ORIGINAL

In the

Supreme Court of the United States

ABRAHAM FRANCIS, Petitioner,	)	
v.	)	No. 74-5808
C. MURRAY HENDERSON, Warden, Louisiana State Penitentiary, Respondent.	)	

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Washington, D.C.
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Petitioner,

v.

C. MURRAY HENDERSON, Warden, Louisiana State Penitentiary,

Respondent.

No. 74-5808

Washington, D. C.

Tuesday, December 9, 1975

The above-entitled matter came on for argument at 2:36 p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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:

BRUCE S. ROGOW, ESQ., Nova University Center for the Study of Law, 3301 College Avenue, Fort Lauderdale, Florida 33314, for the Petitioner.

BARBARA B. RUTLEDGE, ESQ., Assistant Attorney General of Louisiana, Criminal Courts Building, 2700 Tulane Avenue, New Orleans, Louisiana 70119, for the Respondent.

I N D E X

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Abraham Francis against C. Murray Henderson, No. 74-5808.

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

ORAL ARGUMENT OF BRUCE S. ROGOW ON BEHALF OF PETITIONER

MR. ROGOW: Mr. Chief Justice, and may it please the Court: The issue in this case is whether Davis v. United States or Fay v. Noia sets the applicable standard for determining access to Federal habeas corpus relief for a State defendant whose lawyer failed to make a timely challenge to the grand jury which indicted him.

Our position is that Davis does not apply to this case. But if this Court holds that Davis does apply, then Francis has met the test of Davis which is cause shown. He has met that test because of the ineffective assistance of counsel which he received.

Obviously the facts of this case are important. They are largely undisputed.

Francis was indicted on December 10, 1964. He was 17 years old. He was indicted on the charge of felony murder. The maximum penalty in Louisiana for felony murder was death. A lawyer was appointed to represent Francis two months later. That lawyer was Mr. A. P. Tureaud, of New Orleans. Tureaud was appointed, and if he were going to file a grand jury

challenge on the basis of exclusion of blacks, he would have had to have filed that challenge by March 4, 1965, which was three days after the end of the term of the grand jury which indicted Francis.

Tureaud did not file that motion. Indeed, Tureaud filed no motion in this case until the day before trial. Tureaud recognizing his own inexperience associated with himself another lawyer from New Orleans, Mr. Earl Amadee.

QUESTION: Do you know how long Tureaud practiced law? You said he was inexperienced.

MR. ROGOW: I say he was inexperienced in this kind of case, Mr. --

QUESTION: Criminal cases?

MR. ROGOW: Mr. Justice Marshall, he had not handled, and the record in this case is clear, he had not handled a capital case in 15 years. He had not handed a criminal case in many years.

QUESTION: Another Tureaud.

QUESTION: He didn't testify. He was ill at the trial. He didn't testify, did he?

MR. ROGOW: Yes, sir, Mr. Justice Rehnquist. All the testimony in this case in the record is built upon the testimony of Mr. Amadee, the counsel that Tureaud associated. He associated Mr. Amadee, according to Mr. Amadee, because of his inexperience in handling criminal cases, because of the

fact that he had not handled a capital case in 15 years.

QUESTION: Do you regard a lawyer as ineffective or incompetent in trying a capital case because he had never tried a capital case before?

MR. ROGOW: Not per se.

QUESTION: Well.

MR. ROGOW: But I think in the context of this case, we are not only talking about the fact that it had been 15 years since he had handled a capital case. We are talking about a whole series of events which we think support the proposition that he did not do the job that he should have done in protecting Francis' rights.

QUESTION: Well, a per se rule would mean that the first capital case any lawyer tried would automatically be open to your challenge.

MR. ROGOW: And that's why we do not advocate a per se rule, Mr. Chief Justice. We do not say that because this is the first case in 15 years --

QUESTION: Is it really very important one way or the other whether defense counsel has ever tried a capital case?

MR. ROGOW: We think it is important. Obviously the stakes in a capital case are very high, and quite frankly, the acceptance of an appointment in a capital case if this were your first capital case is one which I think a

lawyer ought to take with great consideration and give some thought to, if he were going to do it by himself.

