In the

Supreme Court of the United States

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BEN EARL BROWDER,

Petitioner,

vs

DIRECTOR, DEPARTMENT OF CORRECTIONS OF ILLINOIS,

Respondent.

No. 76-5325

Washington, D. C.
October 31, 1977

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v.	:	No. 76-5325
DIRECTOR, DEPARTMENT OF CORRECTIONS OF ILLINOIS, Respondent.	:	

Washington, D. C.

Monday, October 31, 1977

The above-entitled matter came on for argument at 10:05 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 P. STEVENS, Associate Justice

APPEARANCES:

KENNETH N. FLAXMAN, ESQ., 5549 North Clark Street, Chicago, Illinois 60640, for the Petitioner.

RAYMOND McKOSKI, ESQ., Special Assistant Attorney General of the State of Illinois, 188 W. Randolph Street (Suite 2200), Chicago, Illinois 60601, for the Respondent.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in Number 76-5325, Browder against Illinois.

Mr. Flaxman, you may proceed whenever you are ready.

ORAL ARGUMENT OF KENNETH N. FLAXMAN, ESQ.,

ON BEHALF OF THE PETITIONER

MR. FLAXMAN: Thank you.

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

This case, as it was decided by the United States Court of Appeals for the Seventh Circuit in an unpublished, nonprecedential opinion, involved several Fourth Amendment questions, each arising out of the warrantless arrest one evening of the four teen-age black males found one night in the Browder dwelling in Chicago, Illinois.

The Director of the Illinois Department of Corrections, the Respondent in this Court, asked this Court to resolve the Fourth Amendment questions on the basis of evidence received by the District Court at a hearing on an untimely motion to reconsider. This is precisely what the Court of Appeals did. It relied on that testimony. It resolved disputed questions of fact in the first instance and it reversed the decision of the District Court.

The first question which the Court could resolve in this case and which could, indeed, be dispositive of all the other issues presented, is whether the Court of Appeals was

correct in relying on the testimony which had been heard by the District Judge on untimely motion to reconsider.

It is our position that the District Court lacked jurisdiction to entertain that untimely motion to reconsider and that the Court of Appeals lacked jurisdiction to consider the appeal from that untimely motion to reconsider, and that what the Court of Appeals should have done would have been to dismiss this appeal.

QUESTION: Well, if we reach that and decide it, we need not decide any other question. Isn't that so?

MR. FLAXMAN: That's correct.

The other question which the Court could also resolve is whether it is appropriate for the Court of Appeals to rely on an unpublished opinion ruling, to a priori deprive its decision of precedent.

It is our position that the use of that rule is interrelated with the disposition of this case and that question could also be considered by the Court. But the only issue which the Court need decide in order to grant Mr. Browder the primary relief which he desires is to find that the Court of Appeals lacked jurisdiction to review the decision of the District Court, and that the District Court's order granting Mr. Browder's application for writ of habeas corpus should be reinstated and Mr. Browder reenlarged from custody.

The time limits in which a motion to reconsider may

be made have for the last thirty years been delimited by the ten days of Civil Rule 59. The motion to reconsider in this case was made twenty-eight days after entry of the final order, and was untimely under Rule 59.

QUESTION: Mr. Flaxman, I suppose that's the argument, isn't it, as to what is the final order?

MR. FLAXMAN: The final order is the order which disposes of the case, the order which leaves nothing to be done except to execute what the District Judge --

QUESTION: Well, that has to be your position, but suppose one could argue that January 26 order was the final order?

MR. FLAXMAN: That argument could be made but it would be contrary to the type of final order which is appropriate in habeas corpus cases, and which this Court has been directing the lower courts to enter when an order less than unconditional release is appropriate. This goes back to, I think, Chessman v. Teets where there was some problem in the way the State court record had been prepared. This Court felt, properly, I believe, that it would be improper to release Mr. Chessman because of this procedural error which could be cured, and directed the District Court to enter such orders as would be appropriate to allow the State a reasonable time to cure the error, failing which the prisoner would be released. That's what the District Judge did in this case. He decided

that the petition should be granted and he told Illinois that they had 60 days to retry Mr. Browder, failing which the writ would be executed.

QUESTION: Your position is, in effect, if the judgment as to the invalidity of the State conviction was final then the State was just given a couple of alternatives as to what to do in consequence of that determination.

MR. FLAXMAN: That's correct. That's the appropriate kind of final order when an order less than outright release is appropriate. And the State could have retried Mr. Browder if it had acted within that 60 days. The State courts were too congested. I am sure the warden could have come to the District Judge and said, "We need more time to retry him because there are delays in the State court," and the District Judge, I think, would have extended that time and they would have had ample time to retry him if that's what they wished to do.

QUESTION: Of course, the District Judge did stay the earlier order pending further hearing, didn't he? Pending the evidentiary hearing.

MR. FLAXMAN: That's correct. And I think he erred in doing that, but whether he erred in doing that isn't really before this Court because we didn't seek review at that stage. We objected to the District Judge proceeding with the hearing, pointing out to him that the time in which he could alter or

amend his earlier order had elapsed, but the District Judge proceeded with the hearing and received evidence.

The argument that is raised by the Director as to why that order granting the petition wasn't the final order is the claim that that order left unanswered the question of whether or not an evidentiary hearing would be required. That's a difficult point to understand because it seems obvious that when a District Judge said this petition should be granted on the State Court record he was making a decision that no hearing was required, and he was making a decision that the State should appeal his order that the State should retry Mr. Browder or the State should release him from custody.

What the State did rather than to follow one of those three permissible alternatives was to file an untimely motion to reconsider and ask the District Judge to hear further evidence and readjudicate the lawfulness of the arrest.

The District Judge lacked jurisdiction to hold that hearing and the Court of Appeals lacked jurisdiction to consider the appeal from that --

QUESTION: What would have happened if the State had made that motion one day after the original order was filed?

MR. FLAXMAN: Then it would be timely under Rule 59. The time to appeal would be told.

QUESTION: Is there anything in this record to explain why they did not?

MR. FLAXMAN: There is nothing in this record to explain why they did not, and there has never been any explanation by the State or by the Director as to why they waited 28 days. This rule is not a novel rule, but there is no explanation.

