In the

Supreme Court of the United States

CLIFFORD H. DAVIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

No. 71-6481

Washington, D. C.
February 20, 1973

Pages 1 thru 35

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CLIFFORD H. DAVIS, Petitioner,	:	
v.	:	No. 71-6481
UNITED STATES OF AMERICA, Respondent.	:	

Washington, D. C.
Tuesday, February 20, 1973

The above-entitled matter came on for argument at 1:09 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
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

APPEARANCES:

MELVIN L. WULF, ESQ., 22 East 40th Street, New York, New York 10016; for the Petitioner.

EDWARD R. KORMAN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D. C. 20530; 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 next in No. 71-6481, Davis against the United States.

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

ORAL ARGUMENT OF MELVIN L. WULF, ESQ.,

ON BEHALF OF THE PETITIONER

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

This case which is here on a petition for certiorari from the United States Court of Appeals for the Fifth Circuit presents the question whether petitioner, who is a Negro, may challenge the exclusion of Blacks from the federal grand jury which indicted him in a post-conviction proceeding where the claim was not made before trial. It deals with the scope of Section 2255, the equivalent of habeas corpus for federal prisoners.

The facts are that petitioner, who is Black, was indicted for bank robbery in the Northern District of Mississippi in January, 1968. His court-appointed counsel appeared with him for arraignment several weeks afterwards and was given 30 days for motions.

On March 6th the motions were filed, including a motion to quash the indictment but only on the ground that the arrest which led to his indictment was illegal. That motion was denied.

The case went to trial. The petitioner was convicted by the jury and sentenced to 14 years in jail--

Q Was it a trial of him alone? I notice there were two others indicted.

MR. WULF: There were two others. They were separately tried, Your Honor. They were severed.

Q So, this trial was of him alone?

MR. WULF: Yes.

Q Thank you.

MR. WULF: He was sentenced to 14 years, and the conviction was affirmed on appeal by the Fifth Circuit. And although it is not in the record, I do want to point out that Davis was released on prole last August after serving three years and 11 months of his sentence.

In January, 1971, Davis filed a motion under Section 2255, alleging that Negroes were systematically excluded from the grand jury which had handed down the indictment against him, and he specifically rested on the Fifth and Sixth Amendments and the relevant statutes in Title 28 which then applied.

He also alleged that his attorney in fact had made such a motion but, as appears from the opinions both of the district court and the court of appeals, that does not appear in the printed record. But I will return to that claim later on. It is not terribly important at this stage.

At the same time that Davis--

Q Mr. Wulf, inasmuch as he made that objection, then I take it that you must concede that he knew he had the right to object to the composition of the grand jury before trial.

MR. WULF: All I will concede about his claim that he made it is that he did not intend to raise it. And it might also imply that he knew he had the right to make it. But what would have to be gone into at the hearing on remand, if there is a hearing on remand, would be what reasons, if any, his lawyer did not raise it if Davis had in fact wanted him to raise it. But that is an issue that would really have to be canvassed, and it would go to the whole waiver problem, which is the central issue in the case.

At the same that he filed his 2255 motion, Davis also filed a motion for discovery and inspection of facts relating to the claimed exclusion of Blacks from the jury selection system in the Northern District of California both for the year 1968 and for the 20 years preceding.

The reply by the Government was in effect a general denial which pointed out that he had not raised it before. Trial was ostensibly required by Rule 12(b)(2) of the Federal Rules of Criminal Procedure, and also denied that any exclusion was practiced in the district.

The district court, without granting Davis a hearing, dismissed writing an opinion, saying that his having failed to raise it prior to trial as required by 12(b)(2) and adhering to Shotwell that he had waived the claim.

He also concluded that, in the language of the rule, there is no cause shown to grant relief from the waiver, and he made this finding also without having granted any hearing.

The decision of the district court was affirmed by the Sixth Circuit in a very brief curia opinion. It too relied on Shotwell v. United States in its construction of 12(b)(2).

