CRIMINAL PROCEDURE—EQUAL AFFIRMANCE—WHAT LEGAL EFFECT ON HABEAS CORPUS

In *Neil v. Biggers*[1] the Supreme Court was presented with the issue of whether or not an affirmance of petitioner's state court conviction by an equally divided Supreme Court constituted actual adjudication, thus barring petitioner from bringing a writ of habeas corpus in a federal district court. In section 2244(c) of the Federal Habeas Corpus Act[2] it is stated in part:

> In a habeas corpus proceeding . . . a prior judgment of the Supreme Court of the United States . . . 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 . . . .[3]

However, in *Biggers* the Supreme Court held that equal affirmance did not constitute such actual adjudication; therefore, section 2244(c) was not a bar to collateral attack by a writ of habeas corpus.

Archie Biggers was convicted of rape in a jury trial in a Tennessee state court.[4] The evidence leading to his conviction consisted, in part, of testimony concerning the victim's visual and voice identification of Biggers at a station-house showup.[5] On certiorari, the conviction of the Tennessee court was affirmed by an equally divided United States Supreme Court.[6] Mr. Justice Douglas dissenting, wrote the only full opinion.[7] In a subsequent collateral attack on the judgment, petitioner Biggers brought a writ of habeas corpus in the federal district court. The district court held the showup to be so suggestive that it violated due process requirements. The Court of Appeals for the Sixth Circuit affirmed.[8] There is some question as to whether or not the issues originally

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1. ___ U.S. ___, 93 S.Ct. 375 (1972).
2. 28 U.S.C. §§ 2241-55 (1970). *See generally* 45 TEXAS L. REV. 592 (1966).
3. 28 U.S.C. § 2244(c) (1970).
4. This conviction was affirmed by the Tennessee Supreme Court. 219 Tenn. 553, 411 S.W.2d 696 (1967).
5. ___ U.S. at ___, 93 S.Ct. at 379.
6. 390 U.S. 404 (1967). (Justice Marshall not participating). The basis of the petition for writ of certiorari was the constitutionality of the pre-trial identification.
7. "The usual practice of not expressing opinions upon equal division has the salutary force of preventing the identification of the Justices holding the differing views as to the issue, and this may well enable the next case presenting it to be approached with less commitment." Ohio *ex rel.* Eaton v. Price, 364 U.S. 263, 264 (1960).
8. 448 F.2d 91 (6th Cir. 1971).

before the Supreme Court and those decided on habeas corpus were the same.[9] However, for the purpose of this note, it will be assumed that the Sixth Circuit was correct in finding that the "appellate record clearly show[ed] the issue of the constitutionality of Biggers' pretrial identification ha[d] been completely reviewed on the totality of facts by the Supreme Court,"[10] and that the issues were the same in both instances.[11]

The Habeas Corpus Act of 1867[12] expressly gave the federal courts jurisdiction to hear state prisoner claims on writs of habeas corpus. Extending this doctrine, the Supreme Court held in *Brown v. Allen*[13] that the doctrine of res judicata did not prevent federal courts from reexamining issues decided in prior state proceedings.[14] However, the later deluge of apparently groundless petitions for writs prompted Congress, in 1966, to enact section 2244(c).[15] The legislative intent of this section was to give a conclusive presumption of actual adjudication only to federal rights that are actually adjudicated by the Supreme Court and not to give a conclusive presumption to mere denial of writs of certiorari.[16] This section was intended to produce a "qualified application of the doctrine of res judicata"[17] and to bar courts from hearing writs of habeas corpus which reexamine the same issues previously decided by the Supreme Court. However, the question in this case is whether or not affirmance by an equally divided Supreme Court is res judicata as to the issues in question.

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9. *See* 40 U. CIN. L. REV. 887, 888 (1971). There it was stated that "the facts presented in the petition clearly indicate that the entire identification procedure was put in issue."

10. 448 F.2d at 110.

11. *See* 40 U. CIN. L. REV. 888 n.36 (1971):

> This assumption was also made—at least implicitly—by the court of appeals in respect to their [*sic*] discussion of the applicability of res judicata and the effect of the equally divided decision of the Supreme Court. The question of res judicata and the effect of an equally divided court are important only if the issues were the same before both courts.

12. 28 U.S.C. § 2241 (1970) (originally enacted as Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385).

13. 344 U.S. 443 (1953).

14. *See also* Note, *Constitutional Collateral Estoppel*, 80 YALE L.J. 1229 (1971); Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 478-92 (1963).

15. In 1941 only 134 writs were filed in the federal district courts. This number increased to 3,773 applications during the first nine months of 1966, and more than 95 per cent of these applications were held to be without merit. 3 U.S. Code Cong. & Ad. News 3664 (1966); *see also* Desmond, *Federal Habeas Corpus Review of State Court Convictions—Proposals for Reform*. 9 UTAH L. REV. 18 (1964).

16. 3 U.S. Code Cong. & Ad. News 3664 (1966).

