In the

Supreme Court of the United States

John R. Manson, Commissioner Of Correction Of The State Of Connecticut,

Petitioner,

v.

Nowell A. Brathwaite,

Respondent.

No. 75-871

Washington, D. C.
November 28, 1976

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JOHN R. MANSON, COMMISSIONER OF CORRECTION OF THE STATE OF CONNECTICUT, Petitioner,	:	
v.	:	No. 75-871
NOWELL A. BRATHWAITE, Respondent.	:	

Washington, D. C.,

Monday, November 28, 1976

The above-entitled matter came on for argument at 11:09 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

BERNARD D. GAFFNEY, ESQ., Assistant State's Attorney, 95 Washington Stree, Hartford, Connecticut 06106; on behalf of the petitioner.

DAVID S. GOLUB, ESQ., 733 Summer Street, Stamford, Connecticut 06905; on behalf of the Respondent.

C O N T E N T S

DKM

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 871, Manson against Brathwaite.

Mr. Gaffney, I think you may proceed when you're ready.

ORAL ARGUMENT OF BERNARD D. GAFFNEY, ESQ.,

ON BEHALF OF THE PETITIONER.

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

My name is Bernard Gaffney, and I'm an assistant in the office of the State's Attorney in Hartford, Connecticut. And I might say that in addition to representing the petitioner in this appeal, I represented the State in the trial of the case in the Superior Court in Hartford, and I have also represented the State in the various judicial proceedings which have followed in both the State and the Federal courts.

This case arose from an undercover narcotics investigation in Hartford. Factually, on the evening of May 5, 1970, an undercover State police officer, Jimmy Glover, and an informant went to the third floor of an apartment building on Westland Street in Hartford for the express purpose of purchasing narcotics.

Now there's some question as to whether Glover and the informant went to the specific apartment unit on the third floor that they had intended to go to. And there's

no question that when they got there, the transaction was with some other person than had been intended.

However, there's no question that Officer Glover, in exchange for $20, purchased two glassine envelopes containing heroin. And in court, Glover made a positive identification of the respondent, Nowell Brathwaite, as the seller of the narcotics.

Now, if I might just go on, the sale took place at the doorway to the apartment. And the testimony was that the total transaction, that is, from its very start to its conclusion, took somewhere between five and seven minutes. And during this total period, the door to the apartment remained open for a period of about three minutes. And the seller was standing in the doorway. And Glover said that during this three minute period, he stood within two feet of his seller and was looking directly at his face. And he went on to say that he had absolutely no trouble in seeing in the hallway.

QUESTION: It was night time, though?

MR. GAFFNEY: The transaction, your honor, took place at approximately or began at approximately 7:45 p.m.

QUESTION: On what date?

MR. GAFFNEY: May 5, 1970.

Now Judge Friendly, in his opinion, the Second Circuit Court opinion, pointed out that sunset on that date

occurred at 7:53 p.m.

Now outside the building at the conclusion of the transaction, Glover gave a description of his seller to Officer Michael D'Onofrio of the Hartford Police Department. D'Onofrio was stationed outside the building as the covering officer.

Now D'Onofrio knew Brathwaite by sight. He'd seen him on a number of occasions prior to the date of the sale, and he recognized the description which Glover gave as applying to Brathwaite.

Now, that night or the following day D'Onofrio obtained a photograph of Brathwaite from the files of the Hartford Police Department and he took thatphotograph over to State Police Headquarters and he left it on Glover's desk. And I might point out parenthetically that the Office of the State Police Headquarters in Hartford and the City of Hartford Police Headquarters are in two different buildings, geographically separated from one another by some distance.

Now, a day or two later, specifically, on May 7, Glover returned to his office, and he found the photo which D'Onofrio had left on his desk, and he positively identified the person shown in the photograph as the same person from whom he had purchased the narcotics.

I think it's worth mentioning that at the time he did that, at the time Glover viewed the photo, D'Onofrio was not present. And as a matter of fact, there's no evidence

that there was any contact between D'Onofrio and Glover between the date of the sale and the date of the photographic viewing, and no evidence whatsoever of any verbal influence or pressure brought by D'Onofrio upon Glover to make an identification --

QUESTION: Except the picture?

MR. GAFFNEY: Yes, your honor, except the picture.

Now, after it was confirmed by analysis that the substance sold was in fact herion, police arrested Brathwaite. And it's of more than a little significance, I would submit, that Brathwaite's arrest occurred at the very same apartment from which the sale had taken place. That was not Brathwaite's home. He lived on another address on Albany Avenue in Hartford. And the Westland Street address was occupied by a Mrs. Ramsey.

Now, Brathwaite said on cross-examination that he had visited that apartment on Westland Street many times prior to the date of the offense, and that Mrs. Ramsey, who occupied that apartment, was a friend of the family.

Now, during the trial, through Officer Glover, the State offered testimonial evidence of the photographic identification and the photo itself, and Officer Glover made a positive in-court identification of Brathwaite.

Now the principal issue before this Court as I understand it is whether the case of Stovall v. Denno, which

this Court decided in June of 1967, established a strict exclusionary rule such that the admission of evidence of a pre-trial identification, an unnecessary and suggestive pre-trial identification, renders a criminal accused conviction in violation of due process standards. That is what the Federal Appeals Court said in reversing the decision of the United States District Court, that Stovall did establish such a rule and that the rule was violated by the State.

Now, the petitioner has conceded that the procedure which the police used was suggestive, in that it did consist of a one-photo showup. And we've also conceded that the procedure used by the police was unnecessary, because there really was no emergency that existed and no exigent circumstances that would have prohibited the police from resorting to some more reliable technique.

We dispute the fact, however, that the suggestive-nessness was in any way pronounced or aggravated or even remotely like that which existed in the Foster case, Foster and California, which was decided after Stovall, I believe, in 1969.

And I emphasize, in making that point, that Detective D'Onofrio knew Brathwaite by sight; that he had seen him on a number of prior occasions; and that he recognized the description which Glover gave him.

And I also stress that D'Onofrio was not present when Glover made his identification from the photograph, and exerted no influence, no verbal influence, upon him.

What we are saying is that although the photo, the pre-trial photo identification procedure, was unnecessarily suggestive, there was no grave likelihood of any misidentification under all of the facts.

