ORIGINAL

In the

Supreme Court of the United States

ABRAHAM FRANCIS,

Petitioner,

v.

C. MURRAY HENDERSON, Warden,
Louisiana State Penitentiary

Respondent.

No. 74-5808

Pages 21 thru 44

Washington, D.C.
December 10, 1975

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C. MURRAY HENDERSON, Warden, Louisiana State Penitentiary,

Respondent.

Washington, D. C.

Wednesday, December 10, 1975

Argument in the above-entitled matter was recommenced at 10:02 a.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.

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will resume arguments in Francis against Henderson.

Mrs. Rutledge.

ORAL ARGUMENT OF MRS. BARBARA B. RUTLEDGE

ON BEHALF OF RESPONDENT

MRS. RUTLEDGE: Mr. Chief Justice, and may it please the Court: The State of Louisiana takes the position that under the ruling of Davis v. United States and the facts of this case, petitioner has waived his right to attack the grand jury.

First petitioner urges that this Court should not apply the ruling of Davis v. United States to a State prisoner. The State respectfully submits that this is the ruling which should be applied, that there is no reason or basis not to apply this to State as well as Federal prisons.

QUESTION: Of course, Davis was not a constitutional decision, was it?

MRS. RUTLEDGE: No, it was under the rule, Federal rule.

QUESTION: But I gather Louisiana suggests that there is a constitutional element to the Davis rule that ought to be applied in this case?

MRS. RUTLEDGE: Yes, that by due process, the State prisoner under Louisiana law waived his right and that he

had a fair and impartial trial.

QUESTION: Now, the rule applied by the Circuit Court here was in the absence of a showing of prejudice, was it not?

MRS. RUTLEDGE: That's right.

QUESTION: That's not, is it, the Davis rule?

MRS. RUTLEDGE: In the Davis case this Court stated that actual prejudice must be shown in order to obtain relief from a statutorily provided waiver for failure to assert it in a timely manner. However, even if this Court would not conclude that actual prejudice need be shown, as the Fifth Circuit did, the State respectfully submits that there likewise was no showing of cause in this case.

As far as applying the rule of Davis v. United States the logic that applies there applies with equal force to a State prisoner. This Court observed in Davis v. United States if time limits for attacking the jury composition are followed, inquiry into alleged effects may be concluded, and if necessary cured, before the court, the witnesses, and the parties have gone to the burden and the expense of a trial. If defendants were allowed to flout its time limitations,on the other hand, there would be little incentive to comply with its terms when a successful attack might simply result in a new indictment prior to trial. Strong tactical considerations would militate in favor of delaying the raising of the claim in hope of acquittal with the thought if those hopes did not materialize,

the claim could be used to upset an otherwise valid conviction at a time when reprosecution might well be difficult. That reasoning applies in Federal or State prosecutions.

If this Court should accept petitioner's position, I don't see any reason why there would ever have to be an attempt to attack a grand jury, because under the facts of this case, all the defense counsel would have to say is he believed it would be wasted effort.

In Henry v. Mississippi this Court showed that it will look to see if a procedural rule serves a legitimate State interest, and it is urged that the rule to attack a grand jury prior to trial serves the interest of time and expense of court and witnesses.

This Court stated in Cochran v. United States plainly the interest in finality is the same with regard to both Federal and State prisoners. And that's what the State is seeking.

Moreover, this Court observed in Cochran Federal prisoners are no less entitled to such consideration than a State prisoner. There is no reason to treat Federal trial errors as less destructive of constitutional guarantees than State trial error, nor to give greater conclusive effects to procedural defaults by Federal defendants than to similar defaults by State. The State simply asks that the converse be applied.

In an address to the Conference of Chief Justices in 1964 Mr. Justice Brennan observed, "If the States afford prisoners full and fair opportunity on direct or collateral review to raise and prosecute their Federal constitutional claims as Federal habeas corpus affords, then the Federal habeas corpus courts will have no need to intervene in the supervision of State criminal justice."