Q Did you make any allegations in your 2255 petition as to why it was not raised?

MR. WULF: It was a pro se petition, Your Honor. What he said was that it had been raised. He alleged that in the petition. He said that his court-appointed attorney had made an oral motion before trial, but the district court searched the record, read the transcript, said he could not find any reference to that claim having been raised, and it is at this point a disputed claim of fact which the district court, as I say, found on the basis of his own recollection and on the review of the--

Q Let us assume that issue were not in the case,

about whether it was raised or not, that it just was not raised.

MR. WULF: Yes.

Q Would you say that in a habeas corpus petition or 2255 petition you should make some allegation either that I did not know or that even if I knew, there was a reason for not raising it, so that you could create grounds for having a hearing?

MR. WULF: If those were the facts. He said that it had been raised, which certainly leads to the implication that he intended it to be raised--

Q If that is all you alleged, that it was raised, and the court determines on the basis of the record that there is no real issue of fact, why should there be a hearing?

MR. WULF: He also claimed, Your Honor, that he did not waive it in the motion.

Q All right, he claimed that he did not. So, now we move to another issue. He says, "I did not waive it."

MR. WULF: Yes.

Q Do you not suppose that he should say why he did not raise it? Whose burden is it to show the presence or lack of a deliberate bypass?

MR. WULF: I think the original burden was on the

Government, Your Honor.

Q How about the 2255, the 2255 petition; who has got to shoulder that burden?

MR. WULF: Initially it is on the shoulders of the petitioner.

Q He did not even allege it.

MR. WULF: But he did, if I may--

Q He just says, "I didn't waive it." He did not say why. Do you not suppose he ought to say why he did not?

MR. WULF: He did not say why. But it is ambiguous, of course, because although he said he did not waive it, he supported that by saying that not only had he not waived it but his lawyer had in fact raised it. But whether or not it can be proved that his lawyer raised it, there has to be a hearing on the question of waiver, because that is always a factual question. It may be that his lawyer at the hearing testified--the argument did raise it, in which case I think we might still have some trouble with the application of 12(b)(2) because, even according to Davis, he did not raise it before trial, he raised it after the motions were to be filed. But he could either testify that he raised it, speaking of the lawyer or that he could not remember whether or not it had been raised or that he had not raised it and then could himself testify about what kind of conversations,

if any, he had with Davis about the issue of jury exclusion. These all require a hearing.

Q I take it, then, you are saying that neither are you in any position or willing to say even at this stage why, if he did not raise it, why he did not?

MR. WULF: I frankly do not know, Your Honor, why he did not raise it.

Q That is what I thought.

MR. WULF: But I do not think the pro se petitioners have to be held to a high art of pleading in these cases, that if they make a colorable showing on a constitutional claim and allege in general terms, even if they do not use the word "waiver," even if they said it was not raised, I would think that that should be adequate for purposes of habeas review.

Q Assume it were perfectly clear from the papers that he was represented by counsel and counsel knew what the rule was and did not raise it; assume that it is clear from the record.

MR. WULF: Again, given the fact that--

Q Would you then say automatically a hearing?

MR. WULF: Yes, yes, sir, I would.

Q You would have to, I mean, to maintain your position.

MR. WULF: I think as a matter of fact one would

have to. Again, if one is not going to hold a petitioner, pro se petitioner, to a high art of pleading, I think that on a colorable case, it is more or less something like a prima facie case, that particularly where an important constitutional right such as exclusion from juries is concerned, that a district court should hold a hearing and first deal, of course, with the factual question of waiver and go into the question in order to complete the summary allegations that are made in the complaint.

But I think it always has to be a factual question, and I think it's a factual question which demands a hearing. I suppose there are some cases where it might appear in the pleadings themselves that if he said, "I discussed it with my attorney and we agreed that as a strategic matter we were not going to raise it now because I want to reserve it for a post-conviction proceeding," that the judge would not have to hold a hearing in that case. But that may be the only case that I can think of.