The other fact about the untimeliness is that the District Judge in this case did nothing to lull the Director into failing to appeal within the 30 days of Rule 4 of the Appellate Rules. The motion was filed on the 28th day. Under local rules in the Northern District of Illinois, it could have been presented in open court for a ruling at that time. But instead it was filed and allowed to lay dormant on the District Court's calendar. So there was a decision of the Director to rely upon the presumed power of the District Judge to reconsider a final order after more than 10 days had elapsed. The District Judge lacked that power and should not have received evidence.

QUESTION: Mr. Flaxman, the Respondent's brief places some weight on a decision of this Court a couple of years ago in United States v. Dieter which involved a criminal prosecution rather than a civil one. I don't know if you filed a reply brief or not. In other words, how do you distinguish Dieter?

MR. FLAXMAN: Dieter is consistent with our position. Dieter and United States v. Healy arose from cases under the

Criminal Rule where under Rule 4(b) of the Appellate Rules, there is no totaling rule on motions to reconsider. So that in criminal cases when a motion to reconsider is filed by the Government in the time in which an appeal could be perfected, the filing of that motion totals the time to appeal. This same rule is inapplicable to cases where appealability is determined by Rule 4(a). Dieter states the general rule which is applicable, that only timely motions to reconsider stay the time to appeal. In Dieter a timely -- In a criminal case, a timely motion is one filed within the time in which the Government can appeal. In a habeas corpus case, in a civil case, in any case where appealability -- or where the time to appeal is governed by Rule 4(a) a timely motion to reconsider is one made within the 10-day period of Rule 59.

QUESTION: But is Dieter entirely dependent on provisions of the rules?

MR. FLAXMAN: It is dependent upon the absence in Rule 4(b) of any provision -- any rule or statute authorizing petitions for rehearing, as with United States v. Healy. That's what differentiates this case and that case.

The argument is also made that Rule 4(a) doesn't apply to habeas corpus cases. The contention is that the totaling rules of 4(a) are in direct contravention of the conformity clause of Civil Rule 81(a)(ii), but if we look at the predecessor of Civil Rule 81(a)(ii), that is former Civil

Rule 81(b) which was in existence when the time to appeal was set by the Civil Rule, we see the totaling rule from the Civil Rules were expressly and fully applicable to habeas corpus proceedings. The other Civil Rules were applicable only insofar as habeas corpus practice had conformed to practice in civil cases, but the Civil Rules when they governed appeals were fully applicable to appeals in habeas corpus cases.

So what we have is applicability of the 10-day totaling time. And unless this Court concludes that the order granting the petition and leaving nothing to be done but to appeal or to execute what the District Court had finally determined was not the final order, then the conclusion we have is that the motion to reconsider was untimely and that the appeal from the denial of the untimely motion to reconsider did not vest the Court of Appeals with jurisdiction to review the merits of the District Court's final order, that the Court of Appeals erred in reversing the District Court's decision.

Even if the Court of Appeals did have jurisdiction -- and it is our position that it is clear it did not have jurisdiction -- the Court of Appeals, as the Respondent in this Court, resolved the Fourth Amendment question by making its own findings of fact by reading the testimony heard by the District Judge at the hearing on the motion to reconsider in the light most favorable to the warden who is the losing party in the District Court. The ordinary rule followed by Courts

of Appeals is that factual questions which were in dispute are resolved on appeal in the light most favorable to support the judgment entered. If the Court of Appeals had followed that view, it would have decided the probable cause question in this case the way the District Judge had decided it on the State Court record.

QUESTION: The District Court's freedom to find facts is somewhat limited by the 66th Amendment to the Habeas Corpus Act, though, isn't it? If there has been a State Court record made on the point?

MR. FLAXMAN: That's correct. In this case, this is why we come under the exception in Stone v. Powell. The legality of the arrest and the questions relating to probable cause that you asked weren't heard and decided in the State Court. There was no full and fair adjudication of this issue in the State Court.

QUESTION: Stone v. Powell says if you have an opportunity to make the claim. It doesn't say there has to have been an adjudication.

MR. FLAXMAN: That's correct. But when there hasn't been an adjudication -- as in this case there hasn't been -- I think Stone v. Powell says that there has to be a full and fair opportunity. And when the question hasn't been adjudicated I think full and fair opportunity has to be right together with Wainwright v. Sykes. When the issue wasn't raised at trial,

the rule that has to be applied by the State Court to determine if there is a full and fair opportunity would be to allow the prisoner to show cause for why it wasn't raised and prejudice resulting from the default of trial counsel.

That's what the District Judge did in this case. Before he adjudicated the Fourth Amendment questions, he decided whether or not the question had been waived by the failure of trial counsel to have raised it in the trial court.

The Director argued that this question should be resolved in the State Court record in favor of a waiver, under the precedent then extant in the Seventh Circuit, and the District Judge considered that question and found that under that case which adopted standards virtually identical to those adopted by this Court in Wainwright v. Sykes, that the question had not been waived and should be considered in federal habeas corpus, as the Court said in Henry v. Mississippi when it made clear that the states can apply any procedural waiver rule that they feel appropriate, because if they nonetheless refuse to adjudicate a constitutional question it is open to the federal courts to determine whether or not the procedural rules followed by the state court measured up to federal standards.

QUESTION: But Wainwright v. Sykes didn't deal with any Fourth Amendment problem which Stone v. Powell did deal with. I would have read Stone v. Powell to preclude review on habeas

corpus if there had been an opportunity to litigate the question without regard to the cause and prejudice requirements of Wainwright v. Sykes in other types of claims.

MR. FLAXMAN: I would have read it exactly the same way. I think we have to read -- I read Wainwright v. Sykes as defining what opportunity means.

QUESTION: But not for Fourth Amendment purposes, for right of counsel types of claims.

MR. FLAXMAN: Well, I think that's a narrow reading of Wainwright v. Sykes, that the case has to be read together with the issues decided in that case and with Stone to define what a full and fair opportunity is. In this case, as in Wainwright v. Sykes, he had opportunity to raise the constitutional claim to trial. It wasn't raised in this case. We didn't have any opportunity in the State Court to show that there was cause for why it wasn't raised and that we were prejudiced from it not being asserted. I think if those two cases are read together we come out with this case not being controlled by -- with Fourth Amendment relief not being barred by either Stone or Wainwright. And if this Court agrees that the Court of Appeals lacked jurisdiction, that is that the final order was entered on October 21st and that notice of appeal was untimely with that order, then of course there is no question about Stone or about Wainwright. This case would have reached a final judgment because the appeal wasn't taken

and there has been no contention that those cases should apply retroactively to cases where relief had been granted which had reached a final judgment where a prisoner had been enlarged, or virtually enlarged.

