In the

# Supreme Court of the United States

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| FRANK XAVIER FRANCISCO, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| v. | ) | No. 73-5768 |
| | ) | |
| J. S. GATHRIGHT, SUPERINTENDENT, BLAND CORRECTIONAL FARM | ) | |

Washington, D.C.
October 15, 1974

Pages 1 thru 40

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| v. | : | No. 73-5768 |
| J. S. GATHRIGHT, SUPERINTENDENT, BLAND CORRECTIONAL FARM | : | |

Washington, D. C.

Tuesday, October 15, 1974

The above-entitled matter came on for argument at 10:02 o'clock a.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:

DANIEL C. KAUFMAN, ESQ., Arent, Fox, Kintner, Plotkin & Kahn, 1815 H Street, N.W., Washington, D.C. 20006
For the Petitioner.

ROBERT E. SHEPHERD, JR., Assistant Attorney General of Virginia, Supreme Court Building, Richmond, Virginia 23219 For the Respondent

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We might hear arguments first in No. 73-5768, Francisco against Gathright.

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

ORAL ARGUMENT OF DANIEL C. KAUFMAN, ESQ.

ON BEHALF OF THE PETITIONER

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

The case is here on writ of certiorari to the United States Court of Appeals for the Fourth Circuit and two questions are presented for the Court's consideration.

The first is, may a Federal Habeas Corpus court decline to consider the merits of an issue already presented in a direct appeal to a State Supreme Court merely because the State Supreme Court in a later case has accepted the same position that was earlier urged upon them.

Secondly, may a Federal Habeas Corpus court decline to reach a fully exhausted issue merely because it shares a Habeas Corpus petition with an unexhausted issue.

We submit that both these questions should be answered in the negative and that Petitioner should have a prompt adjudication of both of his Habeas Corpus issues by a Federal Court.

Q Do I read the record correctly that the District --

the state court, by whatever name it is known here, the state court had indicated readiness to grant a new trial?

MR. KAUFMAN: No, your Honor, not at all. What had happened is, in response to the District Court opinion which devolved upon the state the burden of going forward, the Commonwealth had petitioned the Circuit Court of Fairfax County to initiate a Habeas Corpus proceeding on Petitioner's behalf at which the, presumably, the instruction issue would be laid before them and that is how that was set in motion and other counsel were appointed by the Fairfax court and when I received notice of those proceedings, I both moved in the federal court to stay them and I also, when the federal court refused to stay those proceedings, appeared in the state court proceedings and I think, Mr. Chief Justice, you have focused on one of the issues the Respondent has raised, that is, why didn't I just go back into the state court, have this issue, the destruction issue adjudicated, and done with.

I would submit that there are numerous reasons for not going back, first of which, it is not at all clear that, although Commonwealth, through the Attorney General would be satisfied to have the issue adjudicated by the state courts, it is not at all clear under the state court rule of Hawks versus Cox, which is cited in our brief, that the state court would even hear the merits of the instruction issue because

the instruction issue was raised on direct appeal and the writ of error denied and the Hawks doctrice states that, absent changed circumstances, determination of an issue by a state or a federal court is conclusive and there is no indication that the Sharp decision upon which the Commonwealth relies is a changed circumstance within the meaning of the Hawks doctrine.

Secondly --

Q Mr. Kaufman, is Mr. Francisco -- where is he now?

MR. KAUFMAN: He is still at Bland Correctional Farm, southwestern Virginia.

Q Well, if you had gone in, might not the whole thing have been resolved by this time and perhaps he would be out of jail?

MR. KAUFMAN: I don't believe so, your Honor, for the reason that, first of all, it is not at all clear that the state court would even consider the merits of the instruction issue, much less rule in our favor on it.

Q Yes, but if a man's liberty is at stake, isn't it worth trying? And, after all, didn't Judge Millsap indicate that he would like to have you come back?

MR. KAUFMAN: He indicated that we could return if the state did refuse to consider it but I think we have to look at the totality of the case and there was a search and seizure issue also presented.

Q Well, I am just wondering if you aren't risking the man's freedom just for a very nice legal theory?

MR. KAUFMAN: No, I don't think so at all. I think -- I think what happens is, if we were to go back and if we were to get a favorable ruling from the state court on the instruction issue, which is by no means clear, we would still have this unresolved search and seizure issue. Mr. Francisco probably would be retried. I see the Commonwealth has certainly not stipulated they will not retry him. Absent the -- even without the challenged instruction, I see no reason why you could not expect that he would be again convicted at least of the offense of controlled substance which the instruction did not relate --

Q Yes, but would the state have a right to retry him?