Q I take it that you would say that if in a criminal trial or in a civil trial, if you do not demand a jury, that you can later say, "I really did not intend to waive it," and precipitate a hearing, even though you know perfectly well that to get a jury you have to demand it.

MR. WULF: I think that there would have to be a factual question on the waiver there, yes. But I would think

that that would appear on the record, on the face of the record.

Q So, it does not make any difference if the rule says, and you know about it, that if you do not make the demand, it shall be deemed waived. That will not do any good either.

MR. WULF: No. That is what 12(b)(2) says, of course.

Q Exactly.

MR. WULF: That is right.

Q It does not make any difference, even though you know that, and you know that you do not raise it--

MR. WULF: Even though you knew it. Yes, sir.

Q How would you distinguish that from the hypothetical that you posed of the man who recites that as a matter of tactics he decided not to raise it but save it? How would you distinguish that from the one that Justice White just raised?

MR. WULF: Because the man, to respond to Justice White's question, the defendant himself might know about it but his lawyer might, without consultation, waive it without consulting with the defendant. And if he does not consult with the defendant and get his explicit agreement to the waiver, certainly a very, very important constitutional right, certainly one of the dimension involved in this case,

I think that the question of waiver is still a live question on a post-conviction proceeding.

Q What good is the rule?

MR. WULF: The rule serves the purpose of--

Q I mean, under your hypothesis what good is the rule?

MR. WULF: The rule serves the purpose of encouraging defense counsel to discuss the issue with their clients. That is the purpose it serves. It encourages these claims being raised before trial so that the trial can proceed in an orderly way. And if this case is reversed, I would think that that would be notice to all attorneys where there is a possible question of exclusion of Blacks from a jury, that they had better discuss it first with their clients.

Q Do you think the Government attorneys will read our decision rather than to read the rule? They have not read the rule yet.

MR. WULF: We can only hope they will read the decisions, Your Honor.

Q I understand from your position maybe they did not read the rule. What makes you think they are going to read our opinion?

MR. WULF: We can only assume that they always read your opinions, Your Honor. I do not know how to deal

with that problem if lawyers do not read the law.

Q I understand that your position is that the defendant knows what the rule is. The lawyer knows what the rule is. And if they fail to communicate together, they have an automatic 2255.

MR. WULF: If they do not communicate and if the lawyer does not secure the explicit waiver of the defendant on that claim, yes, sir.

Q Automatic.

MR. WULF: Automatically. I think so. I cannot see any other alternative. Because, according to the decisions by this Court in Noia and in Kaufman, which apply to federal defendants, and taking into account also Humphrey v. Cady last term, which made it explicit that lawyers have to consult on some issues with their clients in order to effect a waiver, there are some issues where the lawyer is going to have to talk to his client once in a while and get an explicit understanding with him that he is waiving a substantial constitutional right for whatever the purpose may be.

Q In this case, did he allege that the lawyer did not talk to him?

MR. WULF: No. In this case he alleged that the lawyer made the motion in fact.

Q But he did not allege that the lawyer did not

talk to him.

MR. WULF: That would be inconsistent to allege that. Well, it would not necessarily be inconsistent. The record is silent about the extent of their conversation.

In any case, our argument in summary rests upon two cases decided by this Court, Kaufman v. United States and Noia v. Fay, which together hold that federal defendants in 2255 actions may raise constitutional issues in post-conviction proceedings to the exact same extent that state prisoners may do under federal habeas corpus, and that both are qualified only by the rule of waiver that has been enunciated in Noia.

Secondly, we distinguish Shotwell v. United States as not having application in this case.

And, third, we argue that 12(b)(2) must be construed in waiver terms to follow the decision by this Court in Noia, and that that can be done easily without, as the Government suggests, holding 12(b)(2) unconstitutional, because 12(b)(2) in fact uses the term "waiver" and in addition allows the district court to allow a motion to file late with cause. And our position essentially--it certainly rejects the Government's suggestion that 12(b)(2) has to be held unconstitutional. It does not have to be held unconstitutional. It merely has to be construed consonantly with the decision in Noia regarding waiver.