The State is asking that they be afforded the same direct and collateral review as the Federal prisoner, but that no harsher rule be applied.

Accepting the contention that the standards of Davis v. United States should be applied, we observe that the Fifth Circuit said that actual prejudice must be shown. They found that the Louisiana rule did not make any exception for waiver, but they engrafted a provision that there should be a showing of actual prejudice. It submitted that the Fifth Circuit was eminently correct and that it is not unfair if you find that this is a harsher rule than Davis to apply it since this statute in Louisiana was silent.

However, in the alternative, if this Court finds that something less was meant by cause, we urge that this Court find that there has been no showing of cause in this case.

It was observed yesterday that the issue here basically is was there a showing of incompetence by counsel to justify a showing of cause for the waiver of the attack on

the grand jury. I submit that the record supports a finding that there was a most competent and able attorney in this case.

Petitioner urges first of all that Chief Counsel Mr. Tureaud was not a capable attorney in that he had not tried a capital case in 15 years and his basic practice had turned away from the criminal practice.

I submit that this is no showing of an incompetent attorney. There is nothing in this record that I can point to to show Mr. Tureaud's competence as an efficient, hard-working attorney, but on the other hand, I say --

QUESTION: There is something. He failed to file a motion.

MRS. RUTLEDGE: I don't believe that a failure to file a motion in itself without something more can be said to be shown to be cause to establish that this was an incompetent attorney.

QUESTION: But it is something.

MRS. RUTLEDGE: It's something. It may be that it shows that he made a well-reasoned conclusion.

QUESTION: I suppose there might be circumstances where you would agree that any person who didn't file such a motion would be a fool.

MRS. RUTLEDGE: There could be circumstances, that's right, but I don't believe it's reflected in this record at all.

QUESTION: There is just a failure of proof in this respect.

MRS. RUTLEDGE: There is a failure of proof. I think the record shows that at this time there were being attacks made on the grand jury. There were blacks on the grand jury that indicted this petitioner. There were blacks in the petit jury venire.

QUESTION: Was there ever any question raised in these proceedings about the petit jury?

MRS. RUTLEDGE: In the lower courts? No, there has not been.

QUESTION: And none in the habeas proceeding.

MRS. RUTLEDGE: No, the attack is on the grand jury, and there were blacks on the jury venire. This Court is aware that there were attacks on this grand jury proceeding in Louisiana, and it was found to be validly constituted grand juries and writs of certiorari were denied by this --

QUESTION: This trial was in New Orleans, was it?

MRS. RUTLEDGE: Yes.

QUESTION: Was there anything in the record to indicate that objections to the composition of the grand jury in other cases had been made in New Orleans Parish?

MRS. RUTLEDGE: Yes. In the district court the records were submitted of State v. Barksdale, State v. Simpson.

QUESTION: Did they also involve black accused?

MRS. RUTLEDGE: Yes.

QUESTION: I suppose there are certain kinds of motions in criminal cases that an experienced criminal lawyer might feel he would have a good chance of winning, but that it might not materially advance his client's cause other than to delay the prosecution a little bit.

MRS. RUTLEDGE: It could well be. Attorneys have to make that decision throughout the trial.

QUESTION: You are suggesting perhaps this is a matter of trial strategy.

MRS. RUTLEDGE: Yes, I think it was.

QUESTION: That inference as well as --

MRS. RUTLEDGE: I think it was. His words were he felt it would be wasted effort. I think that can be concluded that he did not think perhaps that it would have been a valid motion. A motion to quash was filed in this case.

QUESTION: Well, valid or not, it might not have helped his client's cause any to make such a motion.

MRS. RUTLEDGE: That's right. That can be an intelligent waiver of motions, and it certainly does not reflect incompetence of counsel. And as I stated, a motion to quash was filed although it was on other grounds.

And in this respect, I think the fact that other motions were filed demonstrates that these attorneys were

actively participating and working for the benefit of their client. These were not incompetent counsel.