Now, with respect to the issue before your Honors, the existence or non-existence of a strict rule of exclusion nowhere in the language of Mr. Justice Brennan's opinion in the Stovall case, and I'm referring to Part II of that opinion, nowhere do the words, exclusionary rule or strict exclusionary rule, appear. What the Court said, on page 302 of that opinion, is that, quote, a claimed violation of due process of law of the conduct of a confrontation depends on the totality of the circumstances which surround it.

And the same overriding principle was restated about a year after Stoval in the Simmons case reported in 390 U.S., and in that case Mr. Justice Harlan said, we hold that each case must be considered on its own facts. And he went on later in the opinion to say that convictions will be set aside only if the procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.

Now, in April of '69, the Foster case to which

I've alluded, Foster against California, adopted the same language, deciding that identification procedures should be judged, quote, in the totality of the circumstances. And your honors, I'm sure, will recall that in that case there were repeated procedures used by the police which the Court said violated due process, and that conviction I believe was reversed.

224 QUESTION: What case was this?

MR. GAFFNEY: Foster against California, your honor.

QUESTION: The opinion written by Justice Fortas? Is that the case? Well, it doesn't matter.

MR. GAFFNEY: I didn't think it was Justice Fortas. I think Justice Fortas may have written the opinion in Coleman against Alabama.

QUESTION: No, Justice Brennan wrote that.

MR. GAFFNEY: Oh, all right.

QUESTION: Well, in any event, I can look it up. I was just trying to recall the case --

MR. GAFFNEY: Coleman and Alabama, I know, was decided after Foster in 1970. And again, similar language, totality of the surrounding circumstances as being the key to evaluating or assessing the prejudicial effect of a pre-trial lineup in that case.

Now, more recently, of course, in the case of Neil and Biggers, decided in December of 1972, this Court

said in rather specific language that it's the reliability of the evidence under all of the circumstances which is the central question. So that it's overall reliability which is paramount, as I read the case, even though the identification procedure may have been suggestive.

That is the position which the petitioner takes in
247 this appeal, that the admission of the showup without more, in the language used by Justice Powell, does not violate due process, and that each case should be decided on its own facts.

Now, I submit to your honors that if the Biggers criteria, those enunciated by Mr. Justice Powell in that case, are applied to the instant case, that Glover's identification is wholly reliable.

And the reasons for that contention I've tried to put forth beginning on page 12 of the petitioner's brief: the opportunity to view the suspect. Glover was at very close quarters at the doorway to the apartment. He was looking directly at his subject. And the door was opened during that period for up to three minutes. The degree of attention. Here you have a trained police officer --

QUESTION: Was Glover a full time police officer?

MR. GAFFNEY: Yes, he was, your honor, with the State Police, acting at that time with an undercover narcotics unit.

QUESTION: Mr. Gaffney, is the testimony about what

was said during the confrontation consistent with it being two or three minutes in duration? Wasn't it quite a brief conversation?

MR. GAFFNEY: The conversation, your honor, was brief. There's no question about that. The door opened. It was then, while the door was opened, that a conversation occurred. The door closed.

QUESTION: But now you say there wouldn't have been two or three minutes in that coversation, would there?

MR. GAFFNEY: There would not have been two or three minutes of conversation. But the testimony as I read it was that the door -- and this would relate particularly to the time after which it was first opened -- that during that period up to two to three minutes was consumed.

Now, I assume that during that period Brathwaite wanted to be sure that he could deal with the parties that were attempting to buy from him.

QUESTION: I thought -- maybe my memory fails me -- I thought that the door was closed after the first conversation. Then after a few more minutes it opened again, and there was another conversation.

MR. GAFFNEY: Well, the conversation when the door opened the second time was quite brief. By that time Brathwaite, the seller, had obtained the narcotics, and it was more a matter of getting them into the hands of the

buyer --

QUESTION: Let me put my question a little more precisely. The two or three minute observation: is it your view that the conversation took two or three minutes, or that there was a very brief conversation and that they stood for another two minutes looking at one another silently?

MR. GAFFNEY: Well, I think more like the latter. For the reason that I tried to indicate, that the seller wanted to be sure that he could deal with the parties in front of him, that he wasn't being set up. And the conversation would not necessarily have had any bearing on that. So I think that the two or three minutes took place initially, and that the period of time after the door opened a second time was much briefer.

Insofar as the degree of attention, as I've indicated, Officer Glover was a trained officer, trained police officer. And of course he was on a potentially dangerous assignment. And I think you can feel sure, at least I felt sure, that he was careful in viewing his subject. The accuracy of the description certainly as Brathwaite appeared in Court, he complied with the description given. The level of certainty: OfficerGlover was unequivocal in his identification in court. And the length of time between the crime, the date of the crime, and the confrontation, was relatively brief, a day and a half, perhaps two days at the

very most.

QUESTION: Well, why did he wait two days to pick up this horrible criminal?

MR. GAFFNEY: Well, it wasn't that he waited two days to pick him up. It was two days at most when Glover got back to his office to find the photograph on his d esk.

QUESTION: Well, what was the delay?

MR. GAFFNEY: Well, I don't know that, Mr. Justice Marshall, that there was any delay. I think --

QUESTION: He went there for the purpose of finding somebody to arrest, didn't he?

MR. GAFFNEY: Not to arrest, to purchase narcotics from, your honor.

QUESTION: Well, why do you purchase narcotics?

MR. GAFFNEY: Well, the arrest would follow after the analysis to determine what in fact you --

QUESTION: And how long -- or more than ten minutes does that take?

MR. GAFFNEY: Well, the analysis is made by the State laboratory at Hartford. Unfortunately, I'm --

QUESTION: Same town? Same town?

MR. GAFFNEY: Yes, your honor.

QUESTION: And you and I know Hartford is not the largest city in the world.

MR. GAFFNEY: Yes, I understand that.

QUESTION: So I'm trying to find out why you had two days before you picked this horrible criminal up. In the mean time he's violating the law.

QUESTION: I suppose if there had been a contemporary objection at trial, the state might have had an opportunity or might have been motivated to flesh the thing out a little more.

MR. GAFFNEY: Yes, I think that's accurate to say, your honor.

QUESTION: I suppose this was not the only narcotics case in Hartford in that period of time?