MR. KAUFMAN: Your Honor, what -- Mr. Justice Marshall, I think what we are asking for is the decision on the search and seizure issue and the instruction issue. If the search and seizure issue is resolved in our favor on the merits, then as a practical matter, the state cannot retry him because there simply is no evidence that could be introduced that was not illegally seized or not the fruit of illegally seized evidence.

Q Assuming that it went through the state court, could not the district court still have held it?

MR. KAUFMAN: I'm sorry, Mr. Justice Marshall, I

don't quite understand your question.

Q If it had gone back in the state court, how would that have prejudiced the federal court?

MR. KAUFMAN: Well, as the Court of Appeals below did, they vacated that part of the decision of the district courts which ruled on the search and seizure issue and said that the federal courts should stay their hands entirely on that issue until the full gamut of state court proceeding has run its course.

Q I am not talking about that. I am saying when the state court matter was attempted to be opened up --

MR. KAUFMAN: Yes.

Q -- and you had gone to the state court and had lost, would you have been any worse off than you are now?

MR. KAUFMAN: We would not be any worse off. We would --

Q And on the other hand, if you had gone to the state court, one, you would have been better off than you are now

MR. KAUFMAN: I would beg to disagree for the --

Q I -- did you hear what I said? If you went to the state court and won.

MR. KAUFMAN: I understand that.

Q And the man was turned loose, wouldn't you be better off than you are now?

MR. KAUFMAN: Not to the extent that he faced retrial and the risk of an increased sentence upon that retrial.

Q I said he was turned loose.

MR. KAUFMAN: Unequivocally and was not retried.

Q Yes.

MR. KAUFMAN: Then you are plainly correct.

Q He would have been better off.

MR. KAUFMAN: Plainly.

Q Why didn't you do it? Why didn't you do it?

MR. KAUFMAN: Because I think it's --

Q Because you didn't think you could win.

MR. KAUFMAN: No, I did not think that I could prevail on the instruction issue and for that reason alone have the state decline to prosecute him further. I simply am at a loss to believe that they would let the matter rest and they have certainly not indicated that they are willing not to retry him if his conviction is set aside only on the instruction issue.

Q And the state court already had rejected your --

MR. KAUFMAN: Exactly, sir.

Q -- search and seizure issue.

MR. KAUFMAN: Well, there is absolutely no question at all that the search and seizure issue had been fully exhausted. There had been no change in state law whatever.

Q Right.

MR. KAUFMAN: And the state courts would probably decline to hear it again even on a retrial.

I think, if you take the Commonwealth's position that the chain of events of a direct appeal in a subsequent state court decision, what you wind up with is more interference with state court proceedings because you'll have the federal courts -- any time a new state court decision comes out, the federal courts will be called upon to determine whether this new decision is going to affect Habeas Corpus petitions presently pending before it and if there is any question that it will or it won't, even though those issues were presented to the state court in direct proceedings, the federal court would be constrained or would be authorized to send it back into the state courts which have indicated no interest in hearing the question.

Q Mr. Kaufman, do you read the Sharp case in the Supreme Court of Virginia as turning on state or federal constitutional considerations?

MR. KAUFMAN: Both, Mr. Justice Rehnquist.

I think it is clear that they relied on their own line of cases and also in this Court's decision in Leary on the federal issue on whether this is an irrational and hence an unconstitutional presumption.

I think that this Court has indicated in Roberts

v. LaVallee, which has been cited in our brief, that the mere possibility of successful pursuit of a state remedy that is open is not sufficient to send the Petitioner back to exhaust that remedy again when he has exhausted it once before.

This Court has been fairly clear that repetitious applications to state court are just not required of a Habeas Corpus petitioner. He is just required to once give the state courts a fair opportunity to resolve the issue and Mr. Francisco has given the state court, in his direct appeal, a fair opportunity to adjudicate the precise question which they later adjudicated in Sharp.

Q Was Roberts cited to the district court in the Fourth Circuit?

MR. KAUFMAN: It was cited to the district court in my motion to stay proceedings, which appears in the Appendix at 43. And the Fourth Circuit, by virtue of their abbreviated procedure in Habeas Corpus matters, did not call for full briefing on this case, but merely sent Petitioner a letter asking him to informally inform that court what complaint he had of the district court's decision.

He, in turn, forwarded that letter to me and I responded in a somewhat informal fashion in light of the circuit court's request and did not cite any cases in that letter.

Q Incidentally, was the federal Habeas petition filed after Sharp was decided or before?

MR. KAUFMAN: The federal Habeas petition was formally filed after the Sharp case was decided. It was received by the district court accompanied by an application to proceed In Forma Pauperis two days after Sharp but was -- and was the delay between the receipt by the district court and the filing that took place because of the district court's refusal to grant In Forma Pauperis status at that stage.