Petitioner strongly attacks the competence of Mr. Tureaud. He does not quite as strongly attack the competence of Mr. Amadee because he cannot say that Mr. Amadee was not completely familiar with the criminal law.

QUESTION: Not only that, I gather Mr. Amadee came into the case at the time of trial rather than pretrial.

MRS. RUTLEDGE: I think that's what counsel would lead you to believe, but if you read the testimony of the transcript of the hearing, they asked Mr. Amadee approximately how long was it before --

QUESTION: What page are you reading from?

MRS. RUTLEDGE: I am reading from the supplemental appendix in the Court of Appeals, page 54.

QUESTION: Do you have the page --

MRS. RUTLEDGE: No, I don't.

MR. ROGOW: I think it's in the original appendix in this Court.

QUESTION: You don't know the page.

QUESTION: Well, there is some colloquy beginning on page 11 of petitioner's brief, but one can assume that perhaps he --

MR. ROGOW: It's pages 25 through 27, I think Mrs. Rutledge is referring to, in the appendix in this Court.

QUESTION: Right.

MRS. RUTLEDGE: And they asked Mr. Amadee approximately how long was it before the time of trial that you were incorporated with co-counsel, Mr. Tureaud?

"Two or three months, I am not positive. Two or three months, two or three months. I'm saying I am not positive."

QUESTION: Wasn't there some evidence that there was a division of responsibility between Mr. Tureaud and Mr. Amadee?

MRS. RUTLEDGE: Also in the transcript he said he considered Mr. Tureaud was petitioner's chief counsel. However, he also said, "I was Francis' lawyer." There was no denial of that fact.

He was asked, "Were you co-counsel?"

"Yes. All the decisions were joint decisions."

QUESTION: Am I right in thinking there was a six-year delay between the time of the trial in Orleans Parish and the State habeas proceeding from which most of this testimony comes?

MRS. RUTLEDGE: You are correct. And I think the reason that you might say Mr. Tureaud is considered the chief counsel is because the State district judge designated only one counsel should do the cross-examination and the presentation of the defense's case. But I think the testimony of Mr.

Amadee shows that they were joint counsel. He said all decisions were jointly made.

Also yesterday petitioner urged that there was a showing of incompetence because the motion to suppress was denied and there was no bill reserved. If you read the transcript, Mr. Amadee said, There is no transcript of the trial of the case, but to the best of his recollection he did file a bill of exceptions which was his general procedure.

Also, it points out that the State in this case was seeking nothing less than a death sentence. The defendant received life. So his counsel fought actively against the State for the death penalty and were effective in that respect.

QUESTION: When you were making the points a little earlier with reference to the appendix, were you referring to page 26 where Mr. Amadee answered that the motions hadn't been made, the motion to quash, because Mr. Tureaud did not want to do it because there were blacks on the grand jury and the petit jury panel and that he had his own ideas about those things.

MRS. RUTLEDGE: That's correct.

Also, counsel pointed out yesterday as an example of the ineffectiveness of counsel that they took no appeal, and he made the statement that that's because they were court-appointed counsel and they didn't want to be hung with the

case for a lengthy time.

QUESTION: I think we went beyond that, that he had not gotten the death penalty, and they thought he had come off rather well without getting the death penalty.

MRS. RUTLEDGE: That's correct. It was not simply because they did not want to be burdened with this case. When you read the transcript, it shows that they made a decision, they talked to the defendant, they talked to his family, they urged him not to appeal not just because they didn't want to carry the case, because he had an armed robbery charge pending over him which they thought they could compromise if he did not appeal by having it not prosecuted.

They also point out in the transcript, "When we heard the facts throughout the trial and as it appears to us, we would be wasting our time as lawyers." This was not just to be relieved of the burden of representing this man. I do not think there has been a showing in this record of incompetence, and petitioner strongly urges that is his ground for cause.

Finally, if it should be concluded that something more than cause has to be shown, if the ruling of Fay v. Noia must apply in this case, I think it might be said that there was a deliberate bypass in this case.

