ORIGINAL

In the

Supreme Court of the United States

3

LOUIS L. WAINWRIGHT, SECRETARY,
DEPARTMENT OF OFFENDER REHABILITATION,
STATE OF FLORIDA,

PETITIONER,

V.

JOHN SYKES,

RESPONDENT.

No. 75-1578

Washington, D. C.
March 29, 1977

Pages 1 thru 53

Hoover Reporting Co., Inc.
Official Reporters
Washington, D. C.
546-6666

Minks

IN THE SUPREME COURT OF THE UNITED STATES

LOUIS L. WAINWRIGHT, Secretary, Department of Offender Rehabilitation, State of Florida, Petitioner,	:	
v.	:	No. 75-1578
JOHN SYKES, Respondent.	:	

Washington, D. C.,

Tuesday, March 29, 1977.

The above-entitled matter came on for argument at 10:07 o'clock, 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
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

CHARLES CORCES, JR., ESQ., Assistant Attorney General of Florida, 412 East Madison Street, Suite 800, Tampa, Florida 33602; on behalf of the Petitioner.

EDWARD R. KORMAN, ESQ., Department of Justice, Washington, D. C, 20530; on behalf of the United States as amicus curiae.

WILLIAM F. CASLER, ESQ., 6795 Gulf Boulevard, St. Petersburg Beach, Florida 33706; on behalf of the Respondent.

- - -

C O N T E N T S

- - -

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in 75-1578, Wainwright against Sykes.

Mr. Corces.

ORAL ARGUMENT OF CHARLES CORCES, JR., ESQ.,

ON BEHALF OF THE PETITIONER

MR. CORCES: Mr. Chief Justice, if it please this honorable Court:

My name is Charley Corces, Jr., appearing in behalf of the petitioner Wainwright in this cause.

This case involves the recurring problem of the procedural default and its effect, its effect on subsequent habeas corpus proceedings in federal court.

The court granted certiorari on two cases, on two points: One, whether the failure to challenge the admissibility of an out-of-court statement at or before trial should preclude habeas relief of a habeas petitioner's voluntariness claim at subsequent habeas proceedings.

And, two, whether or not Jackson vs. Denno mandates a voluntariness hearing where the admissibility of a confession is not challenged.

Mr. Sykes was charged in Florida with second-degree murder. Hr proceeded to trial, and during the course of his trial certain inculpatory statements were introduced in evidence against him.

Florida has a procedural rule, specifically Rule 3.190 of the Florida Rules of Criminal Procedure, which require that a pretrial motion to suppress any confessions which it has claimed or alleged were illegally obtained be made, or at least that an objection be made at trial.

But in this case counsel for Sykes neither filed his pretrial motion nor objected to the admissibility of any of the statements during the course of the trial.

Mr. Sykes was convicted of murder in the third degree, a lesser offense. He appealed his conviction. But in his appeal he did not raise the issue of the voluntariness of these admissions. The only issues he raised on appeal were the sufficiency of the evidence, andtwo other questions pertaining to instructions as to second-degree murder and instructions as to self-defense.

The appeal was affirmed.

The first time that Mr. Sykes raised the issue pertaining to the voluntariness of his admissions or inculpatory statements was in post-conviction proceedings, filed in post-conviction proceedings in the trial court, in the nature of habeas corpus.

But, in Florida, a matter that was known to a criminal defendant and which should have and could have been raised at the trial level, and on direct appeal, cannot be raised collaterally. So, naturally, this was denied.

QUESTION: Is he raising an issue of ineffective assistance of counsel?

MR. CORCES: No, sir. And, in fact, in the habeas hearing in the district federal court, he executed a written waiver of any contention that his State trial or appellate counsel was incompetent. So here we have no question of incompetency. Competency of State trial and appellate counsel has been conceded.

QUESTION: What if he had attempted to raise the issue on appeal, not having raised it at trial?

MR. CORCES: I think that the Florida appellate court would have denied the point.

QUESTION: The rule in Florida is you must raise your evidentiary objections?

MR. CORCES: That is correct.

QUESTION: Is that subject to a plain-error exception? In Florida.

MR. CORCES: I think just about anything is subject to a plain error, where it is clear in the record, Your Honor, that there may be -- for instance, you may have a completely coerced confession, that the testimony comes out that he was beaten, out of the defendant, and in all probably it would be plain error, yes, sir. We don't have that situation here.

