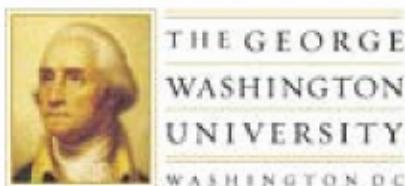


# The Burger Court Opinion Writing Database

*Neil v. Biggers*  
409 U.S. 188 (1972)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University  
Forrest Maltzman, George Washington University



(B)  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

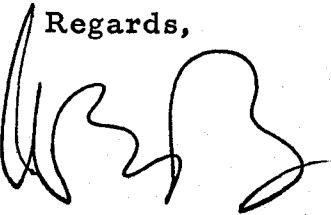
November 30, 1972

Re: 71-586 - Neil v. Biggers

Dear Lewis:

Please join me.

Regards,



Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM O. DOUGLAS

November 16, 1972

Dear Bill:

In No. 71-586 - Neil v. Biggers,  
please join me in your concurring-dissenting  
opinion.

W.O.D.

Mr. Justice Brennan  
cc: Conference

*B*  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR. November 14, 1972

RE: No. 71-586 - Neil v. Biggers

Dear Lewis:

I shall undertake a dissent in the  
above case in due course.

Sincerely,

*Bill*

Mr. Justice Powell

cc: The Conference

2  
1  
To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Stewart  
Mr. Justice White  
✓ Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

2nd DRAFT

From: Brennan, J.

Circulated: 11/16/72

Recirculated: \_\_\_\_\_

SUPREME COURT OF THE UNITED STATES

No. 71-586

William S. Neil, Warden, } On Writ of Certiorari to the  
v. } United States Court of Ap-  
Archie Nathaniel Biggers. } peals for the Sixth Circuit.

[November —, 1972]

MR. JUSTICE BRENNAN, concurring in part and dissenting in part.

We granted certiorari in this case to determine whether our affirmance by an equally divided Court of respondent's state conviction constitutes an actual adjudication within the meaning of 28 U. S. C. § 2244 (c), and thus bars subsequent consideration of the same issues on federal habeas corpus. The Court holds today that such an affirmance does not bar further federal relief, and I fully concur in that aspect of the Court's opinion. Regrettably, however, the Court also addresses the merits and delves into the factual background of the case to reverse the District Court's finding, upheld by the Court of Appeals, that under the "totality of the circumstances," the pre-*Stovall* showup was so impermissibly suggestive as to give rise to a substantial likelihood of misidentification. This is an unjustified departure from our long-established practice not to reverse findings of fact concurred in by two lower courts unless shown to be clearly erroneous. See, e. g., *Blau v. Lehman*, 368 U. S. 403, 408-409 (1962); *Faulkner v. Gibbs*, 338 U. S. 267, 268 (1949); *United States v. Dickinson*, 331 U. S. 745, 751 (1947); *United States v. Commercial Credit Co.*, 286 U. S. 63, 67 (1932); *United States v. Chemical Foundation*, 272 U. S. 1, 14 (1926); *Baker v. Schofield*, 243 U. S. 114, 118 (1917); *Towson v. Moore*, 173 U. S. 17, 24 (1899); cf. *Boulden v. Holman*, 394 U. S. 478, 480-481 (1969).

3  
JW 2-3  
4th DRAFT  
To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

From: Brennan, J.

Circulated: \_\_\_\_\_

No. 71-586

Recirculated: 11/18/72

SUPREME COURT OF THE UNITED STATES

William S. Neil, Warden, } On Writ of Certiorari to the  
v. } United States Court of Ap-  
Archie Nathaniel Biggers. } peals for the Sixth Circuit.

[November —, 1972]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE STEWART concur, concurring in part and dissenting in part.

We granted certiorari in this case to determine whether our affirmance by an equally divided Court of respondent's state conviction constitutes an actual adjudication within the meaning of 28 U. S. C. § 2244 (c), and thus bars subsequent consideration of the same issues on federal habeas corpus. The Court holds today that such an affirmance does not bar further federal relief, and I fully concur in that aspect of the Court's opinion. Regrettably, however, the Court also addresses the merits and delves into the factual background of the case to reverse the District Court's finding, upheld by the Court of Appeals, that under the "totality of the circumstances," the pre-*Stovall* showup was so impermissibly suggestive as to give rise to a substantial likelihood of misidentification. This is an unjustified departure from our long-established practice not to reverse findings of fact concurred in by two lower courts unless shown to be clearly erroneous. See, e. g., *Blau v. Lehman*, 368 U. S. 403, 408-409 (1962); *Faulkner v. Gibbs*, 338 U. S. 267, 268 (1949); *United States v. Dickinson*, 331 U. S. 745, 751 (1947); *United States v. Commercial Credit Co.*, 286 U. S. 63, 67 (1932); *United States v. Chemical Foundation*, 272 U. S. 1, 14 (1926); *Baker v. Schofield*, 243 U. S. 114, 118 (1917); *Towson v. Moore*, 173 U. S. 17, 24 (1899); cf. *Boulden v. Holman*, 394 U. S. 478, 480-481 (1969).

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

November 16, 1972

71-586      Neil v. Biggers

Dear Bill,

I should appreciate your adding my  
name to your concurring and dissenting  
opinion in this case.

Sincerely yours,

P.S.