QUESTION: Not, of course, by the accused, but by his lawyers.

MRS. RUTLEDGE: That's correct. I admit it was not by the accused. But I think --

QUESTION: Does the Fay v. Noia deliberate bypass, is that addressed to the action of the lawyers or of the accused?

MRS. RUTLEDGE: Of the accused, but I think a distinction might be made because I think an accused should be consulted when it's a matter of waiver of appeal. Or perhaps he can understandingly confer with counsel when it's maybe a waiver of a jury trial and entry of guilty plea. But there are certain circumstances where I believe that the waiver of the attorney must constitute the waiver of a client. I cannot conceive of a 16-year-old defendant making an intelligent waiver of a motion to quash.

QUESTION: I suppose you think that Henry v. Mississippi supports you in that respect.

MRS. RUTLEDGE: Well, it doesn't come out as completely as that, but I think it's a logical step from there, that there are certain points where a client could not talk with his attorney and make an intelligent decision whether he should waive a certain motion or not. It would be --

QUESTION: (Inaudible)

MRS. RUTLEDGE: That status, he probably wouldn't need an attorney.

So I would submit, even if you have to go as far as

finding you have to apply a deliberate bypass, even that was done in this case.

So it is the State's position here that under the rule of comity, applying Davis v. United States, to bring a case to finality, unless there is an exceptional showing by petitioner, it must be held that he has waived his right to attack a grand jury, and that there has not been that showing in the case at bar.

MR. CHIEF JUSTICE BURGER: Thank you, Mrs. Rutledge.

Do you have anything further, Mr. Rogow?

REBUTTAL ARGUMENT OF BRUCE S. ROGOW ON BEHALF OF PETITIONER

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

MR. CHIEF JUSTICE BURGER: Very well.

MR. ROGOW: Mr. Chief Justice, and may it please the Court: Of course our position is that the Fay v. Noia standard is the applicable standard, and when Mrs. --

QUESTION: What about her argument that the deliberate bypass in some instances may be attributed to actions of counsel?

MR. ROGOW: That certainly is not what Fay v. Noia stands for.

QUESTION: And what about Henry v. Mississippi? I guess not.

MR. ROGOW: I don't think that Henry v. Mississippi

answers that directly either. But Henry, of course, permits Federal habeas corpus. It leaves open the question of the availability of Federal habeas corpus after this Court's decision.

But I think in addressing this question of whether or not there has been a deliberate bypass, a very interesting point has been raised, and that is if that is the test, and if that is the test that the bypass can be either by counsel or by the defendant, then let us look at what tactical reason existed for Tureaud to bypass this challenge?

The answer --

QUESTION: What I am thinking about, there was that sentence in Henry v. Mississippi, "Although trial strategy adopted by counsel without prior consultation with an accused will not where the circumstances are exceptional preclude the accused from asserting constitutional claims, we think that the deliberate bypass by counsel, the contemporaneous objection rule as a part of trial strategy would have that effect in this case."

Doesn't that suggest that there may be deliberate bypass where the conduct is that of counsel rather than the accused?

MR. ROGOW: It suggests it, but it suggests it in the context of a trial that is going on at the moment where a quick decision has to be made by a lawyer --

QUESTION: So it's contemporaneous objection.

MR. ROGOW: Yes, sir.

QUESTION: What you have here is a failure at pretrial to make the objection that the statute , Louisiana statute, said had to be made pretrial if it was to be made at all.

MR. ROGOW: And there would have been time in this case to make that challenge without having to worry about turning to consult the client during the trial itself.

I think if there is to be a line drawn about whether or not deliberate bypass can be made by counsel, it would have to be drawn as a matter of trial strategy during the trial itself when there is not time to consult with counsel.

Here we have a pretrial motion. What tactical reason exists for not making this pretrial motion?

