification was made more certain by what he said.

At trial, of course, in the state court she said that the first thing that made her identify respondent was his voice. This appears on page 17 of the record which was before this Court in 1968.

It is also undisputed that there was no other evidence of guilt in the identification evidence, that the only other eyewitness to the event could not identify respondent, and that there was no independent further

identification in this case.

So, we come to the particular matters which the state has concentrated its fire at. And, as I read the brief and understand the arguments, they are basically three. One, whether a truly concerted effort was made to hold the lineup in this case. Secondly, the quality of the initial description given by the prosecutrix to the police shortly after the crime. And, finally, the opportunity to observe at the time of the crime. And it is my submission that in each of these instances there is sufficient evidence in the record so that no appellate tribunal can say that the district court's findings as to these matters was clearly erroneous.

For example, with respect to the holding of the district court that there was no clearly concerted effort to hold the lineup in this case and no need for speed, the record shows that what this police officer did over the course of a morning in trying to round up a lineup was to check one jail facility and phone another but not to go to it. He did not try several other penal institutions that were located in the Nashville area, including the state penitentiary, and that there was absolutely no need for speed in this case. The crime was seven months old, and the complaining witness had been perfectly cooperative in the past with police.

The district court had a good deal of knowledge about local conditions. He heard the police officer testify in explanation of why he did not put together a lineup and concluded that there was no need for such prompt showup in this case.

Secondly, with respect to the initial opportunity to observe at the time of the crime, the district court held--and this appears at A41 of the Appendix--that the prosecutrix clearly did not have a good opportunity. She, in fact, testified that she saw the rapist, but the objective circumstances certainly support the district court's conclusion. She was grabbed from behind in an unlit hallway, marched out through an unlit kitchen, up on some railroad tracks where there were some light from the moon and some overhead lights from a nearby street, but she was marched along these railroad tracks at the point of a knife. And she was marched along those tracks for a black or two and then pushed into some overgrowth where the crime took place, and then the assailant fled.

Given those circumstances and the prosecutrix's admission before the district court on page A125 that the lighting in her house was dim, it seems to me that this is not a matter where this Court can possibly substitute its judgment as to the opportunity to view the assailant for the district court's.

The third issue has to do with the quality of the initial description given to the police at the time of the crime by the woman who had been raped. And here the evidence before the district court is quite clear,although at the time of trial Mrs. Beamer, the woman who had been raped, listed a number of traits, she described them as the traits which led her to identify the man who she identified, respondent, at the time of the pre-trial identification. There was no evidence in the record which told us what sort of a description she had given seven months earlier to the police.

Before the district court on page A74, Captain McDaniel, the chief officer involved in the case, was asked about this specifically and he testified, referring to his notes, "All right, sir," he said, "his height was six feet tall, 180 pounds; he was dark haired, medium to dark complexion." That was the description given by the prosecutrix to the police, according to this officer's notes.

In light of that, again it seems to me that it cannot be said that the district court's holding that the initial description was general can in any way be upset as clearly erroneous.

That brings me to a last issue, which is merely the application of a standard,which I take not to be seriously disputed,to facts which I do not think this Court properly sets aside. And I think any examination of what lower courts

have done with Stovall and any examination of the decision of this Court which goes into application of Stovall in most detail, that the Simmons will demonstrate that the district court properly apply this standard to the facts. I think looking at Simmons is quite constructive. In that case, the identification procedure, which was a photo identification, was upheld. But looking at the factors used in Justice Harlan's analysis in that case we find that they are almost identical to the factors used in analyzing this case by the district court and inferentially by the court of appeals.

In Simmons the Court's opinion talks about the necessity for a prompt photo identification. Here there was absolutely no necessity for a showup roughly seven months after the crime with a cooperative witness. In Simmons the Court talks about the initial opportunity to observe a well-lighted bank. Here we have a dark house, woods, and moonlight. In Simmons the Court talks about fresh memories. Here we have a stale memory and a stale memory, in part at least, of a voice. In Simmons there was no suggestion whatsoever by the FBI agents that the man whose photo they showed along with other photos was under suspicion. Here the police described Biggers to the prosecutrix as a suspect, reinforcing with an official finger what the showup itself did, which was to point at the respondent as the person who the police thought may well have been guilty.

And, finally, in Simmons there were five eye-witnesses who all identified the defendant. Here the only other witness to the crime did not and the only evidence of guilt was the identification, which we would assert was tainted.