Q Do you view the issue here about challenging the grand jury differently from the issue in Henry v. Mississippi insofar as the necessity to consult with the defendant is concerned?

MR. WULF: [No response]

Q Do you think a lawyer has to consult with a defendant about everything before he can waive it, before the defendant is bound by the lawyer's decision?

MR. WULF: According to Henry and according to Humphrey v. Cady, I think that this Court has told lawyers that they certainly have to consult with their clients about substantial constitutional issues.

Q There was a substantial constitutional issue in Humphrey, was there not?

MR. WULF: Yes.

Q What did the Court say there?

MR. WULF: It said that the lawyer had to consult, and since they had not consulted they had not waived.

Q Did we not send back to see if they knew about it, knew about the rule?

MR. WULF: Yes.

Q What if they did?

MR. WULF: I am afraid I have not reviewed Humphrey v. Cady close enough to respond.

Q At least you say that this grand jury point is

an issue they must consult on.

MR. WULF: Yes. Yes.

I see no other way to interpret Noia, if there is a waiver, that the waiver--

Q Henry was after Noia. If Noia said he must consult about everything, that rule has not survived, has it?

MR. WULF: As I recall Henry, Henry said that there had to be an explicit finding of waiver by the defendant.

Q Yes, but what constitutes a waiver? What constituted a waiver in Henry? What might constitute a waiver in Henry?

MR. WULF: [No response]

Q Knowledge and failure to object or what?

MR. WULF: I would think that it would be knowledge and failure to object in consultation with the defendant.

Q Thank you.

MR. WULF: Obviously it might be a burden on defense counsel. But where fundamental substantial constitutional rights are concerned, it may be a burden that has to be imposed in order to vindicate the constitutional rights of defendants in criminal cases.

We think that this claim is certainly well within the scope of the kind of claim that this Court said in

Kaufman has to be entertained by district courts on Section 2255 cases. What is at stake is the vindication of constitutional rights. And certainly the constitutional right which is asserted in this case is one that this Court has required be vindicated for at least a hundred years. It is an elementary right and theC ourt never, never swerved from its consistent position that the exclusion of minority groups from juries is a violation of the Constitution in state cases or in federal cases.

And if the defendant in this case is prevented, because of this procedural default, this asserted procedural default, from raising this elementary constitutional claim, then I think that the Court will be retreating from this hundred year course of decision which has made the jury exclusion issue a primary constitutional issue.

As far as Shotwell is concerned--

Q In order to preserve an error for appellate or even collateral review, you have to raise it in a timely manner. That, I would guess, is certainly as old as the substantive rule that you referred to, is it not, as a doctrine in this Court.

MR. WULF: There is a whole course of decisions in this Court beginning with Noia and including Kaufman and by itself, though that was a procedural default at trial, that was a default in appeal, which cut him off from state

remedies. But there are some--and one does not encourage procedural defaults, obviously. But one does say that where important constitutional rights of defendants are concerned--and this Court has said it in Noia and said it in Kaufman--that there has to be a forum made available for his federal rights to be vindicated if he did not have an opportunity to have them heard and assessed in the trial court.

Q Certainly there was an opportunity, at least theoretical.

MR. WULF: There always is.

Q Yes.

MR. WULF: There is always an opportunity for--

Q But I mean a specific opportunity given by the rule.

MR. WULF: There is specific opportunity for counsel to raise constitutional objections all along the course of trial.

Q And if he does not do it, it is just common ground--it is just run-of-the-mill jurisprudence of this Court that if he does not raise it in a timely manner, he has lost it.

MR. WULF: Not where constitutional rights are concerned.

Q No. Where constitutional rights are concerned.

MR. WULF: That certainly was not the case in

Kaufman, it certainly was not the case in Noia. I mean, they were raised at trial, but they were not pursued on appeal. And it seems to me that Noia's discussion revolved entirely around the question of procedural default and in that case it happened to be default because of failure to appeal. But default at trial seems to be no different to me.