QUESTION: Well, is the claim that the -- does his claim in collateral proceedings require flushing out with a

hearing? And did it rest on facts outside the record that had already been made?

MR. CORCES: No, sir. The proceedings in State court were flushed out on the pleadings.

QUESTION: So that all the facts are in the record?

MR. CORCES: All the facts that we have, yes, sir.

QUESTION: With respect to voluntariness?

MR. CORCES: No, sir. His claim of voluntariness is -- the officers gave him his Miranda rights. His claim is that he was intoxicated and did not understand them. And of course Florida was never put on notice that --

QUESTION: So that his claim doesn't depend on any more facts than are in the record?

MR. CORCES: Yes, sir. Because the State was never able to focus on the issue of voluntariness on whether or not he understoodhis Miranda rights.

QUESTION: You mean at the trial he did not make any claim that he was intoxicated?

MR. CORCES: At the time there was testimony that he was intoxicated. He testified, "I drank the" --

QUESTION: Did he link that to a claim that because of that intoxication he did not understand the warning?

MR. CORCES: Oh, no, sir. No, sir. He did not link it at all, to that claim.

QUESTION: Mr. Corces, --

MR. CORCES: Yes, sir.

QUESTION: -- let me focus on this, because some of your comments have confused me a little bit. Maybe I should ask this question of your opponent.

Is the respondent claiming that what he said was involuntary, or is he claiming that he didn't understand the Miranda warnings?

MR. CORCES: He is claiming that he did not understand the Miranda warnings, because he was too intoxicated to understand them.

QUESTION: I think, personally, there's a distinction between those two.

MR. CORCES: Yes, sir.

QUESTION: And you feel it is the latter?

MR. CORCES: Yes, sir.

QUESTION: Well, if your opponent doesn't agree, maybe he can help me out.

QUESTION: Mr. Corces, let me ask you one more question, because I'm not quite sure of how you answered one of Mr. Justice White's questions. As I read Judge Simpson's opinion, for the Fifth Circuit, that court ordered the State to conduct an evidentiary hearing. That would suggest to me that the Fifth Circuit did not feel that the State record contained all of the evidence necessary to determine this new claim.

MR. CORCES: That is correct, sir. It gave Florida ninety days to conduct a Jackson vs. Denno hearing.

QUESTION: So the net of it is, anyway, that if collateral proceedings were open as much as direct-appeal proceedings are to plain error claims, there wouldn't be a plain error apparent on the face of this record?

MR. CORCES: No, sir, there is no plain error apparent on the face of this record.

As I stated aforesaid, Mr. Sykes, subsequent to having his petitions denied in State court, filed a petition in the Federal District Court for the Tampa Division. That court held that Mr. Sykes was not bound by his procedural default, and gave Florida ninety days within which to conduct a Jackson vs. Denno hearing. But under Florida procedure, it can't be conducted, so the State of Florida sought and obtained permission to appeal to the Fifth Circuit.

The Fifth Circuit affirmed, stated that it is incumbent upon a trial judge to conduct a Jackson vs. Denno hearing, even though an admission or an inculpatory statement is not challenged. And further that, inasmuch as Florida had not proven -- placed the burden on Florida -- that Florida had not proven that the procedural default was a tactical decision by Mr. Sykes, that he was not bound by the procedural default.

We submit that both the federal court, the district

court, and the Fifth Circuit were in error.

I would like to make it clearly understood to the Court that we do not question the power of a federal district court to consider federal claims, even when there has been a procedural default. We are talking about the appropriate exercise of that power under principles of comity, federalism, and the appropriate administration of criminal justice, where a State has a procedural rule.

And we submit that principles of comity and federalism require that federal courts forego habeas relief where a petitioner has committed an inexcusable procedural default resulting in the failure to develop the historical facts contemporaneously with a timely presentation of the claim.

Now, I submit that in such cases denial of relief should be the rule instead of the exception. And I fully recognize that this may conflict somewhat with what the Court said in Fay vs. Noia, that it conflicts with the dicta in Fay; it does not conflict with the holding in Fay.