However, I think if you look at the petition, you will see that it was verified by the Petitioner in September, which was prior to the October 3rd decision in Sharp.

So it wasn't a case where the Sharp decision came down, we said, "There is a great decision. Let's run with it in the federal courts."

The petition was fully prepared before the Sharp decision had been handed down.

Q But, nevertheless, the decision was made to go into federal court rather than the state forum?

MR. KAUFMAN: Frankly, your Honor, I was not aware of the existence of the Sharp decision until some two weeks later when it finally made its way into the informal legal press and it was not formally reported in the South-east Reporter till some months later.

So at the time the petition was actually sent to the district court, both I and Petitioner were unaware of the existence of the Sharp decision.

I think also we have to look, not only to the instruction issue, which was involved in Sharp, but we have to look to the search and seizure issue which was, by everyone's notion, fully and completely exhausted, absolutely ripe for decision and what the Fourth Circuit did and the district court did not do was to say, well, the district court is right in sending you back to the state court to have your instruction issue adjudicated.

But what the district court should have also done is stayed its hand on the completely independent search and seizure issue and not even reached the merits of that issue and, accordingly, the court of appeals vacated that portion of the district court opinion which did deal with the search and seizure issue and I would submit that that is a wholly inappropriate way of treating a multiple issue Habeas Corpus petition.

Q What if the court of appeals had ruled exactly the same way the district court had? It had upheld your FEderal Constitutional claim on the instruction. Would it then have been proper for the court of appeals to say, "We don't have to pass on the Fourth Amendment claim since your man is going to get a new trial anyway"?

MR. KAUFMAN: No, I don't think that that is the proper course to take for the basic reason that the search and seizure issue is, as a matter of practicality, dispositive of a retrial. There is very little point in saying, if we are going to make a choice on issues and say because we reach one issue we are not going to reach another, reaching the instruction issue and not reaching the search and seizure issue seems to be putting the cart before the horse because if you say, let's leave the search and seizure issue ride for awhile, let's allow him to be retried, allow him to have another state appeal wherein that instruction presumably will not be given and then, some two or three years later, we'll be in a position to rule on a search and seizure issue which would have been dispositive in the first instance and would have not required any further proceedings in the state court of any character.

Q What if you make both a Miranda claim and a search and seizure claim in your federal Habeas petition? Is it your position that the district court must pass on the merits of both of them, if exhaustion is present?

MR. KAUFMAN: Well, I would first say that I believe that as a matter of judicial economy and the fundamental nature of the Habeas Corpus writ that a court should always pass on all issues presented to it and ripe

for adjudication because they will, in many instances , control a retrial but I think in an individual case you also have to examine -- make an examination of what else is there besides this particular issue that could come up in a retrial?

Now, if you had a Miranda issue and search and seizure issue, for example and if excluding the confession would not, as a practical matter, preclude a retrial, then I think you want to reach -- and the search and seizure would, then I think you want to reach that issue which would, as a practical matter, preclude a retrial. Because otherwise, you'll wind up with a retrial that may prove fruitless.

What you will also be doing is interfering with the fact-finding process that will ultimately have to be made on a search and seizure issue or Miranda issue or any kind of an issue where we have to go outside of the record or we could go outside of the record to determine the issue.

What you are doing by permitting a retrial with an issue unresolved is, at best you are delaying it and you may impair the fact-finding process when a federal district court is ultimately called upon to decide it.

Q Conceivably, on a retrial, the state court might hold a factual hearing, again on the search and seizure thing It might be adequate under the 1966 revisions to the Habeas Corpus act, mightn't it?

MR. KAUFMAN: That might well be but it might also

be that the state court would say that the prior decision on the prior motion to suppress is the law of the case.

We are simply in a very murky procedural area and what we are doing, it seems to me, is going to ensnare a petitioner on these procedural murkiness areas and sort of in the hopes that the case will go away, which is what the Fourth Circuit seemed to say, it might be that this case is going to be moot one day and we'll never have to rule on this search and seizure issue and I simply don't believe that a federal court should speculate as to mootness on this kind of a record where there is simply no reason to believe that Francisco would not be tried.

There is simply no reason to believe that he could not be again convicted by the state, at least of the lesser included offense of simple possession and it is plain that the search and seizure issue relates altogether with whether they can convict him of possessing a controlled substance at all.

The instruction issue merely goes to whether there is sufficient evidence in state court under proper instructions for the jury to have found him guilty of possession with intent to distribute.

I think this interference with the fact-finding processes is the same kind of concern this Court expressed in Barker versus Wingo, the speedy trial case, as the

reasons for not delaying the trial, the initial trial on the merits and I think the other aspect of prejudice alluded to by this Court in Barker, that of anxiety, is still present in this case.