A defendant ought not to be held to have forfeited an important constitutional right because of a decision by his lawyer in which he did not join. That is what it comes to. And procedural default ought not to be allowed to be the basis for loss of constitutional rights.

Q They are every term of this Court, as you know.

MR. WULF: But they were not in Kaufman, they were not--

Q No, they were not in those two cases, but--

MR. WULF: I rely on those two cases obviously, and I also rely on the claim that constitutional rights are too important to be forfeited simply because--

Q Mr. Wulf, would you say that if the lawyer and client consult and they both agree that, "Well, we would rather save this for federal habeas"--

MR. WULF: That is a waiver. That is obviously a waiver.

Q Why is it a waiver?

MR. WULF: Because it is a deliberate bypass in Noia's terminology.

Q A deliberate bypass? You mean you have to have some other reason?

MR. WULF: I think--

Q Some other good reason.

MR. WULF: I think the fact in the matter--

Q If you are going to say that, you must say then that there are some reasons that will excuse not raising it and other reasons that will, will not.

What are the reasons, for example, that will excuse not raising it if you know about it?

MR. WULF: Well--

Q Give me one.

MR. WULF: The best one is in this very case, arising in Mississippi on behalf of a Black defendant, and there are a whole course of decisions--

Q Finally you are going to say what the excuse was. And do you think--

MR. WULF: I am saying that is a possible excuse.

Q Do you think they should allege that in a habeas corpus petition rather than burden some federal court with having a hearing in every case just to find out what the reason is?

MR. WULF: I think if it is a pro se petition--

Q Because you could see there are some reasons that are no good and other reasons that are fine, do you not?

MR. WULF: Surely. If I were drawing--

Q Why do you not say what reason then?

MR. WULF: If I were drawing the petition, Your Honor, I would like to think that I would plead what the reason was. But Davis drew his own petition, as do so many post-conviction petitioners, and if they are going to be held to the fine art of pleading as lawyers can properly be, they are going to be out of court all the time.

Q But why would you not accept then a mediate ground? You dismiss the petition but with leave to refile saying what the reason is, rather than having to hold a hearing.

MR. WULF: If the district courts would do that explicitly in such a way that a pro se petitioner might be informed of the reason for the dismissal, I suppose that will be quite agreeable. But in the absence of that--

Q So, it would be all right with you if he said, "We affirm but without prejudice to refiling, stating a reason"?

MR. WULF: I might not argue against that very much. But that was not the position taken by the district court here, of course. He dismissed outright on the merits.

Q In the lower courts he could always refile.

MR. WULF: He could. He could. He chose to take an appeal, however.

Q If there were an affirmance here, could you not--

MR. WULF: I'm sorry?

Q If there were an affirmance here, could you not file a new 2255 in the form that you would have filed it initially tomrrow?

MR. WULF: I think so, Your Honor, yes.

Q What is this thing that his lawyer did not talk to him?

MR. WULF: It is not that his lawyer did not talk to him, Your Honor. It was that his lawyer raised the issue. That is on page eight of the record. On top of page eight he alleges, "Petitioner avers that he had not waived nor abandoned his right to contest a grand jury array as set forth in Rule 12(b)."

Q If ever there was a conclusion of law, that is. Right?

MR. WULF: Right.

Q No facts at all.

MR. WULF: Except insofar as waiver itself is a fact. He had a little legal knowledge, which may have misled him in that sense.

Q You have been saying that your main point is

that he knew what his rights were but his lawyer did not talk to him. And you used the phrase "lack of communication." Where is that in this record?

MR. WULF: It is not here explicitly.

Q Where is it any place?

MR. WULF: It is here only insofar as that is the implication in paragraph five of his petition.

Q Paragraph five says that his lawyer did not talk to him?

MR. WULF: No. Paragraph five says that he had not waived nor abandoned. The implication of that could well be that his lawyer did not talk to him.

Q Is that a pleading of a fact, in your view?