Because in Fay, as I understand the case, there was a timely objection at the trial level. In Fay, as I understand the case, the historical facts were developed at the trial level. In Fay, what occurred was that the procedural default was in failing to appeal, but the historical facts were developed, they were there for an appellate court to understand them; and, in fact, if I recall in Fay the State conceded that

the confession had been coerced. And in Fay, in fact, there was an intentional bypass. In Fay, there was an intentional bypass, but this Court found that it had been coerced. In other words, there was cause for failing to appeal.

Which brings me to what I would submit to this Court are the appropriate guidelines, which have already been enunciated by this Court in Davis vs. United States. And that is that when there is a State procedural rule, when it is reasonable and when it has a legitimate State interest, that a prcedural default of that rule should preclude subsequent habeas relief, where there has been a default, and that default has resulted in the failure to develop the historical facts unless and until such time as the habeas petitioner demonstrates not only cause but actual prejudice.

I submit to the Court that the Davis guidelines are fair to both sides. They provide a criminal defendant with a federal forum for the vindication of his constitutional rights. At the same time it shows proper deference to State procedural rules which are promulgated to give him the very constitutional rights which he seeks to protect.

And Florida has a rule, a criminal procedure rule, that gives him his Jackson vs. Denno hearing. All he has to do is ask for it.

QUESTION: Well, in this case there wouldn't be much question of prejudice, would there?

MR. CORCES: No, sir.

QUESTION: Now, how about cause?

MR.CORCES: There is no cause. At least none has been alleged.

He has waived any contention that his trial counsel or appellate counsel was incompetent.

QUESTION: Well, you're talking about guidelines. What would -- what if the prisoner or his counsel just simply said, "I didn't realize the statement might be objectionable"?

MR. CORCES: That would not be sufficient under Estelle vs. Williams, Your Honor.

QUESTION: Just a mistake, just a plain mistake.

MR. CORCES: No, sir, it would not be sufficient under Estelle vs. Williams.

QUESTION: But I suppose your guidelines would permit claims of inadequate counsel?

MR. CORCES: Oh, yes, sir.

But I think we have inept counsel, we have a separate constitutional claim.

QUESTION: Well, I suppose -- well, it's a separate constitutional claim, but I suppose this sort of an approach would put a good deal of pressure on developing a more discernible rule about the inadequacy of counsel. What do you think it ought to be? How would you state it?

The counsel says, "I just made a mistake, I should

have objected, but I didn't." Is that enough or not?

MR. CORCES: I think you have to rule -- to consider the entire case and determine whether, in viewing the entire case, he was reasonably effective counsel. And of course if he was not a reasonably effective counsel, considering probable tactical decisions -- and when I say "by probable tactical decisions" I use the objective standard, not the subjective standard. I don't think it would be sufficient for counsel to come in five years later and say, "I didn't know." If there's a probable tactical decision, that it could have been based, he is not incompetent.

QUESTION: And would your guidelines permit plain error exceptions to the rule?

MR. CORCES: Yes, sir, I think that plain error would always be an exception if --

QUESTION: So that if the counsel's failure was plain enough, or if his mistake was plain enough on the record, you would ignore the mistake?

MR. CORCES: I would think so, yes, Your Honor.

QUESTION: I mean, you -- and you would apply ordinary plain-error standards, whatever they are?

MR. CORCES: Yes, sir.

QUESTION: Well, would the plain-error standards depend on the State plain-error standards?

MR. CORCES: Well, since it's a federal constitutional

question, I would say it would depend on the federal, what is the federal plain-error standard, what this Court would --

QUESTION: In reviewing federal conditions?

MR. CORCES: Yes, sir.

QUESTION: Mr. Corces, may I ask you the question: Supposing the prisoner, when he was taken into custody, was given his Miranda warnings by the arresting officer, and he responded by saying, "I've just had two quarts of gin, I don't know what you're talking about, and all I know is I'm sorry I killed this person," words to that effect. It's pretty clear he didn't understand the warnings, but he is making an inculpatory statement.

Would that be admissible?

MR. CORCES: Yes, sir, if he does not object. His counsel may --

QUESTION: Well, supposing his counsel objected at trial, would the trial judge let that statement in?

MR. CORCES: I would assume that that would be a determination for the trial court whether, based on all the evidence, his intoxication was such that he could not understand his --

QUESTION: Yes, assume he couldn't understand the warning.

MR. CORCES: I would say it would not be admissible.

QUESTION: It would not be admissible.

MR. CORCES: Yes.