Tureaud obviously felt he could not do it by himself, and he associated counsel with himself. That counsel was Mr. Amadee who was associated as a trial expert because of Tureaud's feeling, I believe, himself that he was inexperienced.

QUESTION: Would you automatically equate it with self-evaluation of ineffectiveness when a lawyer seeks to have another man associate with him?

MR. ROGOW: No, I would not. I think, though, in the facts of this case, and if I may develop those facts, I think the Court will begin to see why each of these different facts which we put forth are part of the total picture representing the ineffectiveness of assistance.

QUESTION: All we are doing, these questions are going to the matter of the standards that you set up. They are your standards.

MR. ROGOW: Yes, sir, and the standards are based on the totality of the circumstances in this case, not merely on the fact that it had been 15 years since he last handled a capital case. But that is one factor.

Another factor is that no motion was filed until the day before trial, and that first motion that was filed in this case, on the day before trial, June 23, was a motion for a continuance on a form borrowed from the District

Attorney's office, which was struck through by Mr. Tureaud to accommodate it for Francis' use. That motion for a continuance, filed, as I said, just the day before trial, the very first motion filed in this capital case, sought a continuance so that Tureaud could have time to file additional motions in Francis' defense.

The motion for a continuance was denied. On that same day, three other motions were filed. One was a Prayer for Oyer, which is a form of discovery under Louisiana law, another a motion for a bill of particulars. A third was a motion challenging the grand jury indictment only on vagueness grounds, and of course, did not involve the exclusion of black question.

Now, our position is that the fact that those motions were filed the day before trial is just one more factor to be considered. The form of those motions, on a form borrowed from the District Attorney, at least the motion for continuance was borrowed from the District Attorney, is one more factor to be considered.

On the day of trial, a fourth motion was filed. That motion was one to suppress the statements which Francis had allegedly given. The motion to suppress was filed, it was denied without a hearing, and the record of this case reflects that no exception was taken to that denial without a hearing, although an exception was required under Louisiana

law. So one more example of the factors which we say , taken in their totality, begin to bespeak of ineffective assistance of counsel.

Francis was tried on June 24, 1965. He was convicted on that day. And five days later he was sentenced. He was sentenced to life imprisonment. There was no appeal taken from that conviction. The record is clear that Francis knew of his right to an appeal, wanted an appeal, and yet no appeal was taken. And one of the reasons that Mr. Amadee gave for not taking the appeal was that he and Mr. Tureaud did not want to make this case a life work. They felt that the jury by sparing the life of Francis had done enough, and therefore no appeal was taken.

Now, what we are saying is all of those facts together begin to -- more than begin. All of those facts together show that Francis' counsel was ineffective and did not offer him the kind of protection which ought to have been offered, so any presumption of effectiveness was overcome by these facts.

Francis later applied to the Louisiana trial court for habeas corpus, claiming that he was denied his right to appeal and also claiming that blacks had been excluded from the grand jury which indicted him.

The application was denied. It was denied essentially because Francis had not made a timely challenge. Under

applicable Louisiana statute, if one did not make a timely challenge to the grand jury, then the right to challenge a grand jury was absolutely barred. And because of that absolute forfeiture rule, Francis had no opportunity to raise this issue in State habeas corpus proceedings and to fully develop whether or not there was any cause and whether or not he waived the right to challenge the grand jury.

He then filed a petition for writ of habeas corpus after the Louisiana Supreme Court had denied certiorari in the case.

The district court for the eastern district of Louisiana granted Francis' petition for writ of habeas corpus finding that Francis did not knowingly and intelligently waive his right to be indicted by a fairly constituted grand jury, finding in the alternative that if the test were that of Davis cause shown, then Francis had met that test by virtue of the inexperience of his counsel in this proceeding.