MR. WULF: By a pro se petitioner it might well be considered as an adequate pleading. I would think so.

I do not know how much legal knowledge Davis actually had. He had some knowledge, evidently, about the waiver issue. He was not totally uninformed about it. But I do not know whether he knew what would constitute a waiver as a matter of fact. And I would think that a conclusory pleading like this, and it is conclusory, would--ought to be--taken by the district court as an adequate allegation.

Q Has Davis had any legal training at all?

MR. WULF: I do not know, Your Honor.

Q Where did he get the word "avers" from, "waive"

from, "abandon," "grand jury array as set forth in the Federal Rules of Criminal Procedure, Rule 12(b)"?

MR. WULF: He either has some legal knowledge or he secured some while he was in the penitentiary. This was filed while he was a prisoner.

Q I for one am confused as to what this is all about.

MR. WULF: What this is all about--

Q Is it a man files a piece of paper and says, one, "I was tried and something was wrong with the jury"?

MR. WULF: No, that was not all there was, Mr. Justice Marshall. It was a claim that Negroes were systematically excluded from the grand jury which indicted him, and that is no minor thing. That is a very important claim. And when that is alleged and where the additional facts are alleged, even in conclusory terms, that the defendant did not waiver, I think--and perhaps in addition given the fact that this case arose in Mississippi and given the history of the Fifth Circuit Court of Appeals decision regarding state prisoners and their recognition of the special problem in the state of Mississippi regarding the exclusion of Blacks from juries--that this case demanded a hearing on the facts.

Q But this was tried in a federal court.

MR. WULF: This was tried in a federal court, yes,

sir. And there is, of course, the distinctive treatment that the Fifth Circuit applies to state cases and to federal cases in the State of Mississippi. They have reversed a large number of state cases on exclusion grounds and federal habeas. And, on the other hand, in this case and in others, they have refused to allow such claims to be raised if they were not properly raised, timely raised, under 12(b)(2), the implication being that they are not making the same kind of assumptions about the practice in federal court as they very readily have made about the practice in state courts. But that is only an assumption. And again a factual hearing would be necessary in order to find out exactly what the practices are in the Northern District of Mississippi.

And I might say that the affidavits which the Government filed in some other case here, including the affidavits of 67 attorneys practicing in the Northern District of Mississippi mean nothing. Those 67 affidavits, with four exceptions, are written in precisely the same terms and exactly the same language. I think they were prepared by the U. S. Attorney's Office and circulated to his friends in the Northern District. And there are no allegations there except by lawyers, conclusory allegations that significant numbers of Blacks have appeared on juries. But that is certainly not any kind of a determination that ought to persuade any of us that jury selection procedures

in the Northern District are adequate.

MR. CHIEF JUSTICE BURGER: I think your time is up.

MR. WULF: Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Korman.

ORAL ARGUMENT OF EDWARD R. KORMAN, ESQ.,

ON BEHALF OF THE RESPONDENT

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

The issue presented in this case is not, as the petitioner alleges in his reply brief, whether the right to grand jury indictment--whether this Court should assign the prohibition against racial discrimination in grand jury selection to the dust bin.

The issue, rather, is whether that right should be vindicated in the orderly procedure promulgated by this Court in Rule 12(b)(2) and adopted by Congress, and that procedure is simply that the motion which does not go to the fairness of the trial, which does not go to the admissibility of any evidence at the trial, which does not go to the defendant's guilt or innocence but to a defect in the pre-trial proceedings which can easily be cured if timely raised, whether such a motion should be raised prior to trial or years later after trial and conviction when retrial may be difficult or impossible in a federal habeas corpus proceeding.

I would like to talk about Rule 12(b)(2) for a while rather than the habeas corpus statute, because Rule 12(b)(2) is not simply a procedure for making a motion prior to trial. Rule 12(b)(2) under the enabling act is the equivalent of a specific federal statute.

