In the

Supreme Court of the United States

GEORGE SUMNER, WARDEN,	)	
	)	
PETITIONER,	)	
	)	
V.	)	No. 79-1601
	)	
ROBERT MATA,	)	
	)	
RESPONDENT.	)	

Washington, D.C.
December 9, 1980

Pages 1 thru 40

ORIGINAL

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IN THE SUPREME COURT OF THE UNITED STATES

GEORGE SUMNER, WARDEN,

Petitioner,

v. No. 79-1601

ROBERT MATA,

Respondent.

Washington, D. C.

Tuesday, December 9, 1980

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:13 o'clock a.m.

APPEARANCES:

THOMAS A. BRADY, ESQ., Deputy Attorney General of the State of California, 6000 State Building, San Francisco, California 94102; on behalf of the Petitioner.

EZRA HENDON, ESQ., Deputy State Public Defender, 1390 Market Street, Suite 425, San Francisco, California 94102; on behalf of the Respondent.

C O N T E N T S

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MILLERS FALLS
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COTTON CONTENT

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments first this morning in Sumner v. Mata.

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

ORAL ARGUMENT OF THOMAS A. BRADY, ESQ.,

ON BEHALF OF THE PETITIONER

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

This case is before the Court on a writ or certiorari to the Court of Appeals for the 9th Circuit. That court reversed an order of the district court which denied the respondent Mata's habeas corpus petition. The court further ordered that on any retrial of the respondent Mata evidence of identifications of him by two eyewitnesses could not be admitted.

This defendant and his two codefendants --

QUESTION: You mean evidence, in-court identifications, or evidence about a pretrial identification?

MR. BRADY: As I read the opinion, Your Honor, it would apply to both.

QUESTION: Well, which was it? Was there -- did it exclude in-court identifications here?

MR. BRADY: It is my reading of the opinion that it excluded both identifications, both evidence of in-court identifications and evidence of identifications from a group of photographs.

QUESTION: At the state trial there was evidence introduced with respect to the pretrial identifications?

MR. BRADY: That is correct. This defendant and his two codefendants by the names of David Gallegos and Salvador Vargas were convicted in a California court of the first-degree murder of a man by the name of Leonard Arias. The three defendants were members of the "Mexican Mafia" prison gang. Victim Arias was a member of a rival gang. There was evidence introduced that these three defendants accepted an assignment from the Mexican Mafia hierarchy to kill Mr. Arias because Mr. Arias had stabbed another Mexican Mafia member at the California prison at San Quentin. There was further evidence that they armed themselves and that they stated their intention to kill Mr. Arias.

The killing itself occurred at approximately 1:45 p.m. of the 19th of October, 1972.

QUESTION: Where did that take place?

MR. BRADY: It occurred in one of the inmate dormitories at the California Correctional Institution at Tehachapi. At the time there was a correctional officer present in this dormitory. He estimated that there were between 30 and 35 inmates there at the time. Although both the prosecution and the defense interviewed many of these inmates, only three of them would ever admit that they had witnessed the killing. Each of these three were hesitant to some greater or less

degree to admit that they'd seen anything and hesitant to admit that they were able to identify anyone.

The three eyewitnesses who testified at trial were inmates and were residents of this particular dormitory. The first of them was an inmate by the name of Paul Childress. The defendant does not now contend that his identification testimony was improperly admitted. Indeed, Mr. Childress testified that he previously knew the defendant and Mr. Gallegos and he was able on the day after the killing to identify them by name, and to select their pictures, as well as a photograph of the third defendant from a group of several hundred pictures shown to him.

The other witnesses were inmates by the name of Rigoberto Almengor and Jay Allen. Both of them testified that they were walking with the victim when he was suddenly set upon by three men armed with knives who appeared to have been waiting for him. Both of them testified that this fatal struggle took several minutes, perhaps as long as four minutes.

Almengor testified that at one point during it he struggled briefly with the defendant. He made eye contact with the defendant, the defendant broke off his attack on the victim and commenced an attack on Mr. Almengor. This lasted a short time. Thereafter Mr. Almengor backed off from the defendant, they faced each other from a very short distance, Mr. Almengor then turned his attention back to the victim,

but once again he and Mr. Mata backed off. They faced each other from a short distance, and at this point Almengor indicated that he wanted no part of this struggle that was going on.

Mr. Allen testified that he too struggled briefly with one of the other men but then he backed off a short distance from the struggle and began yelling for help. On the day of the killing Mr. Almengor was shown several hundred pictures of inmates at the institution. From these he was able to narrow it down to a group of four of them which he said were similar in appearance to the men he had seen. It should be emphasized that his identifications at this time were not positive. In fact, he selected more pictures at the time than he said there were assailants. Mr. Allen was also interviewed this day. He stated that he did not want to get involved and for this reason he told the prison authorities he was able to identify no one. Because of this they showed him no pictures.