If it please the Court, the Davis approach, cause and actual prejudice, as I stated, is fair to both sides. It also requires a criminal defendant, it forces a criminal defendant to make his constitutional assertions timely, so that the State can focus on the particular issue, and this case points out exactly what I'm talking about.

Whether or not he was so intoxicated that he could not understand his Miranda warnings, if the State is not put on notice to this issue, they cannot focus their evidence on that issue unless they are put on notice as to this issue, and unless he is forced to make his claim in a timely manner, then the State is forced to contest this issue maybe years later when he raises it in federal court.

It also, if it please the Court, simplifies, it tends to simplify federal habeas proceedings, because, by forcing a criminal defendant to take advantage of a State procedural rule which would develop the historical facts, it would make federal habeas proceedings a lot easier. All that they would need, the federal district court would need, is a transcript of what occurred in State court to determine the constitutional issue.

I would submit to this Court that, in this case, the respondent Sykes has demonstrated neither cause nor prejudice, and that the decisions of the lower court were in error.

Now, as to point two, Jackson vs. Denno, the Fifth Circuit held that Jackson vs. Denno mandates a voluntariness hearing even in the absence of a challenge to the confession.

I find it to be a curious ruling by the Fifth Circuit, because in 1972 they ruled completely otherwise in a very similar case to this one. That one involved a federal prisoner, and they ruled that Jackson vs. Denno did not mandate a voluntariness hearing. In Randall vs. United States, cited in the brief of petitioner, the Fifth Circuit relies on this Court's decision in Sims vs. Georgia; but in Sims vs. Georgia, there was a specific motion to suppress, filed by the defendant, seeking to suppress his confession.

Whether or not this Court has specifically ruled on this point, I do not believe it has; however, I have noticed that in all the opinions that have been written that they carefully stated "challenged", "challenged confessions", "challenged confessions", as recently as Michigan vs. Mosely, and as recently as Brewer vs. Williams, the confession was challenged.

To require a trial court, on its own initiative, to conduct a Jackson vs. Denno hearing is to require the trial judge to interfere with the defense of the case. There may be many reasons why even the defense would want an inculpatory statement in evidence. It may contain defensive matter. "Yes, I killed him, but in self-defense". He may not want to

take the witness stand to establish self-defense and his confession may establish it for him. It may contain matters pertaining to insanity, which he would rather not take the witness stand and rely on,on the confession that comes into evidence.

QUESTION: But even if the Fifth Circuit's rule is right in this case, that the trial judge must initiate the inquiry into voluntariness, I presume the defendant could still, if he felt the way you have just described, tell the trial judge, "No, I don't want a hearing on voluntariness, I waive that issue."

MR. CORCES: That may be true, sir, Your Honor, but again if it's done during the course of a trial it's interfering with the defense. The defense may not want the State to focus on the problem. It may be, as in this case, an intoxication; he may be claiming, using intoxication as mitigation. And by raising the issue, it would allow the State to focus on what his true defense is, such as intoxication.

And unless, Mr. Chief Justice, the Court has any further questions, that's all that I have.

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

We'll hear from Mr. Korman.

Mr. Korman.

ORAL ARGUMENT OF EDWARD R. KORMAN, ESQ.,

ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

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

The ultimate issue presented by this case is whether a defendant who has failed to comply with a State procedural rule, which gives him a full and fair opportunity to raise a claim that his confession was obtained without compliance with this Court's holding in Miranda, can simply march into a federal court at his pleasure and obtain habeas corpus relief in a new trial.

I think it would be helpful, before detailing our position on this issue, to speak to the facts of this case in a little bit more detail.

And there are two points I want to deal with:

First, there is this inconsistency between the order of the Court of Appeals in this case and the order of the district court. The district court remanded this case for Florida to hold a full-blown hearing on the issue of voluntariness of the confession, what is described as a Jackson vs. Denno hearing.

The Court of Appeals, in affirming, said that the State of Florida need only provide a hearing going to the issue of whether Miranda had been complied with. Accorded, there is some confusion in the Court of Appeals opinion; the

Court of Appeals opinion seemed to suggest that had the trial court initially, on its own, ordered a Jackson vs. Denno hearing, then counsel's attention might have been more specifically drawn to this issue, and he might have raised the claim on his own.