As the Court of Appeals resolved the probable cause question -- which is the way that the Respondent will, I think, come before this Court and argue the probable cause question -- the Court of Appeals believed that the police officers had reasonable grounds to suspect that the person who had committed the crime was one of two persons. And the Court of Appeals held that under those circumstances it was permissible for the police to enter a dwelling at night without a warrant and arrest both of these persons, even when the offense under investigation had taken place two days before.

QUESTION: What time did they enter the dwelling?

MR. FLAXMAN: At 6:00 p.m.

QUESTION: And it was night?

MR. FLAXMAN: Well, it was a January day which, I think, we can acknowledge was nighttime in Chicago.

QUESTION: Are you placing any emphasis on that fact?

MR. FLAXMAN: We are. The Fourth Amendment questions are threefold. Perhaps, the first question is whether it was lawful for the search of the dwelling to be undertaken in the absence of exigent circumstances without a search warrant. The court has considered that question and has refused to adjudicate.

QUESTION: I suppose the opposition will take the position that there were exigent circumstances here. Are you relying on the fact that it was what you call "night" even though in May it would be all right?

MR. FLAXMAN: It is our position it would have been irrelevant whether it was daytime or nighttime, but in this case it was nighttime.

QUESTION: That's why I asked the question.

MR. FLAXMAN: Well, in this case, it was nighttime. In the next case, when it was daytime, I think that question should be decided, but here we have the evil in its most obnoxious form,which is nighttime entries to a dwelling. If that reserved question is to be decided --

QUESTION: It is a little different from 3:00 a.m., isn't it?

MR. FLAXMAN: It is different in degree, but it is still nighttime.

QUESTION: What about the consent factor?

MR. FLAXMAN: The consent should have been raised by the Director in the District Court. The Director had two opportunities to show that the arrest was lawful. The petition squarely put in issue the illegality of the search based on the absence of a warrant. Mrs. Browder was in the District Court. She testified there was no attempt made by the Director to show that there was consent.

QUESTION: But didn't the record show that she talked with him and told him that she thought one of them was guilty?

MR. FLAXMAN: The record shows that police testified that she said that. The record also shows that she testified denying having said that.

QUESTION: Did she deny having admitted it freely?

MR. FLAXMAN: She wasn't asked about that when she testified.

QUESTION: My question was: Did she deny it?

MR. FLAXMAN: Did she deny it? She wasn't asked to deny or agree with it. She was asked: What happened? She said: "The police came to the door. I asked them what they wanted." They said, "We are here for your sons."

If she had refused to allow the police entry she probably, under Illinois law, would have been arrested for refusing to assist an officer in discharging his duty.

QUESTION: Did she tell them, "Don't come in"?

MR. FLAXMAN: No, she didn't tell them, "Don't come in." If she had told them, "Don't come in," --

QUESTION: That I am not interested in. I am interested in the record.

MR. FLAXMAN: Well, the record wasn't made on this point. I think it is clear that the duty of showing an exception to the warrant requirement is borne by the party who is trying to uphold the legality of the search.

QUESTION: What does the State Court record show about the consent factor?

MR. FLAXMAN: The State Court record shows what I have just answered to Mr. Justice Marshall.

QUESTION: It shows no claim of a forcible entry.

MR. FLAXMAN: We are not claiming that the entry was forcible. We are claiming that --

QUESTION: It shows, on the contrary, that the police testimony was she consented to the entry and permitted them to enter the house. That's not disputed.

MR. FLAXMAN: The consent that's shown by the record is the same kind of consent or accession to official demands that has been rejected by the Court as being a knowing and voluntary consent entry. In this case, the police officers weren't knocking on doors asking questions. They spent the evening getting together to go out to the Browder household to arrest some people. It is difficult to see how these police officers would have taken no for an answer when they arrived at the Browder residence and said, "We are here to look at your sons, Mrs. Browder." There were four officers who got together to go out to the Browder household to arrest the people there and find out which one would be identified. The police officers, before they went to the Browder household, knew -- or so they claimed -- knew they would have to arrest more then one person, and they knew they would be making an arrest for investigation,

an arrest to investigate whom should be charged. That's the kind of power this Court has been reluctant to allow police officers to exercise, consistent with the Fourth Amendment.

The way we read Davis v. Mississippi is that whenever the police are engaging in a planned investigative series of arrests the only conceivable way that that could be authorized would be if it had been previously authorized by judicial officer, as the American Law Institute, for example, has read Davis and has suggested a model statute allowing limited detention.

In this case, the police suspected that the person they were seeking might be one of the persons in that room, in that dwelling, and they went and seized all of them. There was ample opportunity to get a warrant. They knew they would be seizing more than one person. And that power, the power to arrest to clear up an investigation, is the power which strikes at the --

QUESTION: Would you concede that if the police had reasonable grounds to believe that one of the four was guilty of this rape that would have given probable cause for them to arrest all four of them?

MR. FLAXMAN: No, I would not concede that.

QUESTION: Well, what do you mean there was ample opportunity to get a warrant?

MR. FLAXMAN: What I mean is that everything the police

knew on January 29th when they went to the Browder household they knew two days before when the rape was reported. If they did know that the offender was a teenager named Browder who lived in that block, they knew that right after the rape and they waited two days to act on that. They could have done further investigation in those two days. They could have shown a photograph to the rape victim. They could have gone to a prosecutor and confronted him with their problem and said, "What should we do? We think it is one of several people. Should we arrest them all? Should we get a warrant? Should this be turned over to the grand jury and have these people sent down and have the rape victim look at them?" They didn't do any of those things. They had ample time to do something other than to get together that evening and go out and arrest everybody there. So we don't concede that under those circumstances it is reasonable, it's lawful for the police to make a warrantless arrest of four people in the expectation or in the hope that one of them would be identified.

QUESTION: There were two teenagers at that address named Browder, weren't there?

MR. FLAXMAN: Two teenagers who said their name was Browder. There were two other teenagers who said their names weren't Browder, but the police may have suspected they were lying. They were there to arrest a teenaged Browder, like 16, 17, 18, 19.

QUESTION: And there were, in fact, two of them? I mean that said they were Browder.

MR. FLAXMAN: That's correct.

QUESTION: Well, is there any question about their being Browder's. When you say they said they were Browder's.