In the next few days after this there is evidence in the record that a riot was occurring at the prison and that the investigation was postponed for a short time because of this. Finally, on the 27th of October, approximately eight days after the killing, the three witnesses were shown a group of 24 pictures of inmates. This was People's Exhibit 23, introduced at trial, and it as well as People's Exhibit 24,

which I'll mention in a moment, has been brought before this Court.

Mr. Childress was able to identify all three of the defendants from this initial photo display. Mr. Almengor identified a photograph of Mr. Vargas only. Again his identification was not positive. He stated that the pictures that he was looking at seemed to him to be outdated and he asked the prison authorities to see what they could do about getting some new pictures for him to view. Mr. Allen saw the same group of pictures that day. He was able to identify no one. He too commented that he thought new pictures would be helpful.

In a few days following this the prison authorities attempted to take new pictures of a number of inmates. Only those of the three defendants turned out. These three pictures were placed in a different group of 15 pictures, which is People's Exhibit 24, which were shown to the witnesses on the 30th of October. The identifying information on these pictures, the names and the dates the pictures were taken, that was covered at the time. At this point both Allen and Almengor identified all three of the defendants.

At trial the two of them stated that they were now sure when they saw Mr. Vargas in person at trial that he was not one of the people who attacked the victim. They remained firm, however, in their identifications of the defendant and Mr. Gallegos.

I believe that the 9th Circuit's opinion is in error in several respects. The first error is its statement of the standard for determining the admissibility of identification evidence in a case where pretrial photographic identification procedures have been used. The 9th Circuit stated that the appropriate standard required a two-part approach. First, a court should look to the necessity for use of photographic identification procedures. Here, since the defendant and his codefendants were state prison inmates, the court found that there was no necessity for the use of photographic identification procedures. From this lack of necessity it proceeded directly to a determination of whether there had been a likelihood of misidentification. The lack of necessity was said to be an important factor weighing against the admissibility of their identification evidence.

It is our position and our belief that this Court has never held that necessity or lack of necessity for use of a particular procedure is part of the constitutional standard. Indeed, the Court has rejected attempts, most recently, in Manson v. Brathwaite, to have generalities such as this included in what is basically a fact-oriented balancing process. The Court has, in Simmons v. United States, and again in U.S. v. Ash, declined the opportunity to formulate special rules in cases where pretrial photographic identification procedures have been used.

The Court has, instead, applied what we believe is a consistent standard of due process fairness in all cases involving the use of pretrial identification procedures. It has applied the same standard whether photographic identification procedures were used, whether a live lineup or showup was used, or whether there was a combination of these factors.

I believe that this Court's due process standard focuses on two things: first, the suggested nature of the particular pretrial confrontation involved in the case; and, second, the reliability of the identification evidence. We believe that the Court's consistent treatment of all these situations makes it clear that it believes that due process does not require that a particular procedure be used, or that the use of one procedure as opposed to another should be penalized. Rather, I believe the Court's cases require only that the procedure which is actually used not be so unfair as to deny a defendant due process.

We therefore ask the Court to reject the 9th Circuit's approach and to affirm the approach which has been adopted by the 5th Circuit and by the majority of the other courts which have considered the issue. And that approach, very briefly stated, is as follows. First, if the defendant objects to the admission of identification evidence, a court should first ask itself whether the pretrial identification procedures actually used have been so impermissibly suggestive

that they could give rise to a very substantial likelihood of mistaken identification.

The focus here is on the particular identification confrontation and the circumstances surrounding it. The Court may consider, for example, any circumstances tending to suggest that the witness should identify a particular person or not identify a particular person. It may consider the circumstances of the crime, the extent that they have a bearing on the question of suggestiveness.

If and only if the Court should determine that the pretrial identification procedures used were so impermissibly suggestive that they could give rise to a very substantial likelihood of mistaken identification, does it become necessary to determine whether in fact it it is likely that they had this effect. In making this latter determination the focus is on the reliability of the identification evidence. It is at this point that the Court applies the five factors stated in Neil v. Biggers, and restated in Manson v. Brathwaite, and any other factors bearing on the question of whether the identification evidence is reliable.

QUESTION: Mr. Brady, the procedural history of this case is that there was a trial in the Superior Court, appealed to the Court of Appeal, the judgment of conviction affirmed, and then federal habeas sought. Is that right?

MR. BRADY: Yes, sir.

QUESTION: Did the State Court of Appeal pass on the eyewitness identification issues that you've been discussing?

MR. BRADY: Yes, sir, it did. It found that there was no impermissible suggestion in them.

QUESTION: And the 9th Circuit disagreed with the State Court of Appeal?

MR. BRADY: With the State Court of Appeal, and also with the district court.

QUESTION: Did the district court hold a hearing, or rely on the state record?

MR. BRADY: The district court, as did the 9th Circuit, relied solely on the state record. There was no evidence, no new witnesses.

QUESTION: Did they apply the same standards?

MR. BRADY: Well, it's our position the 9th Circuit did not apply the same standard that apparently the district court did, or the state courts. Neither of them mentioned the concept of necessity. The only cases cited in either of the lower courts were this Court's cases, particularly Simmons.