And in light of this, I think it's important to take a brief look at what happened at the trial of this case. The evidence was fairly simple. Willie Gilbert was shot to death, on January 8, 1972, within minutes after the crime was committed the police arrived at the defendant's home. Willie Gilbert was laying about ten feet from the door of the defendant's house. The defendant's wife came running up to the police and she said, "John shot Willie"; a few minutes later the defendant walked up to the police and he said, "I shot Willie". They placed him under arrest, and he was then taken into the police station and interrogated.

At the trial the issue of Miranda was quite evident, the defense lawyer specifically, on cross-examination of the police officer, elicited the exact warnings that were given. He asked whether the defendant was intoxicated at the time. He did everything except make a formal motion to suppress the evidence on the grounds that Miranda had not been complied with.

Now, there may very well have been reaon for this, on the record in this case, because, if you read the transcript,

if you just read the State's case alone, without consideration of the confession, there is an overwhelming case, at least on the charge for which the defendant was convicted, which was a kind of manslaughter charge which, in Florida,is denominated as murder in the third degree. The State did not need his confession on its case-in-chief to prove his guilt.

The confession became relevant only in light of his defense, that is, the defendant was required in this case, and the defendant's lawyer knew it and everybody else knew it, to take the stand and make out a case based on self-defense. And that is where his confession, his incriminatory statement, became particularly pertinent.

Now, since there was no claim that this confession was involuntary in the traditional sense, and there's nothing in the record of the trial to indicate that this confession was involuntary in the traditional sense, presumably counsel may have been aware that once the defendant took the stand in this case, that statement, whether Miranda was complied with or not, could have been used to impeach the credibility of his self-defense testimony. And there may very well have been -- counsel may very well have felt that, what's the point of maing an objection on the State's direct case when the evidence is going to come in anyway when I put my cliemt on the stand, and he's impeached by his prior -- his confession.

And what happens in a case like this, if the Court

says that in these circumstances a defendant can, nevertheless, obtain habeas corpus relief, is that another case arising in a similar context, there will be absolutely no reason for a defense counsel to object. He could figure: well, it's going to come in anyway on the defense case, I won't object on the prosecution's case; they will impeach his credibility, and I will try for the acquittal, but, if not, I could always go into federal court and obtain a writ of habeas corpus.

I think, in the context of what happened here, and the manner in which this confession could have been used and in which counsel may have anticipated it could have been used, he simply may have felt that it would be pointless to raise the objection on the direct case.

And it is in this context that I think we have to look at the issue of whether he can now come into a federal court and obtain habeas corpus relief without ever having complied with a reasonable State procedural rule.

QUESTION: Mr. Korman, will you refresh me a little bit on the facts? The confession was used in the direct case, and of course it acknowledged the shooting.

MR. KORMAN: That's right.

QUESTION: What in the confession was inconsistent -- was there something in the confession inconsistent with the self-defense theory, is that your point?

MR. KORMAN: Yes. Yes. The confession indicated

there had been some altercation, that the defendant lost his temper and just shot the victim. It was quite clear from the confession that -- which we set out at page 5 in our brief -- that it was not in self-defense.

QUESTION: I see.

MR. KORMAN: And, of course, it would have been admitted to impeach his credibility, regardless of whether Miranda was complied with.

QUESTION: Mr. Korman, was the testimony of the wife admissible against the husband or not?

MR. KORMAN: I'm not certain. She testified as a defense witness. She was not terribly helpful, because she said that she did not see the shooting, she was not clear as to the events which preceded it, and --

QUESTION: Did she acknowledge that she had said, "John shot him"?

MR. KORMAN: I believe that she did, Mr. Chief Justice. I believe that she did.

QUESTION: It would be pretty difficult for her to avoid it, or at least to open the door to have the policeman testify that she said so.

MR. KORMAN: That's right. And it may -- even if she had not testified, that statement might have been admissible as part of what we call the res gestae.

QUESTION: There was never any question who shot him,

was there?

MR. KORMAN: No, never any question that he shot him. And that was conceded. That's why I say that it may have been understandable why the defendant's lawyer didn't raise the issue.

QUESTION: If her testimony was simply that "John shot him", without any more explanation, might tend to undermine his self-defense claim.

MR. KORMAN: Of course, and I think it's important to keep in mind that before he was placed under arrest, which would trigger the Miranda issue, he had walked up, shortly after his wife had said that "John shot Willie", he admitted himself that "I shot Willie", without any qualifying self-defense explanation for it.

QUESTION: And then the warning came afterward, did it?