MR. FLAXMAN: They admitted to the name Browder. There were two other teenagers who said they weren't, that their name wasn't Browder, but the police officers didn't believe the two Browder's when they said they didn't commit the rape, and they very well might not have believed the two other teenagers when they said, "Our last name isn't Browder."

QUESTION: Isn't it conceded there were two brothers by the name of Browder?

MR. FLAXMAN: It is conceded.

QUESTION: Who were picked up among the four?

MR. FLAXMAN: That's correct.

QUESTION: Let me ask you another question. Suppose your client, Ben Earl Browder, were the only one there. Would you be making the same argument?

MR. FLAXMAN: I would be making the same argument in addition to others. At the time -- What we have to do is look at what the police knew at the time they entered the Browder residence to make the arrest, and if they had gone --

QUESTION: Would you answer the question. Would you be making the same argument?

MR. FLAXMAN: I would be arguing that they lacked sufficient probable cause to arrest anyone, based on what they knew. They had enough information to get a general warrant to search the 4000 block of Monroe Street. They didn't know that this Browder family was the only Browder family who lived in this block. They made no attempt to determine if there were other teen-age Browders. If, for example, there had been three Browder families, each with five teen-age sons, this quantitative information would have allowed the arrest of fifteen people. The police simply didn't do enough in this case to narrow the focus to any identifiable person. The only arrest warrant they could have gotten would have been a general warrant and that simply is not enough.

QUESTION: If the victim says, "The person who committed the crime against me, his name is Browder and he lives at a particular number on a particular street," would that be sufficient to go and arrest him?

MR. FLAXMAN: That would be sufficient to go and arrest him.

QUESTION: So the only difference is they didn't give him the specific number.

MR. FLAXMAN: Well, that's the first difference --

QUESTION: Is that right?

MR. FLAXMAN: That's the first difference. What you are saying is correct. There is another distinction in

that once the police got there they found there were several people who matched that description.

QUESTION: My point was: But he could have arrested a Browder.

MR. FLAXMAN: They would have had probable cause to go out and arrest a Browder.

QUESTION: Well they did arrest two Browders.

MR. FLAXMAN: That's correct.

QUESTION: What's wrong with it?

MR. FLAXMAN: Once they saw that there was more than one person who matched that description who lived at that address --

QUESTION: So if a man says that "The guy that killed me, his name is Jones and he lives at 213 M Street," and you go to 213 M Street and you find two people named Jones, you can't do anything?

MR. FLAXMAN: I'm not saying you can't do anything. What you can't do is arrest both of them to find out which one --

QUESTION: What could you do in that situation?

You find two people who say "My name is Jones."

MR. FLAXMAN: The police first have to make a determination: Is anything going to happen if we don't act promptly? If they believe that those people are going to flee, then we have a different situation than we have here. Here we have the police calling ahead finding out there are two

people.

QUESTION: What could they do when two people say "My name is Jones"?

MR. FLAXMAN: They have to make that first decision: Are they both going to flee if we don't do anything?

QUESTION: Well, seeing it both ways.

MR. FLAXMAN: Well, if they make the determination that nothing is going to happen if they don't do anything, if both of these people are upstanding members of the community, they are not going to leave, then the police can't arrest them.

QUESTION: I didn't say anything about upstanding members of the community. How do you know whether a man is going to flee or not?

MR. FLAXMAN: I get the --

QUESTION: I assume if you come and say you are looking for a man named Jones who committed murder, so that you can arrest him and convict him, the chances are he might leave. Which one of them would you arrest?

MR. FLAXMAN: Under those circumstances --

QUESTION: Which one would you arrest?

MR. FLAXMAN: In that hypothatical, I think the police could arrest both. The problem would be the search warrant question: Would it be lawful to enter a dwelling to arrest both of them? And it would still, we argue, need a warrant --

QUESTION: Well, in line with our cases, if he came

to the doorway and they saw him could they arrest him?

MR. FLAXMAN: If they had probable cause to --

QUESTION: If he came to the doorway, could they have arrested him?

MR. FLAXMAN: If this Court has held that a warrant is in need in that situation, the answer would be yes.

QUESTION: So they could have arrested both of them?

MR. FLAXMAN: If they were both in a public place --

QUESTION: No, no, no. In the doorway of their own home.

MR. FLAXMAN: If they were in the doorway, yes.

QUESTION: And the men were inside the room.

MR. FLAXMAN: That's our argument. The warrant is needed to enter.

If I may, I'd like to reserve the rest of my time.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Flaxman.

Mr. McKoski.

ORAL ARGUMENT OF RAYMOND McKOSKI, ESQ.

FOR THE RESPONDENTS

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

I would like to briefly address the issue of the arrest, the probable cause for the arrest and the nature of the entry. I'll keep my remarks very limited in this regard.

It is important to keep in mind exactly what the

police knew when they went to the Browder residence. On January 29th they found out from the victim of the rape that her assailant was the brother of a person the victim went to school with. She knew that he was a dark complected male Negro in his late teens, approximately 17 years of age, his last name was Browder and he lived in the 4000 block of West Monroe. She had narrowed it down to one block.

This information was received on January 29th by a homicide investigator, Stan Thomas. It was not until the 31st of January, two days later, that Mr. Thomas conveyed this information to the juvenile authorities who then went out and arrested. On January 31st, the juvenile officers received the information about 4:00 or 4:30 in the afternoon and had made the arrests by 6:00 at night. In that intervening time, they had located a Browder family on the block. They had located a juvenile record on one Tyrone Browder who lived at 4053 West Monroe. They had personally interviewed the victim of the rape themselves to verify the information that Mr. Stan Thomas gave them. They also called for a backup squad.

At 6:00 o'clock they proceeded to the house. -- One other thing I forgot that's very important. -- Before they went to the house, the juvenile officer who was heading the investigation called the Browder residence and talked with the mother of Tyrone and Ben Earl Browder. He asked her if the sons were home and she said yes, and he said, "Would you mind keeping

them there until we get there?" The police then got in their car and went over to the Browder's residence.

In this time, Mrs. Browder had an opportunity to think over what she wanted to do when the police came there, if she wanted to change her mind since the phone coversation. The police arrived, knocked on the door, and Mrs. Browder opened the door and the testimony of the police officers: "Invited them in." They went in. No search was conducted. The arrest was made. Miranda warnings were given and the four gentlemen were taken to the police station.

QUESTION: I take it you are conceding that the four were arrested at that time.