QUESTION: Assume you agreed with the standard, the legal standard that the 9th Circuit applied. Would you be here still?

MR. BRADY: I believe we would, Your Honor.

QUESTION: You think they're -- whatever else there is, you think the 9th Circuit disregarded state courts'

findings without --

MR. BRADY: Yes, Your Honor. That is another one of the reasons which brings us here, our belief that the 9th Circuit did not apply Section 2254 when it should have.

QUESTION: Mr. Attorney General, what about the possibility of a lineup? There wasn't any problem in having a lineup if you wanted one, was there? Is there any reason why they didn't use a lineup?

MR. BRADY: Yes, sir. The record suggests several reasons.

QUESTION: It wasn't for the lack of people.

MR. BRADY: No. One reason appears to be the fact that a riot was going on in the prison at that time. A second reason appears to be that all of this was occurring in a prison which, as was stated in Judge Sneed's dissenting opinion in the 9th Circuit and has been stated in many other places, a prison is a unique world and inmates there are not generally very favorably disposed to come forward and give evidence to identify other prisoners as being responsible for crimes.

QUESTION: Well, that wouldn't have stopped them from getting in a lineup.

MR. BRADY: No, it would not physically stop them, but it is one reason why a decision may be made that the use of photographic identification procedures --

QUESTION: But the question was never gone into by

anybody?

MR. BRADY: No, there was no objection to the admission of the identification.

QUESTION: I thought one of the three did ask for a lineup.

MR. BRADY: One of the three men mentioned that. This was on the 27th of October, I believe, after he'd seen the first group of photographs. Thereafter he saw a second group of photographs, did not renew the request for a lineup, and he apparently felt that the second group of photographs was --

QUESTION: But it never was explained in this record why his request was refused.

MR. BRADY: It was alluded to at one time only by --

QUESTION: My question was, was it ever explained?

MR. BRADY: No, sir, not in so many words.

QUESTION: What did the district court, the federal district court hold on the habeas corpus hearing?

QUESTION: They denied relief.

QUESTION: They denied relief. They found that -- on a fairly conclusory opinion found although the identification procedures used were deficient in some respects, nonetheless, taken as a whole, the identification evidence was still reliable and was still properly admitted.

QUESTION: So, by the time this case got to the

9th Circuit Court of Appeals, three courts had held that there had been no miscarriage of justice: the state trial court, the state Court of Appeal, the federal district court, is that right?

MR. BRADY: Yes, Your Honor, that is correct, although the state trial court was not expressly called on to resolve the issue.

QUESTION: And although the federal district court talked about irregularities, didn't it?

MR. BRADY: Yes, Your Honor.

QUESTION: But neither the federal district court nor the United States Court of Appeals dealt with your 2254(d) argument at all, did they? Did they mention it?

MR. BRADY: No, Your Honor, they did not.

QUESTION: When did you first raise that argument?

MR. BRADY: The 2254(d) argument was first raised in the district court, in our return. We stated at that time that the findings of the State Court of Appeal should be accorded the presumption of correctness, mandated by 2254. We said that this was necessary, because since there had been no objection at trial, the trial court was not really called upon to make fact-findings regarding this identification issue.

QUESTION: Did the trial court -- I understand there was no objection to the testimony about the photo

identification procedure. Is it also true there was no objection to the in-court identification?

MR. BRADY: That is correct, Your Honor.

QUESTION: But you didn't argue as a matter of California procedure that they therefore could not raise this whole problem in the Court of Appeal, did you? That they'd waived their constitutional objection by failure to object in the trial court?

MR. BRADY: Well, let me approach this this way. In the United States District Court, we argued that there had been a procedural default by this failure to object. In the district court, however, we were required to acknowledge that there was a controlling 9th Circuit case which would hold that the state Court of Appeal treatment of the issue substantively would act as a forgiveness of any default. The same thing held true in the 9th Circuit. They could not argue that in the 9th Circuit because there was controlling 9th Circuit precedent which one panel could not overrule another.

QUESTION: And the state Court of Appeal here did treat the matter on the merits, did it not?

MR. BRADY: No, Your Honor, I don't believe that -- well, it passed on the constitutional validity of the identification procedures but it's our position that by so doing it did not forgive any procedural default. California's contemporaneous objection rule does not preclude a state appellate

court from considering, from discussing a constitutional claim. It precludes it from reversing a judgment of conviction if there has been no appropriate objection. It is our position that in order to forgive a procedural default a state appellate court must not only discuss the issue but also reverse the judgment.

QUESTION: But, so far as raising the matter beyond the state Court of Appeal, say to bring it to this Court, the defendant would have been perfectly free, I take it, to petition for certiorari on the merits, since the state Court of Appeal had discussed the merits.

MR. BRADY: Well, that is one of the questions in this case, Your Honor, whether he would be, or would have been.

QUESTION: Isn't your position a little bit inconsistent? If this was just a meaningless discussion, then 2254(d) is of doubtful applicability, isn't it?