Petitioner still has no way of knowing what the ultimate outcome of his Fourth Amendment issue is going to be. If this Court says that the courts below are right and that we should go back into state court, thrash out the instruction issue, if we win, have a new trial, maybe have them convicted to a more severe sentence, to more time by the jury and then he can have the Fourth Amendment issue finally resolved by the federal courts.

I think, if we also adopt the Commonwealth's position in that regard, where you have a multiple issue situation and assuming arguendo that this Court decides the instruction issue has not been appropriately exhausted in that the instruction issue really is properly before the state court, I think what you wind up with doing is encouraging petitions for certiorari to this Court because people who are convicted in state court who have, let's say, a federal constitutional claim which they have directly raised and have fully adjudicated in direct appeal, yet they have other constitutional claims which have not been so adjudicated, would be discouraged from seeking intervention of the lower federal courts by the Habeas Corpus petition

but would instead be encouraged to petition this Court for review by certiorari on that very issue that was, in fact, decided by the State Supreme Court and I think that, as this Court recognized in Fay, a cert petition on direct appeal is an unnecessarily burdensome step in vindication of federal constitutional rights where it can be relied upon that the lower federal courts will be in a position to hold hearings, if need be, or in a position to adjudicate these federal constitutional issues.

If the Court has no further questions, I would reserve the remainder of my time for rebuttal.

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

Mr. Shepherd.

ORAL ARGUMENT OF ROBERT E. SHEPHERD, JR., ESQ.

ON BEHALF OF THE RESPONDENT

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

As Mr. Kaufman has pointed out, there are essentially two issues involved in this case. The first relates to the instructional issue which was based on the Virginia statute at that time that indicated that a conviction of possession of drugs could be based solely upon evidence as to the quantity of that drug, conviction of possession with intent to distribute.

An instruction based on that statute was given

in this case in the Circuit Court of Fairfax County.

I might point out that the objection that was made at the time of that instruction was -- and I quote from page 129 of the transcript of trial, "We object to instruction G, your Honor. We realize that this is merely a quotation from the statutory language. However, it is my opinion that this instruction does not in any way guide the jurors and may tend to confuse them."

Now, this is not in the Appendix, this portion from the transcript.

Subsequently -- in other words, the objection at that point was on the basis of the possible vagueness of the instruction or on the basis that the instruction might tend to confuse the jurors rather than really guide them.

When the petition for appeal was filed in the Supreme Court of Virginia, the nature of the issue had somehow been recharacterized and it was then based on the -- on several Federal Constitutional issues including the validity of the statute upon which the instruction was based, on the basis of vagueness and also on the basis of this Court's decision in Leary versus United States in that it was an impermissibly unconstitutional presumption.

So we would submit that, even initially, there might be some threshold question of exhaustion as to, in light of this Court's decision in Picard versus Connor based

on whether the federal constitutional issue was ever precisely presented to the Virginia courts.

In other words, the Virginia Supreme Court takes the position that the only issues that will be dealt with effectively on appeal are issues that were properly and timely raised at the trial.

Q Was this a writ of error denied case in the Supreme Court?

MR. SHEPHERD: Yes, it was.

Consequently, we deal with that initial threshold question as to whether there was exhaustion despite and in complete ignorance of the issue based on the Virginia Supreme Court subsequent decision in Sharp.

However, let's turn to that aspect of it. The Sharp case, as Mr. Kaufman pointed out, the Virginia decision -- the decision of the Virginia Supreme Court in Sharp was based on state law relative to vagueness in a statute and it was also based on the Leary decision of this court.

Q "State law," that is, state constitution?

MR. SHEPHERD: State constitutional law as to vagueness. The court does not specifically delineate where it is basing its decision on federal constitutional law and where on state constitutional law but it is clearly dealing with the issue in a mixed basis, Mr. Justice

Brennan.

Q On both grounds.

MR. SHEPHERD: Yes, sir, your Honor.

The Petitioner -- and there is no question about the fact that the issue on search and seizure was properly raised and properly characterized, both at the state level in the lower courts and in the Supreme Court of Virginia.

A writ of error was denied as to both issues, which, in the Virginia Supreme Court is considered to be a ruling on the merits, the order denying a writ of error states that it is denied for the reason that the judgment of the court below is plainly right.

The Petitioner then filed his petition for write of Habeas Corpus in the Federal District Court for the Eastern District of Virginia in Alexandria, raising principally these two issues.

As Mr. Kaufman has pointed out, the Sharp decision intervened before the district court dealt with this case and the district court took the position that the intervening decision in Sharp necessitated that the Petitioner exhaust his available state court remedies with regard to the instructional issue in that this intervening decision did present a new state of law and the Virginia court quite possibly and, perhaps, probably, would feel compelled to grant Petitioner a new trial, based on the intervening

decision in Sharp versus Commonwealth.