MR. McKOSKI: Your Honor, I believe that the real explanation -- I am not hesitant to concede that for the purposes of argument the four were arrested. I think what really happened in that contest -- and the juvenile officer who was in charge of the investigation so testified -- they went to the house. They knew two Browder's would be there and they arrested both Browder's because they both fit the description. There were two other young teen-age black males there. The police knew that there was a second assailant. Sharon Alexander was raped by a man named Browder, but there was also another assailant with Browder at the time who also raped her. So, Mr. Conroy testified that he thought maybe one of the other two could have been the second assailant. That's

why he asked the other two if they would go along to the police station to stand in the lineup. Mr. Conroy testified they "volunteered to go with" and that was how a description of the events ended. Once at the police station, arrest slips were filled out for all four youths. So, I think, that they were arrested -- at any event, arrested at the police station when the arrest slips were filled out. I do not believe Mr. Conroy thought he was arresting them at the time at the house, but I don't think it is very important. I think the important point there is, notwithstanding what Mr. Flaxman said, they weren't arresting all four because they thought one of the four was a Browder. They knew who the two Browder's were. The mother introduced the police officers to the two Browder's. It was the other person, the second assailant, they thought might be there.

We argue in our brief that there was probable cause, like the Seventh Circuit held, and that the warrantless entry -- a warrant was not necessary for the entry because the entry was consented to,and even if not consented to was acknowledged by Mrs. Browder. We also argue that in any event a warrant was not necessary to enter a private dwelling to effectuate an arrest, and I would like to get back to that a little bit if I could.

I do feel compelled first though to address just very briefly Mr. Flaxman's initial argument and that was that

the Court of Appeals never had jurisdiction to even consider this case.

There is dispute as to what was the final order, but right now I don't want to concede but I am willing to assume October 21, 1975, was the final order. That order was a minute order and a memorandum opinion that was filed after Respondent filed a motion to dismiss. The petition was filed, a motion to dismiss was filed by the Respondent, and then later the District Court granted the writ and impliedly denied the motion to dismiss, although that was never specifically stated. Twenty-eight days after the writ was issued was a stay of 60 days to re-try the Petitioner. The Respondent filed a motion that was entitled, "Motion for an Evidentiary Hearing." It was Respondent's position --

QUESTION: Is there anything in the record to show why it took you 28 days to find out what the law was?

MR. McKOSKI: There is nothing in the record, with the exception of one statement and the motion for an evidentiary hearing that said that "upon investigation the Respondent feels that one may reasonably conclude that there was probable cause." It is sort of an innocuous statement but the purpose of the statement was that the case was an old case --

QUESTION: Newly discovered evidence?

MR. McKOSKI: I suppose you could phrase it that way, Your Honor.

QUESTION: Well, what was the newly discovered evidence, what the law was?

MR. McKOSKI: No, Your Honor. It was not what the law was.

QUESTION: Well, why wasn't it?

MR. McKOSKI: The problem that the Respondent faced was to find out if there were, in fact, facts to present to the District Court that the arrest --

QUESTION: And the facts were what you presented, your witnesses --

MR. McKOSKI: That's right.

QUESTION: That were in your control.

MR. McKOSKI: Well --

QUESTION: And that's newly discovered evidence.

MR. McKOSKI: Your Honor --

QUESTION: How can you newly discover your own evidence?

MR. McKOSKI: The Respondent in this case, the Director of the Illinois Department of Corrections nor his attorney, the Attorney General, had any idea of whether or not there really were other facts than presented in the record to establish probable cause. It had never been litigated. I certainly --

QUESTION: Didn't they litigate originally?

MR. McKOSKI: No.

QUESTION: Well, who represented the State in the habeas corpus here?

MR. McKOSKI: The Attorney General of the State of Illinois.

QUESTION: That's who I thought represented it. Well, was he incompetent?

MR. McKOSKI: I hope not, Your Honor.

QUESTION: Well, why didn't he put this in then?

MR. McKOSKI: Because he did not know that those facts existed.

QUESTION: Because he didn't know the law.

MR. McKOSKI: Because he did not know that Sharon Alexander gave a description to the police officers.

QUESTION: Because he didn't have the facts.

MR. McKOSKI: He didn't have the facts that were never litigated.

QUESTION: Isn't that the duty of the police officers?

MR. McKOSKI: Not just merely the final motion to dismiss.

QUESTION: Well, do we have to change the rules to take care of somebody that doesn't know how to try a lawsuit?

MR. McKOSKI: No, I don't think the rules should be changed in that regard, Your Honor, but I --

QUESTION: You have no explanation for waiting 28 days to file a motion which should have been filed immediately.

MR. McKOSKI: I have an explanation, Your Honor.

QUESTION: And I am waiting for it.

MR. McKOSKI: The Attorney General's office in all habeas corpus cases receives a copy of the petition for writ of habeas corpus. The attorney assiged to the case reviews the petition. If he thinks a motion to dismiss would be in order he writes a motion to dismiss, basically -- assuming what Petitioner says is true, he hasn't stated a claim and files that without any factual investigation, because none is necessary for a motion to dismiss. The motion to dismiss is ruled on. If it is denied, usually the District Court judge gives the Respondent 10 days or 20 days to file an answer, responsive pleading.

In this case, no such opportunity was given. The motion to dismiss was, in effect, denied, the writ granted.

QUESTION: Did the State's lawyer ask for any time?

MR. McKOSKI: No, Your Honor.

QUESTION: Well, what are you complaining about on that point?

MR. McKOSKI: My first point, Your Honor, is that the Attorney General, the representative of the Respondent, needed time to do a factual investigation of a case five years old.

QUESTION: You left out one very important point. The Attorney General's office is very over-worked. You left that

one out.

MR. McKOSKI: Well, Your Honor, they were over-worked when I was there and they still --

QUESTION: I thought so.

MR. McKOSKI: But I certainly do not rely on that fact whatsoever. The fact I rely on is that it takes time to do a factual investigation of a case five years old. Some of the police officers are no longer with the force and some could not even be located to testify at the hearing.

QUESTION: But the record was there.

MR. McKOSKI: The record, unfortunately, did not go into the circumstances around the arrest because the probable cause issue wasn't litigated.

QUESTION: Mr. McKoski, could not the Attorney General, within the 10 days provided by Rule 59, have filed a motion to amend the order to give him time to conduct the factual investigation and file an answer?

MR. McKOSKI: That could have been done, Your Honor.