MR. BRADY: No, Your Honor, I don't think so. The state Court of Appeal here found itself in this rather no-win situation. It had on the one hand the not very appetizing prospect of foreclosing the defendant from relief solely on procedural grounds, or on the other hand, if it wanted any reviewing courts, any federal courts to have the benefit of its views to find out --

QUESTION: This is a totally inconclusive discussion, and even if the state Court of Appeal had found the

identification procedures wholly improper and unconstitutional, your present submission is it had no power to reverse the conviction, and therefore why is 2254(d) applicable at all if this is just an inconclusive, meaningless discussion?

MR. BRADY: Let me say, it had the power to reverse the conviction but not the right. And I think the Court's treatment of the issue on the merits was not a meaningless discussion. It was meant to inform not only this defendant but anyone else that might be interested in this case, in the future, of what the Court's views on that were, what it believed the appropriate constitutional standard was, the appropriate conclusions. For this reason I don't believe it was at all meaningless.

QUESTION: Well, then, if that's the case, the procedural waiver of failure to object is almost meaningless in the Superior Court. If the California appellate court has the right to say, even though there was no objection, we're free to to treat this on the merits, and we're free to reverse it if we think it's flagrant enough, or if we think it does fall under the federal constitutional ban.

MR. BRADY: In my previous answer I attempted to make the distinction between the power to reverse the judgment and the right to do so.

QUESTION: I don't understand it.

QUESTION: That seems to me somewhat meaningless,

frankly, because, when you say it has the power to do it, do you mean that the Supreme Court of California would reverse it if it did that? Or do you simply mean that any court that isn't reviewed further is going to have its judgment enforced?

MR. BRADY: Yes, I believe that is what I mean, that the court -- this is the state Court of Appeal -- would be able to reverse it. If it is incorrect in doing so, if the matter came before the California Supreme Court, it should reverse the state appellate court's judgment.

But from all this, I don't think that we can necessarily say that what the state Court of Appeal did was really meaningless or worthless or kind of a throwaway sort of a thing. The court I think considered the issue in some detail, and I think this Court's previous cases, most notably Wainwright v. Sykes, have encouraged the state appellate courts to deal with issues such as this and to give the federal courts the benefit of their views, the benefit of what thoughts they might have about any particular state procedures or state laws that might be applicable here.

And I think it's for this reason that the federal courts should, where a state appellate court has passed on a constitutional issue, give deference to the decision of that state appellate court.

QUESTION: But that's not because of Wainwright v. Sykes. That's because of 2254, isn't it?

MR. BRADY: That's correct. But in Wainwright v. Sykes, I read that as this Court encouraging the state appellate courts to tackle these things on the merits and not really to stand on procedural grounds necessarily.

QUESTION: Well, the net result is that your California Court of Appeal chose not to follow its own contemporaneous objection rule. Right?

MR. BRADY: Well, that is --

QUESTION: In which case, what are we to do about it?

MR. BRADY: Well, that is my point. We don't really know from their opinion whether or not they rejected the state contemporaneous objection rule. It was certainly brought to their attention in our brief. It's a very well-known point in California that would not have escaped them. And I think the fact that they considered the constitutional claim on its merits but did not reverse the conviction does not necessarily mean that they forgave the procedural default.

QUESTION: Well, they found no error in the admission of the identification evidence, which would lead to no reversal of the conviction.

MR. BRADY: That's correct.

QUESTION: Well, doesn't that mean that they in effect overruled your suggestion that they not even consider the claim because of a failure to object in the trial court, if they considered it on its merits?

MR. BRADY: I do not think you can necessarily imply that, no, sir. Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Hendon.

ORAL ARGUMENT OF EZRA HENDON, ESQ.,

ON BEHALF OF THE RESPONDENT

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

I think the procedural issues in this case need not detain us terribly long. What we have here is, in the first place, procedural issues brought before this Court which have not been timely presented in the courts below. So far as the record which we have here is concerned, there appears to be no indication that the argument that the procedural default bars federal review was ever raised in the district court. The only thing that we have is a bare assertion in the reply brief of the petitioner that it was orally argued. There is no oral transcript of those proceedings in the district court. I personally did not handle the case in the district court, and so far as I know and so far as the Court is aware --

QUESTION: I thought Mr. Brady said it was in a response that they filed.

MR. HENDON: I think what he said was that their 2254(d) argument was in the brief which they filed. The argument that the supposed procedural default bars federal review, so far as the record that is before this Court demonstrates,

was never raised in the district court. In any event, even if it was raised, if you read their brief carefully, what you conclude is that what was raised was a concession that they are foreclosed from asserting any procedural default argument, and in any event it was never raised in the 9th Circuit. So that the issue is simply not properly before the Court, and even if it were properly before the Court, as I understand the remarks of counsel here this morning, he seems to have indicated that, he seems to have agreed that the argument was presented to the state Court of Appeal, he seems to have conceded that the state Court of Appeal had the power to reverse the conviction based on the argument on the merits that was presented, and given those two concessions it seems to me very clear that there is simply no federal interest. There is no interest in comity that is advanced by a federal court in essence regarding a state court ruling which purports to be on its merits as a mere gratuity, and that's the language that counsel uses.