MR. GAFFNEY: Oh, no, by no means, your honor, by no means.

QUESTION: What independent answer do you have to my question without help?

MR. GAFFNEY: Well, the delay insofar as the confrontation occurred in Glover's not getting back to his office until May 7, that is May 5 to May 7. As far as the arrest is concerned, that would not, under the procedures used in Hartford, that would not have occurred until after it was confirmed by analysis, toxicological analysis, that the substance purchased was, in fact, narcotic. Now, that did not happen, Mr. Justice Marshall, until some time in July. And I concede that that is a rather extended delay. And all I can tell you is that it relates to the backlog, the

worklog, of the state laboratory in Hartford.

After it was confirmed, if I recall it, Brathwaite's arrest took place not too long thereafter.

Now, the rationale, of course, of the reasoning for the strict exclusionary rule as Justice Powell wrote, is to deter the police from using a less reliable procedure when a more reliable one would be available to the police.

Now, the Court said that the rule would not be premised on the assumption that the admission of the evidence of such a confrontation offends due process. Now, if that's the case, it would seem to me in the first instance the question is whether such a strict rule is going to have any deterrent effect on the police.

Now, Justice Blackmun discussed that issue in a #367 recent case decided this past July, U.S. against Janis. I think that was a Fourth Amendment case. But based on the Court's discussion in the Janis case it would seem that there's more than a little doubt that in fact such a rule, an exclusionary rule, has a deterrent effect. At least some doubt among the analysts or the statisticians or those who have perhaps looked into it.

But assuming that it does, assuming that it will have a deterrent effect, I suggest to your honors that what is important is that there is no compelling need today for such a strict rule.

Now, my experience is limited, I concede, to Connecticut, and more specifically, Hartford, and the areas that surround Hartford. But I've been exposed over the years to a great, great many cases, and I submit to your honors that the abuses today are minimal, whether the police are learning or what the reason is, I'm really not preapred to say.

But I can say this: in my experience, photo showups and highly suggestive procedures are the exception today and not the rule; that in the great majority of cases where photo showups, for example, are used, they are used by the police because of circumstances which may be peculiar to the case, or to confirm the identity of a person who is already known.

QUESTION: And has been identified by a person trained in identifying people, and giving accurate descriptions.

MR. GAFFNEY: That certainly does help, your honor.

QUESTION: You don't want to lose that point?

MR. GAFFNEY: No, I don't. That's important.

If the basic purpose of a trial is the determination of the truth, and Mr. Justice Stewart said that in the

397 Tehan v. Shott case decided in 382 U.S. at 416, and I suppose that's really axiomatic. But I certainly subscribe to it. If you accept that, I submit that the prosecution then should not be prohibited in all cases from introducing

this type of evidence, because the effect of the rule will then be to keep out what in most cases is really relevant evidence, and in many cases, certainly probative evidence and perhaps valid evidence as well.

Now, Justice--Mr. Justice Blackmun said, jurists and scholars uniformly have recognized that the exclusionary rule imposes a substantial cost on societal interest in law enforcement by its proscription of what concededly is relevant evidence, that in the Janis case to which I just referred. I guess that's really the point I'm trying to make, that something will be lost in many of the trials if such a rule is adopted.

And as an aside, and as a practical matter from one who is a prosecutor, in cases such as this one, where you have one witness identification, Glover being the sole identifying witness, the evidence is going to come into the case anyway. The defense in its cross-examination of the State's chief identifying witness, undoubtedly -- in most cases at least -- is going to offer the evidence for the purpose of undermining the chief identification witness for the state.

Now, I submit that if that occurs, the State in many instances is going to be placed in a bad light. Juries simply are not going to understand that the state, because of the inadmissibility of the evidence, wasn't permitted to

offer it in the first instance, and having failed to present it, I submit again, the state just is not going to look good. Juries want to hear all of the evidence. It's been my experience that they don't like objection.

QUESTION: I'm not sure I understand the argument you're now making, Mr. Gaffney, and I want to be sure I do. You say on cross-examination --

MR. GAFFNEY: I don't know if it's a cogent argument, your honor, for deciding whether there should be a rule or not. I offer it more from the practical sense.

But in a case such as this one, where you have a one witness identification, and the State presents that witness and he makes an in court identification without any reference to the pre-trial procedure, the defense, in the great majority of cases, is going to cross-examine that witness and develop that there was a pre-trial procedure, to point out how defective it was, how suggestive it was. So that the evidence is in the case anyway, and the jury sitting and hearing that case, hearing that evidence come in for the first time --

QUESTION: They'll wonder why it wasn't put on by the prosecution.

MR. GAFFNEY: -- wonder why didn't the State -- why are we hearing it now from the defendant?

QUESTION: For the first time?

MR. GAFFNEY: And I submit that that doesn't make the state look very good.

QUESTION: I see. I see your point.

MR. GAFFNEY: Now, if there is no such rule, then the evidence, at least in some cases, is offered by the prosecution, I submit that certainly the trial judge, in an appropriate instruction to advise the jury of the weaknesses and the dangers and the deficiencies of such suggestive pre-trial procedures by the police.

In summary, it's the position of the petitioner that Stovall and the cases that have been cited since Stovall did not establish a strict exclusionary rule; that due process standards do not require it; and that there's no compelling need for the adoption of such a rule today, particularly if the objective is the deterrent effect on the police; and that the key question is really one of reliability, reliability of the identification evidence under all of the circumstances; and whether notwithstanding some suggestive pre-trial procedure, whether there's really any great substantial likelihood of irreparable misidentification; in short, that the cases should be decided on a case by case basis.

Now, in what I have referred to in the petitioner's brief as a contingency opinion, Judge Friendly said that even if there was no exclusionary rule, even if he was wrong in

that conclusion, the respondent should be given a new trial for other reasons. And I can see that the Appeals Court had a right to examine the record and interpret the legal significance of all the facts in the context of due process.

But when the Court decided that Officer Glover was not a reliable witness, not a credible witness who, because he was a police officer, whose job it was to make arrests, that an ordinary citizen or a bystander would be a more credible witness, that Glover's positive in court identification of Brathwaite wasn't worthy of belief because Brathwaite was the only person sitting at the counsel table, and that he must have made dozens of other arrests between the time of theoffense and the time of the trial, I submit that in that connection the Appeals Court was injecting its own viewpoint, its own personal conviction, and those were peculiarly -- I would think within the province of thejury.