QUESTION: And that would have avoided the whole problem of the timeliness of the appeal, wouldn't it?

MR. McKOSKI: I don't think -- the issue would have probably still been raised if the Attorney General --

QUESTION: If he had filed a motion within the 10 days?

The problem with your position, as I understand it, is that the 10-day requirement just becomes a nullity.

MR. McKOSKI: That's right, Your Honor. Our position is that in habeas cases, number one, the Federal Rules of Civil Procedure do not apply across-the-board, and it is basically in the discretion of the trial judge whether to apply them or not.

QUESTION: Well, if that's true, is it significant that the motion was filed in 28 days, rather than, say, 31 or 32 days?

MR. McKOSKI: Yes, Your Honor, because traditionally and by practice in the federal courts the motion to reconsider is timely filed or filed within the 30-day period for appeal.

QUESTION: That's under Rule 60(b), isn't it?

MR. McKOSKI: I am talking about, basically, United States v. Dieter and United States v. Healy. Those cases held that a motion to reconsider, traditionally, in civil and criminal practice, is timely filed or filed within 30 days.

QUESTION: Your pleading was not filed under Rule 60(b).

MR. McKOSKI: No, it was not, Your Honor.

QUESTION: And even today you don't claim that it was authorized by Rule 60(b).

MR. McKOSKI: No, Your Honor. It was filed under the rights under the Habeas Corpus Act.

QUESTION: Don't you weaken your case by abandoning

all reliance on 60(b)?

MR. McKOSKI: Your Honor, I am not saying that -- 60(b) could be applied here in our favor. I think it would be applicable, but we do not make that argument and I cannot say that we made the argument when we did not.

QUESTION: I know you didn't. On the other hand, if this is jurisdictional, may this Court make it for you?

MR. McKOSKI: Well, Your Honor, I think if the Respondent has left out an argument that clearly settles the issue, that the Court would probably, or should probably, if I can be so bold, use the argument that the Respondent did not raise, if, in fact, law and justice required, as the Habeas Corpus Act requires, these petitions to be disposed in accordance with.

QUESTION: If you don't rely on Rule 60(b), will you state, as shortly as you can, how you avoid the 10-day requirement of Rule 59?

MR. McKOSKI: Rule 59 talks about a motion for a new trial. We never had a trial.

QUESTION: Or a motion to alter or amend the --

MR. McKOSKI: Our basic argument is the Federal Rules of Civil Procedure can be applied by a district judge when he feels appropriate, when they are in line with disposing of a petition as law and justice requires.

QUESTION: That is in a habeas corpus procedure.

MR. McKOSKI: Right.

QUESTION: I know your basic argument is that the Federal Rules of Civil Procedure do not all literally apply, inexorably apply, to a habeas corpus proceeding. Is that it?

MR. McKOSKI: That's correct, Your Honor, and that is supported by the new rules governing habeas procedures and has always been in effect exercised by the courts.

QUESTION: And what's the test for knowing whether or not a particular Rule of Civil Procedure applies in a habeas corpus petition?

MR. McKOSKI: It is in the district court's discretion. If he feels that a rule is applicable, then he can apply that. And if he does not abuse his discretion, it cannot be disturbed. It is for him to determine what rules are appropriate to be applied.

QUESTION: Well, then you never know when anything is appealable. The whole purpose of the Rules of Civil Procedure is to fix deadlines and let people know when a case is over, when it is timely at rest if no notice of appeal has been filed.

Your system would just leave the whole thing up in the air, wouldn't it?

MR. McKOSKI: No, Your Honor, I don't believe so. When an order was entered that disposed of the case, granted relief to one party or the other, then that order would be appealable for a period of up to 30 days. There is no problem with that.

QUESTION: So then if the Petitioner loses for failure to present evidence, he could 28 days later come in and say, "I've got evidence."

MR. McKOSKI: If I understand you correctly, Your Honor, yes.

QUESTION: He could? Then could he come in after that another 30 days? When does your time-limit take place? Surely you agree sometime it's got to end.

MR. McKOSKI: Certainly, Your Honor.

QUESTION: When?

MR. McKOSKI: I think that it would be the same way that United States v. Dieter or U. S. v. Healy was handled. One motion to reconsider has been allowed traditionally and by practice and when you have that one motion, however it's disposed of, you have 30 days from that time to appeal.

QUESTION: And that would apply to all the judges in that circuit? And would it apply to the next circuit? Do you leave this up to each court? Would you leave this up to each judge?

MR. McKOSKI: Leave what up to each judge, Your Honor?

QUESTION: As to whether or not he is going to ignore the 10-day rule.

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

QUESTION: It would be up to each judge?

MR. McKOSKI: It would be in their discretion.

QUESTION: Then why not do away with the 10-day rule?

MR. McKOSKI: I do not think that the 10-day rule should be applicable to habeas cases because of their nature. There may be some circumstances where they are.

QUESTION: What rule would apply?

MR. McKOSKI: The rule that has been traditionally followed in practice in civil and criminal cases throughout the country in federal courts --

QUESTION: In civil criminal cases?

MR. McKOSKI: In civil and criminal cases. The United States v. Healy rule. You have 30 days to file a motion to reconsider and 30 days from the date of the disposition of that motion to appeal.

QUESTION: So the 10-day rule is out.

MR. McKOSKI: That's right, Your Honor. I think that --

QUESTION: Was it just a mistake?

MR. McKOSKI: I don't think it was a mistake. I think it has a place in talking about normal civil suits. I think also that a district court judge could apply it if he wanted if he thought it was appropriate. I think if he does not apply it he has that right and only if he abuses his discretion in not applying it is there a problem. I think it's in the trial court's discretion as other federal rules of

civil procedure. The district judge chose not to apply it in this case and I think his reasons for not applying it were sound. The issue had never been litigated and the state was making the claim that they had probable cause.

QUESTION: You wouldn't be making this argument except that this was a habeas corpus case?

MR. McKOSKI: Well, there may be other unique kinds of proceedings that should not be governed all the time by federal rules.

QUESTION: Would you say this kind of a petition would be out of time in a non-habeas corpus civil case?

MR. McKOSKI: Of petition to reconsider?

QUESTION: Yes.

MR. McKOSKI: I think still it could be timely filed in 30 days in a normal civil suit under Dieter and Healy.

QUESTION: So, you really do say you should just pay no attention to the rule.

MR. McKOSKI: I say you should pay no attention to it in a habeas case if the district court judge --

QUESTION: I am asking about a non-habeas case.