The district court, though, did proceed to deal with the search and seizure issue, on the merits and ruled that the issue did not have any validity, that the search and seizure in this case was indeed proper and that the evidence was properly admissible.

The district court took the somewhat unusual procedural stance that -- as to the unexhausted instructional issue -- the burden was on the Respondent, represented by the Attorney General's office, to present the issue to the state courts in some manner for a readjudication of the Sharp issue.

The Respondent, of course, objected to this procedure on the basis that the rationale of 28 U.S. Code section 2254 with regard to its requirement of exhaustion of available state court remedies places that burden of exhausting the state court remedies on the Petitioner but, nevertheless, and in the absence of any real guidance as to what procedure the state could take to initiate a Habeas Corpus proceedings, the Attorney General's office did attempt to initiate proceedings in the Circuit Court of Fairfax County.

The Circuit Court was likewise at some loss as to what sort of procedure could be initiated, either by the court or by the Commonwealth and the decision was made to

send Habeas Corpus forms to the Petitioner and advise how they should be prepared and the Petitioner ignored this communication and the court subsequently, in spite of this, appointed counsel for the Petitioner and brought the matter forward for a hearing.

At that point, Mr. Kaufman, who had been involved in this case for some time and still has, appeared at the hearing along with court-appointed counsel and the court attempted in some detail, to urge the Petitioner to present the case forward for a hearing to determine whether a new trial was required and the Petitioner took the position that he did not want to present the issue to the court.

Now, whatever happens to this case in the future, I think a substantial issue may have been raised at this point as to deliberate by-pass of state procedures insofar as that instructional issue is concerned.

The Petitioner was certainly given an opportunity. The court addressed itself both to counsel for the Petitioner and to Petitioner directly and they were advised, I think, in terms that would meet the Johnson versus Zerbst standard as to an intelligent, knowing and voluntary waiver, they made the decision not to proceed further on the instructional issue.

Meanwhile, the case was wending its way to the United States Court of Appeals for the Fourth Circuit --

Q Are you going to make this the law of the case? What are you going to do when you drag a man in the courtroom?

MR. SHEPHERD: You mean, as to the instructional issue as to whether we would make it the law of the case that there has been a deliberate by-pass?

Q Well, you tried to do it. How could you?

MR. SHEPHERD: Well, I think the issue would have --

Q Mr. Kaufman and the Petitioner didn't come in there voluntarily, did they?

MR. SHEPHERD: Well, they didn't come in there voluntarily in the sense that they did not initiate the proceedings. However --

Q They objected to the proceedings.

MR. SHEPHERD: They objected to the proceedings.

Q Why can they be bound by it?

Did they ever submit to the jurisdiction of the court?

MR. SHEPHERD: I'm not sure that they technically submitted to the jurisdiction of the court.

Q Did they file anything?

MR. SHEPHERD: They filed nothing.

Q How do you get jurisdiction over it?

MR. SHEPHERD: Well, of course, we had that

question in the first instance as to why --

Q All I am saying is --

MR. SHEPHERD: -- why the burden was placed on us.

Q All I am saying is, is I am as much troubled as you are. That is all I am suggesting.

MR. SHEPHERD: Right. And, of course, we felt that that procedure was not the appropriate one but nevertheless we proceeded on the basis of what we had been directed to do by the federal district court judge.

It may present -- if this case works its way back down, it may present an interesting issue at that point as to whether it would be considered a deliberate bypass.

But when the case came to the United States Court of Appeals for the Fourth Circuit, they, of course, agreed with the district court's disposition of the instructional issue, feeling that the Petitioner had not properly exhausted his available state court remedies in light of the intervening decision of the Supreme Court of Virginia.

But the court, somewhat of its own motion, took the position that the district court should not also have ruled on the search and seizure issue in that the case was going back to the state court and the disposition of the instructional issue could, in fact, be dispositive of the entire case.

Q You -- you are suggesting, or you say there is an

argument that could be made that there is a deliberate bypass of the instructional issue?

MR. SHEPHERD: That is correct, in the sense that the Defendant has gone forward and would be precluded by deliberate bypass from any remedy in the state court.

Q I think that is a -- in which event the court of appeals clearly would have been wrong not to reach the Fourth Amendment issue.

MR. SHEPHERD: Mr. Justice White, I am not completely sure that is a --

Q Let's assume there were -- let's assume there was a deliberate bypass. That means there would be no remedy available in the state court.

MR. SHEPHERD: That is correct.

Q In which event, the Fourth Amendment issue is squarely on the table.