Four years ago Mr. Justice White asked me if I was merely asking the Court to rule that there was no evidence before the jury in this case. I think that argument the Court in Simmons and in Foster has truly applied, that the procedures employed by the state in taking identification evidence can be so defective as to bar their admission as a matter of law. This is the principle we rely upon here today and submit was properly applied by the courts below.

Q Mr. Meltsner, at page 18 of your brief you have the statement you did not identify the defendant until after the voice test. What is the record?

MR. MELTSNER: Page 18?

Q Page 18, yes.

MR. MELTSNER: She did not finally identify the defendant until after a voice test. That is at page 129 of the Appendix, Mr. Chief Justice, and if I may just direct myself to that in more detail, in making that assertion we are giving the state's argument as much weight as it will bear. Our contention is--and the district court did not resolve

this conflict--that much of the evidence at trial suggested that she identified him only after he spoke. She said so herself on page R17. And a statement by a police officer on R66 confirms this. And the respondent herself said she did not identify him until after he spoke. Four years later she was certain she identified him before he spoke, not after he spoke.

But I then asked her, after he said "Shut up or I'll kill you," were you more certain of your identification, and she said, "Yes."

Q This is followed by the statement that the district court found that she failed to identify him at the trial.

MR. MELTSNER: That is correct. The district court said there was great doubt that there was an in-court identification in this case.

Q What do you think that the record and the appendix of the trial court shows?

MR. MELTSNER: Before the district court she testified that she did identify him four years earlier at trial. All the record of the trial shows is that she was asked, "Is there any doubt in your mind today," and she said, "No, there is no doubt in my mind today."

Q Is that not pretty good identification?

MR. MELTSNER: No, because identifying someone in

a courtroom is a question of picking them out from a group, not saying that there is no doubt. But, in any event, this case must be reversed because almost the entire state's case was the out-of-court identification and testimony about it, not the in-court identification. In Foster v. California is a decision of the Court which reverses on that basis, even though there was an in-court identification.

Q Mr. Meltsner, going back to the relevance of this Court's earlier action for a moment, would you agree that in view of the statute the earlier decisions of this Court such as United States against Pink and the Durham case which makes some comment on the effect of four-to-four affirmance in non-habeas corpus situations are perhaps relevant in construing the meaning that Congress intended to use when it said "actually adjudicate," even though those cases did not deal with habeas corpus.

MR. MELTSNER: To the extent that they indicate that the process of direct review is over, I suppose they are relevant. But I think there is nothing in the legislative history or anything in those cases or anything that I can immediately think of in logic that would alter the scope of the writ in this case and in any way act conclusively to bar federal habeas corpus.

Q Except you have conceded, in effect, have you not, that the statute has changed the situation, at least

after a seven to two affirmance by this Court. So, the statute did alter the scope of the writ in that sense.

MR. MELTSNER: In that sense it did, yes.

Q Mr. Meltsner, would the situation be any different on the seven-to-two affirmance if we never had a statute?

MR. MELTSNER: If we did not have a statute?

Q Yes.

MR. MELTSNER: That brings me back to the answer to Mr. Justice Rehnquist's question yesterday. In that event, I think a district judge clearly would have the power not to entertain the writ.

Q But as precedential right. So, in that sense the statute adds nothing to the situation as regards the impact of an affirmance here nine to nothing or seven to two I think disposes adversely to the state prisoner as a constitutional claim.

MR. MELTSNER: I think that the real meaning of the statute is in its definition of when in that instance one can still go back to a federal habeas corpus.

Q This is not a problem in res judicata.

MR. MELTSNER: Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Durham, you have about 16 minutes left.

REBUTTAL ARGUMENT OF BART C. DURHAM, III, ESQ.,

ON BEHALF OF THE PETITIONER

MR. DURHAM: I will try to use all of those, Your Honor. Thank you. Mr. Chief Justice, and may it please the Court:

I go directly to what caused the factual dispute between my adversary and me all along. We seem to read these records differently. Just a minute or two ago Mr. Meltsner said on page 17 of the original trial record,which unfortunately Your Honors do not have, there is only one copy here in the Supreme Court Library--we were allowed to use the original record--that this says that the lady was identified first by voice. I am reading here on page 17, "What physical characteristics, if any, caused you to be able to identify him?"

Q This is at the original trial in the Supreme Court?

MR. DURHAM: Yes, sir. Counsel referred to it just a moment ago. And the answer to that question is: "First of all, his size. Next, I could remember his voice."

Then counsel cited Your Honors to page 66 of this same record which he says that this was her identification of him first by his voice, confirmed by the policeman, the Lieutenant McDaniel. I am looking at page 66. The question of the police officer was: "When did that take place?"