Mr. Justice Brennan

Copies to the Conference

WB

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

November 16, 1972

71-586 - Neil v. Biggers

Dear Lewis,

I agree completely with Part I of your opinion. My only suggestion would be that you might consider giving a bit more recognition to Judge Mansfield's opinion in the Radich case. I say this because I think the Radich opinion was a very good one, and it was the pioneer investigation of the question involved. Perhaps I am too greatly influenced by my own years as a toiler in the vineyards of the lower federal judiciary, but I feel quite strongly that in a situation such as this it is wise and appropriate to recognize the help we get from thorough consideration of problems by the district courts and courts of appeals.

As to the underlying merits of this habeas corpus petition, covered in Parts II and III of your opinion, I expressed the view at the Conference that this aspect of the certiorari petition should be dismissed as improvidently granted. I adhere to that view, because of my belief that it is not our business to redetermine factual questions that have been settled by two federal courts in individualized cases, unless we can say that the two courts were egregiously erroneous. On this branch of the case, therefore, I shall await Bill Brennan's dissenting opinion before finally coming to rest.

Sincerely yours,

JP

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20542

JUSTICE ~~STEWART~~ STEWART

November 16, 1972

71-586      Neil v. Biggers

Dear Bill,

I should appreciate your adding my name to your concurring and dissenting opinion in this case.

Sincerely yours,

*P.S.*

Mr. Justice Brennan

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

November 16, 1972

Re: No. 71-586 - Neil v. Biggers

Dear Lewis:

Join me, please.

Sincerely,



Mr. Justice Powell

Copies to Conference

B

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

November 16, 1972

Re: No. 71-586 - Neil v. Biggers

Dear Lewis:

Unless Bill Brennan persuades me to the contrary,  
I join your proposed opinion for this case.

Sincerely,

*H.A.B.*

Mr. Justice Powell

cc: Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

November 16, 1972

Re: No. 71-586 - Neil v. Biggers

Dear Lewis:

Unless Bill Brennan persuades me to the contrary,  
I join your proposed opinion for this case.

Sincerely,

*H. A. B.*

Mr. Justice Powell

cc: Copies to the Conference

P. S. Dear Lewis:

I am intrigued by the concept (first line of the opinion)  
of "rape in a Tennessee Court."

*H.*

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

October 23, 1972

Re: No. 71-586 Neil v. Biggers

Dear Chief:

There were two issues in this case: (i) whether a 4-4 decision of the Court is a final adjudication; and (ii) whether the case was correctly decided on its merits. We reached the second question because the first was answered in the negative.

As a result of the discussion at the Conference, I have given this further thought. Over the weekend I read for the first time the transcript of the state court jury trial and reexamined more carefully the record of the habeas corpus hearing before Judge Miller. I am now satisfied that the jury verdict was fully supported by the evidence, that the identification by the rape victim of Biggers was unequivocal (and also made prior to her supporting voice identification), and that there was a positive in-court identification.

I have concluded, therefore, that the federal courts erred in overturning on habeas corpus the decision of the state courts. I would appreciate your recording my vote on the merits as "Reverse".

Sincerely,



The Chief Justice

cc: The Conference

3  
AM  
To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Rehnquist

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

From: Powell, J.

No. 71-586

Circulated: NOV 14 1972

Recirculated:

William S. Neil, Warden, } On Writ of Certiorari to the  
v.                           } United States Court of Ap-  
Archie Nathaniel Biggers. } peals for the Sixth Circuit.

[November --, 1972]

MR. JUSTICE POWELL delivered the opinion of the Court.

In 1965 respondent was convicted of rape in a Tennessee court and was sentenced to 20 years' imprisonment. The State's evidence consisted in part of testimony concerning a station house identification of respondent by the victim. The Tennessee Supreme Court affirmed. *Biggers v. State*, 219 Tenn. 553, 411 S. W. 2d 696 (1967). On certiorari, the judgment of the Tennessee Supreme Court was "affirmed by an equally divided Court." *Biggers v. Tennessee*, 390 U. S. 404 (1968) (MR. JUSTICE MARSHALL not participating). Respondent then brought a federal habeas corpus action raising several claims. In reply, the State contended that the claims were barred by 28 U. S. C. § 2244 (c), which provides in pertinent part:

"In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein. . . ."

8  
N

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Rehnquist

## 3rd DRAFT

## SUPREME COURT OF THE UNITED STATES

From: Powell, J.

No. 71-586

Circulated:

Recirculated:

NOV 23 1972

William S. Neil, Warden, } On Writ of Certiorari to the  
v. } United States Court of Ap-  
Archie Nathaniel Biggers. } peals for the Sixth Circuit.

[November —, 1972]

MR. JUSTICE POWELL delivered the opinion of the Court.

In 1965, after a jury trial in a Tennessee court, respondent was convicted of rape and was sentenced to 20 years' imprisonment. The State's evidence consisted in part of testimony concerning a station house identification of respondent by the victim. The Tennessee Supreme Court affirmed. *Biggers v. State*, 219 Tenn. 553, 411 S. W. 2d 696 (1967). On certiorari, the judgment of the Tennessee Supreme Court was affirmed by an equally divided Court." *Biggers v. Tennessee*, 390 U. S. 404 (1968) (MR. JUSTICE MARSHALL not participating). Respondent then brought a federal habeas corpus action raising several claims. In reply, the State contended that the claims were barred by 28 U. S. C. § 2244 (c), which provides in pertinent part:

"In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein. . . ."

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

November 16, 1972

Re: No. 71-586 - Neil v. Biggers

Dear Lewis:

In Conference I had voted just the other way on the "actually adjudicated" issue, but your opinion has persuaded me of the error of my ways. Please join me.

Sincerely,



Mr. Justice Powell

Copies to Conference