QUESTION: Mr. Hendon, is there not a federal interest, even assuming for the moment there were no California contemporaneous objection rule at all? Not just that they didn't waive it? And supposing a federal judge reviewing the state record formed the conclusion that as a matter of trial tactics the defense counsel decided he would not make any objection to admissibility of the identification evidence,

because he thought he might have a greater chance of obtaining a not guilty verdict by cross-examining the witnesses at great length and trying to show improper police behavior, and so forth. Would not the federal court in its interest in trying to reach the right result properly take that trial strategy into account?

MR. HENDON: Not as a matter -- it would not bar the federal court, procedurally to bar --

QUESTION: I understand. It's not a procedural bar, but should it not be a factor that should be considered in the overall picture of whether due process was denied?

MR. HENDON: On the merits, yes. I would say that that is -- that if the conclusion is that it was a tactical decision, then clearly counsel can't get the benefit of both ends of --

QUESTION: Well, what is there in the record to indicate that it was not a tactical decision here? Surely the objection is one that's well known to trained defense lawyers.

MR. HENDON: Yes, this is one of the unresolved issues of this case. It's unresolved because neither lower court ever reached it, and it is not presented, as I read the papers here, in this Court, as an alternate ground for reversal of the Court of Appeal by the petitioner. I don't understand them to be arguing that even if the identification is

bad the Court of Appeal's judgment must be reversed because there was a tactical decision not to object.

QUESTION: But that's not to say that that's not their 2254(d) argument that you're talking about now, is it?

MR. HENDON: No; no, that's not their 2254(d). I suppose what this Court -- well, if this Court were inclined to consider that matter on its merits, I suppose the appropriate -- first, the Court, of course, would have to find that the identification was improper, that there is something wrong with the identification. If the Court were then to go on and consider that the --

QUESTION: No, I'm not sure that that follows. I'm suggesting in the analysis of the question whether there was constitutional error committed --

MR. HENDON: Oh, I see.

QUESTION: By letting this evidence into the record. It seems to me one could take into consideration the fact that no objection was made and conceivably that that was a tactical decision by counsel. It's hard for me to reach a conclusion that there's a deprivation of due process in receiving unobjected evidence, evidence to which there was no objection at all, if the objection was available to counsel.

MR. HENDON: Well, it seems to me that there are two separate questions. One is whether the identification is proper or not, and to resolve that question we look to all of

the factors that exist in the case with regard to the identification itself.

QUESTION: Yes, but even if it's improper, no denial of due process takes place unless it's put into the record of the trial. You can do everything, all the suggestive material you wanted in the police station if the witnesses never testify. There can't be any denial of due process from that. The due process issue only arises at trial, as I understand the constitutionality.

MR. HENDON: Yes.

QUESTION: So that it seems to me the critical point is when the evidence is offered. And if it's improperly received, perhaps a denial of due process could take place.

MR. HENDON: Yes.

QUESTION: But it's hard to find a denial of due process by the admission of evidence to which competent counsel doesn't make any objection.

MR. HENDON: Well, I think that assumes the ground of the --

QUESTION: You don't challenge the competency of counsel?

MR. HENDON: We did, below. That is --

QUESTION: I'm sorry.

MR. HENDON: We did, below, yes. And that was not resolved.

QUESTION: I see.

MR. HENDON: It was not resolved in the 9th Circuit because the 9th Circuit decided that the identification was improper. What I'm suggesting is that if the Court takes the first step and decides that the identification was improper, and is still concerned about the failure to object, then I suppose an appropriate course would be to remand for further consideration on whether there was a tactically based failure to object.

Now, with regard to the 2254(d) argument, I think a fair reading of the record again indicates that that is not properly perserved for review in this Court. It was raised in the federal district court. It was not raised in the 9th Circuit until after the case had been decided. And I simply suggest that this is not -- to reach that question, this procedural question on its merits, is basically to reward a kind of off-again-on-again way of approaching procedural issues.

QUESTION: Don't you concede the possibility that 2254(d) may impose an obligation upon federal courts regardless of whether or not anybody raises the point?

MR. HENDON: That may well be. That, I don't think -- with all due respect -- speaks to the question of whether that issue was properly preserved for --

QUESTION: Well, but if the Court of Appeals didn't

even mention 2254(d) --

MR. HENDON: Yes?

QUESTION: And if 2254(d) does impose some obligation upon federal courts to consider it, and to find an exception to its generalized application -- and it lists various exceptions; eight of them, I think -- what does it matter if anybody raised it?

MR. HENDON: Well, if this Court is prepared to hold that in every federal --

QUESTION: Well, do you concede the possibility that 2254(d) might impose some obligation upon federal courts, in federal habeas corpus courts?

MR. HENDON: I suppose so; yes.