"Right at that time when she iden"--he does not get to finish that word--he says, "saw him, she asked us to have him repeat a question, which he repeated that."

"And she also by voice?"

"Yes, sir."

That's ambiguous, as I point out in my brief. Three officers testified about the identification. Whether or not it was voice first or after did not make any constitutional difference in 1965. This one man's testimony is so ambiguous is it does not even make grammatical sense in the English language. They seized on certain words of that, this page 66, and tried to say that this officer said that she identified him first by voice. We respectfully disagree.

Q The basic point, as I understood it, that your brother was making, was that all this testimony went to the circumstances under which she identified him at the showup prior to the trial. And she could not identify him at the trial independently. I think that was the basic point your brother was making. Perhaps I misunderstood him.

MR. DURHAM: I respectfully disagree, Your Honor.

Q You disagree that that was the point he was making?

MR. DURHAM: I disagree that that was the point. I understood the point to be that he is trying to show that

this was a weak identification in that the voice was the primary mode of identification.

Q There was not an independent identification in the courtroom at the time of the trial. All of this testimony went to the identification prior to the trial during the procedures that he says were constitutionally invalid.

MR. DURHAM: My colleague says that I have said that the district court made findings on a cold record and he disagrees with this. What I am saying, and I want this to be clear, is that take the cold record of this trial in 1965 here and supplement that with the very limited evidentiary hearing in which the two police officers testified adversely to Mr. Meltsner's position. And no one testified, that I know of, to his position, and Mrs. Beamer testified adversely to his position. But just does not believe them entirely and just go on the cold record.

In other words, believe all of his witnesses before the United States district judge, disbelieve all of my witnesses before the United States district judge; and my assertion is that the record is still uncontradicted as to (a) the lady did not change her testimony between the time of the trial and the time of the habeas corpus hearing, nor did the police officers, the point being--the constitutional point that they are anxious to convey--is that it puts them

in a better constitutional posture if they can have it so that she identified him first by voice and then by recognition of the person. And it made no constitutional difference back in that time. So, the district judge found that the police officer and the lady changed their testimony, and I am saying that is uncontradicted in the record that the district judge errs there.

Counsel mentioned the finding, quoting Appendix 41 of the district judge's order. There is no indication that a truly concerted effort was made to produce suitable subjects for a lineup aside from a phone call to the juvenile home and the screening metro jail inmates, no other efforts were made. All the testimony at the habeas corpus hearing, we knew that, and the district judge, we say, just ignored that.

I suppose you would have to not disbelieve that or perhaps that finding would stand. The only testimony was that this police officer said I consulted with the juvenile court judge and his superior at the jail and it was not possible to find anyone of that size.

The picture of Mr. Biggers, although not introduced into evidence, is a part of the original trial record. He is a large boy. He was only three days past his 16th birthday. But he is a giant sort of young man. And the state argued that it would be extremely difficult to get young people that large or people that large who would be that young. He is

a giant 16 year old who has a very distinctive appearance.

Counsel cited you to a statement that Mrs. Beamer, the victim, made; he cites you to page 125 of the record where she says that her lighting in the house was dim. If you want to just go through this thing on cross-examination and say, "Was your lighting kind of dim" or something like that, you can find that. But take the thing as a whole. Take the testimony as a whole. In many other places and at the trial she said the house was "well lighted," meaning by that to some degree. And our argument, of course, is that the jury's verdict has to a great degree settled that.

I realize that we do have a burden here that's not an easy one, to overturn factual findings. The findings were, as counsel stated, affirmed by the Sixth Circuit, but they were done offhand, as I argued earlier. The first reason, the state did not raise much of an issue about the findings of fact in the Sixth Circuit. We preserved it--I was not counsel then--frankly we did not argue that as strenuously as we did the legal argument. All the Sixth Circuit said was, "We are not able to say that this was clearly erroneous."

We are. I am able to tell Your Honors that the finding of the district judge is clearly erroneous in seven aspects, and I have listed them in my brief.

Counsel has analogized Biggers to Stovall, Simmons,

and some of the other identification cases which this Court has decided. I frankly believe that there is little profit in that. Counsel said that I had no dispute with the district judge's interpretation of what the law is, and that is probably true. I think the district judge, just as every judge and as this Court, in light of Stovall says, "Why is the man prejudiced by this identification? Was it an improper identification? Was it unfair?" That basically is what it boils down to. If it is unfair, so unfair as to deny him a fair trial, let's give him a new trial. And the state respectfully contends on the totality of the testimony, the undisputed testimony, that he did get a fair trial.

Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 10:35 o'clock a.m., the case was submitted.]

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