QUESTION: Well, we have evidence on that. It's on page 26. And this co-counsel said that he did not recall whether he had discussed it with Mr. Tureaud. He said, "I am of the opinion he wouldn't have done it because Mr. Tureaud is a man who doesn't believe in what he calls wasted effort."

MR. ROGOW: And that is my point, Mr. Chief Justice. What effort would be wasted when a man is on trial for his life if you use every available tactic, perhaps, to try to save that person?

QUESTION: That's up to the skill of the lawyer

frequently and his own judgment of the matter, because in the last line on that same page, the witness, Mr. Amadee, said he knew that these were motions made in quite a few cases and that they were often made, so it was not a matter of overlooking it. Rather, does the record not show that it was a matter of the judgment of the lawyer that there was no point in making the motion?

MR. ROGOW: No, sir, I do not think that the record shows that. These are the recollections of Mr. Amadee regarding what Mr. Tureaud may have been thinking.

QUESTION: This is his co-counsel, and that's the only evidence in the record, unless you can point to some other.

MR. ROGOW: The testimony in the record on page 27 which I think puts the thing in its proper light is in the middle of page 27 Amadee saying one thing, "I came into the case kind of late. I came in as a trial expert to help Mr. Tureaud to select juries and what not. Things done previous thereto was Mr. Tureaud's business. I did tell him I thought he ought to have a bill of particulars and a Prayer for Oyer and he did that."

Now, those motions were filed the very day before trial. I don't understand how Mr. Amadee -- he can say that perhaps Tureaud considered it, but he certainly can't know what Tureaud was considering. What we have here is a record

that is unrebutted in terms of Amadee saying that Tureaud didn't do anything until the day before trial and it's what I suggested that he do, because if we look at the record, we see that those motions were filed the day before trial.

QUESTION: What is a Prayer of Oyer?

MR. ROGOW: It's a discovery kind of motion, and it sought the statements that were made by Francis.

QUESTION: Mr. Rogow, in my days of practice in Arizona in the Federal Courts there was a proceeding whereby someone who had committed a crime in another State could be tried in Arizona upon waiver of indictment, because the grand jury couldn't indict, because the witnesses were also -- they would bring the witnesses in for the trial. And I have a feeling that probably still obtains. And I don't think any of the members of our bar felt that they were giving up any substantial right of a defendant to waive indictment in that situation. He was going to get his trial and they figured that the grand jury was probably going to indict him. It would take time, but that would be all they would gain.

MR. ROGOW: Mr. Justice Rehnquist, you are directing yourself, I think, to the question of tactics, of strategy, and you are saying there would be nothing to be gained there.

What I am pointing to in this record is one cannot

draw the conlusion that nothing will be gained by attacking the grand jury that indicted Francis. This young boy was on trial for his life. The State was seeking the death penalty.

QUESTION: But you have got to conclude that if they had successfully attacked the grand jury, that something -- not only that something would have been gained, but that no reasonable lawyer could have concluded otherwise. And isn't it a perfectly reasonable hypothesis that if they successfully attacked this grand jury, some other grand jury is going to return exactly the same indictment?

MR. ROGOW: I don't think that hypothesis is so reasonable in this case given the unique circumstances of this case. In this case we have a unique decision to charge made basically by the District Attorney, and the record is clear on that. This is the first time in the recollected history of Orleans Parish that a person had been indicted for felony murder where the deceased was a co-perpetrator of the crime. One wonders whether or not a fairly constituted grand jury might have questioned the District Attorney in seeking the felony murder indictment in this case.

All I am suggesting is that there are questions. This case is not a case where, like in Davis, one must conclude that there is an overabundance of evidence showing

that the grand jury would have done what it did and that the petit jury would have convicted.

QUESTION: Do you think, Mr. Rogow, that there was ever a case tried in any court that after the event someone could not have concluded that perhaps if he had done something else things might have been better?

MR. ROGOW: Yes, sir, I think that --

QUESTION: There are such cases?

MR. ROGOW: No, I think that in most cases people would on reflection think that things could have been done differently.