QUESTION: And following up Justice Stewart's question, certainly the phraseology makes it virtually an element of the federal habeas cause of action, does it not? That is it's almost as if it were typical bench trial negligence causation damages: the plaintiff fails to prove causation, the defendant doesn't object, and on review would the reviewing court be prevented from assessing or reviewing what is essentially a basic element of the cause of action?

MR. HENDON: No, I don't think that they would be precluded from reaching it. It has always been my understanding, and I'm not aware of any authority which suggests that there is a sua sponte obligation on the part of the federal

district court or therefore the Court of Appeals to reach that question. And I think this Court would be breaking new ground if it were to decide that.

QUESTION: Isn't it virtually jurisdictional? I mean, the habeas corpus statute confers a special kind of jurisdiction on federal courts to, in effect, review the same findings that the state courts made and come out differently, if there is a constitutional claim. And if it's jurisdictional it's really our obligation as well as counsel's to investigate whether the jurisdictional requirement was met.

MR. HENDON: Well, if the conclusion is that it is jurisdictional, then you are correct. I am not aware of authority which holds that it is, and I think in any event it's of no moment here because I don't think we're dealing truly with conclusions of fact; I don't think these are fact findings that we're dealing with. I think we're dealing, properly understood, with conclusions of law, and I think that as I read Justice Powell's footnote in Neil v. Biggers, I think in an extremely similar context he's held as much. I think that what we're dealing here is not so much with the findings of fact as we are with the conclusions, the constitutional conclusions to be drawn from those findings.

QUESTION: Well, what troubled me about Judge Ely's opinion was that there was absolutely no reference to 2254(d) in it. And if you're right, it seems to me he could

have set it aside, set the point to rest in a footnote saying we're dealing here with questions of law and therefore 2254(d) has no force or effect or he could have dealt with it in some other way. But one got the impression that neither the majority nor the dissent in the 9th Circuit had even any knowledge of 2254(d).

MR. HENDON: Well, with all due respect, Your Honor, I think they had no knowledge of it, and didn't think of it, because counsel never brought it to their attention. Whether it was jurisdictional or not, I think that's the explanation for why it's not addressed. If this Court is inclined to go ahead and treat this procedural issue on its merits, then it has to essentially substitute itself for the 9th Circuit and draw its own conclusions. My point here is that the conclusions which you have to draw are that what the 9th Circuit was dealing with was conclusions of law, the constitutional significance of facts. It was not going ahead and finding any new facts on its own, and I think that's a fair reading of the opinion, regardless of whether the 2254(d) issue is addressed on its face.

QUESTION: You are suggesting, then, that 2254 just doesn't address itself to mixed questions of fact and law?

MR. HENDON: Yes, I am.

QUESTION: It's just purely historical facts that it relates to?

MR. HENDON: That's right. Primary historical facts. I think that's --

QUESTION: But you also contend it only applies to determinations by the finder of fact who actually saw the witnesses? That's a separate question.

MR. HENDON: Yes. Well, yes, but here you have the wrinkle that there was no objection in the trial court and the argument that's being made by the petitioner is that the finder of fact in that situation is the Court of Appeal.

QUESTION: But wouldn't you contend that 2254(d) simply doesn't apply unless there's a determination by a trial court?

MR. HENDON: Yes.

QUESTION: I thought you'd made that argument.

QUESTION: There was at least an implicit determination by the trial court when he admitted the evidence, wasn't there? Didn't he necessarily, by implication --

MR. HENDON: Yes.

QUESTION: Find that there was, it was perfectly proper to admit the evidence, and therefore that the evidence -- it was not unconstitutional to admit the evidence?

MR. HENDON: Yes, but in addressing the question of which primary facts we ought to defer to, which we are not to defer to --

QUESTION: There was no discussion, there were no

findings of fact as such.

MR. HENDON: There was no discussion, so that's why it's difficult to identify them.

Now, with regard to the merits, I -- as I understood counsel to be speaking this morning -- I find that I have no special objection to the test that's proposed here, that is we look first to suggestiveness, secondly we look to necessity; and we ask the question with regard to suggestiveness whether these identification procedures could have been suggestive. And with that statement I think what I'd like to do is identify what I regard to be the issue in this case.

It seems to me that in Manson v. Brathwaite and in Neil v. Biggers, this Court made clear that the focus of the inquiry in eyewitness identification cases is suggestiveness and reliability, and that the issue that's raised by this case is what a court may properly consider in passing on the question of whether a given identification is suggestive and reliable.

QUESTION: You're suggesting then that basically the 9th Circuit and the state Court of Appeal applied the same legal test for eyewitness identification?

MR. HENDON: The same as each other, each -- as each other?

QUESTION: Yes, that they roughly applied the same test but reached different results.

MR. HENDON: Yes, I would say that that's --

QUESTION: Well, then, wouldn't you feel that there was some obligation on the Court of Appeals to say that the state Court of Appeal was, that your client had demonstrated by clear and convincing evidence under 2254(d) that the state Court of Appeal was wrong?