MR. SHEPHERD: Probably so and of course --

Q "Probably"? It would be, wouldn't it?

MR. SHEPHERD: That is correct. But I don't think that question --

Q Did you make deliberate bypass on the --

MR. SHEPHERD: Well, I don't think that question was --

Q -- argument?

MR. SHEPHERD: -- ever squarely before the United

States Court of Appeals for the Fourth Circuit.

Q Are you putting it before us?

MR. SHEPHERD: No, not really, at this point because --

Q I'd think you would.

MR. SHEPHERD: -- because I think this Court has to probably deal with the issues as they were before the Fourth Circuit and I think the question of deliberate bypass may have to be dealt with in the district court --

Q In the state court.

MR. SHEPHERD: In the state courts ultimately. Initially and perhaps ultimately in federal court again.

Q Well, if the Defendant is going to face that kind of an argument from you and the state courts, which apparently he is, at least it is another argument for having a ruling in the federal court on the search and seizure issue.

MR. SHEPHERD: Well, of course, then we get into the question of procedural sequence and, you know, it appears to me that the federal courts would have to deal with the question of exhaustion, including the deliberate bypass argument, before they could deal properly with the search and seizure question.

Q Well, nobody would ever have to deal with it unless you raised it, I suppose.

MR. SHEPHERD: Well, that is correct and I certainly would not want to waive that position at this point.

Q But nevertheless argue he must go back and face it.

MR. SHEPHERD: I think that is right. I think he has got to go back and face the question.

Q But then you can come back to the federal court on the search and seizure issue.

MR. SHEPHERD: It was certainly a procedural decision that he had to make at the time of that hearing in the Circuit Court in Fairfax County. He very easily, and I think the tone of that hearing indicated, that the judge of the Circuit Court, the state court, would have been inclined to -- the question was put to him in the sense of, if a new trial were ordered, would you cooperate? And he said no. And that they felt that it would be double jeopardy.

Of course, going back to the Fourth Circuit's decision on the search and seizure issue, we would take the position at this point that if the Court wants to deal with the procedural aspects of the search and seizure issue, then we feel that that that issue should be addressed in the context of Mr. Justice Powell's concurring opinion in Schneckloth versus Bustamonte as to whether the search

and seizure issue itself should, in fact, appropriately be dealth with on Federal Habeas Corpus without a determination of the narrow context as to whether Mr. Francisco had been afforded a fair opportunity to raise the federal constitutional issues and have that question adjudicated in the state courts.

Q What about Roberts against LaVallee?

MR. SHEPHERD: Mr. Justice Marshall, we feel that Roberts against LaVallee is perhaps a decision of somewhat narrower boundaries than this decision. The issue involved in Roberts was whether the Petitioner in that case, as an indigent, was entitled to a free transcript of the preliminary hearing, just as a pecunious defendant would have been.

This Court dealt with that case on a per curiam basis. We submit that the Roberts issue was, in fact, a narrow procedural point; the right to a transcript of the preliminary hearing really was not a substantive issue in the sense that instructional issue is a substantive issue.

We submit that we are dealing here with a question that may, in fact, be dispositive of the entire substance of the case and it is not merely a procedural point as to whether the person was entitled to a transcript or something of --

Q Well, in this case, if he was entitled to another

instruction, he would be retried.

MR. SHEPHERD: That is correct.

Q And the same evidence would be used.

MR. SHEPHERD: That -- I -- assume, unless the state court --

Q Well, that is kind of fundamental, isn't it?

MR. SHEPHERD: Unless the state court --

Q In a heroin case, I mean, once you lose your motion to suppress, you have about had it.

MR. SHEPHERD: That is correct and I think Mr. Kaufman is correct in that the state court would not readjudicate the search and seizure issue after the Supreme Court of Virginia denied a writ of error.

Q Well, that's a lot like Roberts?

MR. SHEPHERD: Well, the results may be the same. The court really did not address all of the issues in Roberts. I don't believe the case was -- I am not sure whether the case was briefed and argued. It was a per curiam decision. Petition for writ of certiorari appeared to have been --

[The Justices look for a case.]

Q We'll get it.

MR. SHEPHERD: It was a per curiam opinion that dealt fairly narrowly with the issue as to the availability of the transcript and the right to access to the transcript.

The Court did not deal too broadly with the procedural Habeas Corpus issue and --

Q They did say though, they had an opportunity and did raise the question before the state courts on direct appeal. You didn't have to go back in a state collateral procedure to raise the same thing all over again, see?

MR. SHEPHERD: I think the problem we have here, of course, is that the resolution of that question was somewhat dispositive in that case procedurally.

Here we have got an initial issue, for example, as to whether the instruction could have been harmless error. In other words, there would be an opportunity for a factual hearing in this case as to whether even the granting of the instruction was error such as to require a new trial.