The court also found that the grand jury which indicted Francis did indeed exclude blacks and it vacated the indictment, set aside the conviction, ordered the State to reindict and retry Francis if it so desired. The State appealed to the Fifth Circuit, and the Fifth Circuit held that the Davis test is the applicable test, not the Fay v. Noia test. But it held that the Davis test in this case because of the absolute forfeiture rule in Louisiana would

require Francis to show prejudice, not cause, which is what Davis speaks of, but prejudice.

Now, the Fifth Circuit has taken two positions. When there have been State rules which parallel rule 12(b)(2), the Fifth Circuit has said that a State defendant must show cause. But in Louisiana, because the rule is one of absolute forfeiture, the Fifth Circuit said that Francis must show more than cause, he must show actual prejudice.

Our position is, first, that Davis does not apply. Davis does not apply because it turns upon the fact that Congress by adopting rule 12(b)(2), the Federal Rules of Criminal Procedure, set a new standard for determining waiver, and that standard is one of cause. So Congress' action vis-a-vis 2255 is what Davis turns upon. There is no analogous provision regarding 2254. Congress has not in any way limited access under 2254, except by the exhaustion of State remedies, a requirement which is written into the statute. So we say Davis does not apply.

But if the Court were to find that Davis does apply, then we believe Francis has met the test of Davis. That test is one of cause, because the rule speaks of cause, Davis speaks of cause, and one of the touchstones of cause is ineffective assistance of counsel, and Francis' counsel was ineffective, especially as protecting this very basic constitutional right which he was entitled to.

The State has argued that the Davis test should apply because the interests of the State and the Federal Government are the same.

If the interests of the State and the Federal Government are the same, then the test --

QUESTION: Is your claim any different from the claim that you have not had adequate assistance of counsel?

MR. ROGOW: It is different, your Honor, but we do have a situation --

QUESTION: Well, if you had adequate assistance, there wouldn't be cause.

MR. ROGOW: I think that's what Davis says, yes, sir.

QUESTION: Well, I guess what you just said --

MR. ROGOW: Yes.

QUESTION:--is that you explain your cause by inadequate assistance of counsel.

MR. ROGOW: Because that is one of the factors used to determine cause.

QUESTION: What else is there here?

MR. ROGOW: I'm sorry. When you say what else --

QUESTION: What else is there here in terms of cause?

MR. ROGOW: That is the only cause in this case.

QUESTION: So that your issue here really is whether

he had adequate assistance of counsel. It might as well be put that way.

MR. ROGOW: I think that that probably is a fair assessment, that that fact certainly is essential to our analysis of the case if Davis is the test.

QUESTION: You base your position on the ineffective assistance of counsel, whereas you have already stated two counsel in this case. You claim both were ineffective?

MR. ROGOW: We claim that only Tureaud was responsible for anything that happened prior to trial because by Amadee's testimony he said that he had nothing to do with what Tureaud may have done before he came into the case and before he told Tureaud to file the Prayer for Oyer and motion for a Bill of Particulars.

QUESTION: Amadee did testify that he felt, although he wasn't positive, that he had discussed whether or not a motion should be made to suppress the grand jury indictment for the grounds you now rely on. And Amadee had tried over a hundred murder cases. How could he be incompetent?

MR. ROGOW: The mere fact that he may have tried over 100 murder cases, we don't think necessarily --

QUESTION: I thought you argued that one had to try at least one --

MR. ROGOW: No, I think -- if the Court got that impression, I apologize for it. I use that only --

QUESTION: No matter whether you try one or a hundred, you still may be incompetent.

MR. ROGOW: Yes.

QUESTION: I suppose is correct.

MR. ROGOW: Certainly.

QUESTION: So you are saying these particular lawyers were incompetent.

MR. ROGOW: We are saying that Tureaud was certainly incompetent based upon the record that we have in front of us. Whether or not Amadee did a competent job in helping Francis at trial, actually we don't know, because there is no record of this trial proceeding; since no appeal was taken no record was transcribed.

While I don't call into question Amadee's credentials at this point, because I don't think we have to, because Tureaud had the responsibility for the period of time that we are concerned about, I think that the other factors that I mentioned, the fact that no exception was taken to the denial of the motion to suppress, the fact that no appeal was taken and Amadee said they didn't want to make this their life work, that also makes one question the effectiveness of Amadee for Francis in this case.