MR. McKOSKI: In a non-habeas case, I think the rules of federal procedure should apply strictly to those cases.

QUESTION: So this kind of petition would be out of time in a regular civil case, a non-habeas corpus case,

just the motion to reconsider.

MR. McKOSKI: My reading of Healy --

QUESTION: Isn't there a yes or no to that?

MR. McKOSKI: I am happy to say that this kind of motion would be out of time but I think my opinion there might conflict with Healy.

QUESTION: What makes you think so?

MR. McKOSKI: Because Healy and Dieter say --

QUESTION: Healy never said that that petition for -- an out of time petition for reconsideration would extend the time for appeal.

MR. McKOSKI: If it does not, Your Honor, then I --

QUESTION: And none of the cases on which it relied said that.

MR. McKOSKI: If it does not, Your Honor, then I am mistaken and I apologize, but that was my reading of this case and also Dieter. I think both of those appeals were filed after 30 days of the original order.

QUESTION: Dieter was a criminal case where you don't have the counterpart of Rule 59.

MR. McKOSKI: That's correct, Your Honor, but Dieter says that "petition for rehearing has been traditionally considered timely filed in civil and criminal cases" if within the 30 days. Dieter was not a civil case, but the rule --

QUESTION: Did you read the cases that Healy cited for

that proposition?

MR. McKOSKI: I do not know of any cases, Your Honor, of civil cases considering a motion to reconsider. I do not know of any. That's why I am saying -- I don't hesitate to say that the Rules of Civil Procedure should apply strictly in normal civil cases.

QUESTION: Well, the lead case that Healy cited said that the filing of an untimely petition for rehearing does not extend the time for appeal.

MR. McKOSKI: What case was that, Your Honor?

QUESTION: That case is Bowman v. LaPerino. Did you ever read it?

MR. McKOSKI: No, Your Honor, I have not.

QUESTION: Neither did we. But the people who wrote Healy certainly read it.

MR. McKOSKI: I apologize to the Court. I am not familiar with the case, Your Honor.

QUESTION: I thought the argument you were making at the outset was that for all practical purposes a habeas corpus case is a criminal matter and should be viewed in a criminal context, just as Congress has viewed it for purposes of the Criminal Justice Act. Do you have to go beyond that and try to give this unlimited discretion to each district judge to pick time limits of his own, in his own view?

MR. McKOSKI: No, Your Honor. There is no question

that a habeas case, underlying it are solely criminal issues and it arises from a criminal case. I am afraid that -- being as direct as I can, I got into trouble with the civil, talking about normal civil cases -- I am happy to say that without exception the Federal Rules of Civil Procedure should apply in civil cases. I only mentioned that I thought that it might conflict with Dieter because of the word "civil" in there and "criminal." I am happy to withdraw that and I think habeas cases are special.

QUESTION: Mr. McKoski, even if you treat it as a criminal case, it wouldn't solve your Healy and Dieter problem, would it? Because there there was no rule authorizing appeal by the Government for a delay in the time to appeal by the Government. Whereas, there is a provision for some kind of a motion by a defendant who loses, isn't there, in a criminal case?

MR. McKOSKI: There is provision in a criminal case -- I am sorry, Your Honor, I did not --

QUESTION: Can a defendant in a criminal case, after conviction, move in the district court for a new trial?

MR. McKOSKI: Yes.

QUESTION: Whereas, the Government cannot.

MR. McKOSKI: That's correct.

QUESTION: And isn't that the thing that was missing in the -- It's not just a civil-criminal distinction but

it's also the fact that it was a party who had no right in the district court to get an extension of time for a new trial other than by an analogy to a petition for rehearing.

MR. McKOSKI: I think that's correct, Your Honor.

QUESTION: So that, even if you treated this as a criminal case, you still have your 10-day problem? It says here there is a rule squarely in point that says within 10 days the court has power to alter or amend the judgment.

MR. McKOSKI: I think the basis of Dieter was that based on tradition and history, I mean besides tradition and history that it was the most economical way to adjudicate the issue. And I think that same rationale applies here. To give a respondent 10 days to move for some kind of relief after his motion to dismiss has been denied and nothing else has been stated on the case, I think, provides a burden on him that is very hard to comply with at any time when you are talking about habeas cases.

QUESTION: Well, you say after his motion to dismiss is denied, but actually the 10-day period contemplates the motion to be made after a trial also which is a much more burdensome thing. You try a six-months case and figure you have to go in within 10 days and file a motion to alter or amend the judgment, I think you've got a much bigger problem than you do in your typical ruling of law type of thing that you had here, without any evidence taken.

MR. McKOSKI: When you go through a long trial, at least you know what the facts of the case were. When our motion to dismiss was denied here, we did not know what facts the police officers had in their possession in a case that was five years old and we had to literally track down people. It was not a matter of office work, going through voluminous records or checking your memory for what happened in the trial. In a case like you described, Your Honor, at least you know the facts. Here, we did not have any idea what the facts were and had to scout them up.

QUESTION: How long before had this trial taken place and these events?

MR. McKOSKI: In August of 1971.

QUESTION: And how long was the trial?

MR. McKOSKI: I believe that it was three days, two or three days.

QUESTION: And how long would it take you, as a lawyer, to go over a three-day record?

MR. McKOSKI: Not very long, Your Honor, but --

QUESTION: It would be less than 10 days, wouldn't it? It would be less than 10 wouldn't it?

MR. McKOSKI: Yes, Your Honor. The problem is that the record included absolutely nothing on the probable cause issue and we had to go outside the record to locate witnesses around the City of Chicago.

I would also like to mention, too, in passing, on this, that if the Federal Rules of Civil Procedure do apply then the rules were violated by the district court by ruling on the merits of the case with only our motion to dismiss pending. Certainly, in any other kind of civil case where the Federal Rules of Civil Procedure apply, the case cannot be decided on the merits with only a motion to dismiss pending. He did not consider it as a motion for summary judgment. The Petitioner did not file a motion for summary judgment. The only thing that we had pending was a motion to dismiss where we admitted everything the Petitioner said and said he did not state a claim. We had a right to a hearing if our motion to dismiss was denied. The trial judge did not give us that in compliance with the rules. He did not give us a chance to answer, whatever the provision is, 10 or 15 or 20 days to file an answer. We got no --

QUESTION: Isn't this ordinarily raised by appeal?