Justice Frankfurter, in the Malinksi case, 324 U.S. at page 417, expressed it well, far better than I have, when he said the judicial judgement in applying the due process clause must move within the limits of acdepted notions of justice, and it is not to be based upon the idiosyncrasies of merely personal judgement. An important safeguard against such merely individual judgement is an alert deference to the judgement of the state court under review.

And if I may, your honor, I'd like to reserve

whatever time may be left to me for rebuttal argument.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Golub.

ORAL ARGUMENT OF DAVID S. GOLUB, ESQ.,

ON BEHALF OF THE RESPONDENT.

MR. GOLUB: Mr. Chief Justice and Members of the Court:

The paramount and undisputed issue, the fact in this case, is that the identification testimony that served as the sole basis for respondent Brathwaite's conviction was derived from what has been conceded by the State, and what has been found by every court that has reviewed this case, to be an impermissibly suggestive procedure that was totally unnecessary under the facts of this case, under the circumstances.

QUESTION: You're not suggesting that that alone would exclude an in court identification?

MR. GOLUB: No, we're not, your honor. We recognize that there is an independent basis test that would still be applicable to the in-court identification.

QUESTION: You're just saying that the testimony about the out of court identification should have been excluded simply because it was impermissibly suggestive?

MR. GOLUB: Well, we do say that. We also say --

and I think Judge Friendly held -- the in court identification also should have been excluded. His opinion applies to both the out of court and the in court.

QUESTION: Yes.

QUESTION: He regarded it as tainted -- the second was tainted by the first?

MR. GOLUB: That's correct, your honor.

There is, in addition, an additional fact for the second in court identification that wouldn't be applicable to the out of court showup.

QUESTION: But you don't say that the in court identification is automatically excluded?

MR. GOLUB: No, we don't.

QUESTION: Along with the out of court identification?

MR. GOLUB: No, we don't say that.

We take the facts, your honors, as Judge Friendly found them in the Court of Appeals. It was a very brief encounter. Ittook place in a dimly lit hallway at sunset. There were no electric lights in the hallway or in the apartment. The door to the apartment was open only 12 to 18 inches. And this is all Glover's testimony, the agent's testimony. There were two people in the doorway. The door was closed most of the time while the heroin was being prepared inthe apartment. The officers admitted they made at least one mistake in the case, they went to the wrong apartment. They were trying to

find drugs from a different person.

QUESTION: Mr. Golub, wouldn't a good deal of this speculation that you're now indulging in be prevented if there had been a contemporary objection, and this could have been argued out in the trial court, or Glover be cross-examined as to how he really knew this was the same man?

MR. GOLUB: Your honor, it is true that there was no contemporaneous objection at the time of trial. I think it's significant that in proceeding in the District Court, the State felt that the trial transcript was sufficient to establish the evidentiary basis for the in court and out of court identification.

QUESTION: And you did too?

MR. GOLUB: We did too. As the memorandum of
530 opinion from Judge Blumenfeld indicates, he asked us whether either side wanted an evidentiary hearing. And both sides agreed that it wasn't necessary.

I might also point out, your honors, that Judge Blumenfeld invited briefs on the subject of the contemporaneous objection, the absence of the contemporaneous objection. The State chose not to file a brief, the State chose not to raise the issue in its pleadings.

QUESTION: Wasn't what Judge Blumenfeld talking about, whether it was raisable at all on habeas in the absence of a contemporaneous objection, rather than the

question of the degree of speculation you could go into about people's motives and that sort of thing if you hadn't raised it at trial?

MR. GOLUB: Yes. He was asking for briefs, I think, on whether or not the failure to object precluded habeas corpus relief.

I think it's important to note, I don't think it does preclude habeas corpus relief. I don't think the State has raised it. I don't think it's conceivable that it could have been a deliberate bypass for tactical reasons, even under the recent standards that have come forth in the Court's cases last term. There certainly is actual prejudice to the
#547 defendant in the case shown here, under Frazier v. Henderson. And furthermore, I think that under the principle of
548 Warden v. Hayden, we might have argued in the District Court, had the State raised it, that this was plain error. And that's the basis, apparently, on which the Connecticut Supreme Court reviewed it.

For all of those reasons, in response to the subject of absence of contemporaneous objection --

QUESTION: You mean that in any case in which police authorities show a picture to a complaining witness, automatically, no trial?

MR. GOLUB: No, that's not what we're saying, your honor.

QUESTION: Well, what are you saying?

MR. GOLUB: We're saying that -- there are two issues in this case, and two standards that could be applied in this case. One would be the totality test, which Judge Friendly applied in the alternative. The other would be the strict rule of the exclusion of the evidence that Judge Friendly also felt was applicable.

We feel -- and we feel that under the case law and under the constitution, a strict rule of exclusion of evidence derived from an unnecessarily suggestive identification procedure is warranted. That applies to the out of court identification. We feel in this case even more so that whether or not that test is applied, even if the totality test is applied, that Judge Friendly was certainly correct in applying the test as he did in this case, and coming out with the conclusion that a substantial likelihood of misidentification resulted.

QUESTION: So you don't want the automatic one?

MR. GOLUB: Well, we do want it, your honor. But we don't think it's necessary for the Court to reach it to affirm the opinion below.

QUESTION: Well, what is the total you have here?

MR. GOLUB: I'm sorry, I didn't hear you.

QUESTION: What is the total evidence that you have here that takes it out of that automatic rule?

MR. GOLUB: Well, we feel, on the totality test, Mr. Justice Marshall, that in view of the brief nature of the encounter -- and we agree with the question that was posed by Mr. Justice Stevens about the length of time that was involved -- the conversation we think was the total amount of time. The door was closed.

QUESTION: Well, how much time would it take?

MR. GOLUB: Well, we read it as being no more than a minute. We read it as being very momentary. There was a -- on page 30 of the transcript, Glover --

QUESTION: I said, how much time would it take for me to look at you before I can identify you? How much?

MR. GOLUB: Well, I think your honor, it would depend on each individual person. It might be that --

QUESTION: Well, how much if I were a well trained police official? How long would it take?