MR. KORMAN: That's right, the warnings came when he was questioned at the station house.

QUESTION: What was he charged with?

MR. KORMAN: He was originally charged with murder in the second degree, which is that he --

QUESTION: Not with first degree?

MR. KORMAN: No, not first degree. It was an unintentional killing.

QUESTION: Yes, that's what I mean.

MR. KORMAN: That's what he was originally charged with, and what he was convicted of was an even lesser degree of an unintentional killing; and he was sentenced to ten years, of which he has now served five.

And the question becomes: why should he now be entitled to habeas corpus relief?

After this Court decided Davis v. United States, which held that the knowing and deliberate waiver standard did not apply in a habeas corpus proceeding where the defendant failed to comply with a reasonable procedural rule, Rule 12(b)(2), which dealt with defects in the institution of the prosecution, the court, and I think it's critical that it was after Davis, gave this construction to Rule 12(f) in the context of the habeas corpus case. This Court amended the federal rules of criminal procedure, that is, promulgated an amendment which added to the motions that must be made before trial or be deemed waived all suppression motions.

And that procedural rule which this Court promulgated did not simply go into effect by congressional inaction, Congress affirmatively adopted and approved that amendment. And so it seems clear to us that, absent cause, to relieve him from the waiver provision, a federal prisoner could not come into a federal court and get this relief, after Davis and after the amendment of Rule 12(b)(3), and we think it's equally clear, as a result of this Court's opinion in Francis vs.

Henderson, that a State prisoner cannot do any better than a federal prisoner would have in the face of a reasonable State procedural rule.

And, Mr. Justice White raised the question of what would constitute cause, to relieve the defendant from the waiver provisions. And we believe that cause means prejudice in the sense of his right to a fair trial, in the sense that the habeas corpus statute is really intended to deal with; that is, to insure that an innocent man is not confined to prison.

QUESTION: So you don't -- you do differ, then, with your colleague?

MR. KORMAN: That's right. And to deal with your point with respect to counsel, we think that the reason that counsel was provided -- and I think you have to, when you'll answer the question about what about the inadequacy of counsel claim, that counsel didn't raise it because he's inadequate, I think you have to look at it in the perspective of what is the purpose of a habeas corpus proceeding.

QUESTION: So you wouldn't open up habeas corpus to plain-error claims, neither, unless it went to the --

MR. KORMAN: That's right.

QUESTION: -- unless it went to the integrity of the fact-finding process?

MR. KORMAN: That's right. Of course, as Your Honor

developed in his questioning, there was no plain error here, you cannot look at the record of this case and say that there was any error.

But we think that when --

QUESTION: And your counsel claims would be subject to the same standards?

MR. KORMAN: Well, that's right. We think that the same test of prejudice is: What did he lose as a result of the failure of his counsel to make this objection, regardless of the reason for it?

QUESTION: And even if any fool should have known enough to object, if there's no indication that the evidence is unreliable, there should be no federal habeas; is that it?

MR. KORMAN: That's right. Because I think we have to -- there are other values that enter the picture when you're dealing with motions that are made years after the trial, which could have been made earlier.

And the question then, particularly when you are dealing with a State procedural rule, is: What did you lose as a result of counsel's inadequacy? You lost the right to exclude this statement that was taken without full compliance with Miranda, but was the statement coerced in the traditional sense? No. Was it unreliable? No. Well, then, why then should we not give some consideration to questions of finality?

QUESTION: Do you put in the scales the fact that, as you've suggested earlier, this statement was inevitably going to come in once the defendant took the stand?

MR. KORMAN: I think that also weighs in the scales in this particular case, because I think, aside from the stipulation that the defendant made that he was not claiming his counsel was inadequate, I think it suggests that counsel may have made a deliberate decision; and I would reiterate that if this Court were to now hold -- and I don't know whether in this case counsel made a deliberate decision; if I were to guess, I would say he didn't -- but if this Court were to now hold that in a case just like this federal habeas corpus is available, then there would be no incentive for the defense lawyer to make the objection, because he knows it's got to come in anyway to impeach the credibility of his defendant, if the defendant doesn't take the stand he's surely going to be convicted.

So why make the motion, if you can get another crack at the apple by obtaining a habeas corpus ruling?

Now, I also --

QUESTION: Mr. Korman, may I ask one other question about the impeachment point you made earlier? Did, in fact, the prosecutor use the statement to impeach the defense testimony?