QUESTION: Well, is it not a common experience for lawyers when they finish a case to feel the result is a bad result, an unjust result, but they wouldn't take a new trial

under any circumstances for fear of having a worse result? Is that not so?

MR. ROGOW: Certainly --

QUESTION: Civil cases, criminal cases, all kinds of cases.

MR. ROGOW: I have no doubt that in some cases that certainly is a consideration, although in some ways it was stated as one of the considerations in this case by Amadee saying that he felt that if Francis came back for a new trial, he might get a consecutive 30-year sentence upon a pending robbery charge, although the record in this case reflects that that kind of consecutive sentence had never been given in Orleans Parish, and perhaps could not even be given under the applicable Louisiana law.

QUESTION: Could something worse than the sentence he got have been imposed?

MR. ROGOW: The death penalty?

QUESTION: Yes.

MR. ROGOW: Certainly. Perhaps it could have been imposed, although questions are raised about that on a successive trial whether or not the death penalty would have been appropriate to be imposed. That question was not resolved at that time, of course.

QUESTION: Even if it's technically inappropriate, it isn't a very pleasant sentence to have come to you, is it?

MR. ROGOW: No, sir. I agree. But I think it's important once again that I stress that it is not any single one of these factors that supports our argument that Tureaud and Amadee were ineffective. It's all of these arguments taken together, all of these facts taken together.

QUESTION: Some of your arguments would be addressed against a man alleged to have been one of the great criminal lawyers of all time when he represented Loeb and Leopold some 40 or 50 years ago and saved their lives, as he thought, by getting them life sentences.

MR. ROGOW: And I am sure that counsel in that case, though, did not wait until the day before trial to file motions and borrow forms from the District Attorney or co-defendants in the case in filing the motions.

I understand your position, Mr. Chief Justice, and I think that perhaps the fact that no appeal was taken looked at by itself could be explained in some way. This record does not explain it, though. That is not one of the reasons given in this record. And as I say, if one looks at the total record, one has to wonder about the effectiveness of assistance received by Francis in this case.

QUESTION: I must say, Mr. Rogow, I share Justice Marshall's question as to your comments -- no doubt based on .. -- about Mr. Tureaud. I can remember when I was a law clerk here seeing his name on briefs in this Court 20-odd

years ago.

MR. ROGOW: Mr. Justice Rehnquist, we know that Mr. Tureaud practiced for a long time in New Orleans, we know that he practiced in civil rights cases in New Orleans. But I don't think that that fact in and of itself overcomes the facts that we have developed in this record. If the Court is saying that it can take judicial notice of the fact that Mr. Tureaud was an exceptional lawyer, I don't think that it can.

QUESTION: No, that's not a fair thing. But what do you have when you come down to it? By hypothesis in any case like this, you are always going to have the case where the lawyer failed to make a timely challenge to the grand jury. Otherwise you wouldn't be here. And if that's ineffective assistance of counsel, then the cause requirement means nothing. You've got to show something more than the fact that he didn't do what he is now claiming he is relieved from doing.

MR. ROGOW: I don't want to be trapped into the position that that necessarily is the proper test, because, as I have said, we think that Fay is a proper test which is knowing and intelligent waiver, which would not turn upon a showing of ineffective assistance of counsel.

But if Davis is the proper test, we think that merely not filing the grand jury challenge perhaps is not sufficient to show cause in and of itself, because the Court talks about in Davis and in Shotwell effective assistance of counsel.

In Davis the Court notes that the Fifth Circuit viewed Davis' lawyer as being extremely competent. In Shotwell the defendants were represented by the same lawyers twice before this Court. We think that is certainly one of the important factors.

Now, when one looks at those cases, one would have to examine all of the facts in the case, not just the fact they didn't file a timely grand jury challenge. And we say when all the facts are looked at in this case, any presumption of competence which may attach has been overcome.