MR. GOLUB: I don't know, your honor, and I don't think judges can --

QUESTION: Well, would two or three minutes be enough?

MR. GOLUB: It might be for some people, but I --

QUESTION: Well, it was two or three in this one.

MR. GOLUB: Both Courts below found that it was no more than one or two.

QUESTION: Well, one minute short.

MR. GOLUB: And I might point out that with respect to the argument about the trained police officer, we have an individual who went to the wrong apartment. We have an individual who was observing the seller without the benefit of electric lights at the time of sunset. We have an individual whose identification was disputed by the other witness present. We have an individual who was subjected to a very suggestive photographic confrontation, but moreover was subjected to the suggestiveness of his superior officer saying, I know who it is. I know it's Brathwaite. And we have an individual who, no matter how certain he may have been, felt it necessary to look at th e picture again before the day of trial when he was to make an in court identification.

So we have to concede -- and I think that he is a police officer. But I don't think there's any reason to exempt a police officer from the scrutiny that we would give to other witnesses. Yes.

QUESTION: Mr. Golub, is the fact that the defendant was arrested in the apartment relevant to the question of whether the identification was reliable?

MR. GOLUB: Well, not as I read the facts, your honor. What we had in this case was D'Onofrio saying, I recognize the description that you've given me. It's Brathwaite. And he apparently recognized it because he'd seen Brathwaite in the area. And there's no question that

Brathwaite visited that apartment. He was a heavy set black male, your honor. We contend that what D'Onofrio recognized was a heavy set black male. It could have been any number of heavy set black males in the apartment. And the fact that it was three months after the incident that Brathwaite was arrested, the fact that it was even two weeks or three weeks after the lab report came back -- and I might point out that there was a lab analysis done on the street the day of the alleged sale.

QUESTION: Let me make my question a little bit more precise.

MR. GOLUB: I'm sorry.

QUESTION: Is evidence which one might assume to be relevant to the issue of guilt -- I assume the fact that he was arrested in the apartment, and he went there many times, is relevant on guilt -- can we consider that in determining whether the identification is reliable? Or are they two separate and entirely different things?

MR. GOLUB: Well, I think they're two separate questions. I know there have been courts that have -- appellate reviewing courts have looked to other indicia of guilt or innocence in their appellate review. I think that -- I would disagree with those courts that did it, and I would say that that is an independent issue.

In addition, your honors, I would say there is a

threshold question here of whether or not this Court is going to sit as a reviewing court for factual decisions made by courts of appeals when the standard of review is not in question.

QUESTION: Isn't that what the Court of Appeals in the Second Circuit has done?

MR. GOLUB: Well, they did do that, your honor. But I think there's a different standard for review in this Court. In Neil v. Biggers, this Court did indicate that it would review the facts. It did review the facts. But in that --

QUESTION: Well, what does the Court mean when it says, as Justice Harlan said in this context, that we must review these on a case by case basis? Does that mean our scope of the examination of the record is less than that of the court of appeals?

MR. GOLUB: No your honor, I don't think that it is. But I think that this Court certainly does not to be faced with reviewing every identification case that comes from the court of appeals on a factual basis.

QUESTION: Quite right. But perhaps the Court has a different attitude when a court of appeals, the first reviewing court, undertakes to review credibility without ever seeing the witnesses.

MR. GOLUB: You mean the court of appeals, or the --

QUESTION: Yes, the Court of Appeals undertook to

review the credibility issue, did they not?

MR. GOLUB: Well, I don't think they did --

QUESTION: What did Judge Friendly have to say about the credibility?

MR. GOLUB: I think what he indicated in the opinion, your honor, was that Glover's incentive either to make an identification, either consciously or subconsciously, could not be ruled out. I mean, he had expended government and state funds. He had initiated an investigation. He had made a mistake and gone to the wrong apartment. And now, when his superior officer came and said, is this the man? I think Judge Friendly thought he had an incentive to make an identification. I think that Judge Friendly -- I don't think he was questioning the credibility of the witnesses so much as pointing out that there was a possible --

#637 QUESTION: Well, if you don't have concurrent findings --

MR. GOLUB: Well, I think the findings by the District Court and the Court of Appeals --

QUESTION: You think it's a case for the two-court rule?

MR. GOLUB: I think there is no -- there were no factual findings that were reversed by the Court of Appeals. I think it was simply a question of applying the law to the fact, as this Court did in Neil v. Biggers. But I think --

QUESTION: Well, over a dissent.

MR. GOLUB: Yes.

QUESTION: That was a case for the two-court rule.

MR. GOLUB: Well, I think so. But I think the difference from the Court's point of view, from Neil v. Biggers and this case is, that in Neil v. Biggers there was the further argument over dissent that there was a -- the rule of law was incorrectly applied in the Court of Appeals. In this case, on the totality test, there's no question but that the rule of law was accurately applied as a rule of law. There's the question that the State has raised as to whether or not the final determination was correct. But --

QUESTION: Well, which court? The District Court or the Court of Appeals?

MR. GOLUB: I think both Courts applied the totality test. They reached different conclusions, and we feel that's partly --

QUESTION: Well, which court should we follow on the facts?

MR. GOLUB: I think the facts are the same in both courts, your honor.

QUESTION: Well, which court should we follow?

MR. GOLUB: I would say, follow the Court of Appeals.

QUESTION: Well, don't you think the Court of Appeals differed with the District Court on the credibility of the

witness or not?

MR. GOLUB: No, I think the only difference is that the District Court said -- that the Court of Appeals said that there might be an incentive to -- there might be a reason or there might be an incentive for him to make an identification.

QUESTION: Well, so they question the believability of the witness?

MR. GOLUB: Well, they just -- I think they discounted the fact --

QUESTION: Well, the answer is yes or no? They did, didn't they, discount his credibility?

MR. GOLUB: I suppose the answer is, yes. I'm reluctant to give that answer, not because I'm avoiding the question, but --

QUESTION: Well, Mr. Golub, certainly Judge Friendly at least inferred a bias in Glover, didn't he?

MR. GOLUB: He inferred a potential bias, and I think --

QUESTION: Well, I know but that -- but Judge Bloomenfeld didn't.

MR. GOLUB: Judge Bloomenfeld did not do that, and I think that's why --

QUESTION: Judge Friendly never saw the witness. Did the trial judge or not? Was there a hearing?