Under the terms of the enabling act, Rule 12(b)(2) operates in fact to repeal any statute which is inconsistent with its provisions. And Rule 12(b)(2) does not talk about knowing, deliberate waivers. It does not talk about waivers that are made only with consultations by the defendant's lawyer with his client.

Rule 12(b)(2) says in plain terms that if you do not make this motion it shall be deemed waived. This is really not a waiver in the general sense of the term but really the equivalent of a statute of limitations; just as one's right to just compensation under the Fifth Amendment is not waived unless you have a knowing and deliberate waiver, that does not operate to make a statute of limitations which says you can only raise this claim for just compensation in three years or four years unconstitutional.

Rule 12(b)(2) has the same effect as an ordinary statute of limitations for the assertion of a particular constitutional right. And the policy considerations which motivated the adoption of Rule 12(b) are rather plain. There really is no incentive for a lawyer representing a

defendant to make this kind of a motion before trial, because what does he get? What would Mr. Davis's lawyer have gotten for him had he made this motion prior to the trial and had he been successful?

He would have gotten for Mr. Davis a new indictment. And Mr. Davis would have stood trial and, by the way, it is worth noting here that the defendant was caught in the act. There is not the slightest question that any grand juror, black or white, faithful to his oath, would have voted this indictment.

So, he would have gotten simply a new indictment, and that is true with many defects in the institution of the proceedings. They are easily cured if you make the motions when you are supposed to make them.

On the other hand, there is a great incentive to sit back and say, "Why should I bother making this motion now? Let me take my chances on an acquittal. And if he is found guilty, well, then, I can go ahead and make the motion after trial." And that is just another way of upsetting a valid judgment of conviction.

The statute, despite the fact that Rule 12(b)(2) thus has a reasonable justification, it is not an absolute waiver provision. It has an express clause that gives the judge the right to grant relief from the provisions of the waiver, from the waiver clause, upon a showing of just

cause. No showing of just cause was made here. And both courts below so found. There was not the slightest doubt that this defect about which the petitioner complains could have been made and discovered with due diligence at the time.

And so that we have here a rule which is the equivalent of a federal statute and which takes precedence over anything to the contrary in a federal habeas corpus statute. And having said that, let me say one more thing. That at the time Rule 12(b)(2) was adopted, there was no conflict between Rule 12(b)(2) and the federal habeas corpus statute in 1946; it was well understood and settled law that if you did not comply with the procedural rule raise an objection timely when you should have, you could not get federal habeas corpus relief. And, as a matter of fact, this Court so held in Daniels v. Allen decided in 1952, after the adoption of the federal rules.

To the extent that there is now any inconsistency between the federal habeas corpus statute and the provisions of Rule 12(b)(2), it has resulted because of a thorough reexamination of the language of the federal habeas corpus statute undertaken in Fay v. Noia.

There is no similar basis for reinterpretation of Rule 12(b) that the defendant asks for here. Rule 12(b)--both the language of Rule 12(b), the advisory committee notes, the notes of the preliminary draftsman, all indicate

(a) that it was intended to apply here and (b) that it was intended to apply regardless of whether or not there was a knowing and deliberate waiver.

There are state cases which are cited, and Mr. Wulf has alluded to them, in which the Fifth Circuit has granted habeas corpus relief to state prisoners. There are a few things that I would like to say about those cases.

First, any state procedural rule which is the equivalent of Rule 12(b) and which is inconsistent with the habeas corpus statute would, under the Supremacy Clause, have to yield to those provisions. As the Court noted in Fay v. Noia, state procedural rules must yield to the strong policy considerations which are reflected by the federal habeas corpus statute.

In this case, as far as this federal prisoner is concerned, the federal policy is stated by Rule 12(b)(2) that was promulgated by this Court, that was adopted by Congress, and it need not yield to the contrary under 18 U.S.C. 3771. It is the habeas corpus statute which must yield.

In the second place, it was not until last year in the case which will be heard right after this one, that any federal court held that where the sole claim was to the grand jury, not the grand jury and the petit jury, that this claim could be raised in a habeas corpus proceeding.