MR. HENDON: I think that the only obligation that the federal court had was to apply the law, the proper law, whatever this Court finds it to be, to not substitute its findings of fact for those that already were made, and to draw constitutional conclusions from them. If the constitutional conclusion that the federal Court of Appeals reaches is different from the conclusion that the state Court of Appeal reached, then that issue will be resolved here, but I don't think they had any independent obligation to apply a different standard, a clear and convincing evidence standard, if I understand the thrust of your question.

I think the only obligation was to apply the law and to draw their conclusions from it.

QUESTION: How do you read the Subsection 8 of 2254(d) then, where it says that, where a factual issue was determined by the state court, the burden is on the habeas petitioner to prove by clear and convincing evidence that it was wrong?

MR. HENDON: Well, it seems to me that that clear

and convincing evidence standard is a part of the already existing legal standard, and that by implicitly, by coming to the conclusion that it came to here, the 9th Circuit has in essence said that.

QUESTION: Well, you think that on an appeal, say, within the federal system that doesn't involve federal habeas, that a court of appeals could reverse the admission of identification testimony by a district court only if it found that it was clear and convincingly wrong, rather than just wrong by a preponderance of the evidence?

MR. HENDON: You're asking me whether, on a direct appeal, and in a federal case?

QUESTION: On a direct appeal, yes?

MR. HENDON: Well, I have to plead ignorance on that, Your Honor. I do not practice in federal --

QUESTION: Well, in a direct appeal of a federal criminal conviction, a federal reviewing court sets the conviction aside if it finds that there was error in the trial, and I don't know that there's ever been -- it doesn't need to find that beyond a reasonable doubt or by clear and convincing evidence; it just finds that there was error in the trial, error in the admission of evidence or error in the instructions to the jury, or error somewhere else.

MR. HENDON: I think that's the point that I have been trying to make, or I tried to make at the outset of

Justice Rehnquist's question, that the obligation of the reviewing court is to apply the legal standard that this Court tells it to apply.

QUESTION: Generally there's no great argument about what happened at the trial because you have the trial record and you know how the judge did instruct the jury, and you know what was admitted in evidence, and so on.

MR. HENDON: You have that here too.

QUESTION: So, if you conclude that that was erroneous, something about it, that it was prejudicial, a judgment of conviction is set aside.

MR. HENDON: You have that here too. I don't think there's any problem with the record in that regard. This is a fully litigated issue and you have a complete record on the eyewitness identification question.

It seems to me that the dispute between the parties on the merits in this case is essentially whether the Court of Appeals ought to have been free to consider necessity, the lack of necessity, and particularly the failure to conduct a lineup. Now, it seems to me very clear that the court ought to have been free to do it, and that's precisely what the Court of Appeals did in this case.

The test that this Court has established in Manson and in Neil is totality of the circumstances. A court looks to all of the circumstances and so long as it predicates its

findings on reliability, so long as it looks to reliability, and so long as reliability is the bottom line, then I read this Court's opinions, especially in Manson and Neil, to conclude that any circumstance may be considered by a court so long as it goes to reliability.

Now, here in this case you have a witness who is essentially saying, I cannot make an identification from photographs, I need to see a lineup. You also have no reason why a lineup could not have been conducted. Let's assume, at least, that there is a dispute between the parties on that question. But let's assume, for the moment, that there is no explanation, there is no valid explanation for why a lineup could not be conducted.

And it seems to me very obvious, under those facts, that the failure to conduct a lineup is a factor going to reliability. We all know, and this Court has held, that lineups are more reliable than photographic identification where you have a witness saying, I cannot make an identification from a photograph, it's too old, the photographs are in black and white. Where you have a witness who's saying that, and saying, I need to have a lineup, then it's perfectly proper for a court to consider the failure to conduct a lineup. And I think if you read the petitioner's briefs in this case, you see that there has been a subtle shift from the opening brief to the closing brief. What petitioner had been arguing

at the outset and what is essentially the position that, as I read the 5th Circuit cases, has been adopted in the 5th Circuit, is that you do not look to the conduct of the police in passing on suggestiveness. What you look to is the photo spread by itself. You don't look beyond the photo spread, and you look to the photo spread on its face.

Well, that assumes that so long as you have a photo spread which is fair on its face, then you never get beyond it and you never get to the second step, which is reliability. And I think a few simple examples ought to demonstrate to the Court that that simply cannot be the case.

Let's assume that you have a photo spread which is fair on its face, but that the police officer is saying to the witness, this is the person. Look at photograph number three, don't you think that looks like him? Now, I think everybody would concede that in a circumstance such as that the conduct of the police in suggesting a particular identification to a witness was a factor that properly could be considered in passing on, (a) suggestiveness, and (b) reliability.

And I think that's essentially what was done in this case. I think that you have peculiarity, a peculiar fact situation in this case where you have a witness saying, I cannot make an identification from a photograph, I need to see a lineup. I think that that's one factor to be considered along with many others that exist in this case that point to

a suggestive identification.