MR. GOLUB: There was no hearing in the trial court.

QUESTION: So that it's all -- both the District Court and the Court of Appeals were operating on a cold record?

MR. GOLUB: On the same transcript, yes, your honor.

QUESTION: But the District Court followed the more traditional rule that on a cold record you don't reexamine the credibility, did he not?

MR. GOLUB: The district -- yes, he did not look to Glover's motives.

QUESTION: Was there any cross-examination of the officer opening up and ventilating these facts that Judge Friendly seemed to rely on?

MR. GOLUB: There was no cross-examination of Glover that went to this issue. In fact, the Court's examination of Glover was very limited in --

QUESTION: Glover's been found not a credible witness by default, in effect, hasn't he?

MR. GOLUB: Well, I think the only thing that Judge Friendly found was, that he couldn't be presumed to be accurate simply because he was a trained police officer. I don't think --

QUESTION: Well, he presumed the contrary, did he not?

MR. GOLUB: I think he noted the contrary, the contrary might be true, it might be possible.

QUESTION: Well, he either accepted the policeman's testimony or not. And which did he do? He rejected it, did he not?

MR. GOLUB: He found that the testimony -- there was a substantial likelihood of misidentification from the procedures employed.

I might point out --

QUESTION: Well that rejects totally and completely, does it not, the in court identification of the accused?

MR. GOLUB: Well, I don't think it's necessary to say it's a total rejection. I think it indicates that he felt there was too high a risk of misidentification under the procedures employed. It might be that it's a -- and we in fact contend it -- that one of the problems with the totality test is, that it's a very fine line in many instances. I don't know how long it would take Mr. Justice Marshall to identify me. I don't know what it means that a police officer on the street has made a mistake and wants to correct it. And when we tried to inquire into all these uncertain areas of psychology, when judges try to inquire into that, the result is one that is suceptible of many different resolutions.

QUESTION: Did you suggest earlier that you and your colleagues stipulated that no hearing was necessary

before Judge Blumenfeld?

MR. GOLUB: We agreed to go on the trial transcript.

QUESTION: That's on the State transcript?

MR. GOLUB: Yes.

QUESTION: And is cold transcript here?

MR. GOLUB: It is. It's part of the record. It's not --

QUESTION: It's part of the record here.

MR. GOLUB: It is. It is not printed in the Appendix.

QUESTION: The burden is on you in a habeas proceeding, isn't it?

MR. GOLUB: Well, I think the burden is on us to show that there was unnecessary suggestiveness. And I think once we've met that burden, which we did, the burden then shifts to the state to show that there was no substantial likelihood of misidentification.

QUESTION: And what case do you rely on for that proposition?

MR. GOLUB: Well, I don't think it is explicitly stated in a case, your honor. But I think that's the rationale of the identification law cases. It's not in Neil v. Biggers. And I think it's not in Neil v. Biggers because that was an opinion where the test was framed to deal with pre-Stovall identification. But it certainly is in Simmons and it

certainly is in the other -- the right-to-counsel identification law cases. The burden is put on the state or the government to show that there was no substantial likelihood of misidentification.

I'd like to turn to the strict rule of exclusion that Judge Friendly, in the unanimous panel of the Second Circuit, held was applicable to this case. I disagree, I suppose, personally with the comments of my brother about the need for deterrence. I think that Judge Friendly and the panel and other judges, all the commentators -- and there are many of them cited in the brief -- also disagree that -- they feel there is a need for deterrence. There is a need for a deterrent rule. The facts of this case indicate the need for a deterrent rule.

Simmons in 1968 made it clear that the use of one photograph was impermissible. Lower courts stridently condemn the use of one photograph. And in this case we have a procedure where not only was it used, but one of the officers, D'Onofrio, said that it was not even an unusual practice.

We think that the rule --

QUESTION: Well, as to the unusual practice, is it an unusual practice for police officer to look at the mug shots?

MR. GOLUB: Well, on the basis of my experience --

QUESTION: Is it? Isn't that rather normal for police officers?

MR. GOLUB: This is a limited branch of the Connecticut State Police Department. It's the regional crime squad, who are engaged in doing this kind of undercover buying of drugs. It is my understanding --

QUESTION: And isn't it normal for them to look at mug shots?

MR. GOLUB: It's my understanding that their normal practice, that they make the purchase and then go back and look at only one mug shot, for no reason other than that's the standard procedure.

QUESTION: Well, how could he normally find one mug shot?

MR. GOLUB: Well, they have a list -- they have a book of pictures, and one of the officers --

QUESTION: A book of pictures. That's not one mug shot.

MR. GOLUB: They pull the picture out of the book, your honor. And they will then bring it over --

QUESTION: But with police officers, they're different from ordinary people. They're trained.

MR. GOLUB: Well, they're trained, but they're still subject to the same --

QUESTION: Well, suppose the police officer comes

out and says, the man I saw was 5'8", 180 pounds, a Negro, with blond hair, blue eyes, and a scar across his face. And you show him a picture of that. What's wrong with that?

MR. GOLUB: Well, there are many people who might look like that, your honor?

QUESTION: And that's the best you can do?

MR. GOLUB: What I seriously feel is wrong with that is, there is no reason why that can't be done by means of a photographic spread. There's no reason -- to ensure the accuracy of the identification, even if it's by a police officer, that it can't be done in six or ten photographs. And the use of one photograph is ensuring that the identification will be made of the person in the photograph.

And this is a very good case of this because Glover had no prior contact with Brathwaite. Glover didn't know who it was. D'Onofrio said it was Brathwaite. D'Onofrio showed Glover the picture, or left the picture for Glover to see.

QUESTION: No, he didn't show him the picture until after he got a full description of him good enough to be able to pick out the picture.

MR. GOLUB: It's a description, your honor, of a heavy set black man with high cheekbones. There's no showing -- there's nothing of age, there's nothing of facial characteristics --

QUESTION: So he found one with high cheekbones.

MR. GOLUB: There's nothing about --

QUESTION: Because so many thousands of Negroes have high cheekbones.

QUESTION: Mr. Golub, does the record tell us whether Officer D'Onofrio knew that the defendant frequented this apartment before he received this subscription?

MR. GOLUB: The record -- the transcript seems to indicate that D'Onofrio had seen Brathwaite in the area, and that's as far as it goes.