In other words, this was one of the basic reasons for the state court having an opportunity to readjudicate the issues in light of Sharp.

For example, in this case, there was affirmative evidence at the trial, not only of an intent to distribute, but of an actual distribution of the heroin in this case.

As a consequence, the court could conclude, after an evidentiary hearing, that the giving of the Sharp instruction, for want of better terminology -- it's a shorthand -- the giving of the Sharp instruction was, in fact, harmless error because there was substantial evidence

in the record of actual distribution.

Q Mr. Shepherd, you were right without argument. We granted the certiorari and they gave the judgment.

MR. SHEPHERD: That was my impression, Mr. Justice Marshall. Of course, I feel that the Court has, in the last couple of years --

Q You didn't try to get too much out of that, though, did you?

MR. SHEPHERD: Sir?

Q You don't try to get too much out of that, do you?

MR. SHEPHERD: I don't try and get an awful lot out of it.

Q There was an opinion and a dissident opinion.

MR. SHEPHERD: Although I think the Court -- I think the Court has been inclined in the last few years to deal with some of the procedural aspects of Federal Habeas Corpus in a good deal more detail than it had during the period in which the Roberts case was decided.

Q That is your opinion.

MR. SHEPHERD: That is my opinion, yes.

Q Which you are entitled to.

MR. SHEPHERD: That is true.

Q Your Honors, we submit that the decision of the United States Court of Appeals for the Fourth Circuit in

this case is plainly correct, that the court was proper in saying that the issue of search and seizure should not be decided by the state courts in light of the disposition that was being made of the Sharp instructional issue.

If the Court --

Q Suppose the Virginia -- suppose the state courts had not changed their minds? Suppose there had not been any change in the state law? And the issue had been presented to the state courts, turned down, no question of exhaustion and the two issues are presented to the federal district court and to the federal court of appeals.

Which issue would you think the court of appeals should reach? You don't think they should reach both, but which ones should they reach first?

MR. SHEPHERD: Assuming that there had been exhaustion, we would take the position that they should not reach the search and seizure issue at all.

Q Well, I know, but that is because you think that that is not available. Now, let's assume the law stays the way it is, namely that you do reach the --

MR. SHEPHERD: That Kaufman is still viable.

Q Yes. Yes.

MR. SHEPHERD: Well, certainly, the search and seizure issue is going to have a greater impact on the trial than the instructional issue, isn't it?

MR. SHEPHERD: I think that is probably correct, Mr. Justice White.

Q Yes.

MR. SHEPHERD: Obviously, if the evidence as to the search and seizure is excluded, I think that is --

Q A different ballgame.

MR. SHEPHERD: -- in a sense, dispositive of the case. But in light of the action that the district court had taken on the instructional issue and in light of the Fourth Circuit's view that that was a correct disposition for the Court to then deal with the search and seizure issue --

Q I know, but what is --

MR. SHEPHERD: -- would be to, in effect, dealing with a pretrial Federal Habeas Corpus giving an advisory opinion prior to what very well might be a new state trial.

Q Why shouldn't the Fourth Circuit have deal with the search and seizure issue first? Then, if it sustained it, the trial -- the case was over. And if it turned it down, then they'd send back the case to the Virginia courts on the instruction issue.

MR. SHEPHERD: I think that would have been a much easier road to travel but as to whether it would have been an appropriate or a proper road --

Q Yes.

MR. SHEPHERD: -- I think is an entirely different question.

Q Or whether it is error, if it didn't cover it.

MR. SHEPHERD: Or whether it is error if it didn't.

Q Is it apparent from either the district court opinion or the court of appeals' opinion that the state simply would not have tried the man again had the search and seizure point been resolved against him?

MR. SHEPHERD: I don't think either of the courts expressed any view on that, Mr. Justice Rehnquist, and it is really hard for me to even say at this point what other available evidence there might be, because it is the local Commonwealth Attorney that actually tries the cases and we merely handle the Appellate and collateral proceedings.

Q Do you know of the number of dope cases in Virginia where there was a conviction without any dope being used?

I've never heard of one.

MR. SHEPHERD: I think it would -- I think it would be very, very difficult. But, conceivably, in this case, they might have proceeded purely on the testimony of the informer. As to whether he was able to express the fact that it was really heroin.

Q But more to the point, as I understand what your point is, the the Fourth Circuit could have passed on both points but they didn't have to pass on both. Is that really

your point?

MR. SHEPHERD: I think that --

Q You admit that they could have passed on both?

MR. SHEPHERD: I think they probably could have passed on both.

Q But they didn't?