17. *Id.*

In numerous cases[18] dealing with equal affirmance, the Court held that where there is equal division of the Supreme Court Justices the ruling of the court below is affirmed, but the principles of law which have been argued cannot be considered settled.[19] These cases[20] indicate that the affirmance by the Supreme Court is merely a matter of technicality, since there was not a majority to reverse.

However, in other cases[21] the Supreme Court held that "an affirmance by an equally divided court is, as between the parties, a conclusive determination and adjudication of the matter adjudged."[22] These cases indicate that affirmance by an evenly divided court, though having no stare decisis effect and having no value as precedent, is a binding and conclusive decision upon the parties and issues involved.[23] Therefore, should not petitioner Biggers have been estopped by section 2244(c) from collaterally attacking his conviction by a writ of habeas corpus?

United States ex rel. Radich v. Criminal Court of the City of New York[24] is a very enlightening case on the term "actually adjudicated" as it pertains to section 2244(c). Radich was convicted of casting contempt on the American flag. On appeal to the United States Supreme Court his conviction was affirmed by an equally divided court.[25] Petitioner then sought habeas corpus relief but this was denied. Judge Cannella of the District Court for the Southern District of New York stated, in an unreported decision, that the affirmance of Radich's conviction by the Supreme Court, though equally divided, still "constituted an actual adjudication by it on the merits of his constitutional claims, which by virtue of 28 U.S.C. § 2244(c), is a bar to subsequent federal habeas corpus relief."[26] On appeal, the United States Court of Appeals for the Second Circuit reversed, stating that "because of the very fact of its equal division . . . the Court has been unable to reach a decision on the

18. *See, e.g.*, ___ U.S. ___, 93 S.Ct. at 377; Etting v. Bank of the United States, 24 U.S. (11 Wheat.) 59 (1826); Antelope, 23 U.S. (10 Wheat.) 66 (1825).

19. 23 U.S. at 126, 127.

20. These two cases (*Antelope* and *Etting*) are civil cases.

21. United States v. Fink, 315 U.S. 203 (1942); Hertz v. Woodman, 218 U.S. 205 (1910); Durant v. Essex Co., 74 U.S. (7 Wall.) 107 (1868).

22. 218 U.S. at 213.

23. *See* 50 C.J.S. *Judgments* § 698 (1947), "A judgment is no less conclusive because it is rendered by a divided court. . . . [A]nd where an appellate court affirms the judgment below, because the judges are equally divided in opinion, it is generally res judicata to the same extent as if affirmed on the merits."; 46 AM. JUR. 2d *Judgments* § 442 (1969), "The division of the court in the rendition of a judgment does not prevent the application of the doctrine of res judicata thereto."

24. 459 F.2d 745 (2d Cir. 1972).

25. 401 U.S. 531 (1971).

26. 459 F.2d at 747-48.

merits and there has therefore been no adjudication of them by it."[27] The court also stated that "[a]bsent an actual decision of the issues by the Supreme Court its equal division has no more legal significance for habeas purposes than denial of certiorari, which has never precluded subsequent collateral relief."[28]

When a party appeals to the Supreme Court, he has the burden of convincing a majority of the Court in order to gain a reversal. However, if affirmance is by an equally divided court, the decision of the state court does not become the decision of the Supreme Court.[29] It remains a state court determination on federal constitutional issues which "cannot . . . be accepted as binding."[30] As stated earlier, the legislative intent of section 2244(c) was to help alleviate the rapidly growing burden placed on the federal courts by the bringing of frivolous habeas corpus petitions by state prisoners who had already had a full hearing and decision of their federal claims by the Supreme Court.[31] "Affirmances by an equally divided court of a state court conviction can hardly have been in the contemplation of Congress; there have been so few in criminal cases that the number of habeas corpus petitions resulting from them cannot have been significant."[32] The objective of the writ of habeas corpus is to assure a person that he will be afforded an independent determination by a federal court of his constitutional rights, although these issues may have already been decided by a state court.[33] When a decision of the state court is affirmed by equal division, the state court's decision remains in effect. Therefore, the petitioner has not had his federal constitutional rights determined by the federal courts. "Absent an actual decision of the issues by the Supreme Court its equal division has no more legal significance for habeas purposes than denial of certiorari, which has never precluded subsequent collateral relief."[34] Affirmance by an equally divided court does not, and should not affect appellant's right to collateral review by a writ of habeas corpus. The Court rightly held that petitioner is not estopped by section 2244(c) from bringing the "Great Writ."[35]

H.W. COOLIDGE, JR.

27. *Id.* at 750.
28. *Id.*
29. Brown v. Allen, 344 U.S. at 506.
30. *Id.*
31. 3 U.S. Code Cong. & Ad. News. 3664 (1966).
32. 459 F.2d at 749.
33. *See*, Developments in the Law, *Federal Habeas Corpus*, 83 HARV. L. REV. 1038 (1970).
34. 459 F.2d at 750.
35. ___ U.S. at ___, 93 S.Ct. at 379.