QUESTION: In the area, but not necessarily in this particular apartment?

MR. GOLUB: No, there's no evidence -- there's no testimony one way or the other as to that.

With respect to the adoption --

QUESTION: Well, let me just go one step further.

MR. GOLUB: Yes, I'm sorry.

QUESTION: Then is it a fair inference that D'Onofrio picked out this picture on the basis of the description given to him by Glover?

MR. GOLUB: I think that is a fair inference. He recognized from the description a heavy set black male that he'd seen in the area, and secured a picture of it. I might point out, the picture is a mug shot and doesn't have anything fromthe neck down, so it's not a full photo of the individual that the description had been given of.

With respect to whether or not a strict rule of exclusion is warranted in this case, we have argued in the brief that there is a constitutional basis for the rule. And I think we're also aware that several members of this Court have indicated that there is some doubt in their minds as to whether a constitutional basis, either in the Fifth Amendment right to a fair -- the right to a fair trial, exists.

We feel -- we don't retreat from the position we took in the brief as to the fact that the identification law cases, Gilbert and Stovall, indicate that there is a right to a fair -- that the right to a fair trial would apply in warrant of the term, exclusionary rule.

But we feel in addition that the recent decisions of this Court dealing with the development of the standards under which a deterrent rule is warranted -- and I'm talking about decisions such as Michigan v. Tucker, Calandra, Brown v. Illinois, and cases such as those, indicate that there are certain guidelines that this Court feels are applicable when creation of a deterrent rule is considered.

And in Michigan v. Tucker the Court indicated that even when there is no constitutional basis for the rule, a deterrent rule can be warranted for prophylactic rules designed to ensure constitutional rights. Of course, in Michigan v. Tucker, it was the Miranda rule that was -- the fruits of the

Miranda rule that were at issue.

But the point in Michigan v. Tucker, and the point in all these cases is, the Court has been formulating standards by which a deterrent rule can be warranted. And we feel that under the standards announced in those cases, that the strict rule of exclusion suggested and adopted by the Second Circuit is fully mandated.

And I would like very quickly to go over some of the principles that we feel some of these prior cases have indicated. There was a concern in the prior cases with whether or not the conduct that is being deterred can in fact be deterred. One of the criticisms of the Fourth Amendment rule is that it applies to searches and seizures which are made in good faith.

By contrast, in this particular instance, we're dealing with a rule that applies only to unnecessary photographic procedures. They're procedures that are willful and negligent. It falls within the language of --

MR. CHIEF JUSTICE BURGER: We'll resume there at 1:00 o'clock, counsel.

[Whereupon, the Court was recessed until 1:00 o'clock p.m., November 28, 1976.]

MR. CHIEF JUSTICE BURGER: Mr. Golub, you may continue.

MR. GOLUB: Thank you.

Mr. Chief Justice, and Members of the Court:

As I was saying before the lunch recess, I think that if we look to the cases of this Court in recent terms dealing with the development of exclusionary rules for deterrent purposes, they provide guidelines which can be applied to this case and which mandate creation of the rule that the Second Circuit adopted.

As I mentioned before, this rule, the strict rule of exclusion of unnecessarily suggestive identification evidence, deals only with evidence that can and should be deterred. Because the procedure was unnecessary, it is either willful or negligent. It falls within the definitions of all the cases that deal with the development of these rules, as conduct of which the officers have knowledge is improper or are properly chargeable with knowledge.

Second of all, I think it's clear that this is a rule that will have impact. It's a rule that will aim directly at the conduct of the officers. They will understand under what circumstances their conduct was permissible, under what circumstances their conduct was not permissible. It avoids the second step of the analysis, which gets into the particular individual who made the identification, the witness involved. The officer may not often, under present law, understand that it's the witness' length of observation or the witness' memory that makes an identification survive.

Under the strict rule of exclusion, impact on the officers will be clear. If they use a suggestive means, they'll understand that that means is why the -- it's as a result of that procedure that the evidence was excluded.

Thirdly, it's also clear that there really is no other remedy right now for the victim of this kind of procedure. If there is no constitutional basis for the procedure, if there's no constitutional violation that occurs when a photographic showup is employed, certainly there's no remedy under any kind of civil rights action or any kind of tort theory.

This Court has held only recently that the prosecutors are immune from suit for something like this. I would think it would clearly fall under the recent decision.

QUESTION: How would the prosecutors conceivably have any responsibility for the identification process? Or do you mean that he might be at fault for using -- for attempting to employ an identification?

MR. GOLUB: Well, I think very often -- excuse me. I think very often the prosecutor himself engages in an identification procedure. In this case, for example, on the day of the trial, the prosecutor did show the photograph to agent Glover again. So a prosecutor may himself become involved in --

QUESTION: Do you think there's something wrong with

a lawyer showing a potential witness some of the evidence they're going to be dealing with before trial?

MR. GOLUB: Well, I do, your honor --

QUESTION: Isn't that essentially like interviewing the witness?

MR. GOLUB: I think, your honor, there was no reason why a spread couldn't have been used on the day of trial as well, especially since it's eight months later, and the individual is going to attempt a courtroom identification. I think that there was a responsibility to show him -- to not prejudice that courtroom identification by showing him one photograph again.

QUESTION: Counsel, on the re-trial that was ordered, you can't use either identification.

MR. GOLUB: Well, I think under the totality test, that Judge Friendly --

QUESTION: Well, I thought Judge Friendly said you can't use either test, either identification.

MR. GOLUB: That's correct.

QUESTION: How would you convict him?

MR. GOLUB: Well, I might say, that I doubt if there would be a re-trial. I don't think he could be tried.

QUESTION: Oh, you mean, you think he'd just be turned loose?

MR. GOLUB: Yes, I do , your honor.

QUESTION: And you don't really think that -- you're not urging us to turn this man loose, are you?

MR. GOLUB: Well, I certainly am. I --

QUESTION: Yes or no. Oh, you are? You're asking us to turn him loose?

MR. GOLUB: I certainly am. I think that there's substantial question of his guilt in this case.

QUESTION: The only part you have is, that they showed him this picture. And on the basis of them showing him this picture, he goes free. He can never be convicted under any circumstances.

MR. GOLUB: Well, in this particular case, on these facts, the evidence is not admissible, your honor.