MR. McKOSKI: That's right, Your Honor. To raise that by appeal, though, would just expand the litigation over years. We would have gone up to the Seventh Circuit to ask for a hearing and they would have given us a hearing, hopefully. And we would have gone back down to district court. The district court would have found no probable cause and we would havebeen back up to the Seventh Circuit Court of Appeals. They would have found probable cause, if they stuck to their original

decision, and it would have taken a couple more years. It certainly saves a lot of time and I think that was part of the reason in Dieter to ask right there in the district court for the hearing and avoid one appeal.

We would like to speak briefly, if I may, concerning the Stone v. Powell issue and the Wainwright v. Sykes issue. It is our contention, basically, that the search and seizure issue, the Fourth Amendment claim, is not cognizable in a habeas case. And even if it is cognizable the Petitioner has, in effect, waived his right to present that issue in a federal habeas corpus petition because he did not object to the entry of the evidence in the trial court on the basis of unlawful arrest.

Stone v. Powell requires an opportunity -- the state give an opportunity for Petitioner to raise a Fourth Amendment claim. The State of Illinois provides such a procedure. A motion to suppress evidence can be made before trial, so the facts were not known at trial. This opportunity, provided for in Illinois statutes, safeguards the deterrent effect of the exclusionary rule, which was the main concern in Stone v. Powell. Simply put, as long as the police know that illegally seized evidence can be suppressed or will be suppressed by a state court, there is no incentive for them to disregard the Fourth Amendment. In fact, there is a deterrent, because illegally seized evidence will not be allowed.

The fact that the defendant in the trial court and the Petitioner here did not choose to challenge the evidence in the state court doesn't detract from the effectiveness of the Illinois procedures in deterring police conduct. It would only have an effect on the deterrence if we could assume that a police officer would think, "Well, I can seize this evidence illegally because the defendant's attorney probably won't raise the issue." I don't think that can be a valid assumption. The state did nothing to interfere with the opportunity Petitioner had in state court to present his issue. There was an opportunity -- defendant did not take advantage of the opportunity but it was there -- and, therefore, this purely Fourth Amendment claim is not cognizable. If it is cognizable, defendant did not raise the issue in a trial court. He did not raise the arrest issue on a motion to suppress. He did raise the arrest issue at trial, using it to show that the police officers really didn't know who they were arresting, that there was no warrant, there were four arrested, investigation of rape, using it to show the jury that the police weren't sure who committed the crime and therefore the jury should not be sure who committed the crime.

Petitioner's trial counsel knew the factual basis for an arrest claim. He filed motions under the contemporaneous objection rule, so he was aware of that. In fact, his efforts helped secure the Petitioner's acquittal on the armed robbery

charge, although he was convicted of rape. There is no challenge that he was competent, simply the Petitioner has not shown cause why his failure to object in the trial court should be excused.

Also important here is the reliability of the evidence. In court identification was from an independent source, not the arrest. The district court and trial court held that. The confession was purely voluntary, as a volunteered statement after two eyewitnesses identified the defendant in a lineup. He admitted to one and denied the other, called the police officers over to speak to him, no interrogation whatsoever. Each statement was only a couple minutes long. Miranda warnings were given three times.

In short, it is our position the issue is not cognizable. Secondly, Wainwright v. Sykes, application of that rule only leads to one result that he waived the issue because there is no cause and there was no prejudice from the alleged constitutional violation.

Thank you, very much.

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

REBUTTAL ORAL ARGUMENT OF KENNETH N. FLAXMAN, ESQ.,

ON BEHALF OF THE PETITIONER

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

QUESTION: Mr. Flaxman, before you commence, if you should prevail on the jurisdictional issue, do you think we must reach the Rule 35 issue, that you also raised?

MR. FLAXMAN: No, I don't think the Court must reach it. Mr. Browder would be happy with reinstatement of the writ granted by the district court.

The primary argument that I have been listening to is that the State or the Director didn't have time to get together its motion to reconsider within 28 days. The motion that was filed in opposition to the petition was not really a motion to dismiss. It was a motion for summary judgment. It was based on facts set out in the State court record that were before the district judge and it relied on those facts. In our memorandum filed in support of the petition, we suggested that it would not be inappropriate if the district judge said it was all right to allow an evidentiary hearing for the Director to show that there was probable cause for this arrest. If the Director had come in within 10 days and said, "Judge, you didn't hold an evidentiary hearing. You should have held one, even the Petitioner thinks you should have held one," we probably would have been estopped to dispute that and the hearing would have been held. Rather than come in within 10 days, there was this 28-day delay.

QUESTION: The motion, instead of being denominated and a motion to alter or amend had been denominated, a motion

for a new trial on the basis of newly discovered evidence, under Rule 60, in the same time sequence had obtained.

MR. FLAXMAN: If it had been -- Regardless of how it -- If the district judge construed it as a Rule 59 motion, it would have told the time to appeal. If it had been a Rule 60(b) motion which could be filed any time after the notice of appeal should have been filed, without telling the time to appeal, then there would be -- the standards for review of the denial of that motion would be whether the district judge had abused his discretion in refusing to modify his earlier order. There is no abuse of discretion here, but evidence before the district judge at the hearing for a motion to reconsider was contradictory.

QUESTION: But at least there the Court of Appeals would have had jurisdiction to entertain the appeal.

MR. FLAXMAN: That's correct. That's exactly what we argued in the Court of Appeals, that this motion should be -- this appeal should be viewed as an appeal from the denial of Rule 60(b) relief. The Director conceded, or represented and urged the Court of Appeals not to view it as a Rule 60(b) appeal and has urged this Court not to do so. I think it would be inappropriate for this Court to go back and reconstrue the case if it had been an appeal for denial of Rule 60(b) relief. Even if it had been, though, the result necessarily would have been that the district judge should have been affirmed because

there were ample contradictions to support his refusal to modify his earlier order.

The argument that Rule 59 does not apply to habeas corpus proceedings overlooks what I think Mr. Justice Rehnquist was getting at in his question as to how do we tell which set of rules apply. We can tell that when it is not explicitly said by looking at former practice and seeing if former practice in similar cases conforms to practice in habeas corpus cases, and indeed it did, as we make clear in the two cases that we cite in our brief, in a footnote at page 21.

MR. CHIEF JUSTICE BURGER: Your time has expired, Mr. Flaxman.

MR. FLAXMAN: Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 11:05 o'clock, a.m., the case in the above-entitled matter was submitted.)