MR. KORMAN: I believe that he did.

QUESTION: He did. Because you didn't mention that in your brief.

MR. KORMAN: I believe he did, but it's been a little bit of time since I've read the complete transcript.

QUESTION: Your brief doesn't identify a contradiction between the defense testimony and the statement. You say it might have been used for that purpose, but I didn't find it in the brief.

MR. KORMAN: Well, the defendant said, I believe, in his confession that Gilbert came to his trailer, was playing around with the gun. He told him to put the shotgun down, so Willie put it down and went into the yard. The respondent said in his confession that he followed him out to the yard, then Willie turned around and patted his butt at him, like this, and I shot him. Which is completely inconsistent with the testimony that we have set out at page 7 and 8 of our brief, in which he purports to claim that he was afraid that -- he shot him because he was afraid that he was going to come running back at him and attack him in some way.

I mean, they are completely inconsistent.

There is just one more point that I want to make. We would not necessarily be making the same argument, and I think it's important to make this point, if we were dealing with the claim that the confession was involuntary as a matter

of fact, that this was a traditional involuntariness argument, because in cases like that there is always the element that an involuntary confession may be unreliable, and so that when you get into the context of a claim of true involuntariness, then another question arises that perhaps an innocent man may be convicted; and in that context we would think that if there was no other evidence except a coerced confession, which was the case in Fay vs. Noia, there was a coerced confession obtained by the most blatantly improper and unconstitutional means, there was not a shred of other evidence in the case, then we would think that that might be an appropriate case to excuse a procedural default.

And perhaps Florida would, under those circumstances, as well. And I think that particularly apposite here, and we quote it at length in our brief, as this Court's opinion in Jenkins v. Delaware, if you will recall in Johnson v. New Jersey the Court said that Miranda would be applied retroactively to all trials which took place after the date of its decision; in Jenkins vs. Delaware, the Court said, well, that didn't apply to retrials where the conviction had been reversed after Miranda, and the defendant was scheduled to be tried again.

And the reasons that the Court gave are really the basic reasons why we believe that habeas corpus should be denied in this particular context. And that is, the Court said

that when a trial had not yet commenced, it was relatively close in point of time to the date that the crime was committed, that law enforcement officers could attempt to reconstruct their case, while memories were still fresh. But when you are dealing with a conviction that was reversed, probably years have gone by, much more difficult to reconstruct a case, particularly where the prosecutor had relied on the confession as an essential part of his case.

So that the Court said: for these reasons, even though Miranda applies to trials that took place after the date of the holding, we're not going to apply it to retrials.

And those same underlying considerations of policy apply equally here.

But, the Court said, the defendant can still take advantage, perhaps, of the rule that if he could show that his confession was truly involuntary, as a matter of fact, then maybe he can get relief.

And that is the basic analysis here, so that I think it's quite clear that the Court of Appeals erred in -- and both the district court and the Court of Appeals erred in granting habeas corpus relief in the context of the case like this.

I wonder, Mr. Chief Justice, if I could reserve my remaining time for some rebuttal.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Casler.

ORAL ARGUMENT OF WILLIAM F. CASLER, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. CASLER: Mr. Chief Justice, if it please the Court:

I am Court-appointed to represent John Sykes. My name is William F. Casler. I am from St. Petersburg Beach, Florida.

First of all, both the petitioner and the amicus have totally ignored Florida's rule, a very specific rule that has to do specifically and only with suppression of confessions and admissions; no other evidence. We have other rules for suppression of other evidence. Our rule that we are here on today is 3.190, has to do specifically with admissions and confessions, and it's very important.

This rule was adopted and has been the practice of Florida for years, since 1919, in a Supreme Court of Florida case, Stiner vs. State. The rule follows that case law, and not only that but Florida is adopting, July 1st of this year, an evidentiary rule which follows this explicitly.

Now, this rule says, "Upon motion" -- it's in my brief, both the federal rule and the State rule are side by side, at page 2 is the State rule and on page 3 is the federal rule. And they are totally inconsistent with one another, and

totally distinguishable.

The Florida rule says: "Upon motion of the defendant" -- and then it says, it's disjunctive, it says "or upon its own motion, the Court shall suppress any confession or admission obtained illegally from the defendant."