QUESTION: You dwelt at some length by mentioning it several times that he borrowed some forms from the prosecutor. Isn't it again a matter of common human experience in the practice of law that court-appointed counsel and frequently not court-appointed counsel will go and consult with the prosecutor about a great many things and getting suggestions from him. All prosecutors are not filled with hostility. In fact, many of them are trying to cooperate with defense counsel.

MR. ROGOW: I can't dispute that, Mr. Chief Justice.

QUESTION: And the fact that he borrowed a form for whatever it was is no more important really than the fact that he borrowed a form of subpoena from the clerk.

MR. ROGOW: No, I think that it is more important. Quite frankly, and maybe this is too subjective, but I think

it is offensive in a capital case where a man's life is at stake, a young man's life in this case, that motions are filed the day before trial, and they are not just borrowed for the sake of borrowing the form, the whole form itself is borrowed, and a lawyer with a pen strikes through the District Attorney's name and writes in his own. That seems to me to show that not much preparation has gone into this kind of motion, that one is doing it perhaps on the spur of the moment or last minute. It certainly was last minute in this case. It is the day before trial. Tureaud was appointed on February 9, this first motion is on June 23, 1964.

QUESTION: The motion for continuance you are talking about?

MR. ROGOW: Yes, sir.

QUESTION: Perhaps until that time he hadn't decided that he wanted a continuance.

MR. ROGOW: Perhaps that is true, but he had known prior to that time that he might have wanted the statements that Francis allegedly made,and the Prayer for Oyer and motion for Bill of Particulars is directed to that. He certainly should have known about that prior to the day before trial. That motion could have been made then.

As I say, I think that it is wrong to --

QUESTION: We don't have any explanation from Tureaud at all. .. was in the hospital with terminal

cancer.

MR. ROGOW: Yes, sir. And Tureaud has since died, of course. But the only explanation we have is that of Amadee in the case. And so Amadee's testimony has to be the testimony looked at in determining why the motion was not filed and what, if anything, Tureaud did.

Of course, our position is that Fay v. Noia provides the applicable standard. If we are right about Fay v. Noia, then the question of cause does not come into play at all. And in this situation it's quite clear that there was no knowing and intelligent waiver made by Mr. Francis. There is no deliberate bypass made. The record does not reflect deliberate bypass, strategic decision made by Francis, nor even by Mr. Tureaud. And if Fay v. Noia is the proper standard, then Abraham Francis has met that test, too.

And we think it is especially appropriate to use the Fay v. Noia test in this case, because the right that's involved here is a very important right, one recognized by the Court from Strauder v. West Virginia through Alexander v. Louisiana in 1972, one that is embodied in a Federal criminal statute, 18 U.S.C. Sec. 243, which makes it a Federal offense to exclude blacks from grand jury and petit jury processes. So we think that it is very important that a defendant have an opportunity, full and fair opportunity, to raise this basic constitutional right. We think that the Fifth Circuit cut it

short by imposing an actual prejudice test, a test that places a State defendant in a much more difficult position than the Federal defendant in Davis v. United States. That just cannot be. The purposes of the Federal Habeas Corpus Act passed in 1867 show that it was meant to implement the 13th and 14th amendments ratified in 1865 and 1868 respectively,and looking at that together with 18 U.S.C. Sec. 243, passed in 1875, it's quite clear that this right is an important right, and Francis ought to have the opportunity to vindicate it in Federal habeas corpus proceedings. And we believe that he can vindicate it in Federal habeas corpus proceedings under Fay v. Noia. If Davis is applicable in this case, we believe he should have access under the cause shown test in Davis and he has met that test and therefore the Fifth Circuit was wrong in applying any harsher test.

We reserve the balance of our time if indeed there is any left.

MR. CHIEF JUSTICE BURGER: Counsel, I think we will not ask you to argue for 2 minutes today. We will let you begin afresh in the morning at 10 o'clock.

[Whereupon, at 2:58 p.m., the argument in the above-entitled matter was recessed, to recommence at 10 a.m. the following day, Wednesday, December 10, 1975.]