QUESTION: And so he's free.

MR. GOLUB: He would be-- since there's no other evidence, he would have to go free, that is correct.

QUESTION: And he'd have to go free.

MR. GOLUB: The other thing that I think comes through from the Court's opinions on deterrent rules is that a cost-benefit analysis is properly applied. And we set forth the cost-benefit analysis in the brief.

QUESTION: I'm not sure about your answer to Mr. Justice Marshall. I thought you said awhile ago that adopting the per se rule wouldn't necessarily taint the in court identification.

MR. GOLUB: That's correct. I meant to answer with respect to the totality test, your honor. With respect to the totality test, Judge Friendly found that both the in court and the out of court were impermissibly suggestive, giving rise to a misidentification.

Under the per se rule, there would still be a finding possible on the in court identification.

QUESTION: Let's assume that the per se rule is not adopted for the out of court identification, but that the totality was, a substantial likelihood of a misidentification.

MR. GOLUB: Yes, your honor.

QUESTION: And let's assume that in a particular case, applying that rule, it was found that the pre-trial identification was so suggestive that it should not be admissible because of the substantial likelihood of misidentification.

Would that automatically preclude any in court identification?

MR. GOLUB: It would not automatically preclude it. Practically speaking, however, since the tests are so similar, it's unlikely that --

QUESTION: Well, I know, but there's a -- why wouldn't there still be a question open for trial, whether there was an independent basis for the identification?

MR. GOLUB: I certainly believe that there would be.

QUESTION: Well, if that is true -- Judge Friendly did not go through that routine. He just found, in the latter part of his opinion, that on the totality that if the out of court identification was bad, the in court automatically was, didn't he?

MR. GOLUB: I don't think he's clear in his opinion as to why he's suppressing the in court identification.

QUESTION: Well, at least he never inquired as to whether there was any independent basis for the in court --

MR. GOLUB: We raised it in the court in our brief, and he did not specifically articulate why he was suppressing the in court. As I read the opinion --

QUESTION: But in any event, you don't -- whatever the rule that is adopted for the out of court identification, you do not claim that that automatically disposes of the in court identification?

MR. GOLUB: Oh, no. We do not claim that. We certainly don't.

QUESTION: Well, then, was your answer to Justice Marshall correct or not?

MR. GOLUB: Well, I think it's correct on these facts, your honor, because --

QUESTION: Oh, on these facts?

MR. GOLUB: On these facts only, it's correct. And

that's all I meant to say, with respect to these facts.

QUESTION: I'm reading this on page 27a: Assuming, which we do not believe, that Simmons states the appropriate test for both of Glover's identifications, we hold that both were inadmissible. End of quote.

MR. GOLUB: I think that's -- and I think he's holding there that neither one could be used --

1869 QUESTION: Well, that is the bottom line.

MR. GOLUB: Yes, I think he's holding that neither one could be used at trial on these facts. I think he's not holding that on other facts, an in court identification would not be admissible.

QUESTION: Well, you mean that on retrial there would -- however, if there were an in court identification by Glover, then the State would have to go forward also and show there was an independent basis, not related to the showup?

MR. GOLUB: On a retrial, the State would, yes.

QUESTION: But the State would have to show, in addition to Glover's in court identification, a basis for it. That identification was rested upon a basis independent of the showup, would it?

MR. GOLUB: Yes, I believe that that would --

QUESTION: You think that the State may retry him?

MR. GOLUB: I think there's no chance at all if he's --

QUESTION: It sounds to me like Judge Friendly on the Second Circuit held that this particular policeman's testimony would not be received.

MR. GOLUB: That's how I read the opinion also, your honor.

QUESTION: Yes.

MR. GOLUB: Thank you.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Counsel?

REBUTTAL ARGUMENT OF BERNARD D. GAFFNEY, ESQ.,

ON BEHALF OF THE PETITIONER.

MR. GAFFNEY: Just very briefly, your honor, if I may, with respect to some of Mr. Golub's comments. I don't know whether he meant to imply, or actually said, that Detective D'Onofrio was Glover's superior officer. If so, that is not accurate. They work -- and I thought I indicated that in my opening argument -- for entirely separate law enforcement agencies.

And when Mr. Golub mentioned that D'Onofrio said after Glover had given him the description, I know who it is, it's Brathwaite, perhaps Mr. Golub meant to imply that that's what was going through D'Onofrio's mind, and itmay well have. But he did not make any such statement to Glover. In fact, he made no statement of any kind to Glover.

Mr. Justice Marshall asked about the use of a mug

shot, particularly one mug shot by the police. And it is true that this does occur particularly in narcotics cases as your honors probably realize. The undercover officers actually go out into the drug culture, try to get to know these people in garb which is totally un-police-like, and eventually, when they do recognize and get to know the dealers, they are dealing with a person who's known to him, to the buying officer. So that when the mug shot is used, thereafter, most frequently it's used to simply confirm the identity of a person that's known to the officer that bought the narcotics. I think that's a little bit of history.

QUESTION: Wouldn't the admissibility of the out of court identification be critical in a lot of cases?

MR. GAFFNEY: Yes, it would, your honor. Yes.

QUESTION: In the sense that without the pre-trial identification and without it's being admissible, the officer might have a real problem in identifying in court?

MR. GAFFNEY: Well, I suppose that would be true if there was a lapse of time, particularly.

QUESTION: Well, and not only that, but having dealt with -- but having seen an awful lot of people.

MR. GAFFNEY: That's right, that's correct. Because there are a great many persons that these undercover officers deal with over a period of time.

QUESTION: Mr. Gaffney, if we apply the totality

of circumstances test, am I correct in assuming that that would mean both the in court and the out of court identifications would always stand or fall together?

MR. GAFFNEY: Well, no, I would think that if the pre-trial procedure was found to be defective and yet there could be an independent basis shown for the in court identification apart from the pre-trial procedure thatthe State could hopefully proceed on that basis.

QUESTION: But isn't the inquiry as to whether it's reliable or not? And if it is reliable, well, you pass it for the out of court as well as the in court.

MR. GAFFNEY: Well, yes, I guess that's so, your honor. Reliability is the key.

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

[Whereupon, at 1:12 o'clock p.m., the case in the above-entitled matter was submitted.]