MR. SHEPHERD: And, in fact, in the past, as counsel for the Petitioner has pointed out, they have done so, in Hewitt versus North CArolina, they dealt with an unexhausted issue, and exhausted issues and they dealt with the merits of both issues. But I don't think that their refusal to do so amounts to such an abuse of their discretion as to constitute reversible error in this Court.

I think that it is a matter that should be left with the courts in the exercise of their discretion.

Q Mr. Shepherd, you have sought to bring up a couple of times the larger question, or the larger position, the larger claim, that a search and seizure claim is simply unavailable on Federal Habeas Corpus. That is the position taken by Mr. Justice Powell in his concurring opinion in Schneckloth against Bustamonte.

You haven't developed that. My question is, is that -- is that issue really here? Have you ever brought it up until now? In this case, I mean.

MR. SHEPHERD: I am not sure that it has ever directly been brought up. And, as to whether it is properly before the Court at this point -- and as a matter of fact, as to whether the substance of the issue is even before the Court, we are dealing more with the procedural niceties surrounding the substantive issues without dealing with the substantive issues directly.

Q Well, of course, if you are -- if the claim is here, if you should prevail on that claim, then, clearly, the Court of Appeals was right in saying -- in not reaching the claim because, if you are correct, they couldn't reach the claim. They wouldn't have the power, if you will.

MR. SHEPHERD: That would be correct.

Q But you haven't made that. You haven't taken that position in this litigation until now, have you?

MR. SHEPHERD: No, Schneckloth is --

Q And you don't, really, in your brief here.

MR. SHEPHERD: Schneckloth is cited, but it is not cited for that purpose.

Q For that broad proposition.

MR. SHEPHERD: Right.

Q And you haven't briefed it, have you?

MR. SHEPHERD: No. That is correct. It has not been briefed because we did not feel that the substantive issue itself was before the Court. It was more the question

of the derivative exhaustion --

Q Right.

MR. SHEPHERD: -- argument, as phrased by counsel for Petitioner.

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

Mr. Kaufman, do you have anything further?

MR. KAUFMAN: Yes, I do, Mr. Chief Justice.

REBUTTAL ARGUMENT OF DANIEL C. KAUFMAN, ESQ.

ON BEHALF OF THE PETITIONER

MR. KAUFMAN: First, on the objection in state court, I would freely concede that inexperienced trial counsel, namely me, in the heat of a hotly-contested trial, just overlooked that grounds for objecting to that instruction, for I point out to the Court that the constitutionality of that instruction is plainly and unmistakeably raised in the petition for writ of error, as demonstrated on pages 31 and 32 of the Appendix.

The Commonwealth, in responding to that petition, the extract there is at page 34 of the Appendix, addressed the merits of it. There was no question at that time of any proceudral default in raising the constitutionality of that instruction. At neither the district court nor the court of appeals level has the Commonwealth asserted procedural default in raising that issue.

Q Do you agree with Mr. Shepherd, Mr. Kaufman, that the practice of the Supreme Court of Virginia is not to pass on an issue such as that if it wasn't raised any differently than you raised it in the circuit court?

MR. KAUFMAN: Mr. Justice Rehnquist, I'm not that familiar with the practice of the Virginia Supreme Court to be aware of the rationale for their decision, but, as Mr. Shepherd pointed out, it was a decision, it had the effect of a decision on the merits.

Q But certainly not on the merits of a claim that prior decisions the court would hold couldn't properly be raised in the absence of a suitable objection.

MR. KAUFMAN: I would tend to agree that that would certainly be an open question, had the Commonwealth, in opposing the petition, called the Court's attention to some defect in the objection, but they did not. They went right to the merits of the instruction itself. There was no question raised at that point as to any procedural default and I would, in that regard, direct the Court's attention to a recently reported decision of an en banc panel of the United States Court of Appeals for the Ninth Circuit in Harris versus Superior Court, which appears at 500 F. 2nd 11/24 where the court there said, a state court decision which could have been procedurally founded will not be presumed to be procedurally founded in a Habeas

Corpus case unless the state court, in its decision, expressly states that it is declining to reach the issue of the claim on a per procedural matter.

Also, on Mr. Shepherd -- would have us send this back to the state courts because there is something different about the way the state court and the state Habeas Corpus proceeding would handle it than the federal court would and he mentioned this concept of harmless error and I would suggest to the Court that harmless error is always present in any Habeas Corpus petition, whether it be state or federal in its present and direct appeals.

I don't see any difference between the kinds of questions and the ability of a court to consider the kinds of questions, whether it is a state court or a federal court.

And if there are no further questions from the Bench, I would submit.

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

Thank you, Mr. Shepherd.

The case is submitted.

[Whereupon, at 10:52 o'clock a.m., the case was submitted.]