You have, for example, the police officers telling the witnesses who made identifications -- I think the record will bear out the conclusion that the initial identifications that were made by witness Almengor were positive identifications. He identified someone by the name of "Bogus Pete" Nunez, as the perpetrator of the offense, and the guard said to him, no, no, it can't be Bogus Pete, Bogus Pete wasn't in the prison at the time.

Now, it seems to me that if what the police are interested in is simply the identification that the witness presents to them rather than the one that they want to orchestrate, they will not point out wrong choices. And I think this Court has indicated in several of its cases that it will not do that.

Secondly, they removed all choices that they thought were wrong. The other witnesses, the other -- Almengor also pointed out other people who simply magically disappeared from subsequent showups. Their photographs just never recurred again. I think the record also supports the fact that the three defendants who were ultimately identified were brought before the holding cell in a very suggestive way so that this also focused the attention of the witnesses on them. These are all factors which I think the Court of Appeal considered. I think if you read the Court of Appeal's opinion,

it considered all proper factors, it applied an appropriate standard, and it came to the only conclusion that I think it could have come, which was that you had a very volatile, tense situation, there was an interest in identifying somebody, in getting somebody incarcerated for these -- this offense, and they just picked out the three people that they thought were most conducive to being convicted.

Now, I think if anything proves the necessity for a lineup in this case, nothing does it so much as the fact that after one of the witnesses said, I need to see a lineup, I cannot make identifications in photographs. They finally showed him the last photo spread, he points to the three defendants, they take him out, he has a chance encounter with the defendant Vargas, who is taking a shower, he sees him live, and he says, my God, I identified the wrong person, and he turns to the guard and he says, I picked out the wrong person, this is not the person who did it.

Now, this is a live, he sees him live. This is the only opportunity that he had to see him live and he said, I picked out the wrong person. The guard said, in effect, tell it to the judge. And he goes to court, and here we are today. I think that is palpable proof of the fact that these witnesses indeed needed a lineup, that you could not have a reliable identification in this case without a lineup, and that the Court of Appeals properly considered that factor in reversing

this conviction. Thank you.

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

ORAL ARGUMENT OF THOMAS A BRADY, ESQ.,

ON BEHALF OF THE PETITIONER -- REBUTTAL

MR. BRADY: Very briefly. If, to concede at the moment for purposes of argument that the state Court of Appeal's opinion was an opinion on the merits of the constitutional issue, then we submit that that court's findings should be accorded the presumption of correctness of Section 2254(d). We raised this point expressly in our return in the district court, and this appears at page 195 of the Joint Appendix.

In the 9th Circuit we raised the point a little bit differently. We were at that point reviewing the findings of the district court, and we asked the 9th Circuit to accord to the findings of the district court, which as far as we could see had given appropriate deference to the state Court of Appeal's findings, we asked the 9th Circuit to give the district court's findings deference. It did not.

QUESTION: Did the 9th Circuit show a lack of deference to anything other than the ultimate conclusion of the district court?

MR. BRADY: Yes; yes, Your Honor --

QUESTION: Did they differ on the historical facts?

MR. BRADY: I think they differed on the historical

facts. I think two examples will show this. The state Court of Appeal opinion says, in so many words --

QUESTION: Your colleague doesn't agree with you, does he, on that?

MR. BRADY: He apparently does not. The state Court of Appeal says in so many words, there was no influence on the witnesses by the investigating officers. The 9th Circuit holds precisely to the contrary. The state Court of Appeal says there was an adequate opportunity for the witnesses to view the attackers at the time of the attack. The 9th Circuit doesn't so much take that on; it says, the fact that there was this knife attack going on, this violence, this excitement, that very likely had the effect of, if you will, taking the witness's attention away from the men in front of him so that very likely they did not have an opportunity to view the attack.

This particular finding seems to be a general purpose one made up by the 9th Circuit. It could apply to any crime of violence. There is nothing in the record here that these witnesses said, we were afraid, or anything of that sort. So that I think we really have not an academic exercise here, we have a case where a federal appellate court has very really found that it should be a fact finder in a case where there's been both a state trial court determination, state appellate court determination, and also a district court determination.

QUESTION: Mr. Brady, if we agree to the 9th Circuit with respect to the necessity part of its opinion, would we reach this other issue?

MR. BRADY: I think we would, Your Honor.

QUESTION: You don't think the necessity ruling was dispositive, or independently dispositive?

MR. BRADY: No, Your Honor, I do not. It was one or two strikes against us, but I think even if we were to assume that the 9th Circuit were correct in this, I still do not think we would be over the line into where we would have a constitutional violation. This Court, I think, has never stated the appropriate standard better than in the Foster case. It asks, is this the man? Has this man been singled out? Looking at the circumstances here, I think this Court cannot conclude that. Thank you.

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

(Whereupon, at 11:10 o'clock a.m., the case in the above-entitled matter was submitted.)

CERTIFICATE

North American Reporting hereby certifies that the attached pages represent an accurate transcript of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

No. 79-1601

GEORGE SUMNER, WARDEN

V.

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