But here we are talking about a basic constitutional right, one established for nearly a hundred years. And this is not the kind of thing that one, I think, upon reflection should say, "Gee, I wish I would have done that." This is the kind of thing that one should consider especially, and that's what disturbs me in this case. I do not understand what tactical reason could exist for failing to challenge the grand jury. If he had made a plea with the State where they would not be asking for the death penalty, then perhaps I could see that he would have gained something.

QUESTION: I gather -- Goldby was a case, as I remember it, from Mississippi where the lawyer was an assigned white lawyer and the accused was black, and there I gather there were some reasons to support why a white

lawyer didn't make the kind of attack. But here you have got black lawyers with a black accused. And what possible reason could there be for their not -- they had to know about and did know about the statute which required that the attack be made pretrial. What possible justification could there be for their not doing it?

MR. ROGOW: I can see none. And then I turn to the record, and I see that nothing is done in this case until the day before trial at all, no seeking of the statements that Francis allegedly made.

QUESTION: I just wonder, though, their failure to do it, does that add up to incompetence?

MR. ROGOW: It adds up to ineffective assistance of counsel in protecting the constitutional right that Francis is now seeking to vindicate.

The difficulty, I think, with casting this case in terms of incompetence is it raises the spectre of incompetent bumbling lawyers.

QUESTION: You say that you could see no reason. Now, your practice, I take it, has not been in New Orleans.

MR. ROGOW: No, sir.

QUESTION: Here were two very, very experienced lawyers, knowing the situation in New Orleans, knowing the availability of this motion and indicating on this record that Mr. Amadee had made such motions in some cases. And then

his explanation is that it wasn't done because it would have been wasted motion.

Now, if you've got a third lawyer in, perhaps he would have had a different point of view. But how can a court, 11 or 12 years after the event, try to second guess the judgment of experienced trial lawyers familiar with the practices in that area.

MR. ROGOW: We don't think that this record reflects the conclusion that they did make an intelligent strategic decision not to make the challenge. That's why I don't think the Court is bound to conclude --

QUESTION: Could Mr. Amadee have made it when he came in the case?

MR. ROGOW: He could have made it, but he didn't. But as he says, he came in the case only for the purpose of being the trial expert, and whatever Tureaud did before was Tureaud's business.

QUESTION: If he saw a mistake that could still be remedied, are you suggesting that as an expert trial lawyer he would not have moved on it?

MR. ROGOW: No, I'm not. But, of course, a mistake could not have been remedied. The motion to challenge had long -- the time for filing the motion had long passed. It passed on March 4th.

QUESTION: That's when Mr. Amadee came into the

case, is it not?

MR. ROGOW: Mr. Justice Brennan, I don't think that we can say from the record that Amadee was in the case on March 4, 1965. He said he was in there several months before --

QUESTION: Four or five months, he said.

MR. ROGOW: No, sir. He said that Mr. Tureaud -- and there is great confusion in this area. He said that Mr. Tureaud had been in the case for four or five months and then he was appointed several months before the trial. If that were true, that would have meant that Tureaud would have been appointed for nearly seven or eight months prior to trial, which of course just is not the case. Tureaud was appointed in February, the trial was in June. Mr. Amadee was not clear in his recollection of exactly when he came in.

QUESTION: After all, he was testifying 10 or 12 years after the event, wasn't he?

ROGOW: Yes, sir, I understand that. But I think the important point is that Amadee's responsibility was limited. And if one looks at the totality of the circumstances in this case, one is left with the questions of why was this motion not filed. There is nothing clearly stated in the record that shows there is a tactical reason. One is left with the other factors, which we say add up to the fact that there was no knowing and intelligent waiver by Francis, there

was no deliberate bypass by Francis or his counsel, but if the test is not that of Fay v. Noia, if the test is one of cause, then we say this record supports the proposition that cause has been shown.

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

Thank you, Mrs. Rutledge.

The case is submitted.

[Whereupon, at 10:33 a.m., the argument in the above-entitled matter was concluded.]