As a matter of fact, in Parker v. North Carolina, reported at 397 U.S., decided long after Fay and after Kaufman, Mr. Justice White stated for the Court that the issue whether the failure to comply with a procedural rule similar to Rule 12(b) would stand as a bar to federal habeas corpus relief was still an open question.

There are many reasons why that should stand as an open question--

Q What would you say if there was an allegation in this case that the reason for not raising the matter to back up his claim of no waiver--let us assume that he was threatened that if he raised it, he would be charged with something else.

MR. KORMAN: I think under Rule 12(b) the judge has wide discretion to grant relief from the waiver provisions. And if he came up with a reason that moved the court to exercise its discretion--

Q What would be a good reason, in your book?

MR. KORMAN: I think the reason that Your Honor suggested. I think another reason might be the inability to--

Q What about a reason that it would annoy the judge?

MR. KORMAN: I would not think that that was an adequate reason.

Q You would not?

MR. KORMAN: No.

Q So, what about the state cases?

MR. KORMAN: As I have indicated, all of the state cases until the most recent one in Winters v. Cook all involved claims with respect to both the grand and petit jury, and I am willing to concede for these purposes that the claim of discrimination in the selection of a jury, the petit jury as opposed to the grand jury, involves different considerations that are based on the difference of the role of the grand jury--

Q If the objection is made outside the presence of a jury?

MR. KORMAN: Pardon me?

Q If the objection is made outside the presence of a jury?

MR. KORMAN: No. What I am saying is that the right is simply more significant. And, therefore, before waiver is implied, perhaps there might be a greater showing or less of a requirement than ought to be made in terms of explaining waiver than in the cases of grand juries. I am not conceding it. I merely suggest the two cases are not necessarily the same.

There are lots of times--

Q There should have been a hearing in this case

if he had made an allegation of a sufficient reason?

MR. KORMAN: If it were sufficient on its face and it was not contradicted, I would assume--

Q If it was contradicted you would have the hearing?

MR. KORMAN: Yes.

The same strong policy considerations which, we submit, motivated and justify Rule 12(b) would also and should also justify that a district court in denying habeas corpus relief, even if there were no Rule 12(b)--all of the cases that this Court has dealt with involved claims with respect to the fairness of the trial, to the admissibility of the evidence, and to claims which go ultimately to whether the person should be found guilty or not guilty.

The claim with respect to a grand jury stands on a much, much different level. It does not involve any of those claims at all. It involves simply the issue of whether this man should be indicted on the basis of a particular set of facts. While the right to a grand jury, of course, is a significant and important right, this Court has recognized the distinction on several occasions, that is, the distinction between the petit jury and the grand jury.

In the first place, it has refused to hold that the right to a grand jury is so fundamental that the states must provide it under the Due Process Clause.

In Costello v. United States the issue was whether a defendant could obtain a review of the grand jury minutes to determine whether there was any evidence, any legally sufficient evidence at all, to sustain the indictment, and this Court in a unanimous opinion said no, and Mr. Justice Black, writing for the Court, said that in a trial on the merits, defendants are entitled to a strict observance of all the rules designed to bring about a fair verdict.

"Defendants are not entitled, however, to a rule which would result in interminable delay but add nothing to the assurance of a fair trial."

The right to a grand jury does not have anything to do with the right to a fair trial. And to permit it to be asserted years after a judgment of conviction when retrial may be difficult or impossible, would have an undesirable effect on the entire criminal justice system as it has come to be recognized. The notion that there must come a time when judgments of conviction become final, when they are no longer subject--when issues which have nothing to do with guilt or innocence or with the fairness of the trial cannot be rehashed over and over again in a criminal proceeding. And we submit that in this case the Court properly ruled that the claim was barred by Rule 12(b)-(2) and a properly denied habeas corpus relief.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Korman.

Thank you, Mr. Wulf.

The case is submitted.

[Whereupon, at 1:51 o'clock p.m., the case was submitted.]

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