And I think this is the basis -- this was my argument in the district court and it was my argument in the Fifth Circuit, and both -- in the Fifth Circuit, the judgment of that Court, the opinion of that Court follows this rule.

QUESTION: Well, isn't that assumed that someone is going to call the trial judge's attention to the matter by objection?

MR. CASLER: No, sir, I don't think so.

QUESTION: It doesn't preclude the judge from acting on his own, but you suggest that there is no consequence of the failure to draw the matter to the Court's attention.

MR. CASLER: We have absolutely nothing in our rules that says, "If you fail to do this, defendant, you have waived anything".

QUESTION: Well, doesn't it at least suggest that there has to be some evidence produced before the judge which would motivate him to act on his own motion?

MR. CASLER: A confession coming in -- an admission coming in is enough. It says he shall -- that no confession or admission shall -- pardon me, "the Court shall suppress any

confession or admission obtained illegally from the defendant."

Now, how does the Court know that unless there is a hearing to find out if it was a voluntary confession?

QUESTION: Well, if it said it in just the words you recited, you might have a pretty good argument. As I read it, it doesn't say it in quite those words.

MR. CASLER: All right. This is the practice of Florida. This is the practice of Florida. In the Circuits that I practice in, this is the practice. The defendant, if he doesn't do anything, the judge has a hearing, automatically.

QUESTION: Well, why didn't the judge have a hearing in this case?

MR. CASLER: This rule came in in 1972. This defendant went to trial in 1972.

QUESTION: Before the rule came in?

MR. CASLER: No, sir. No, sir. Shortly -- six months after this rule went in.

QUESTION: Would you say the rule was just too new for the judge to know about it?

MR. CASLER: That could have been, I don't know. But when we get to the cases on this, it's obvious, and the new law, the new evidentiary rule that's coming in -- well, in fact, if you will turn to page 26 of the brief, it will -- in July 1, 1977, this year -- now, this is a legislative act, the rule was a Supreme Court of Florida, an integrated bar,

Rule 3.190 is by the Supreme Court of Florida. Now we've got a legislative act that strengthens the rule that I've just recited. "This act shall apply to both civil and criminal cases brought after the effective date of this act... Nothing in this section shall preclude a court from taking notice of fundamental errors affecting substantial rights, even though such errors were not brought to the attention of the trial judge."

QUESTION: Does that tell us very much? You don't need a rule or a statute to have a judge have authority to take notice of something that he thinks affects the fairness of the trial. It doesn't say the judge shall hold a hearing, as I thought you admitted, it says he shall not be prevented, even in the absence of a motion, from acting on his own.

MR. CASLER: The way I construe the rule, our rule in Florida, is that the defendant shall do this on his motion or the judge will do it on his own motion, to see that no admission or confession comes in illegally.

QUESTION: Well, Mr. Casler, why have a motion by the defendant at all if the judge is obliged to do it?

MR. CASLER: I think that's a good point, and I think that's exactly the way it should be, and that's what the district --

QUESTION: Well, I'm asking the question. You say the judge must do it.

MR. CASLER: Yes, sir.

QUESTION: Well, why does the rule say "upon motion of the defendant or the judge"? Why not just say the judge shall do it?

MR. CASLER: Because the case law says that -- on page 19 of my brief, and this is a 1919 case and it's still the law of Florida, it's been followed all these years, it's still being followed, and it is the basis for this rule -- in Stiner v. State:

"The question of whether admissions or confessions are made freely or voluntarily is for the Court to determine; to enable it to do this, there should be preliminary investigation by the court, and this examination should be made in the absence of the jury. While we think it is best for counsel to interpose objections to the introduction of evidence of admissions or confessions, in order that the court may make the preliminary investigation to determine its admissibility, that does not relief the trial judge of the duty when evidence of this character is sought to be introduced to satisfy himself that the admissions were freely and voluntarily made before admitting them."

QUESTION: Of course, in the 1919 case I presume the Supreme Court of Florida was talking about the voluntary confessions in the traditional non-coerced sence, rather than just in terms of confessions which were made without proper

Miranda warnings.

MR. CASLER: Well, I would imagine -- I don't know what the --

QUESTION: It would have had remarkable foresight, let's say, if they had been talking about the last.

MR. CASLER: Well, I think it probably may have had remarkable foresight.

QUESTION: Then, Mr. Casler, --

MR. CASLER: It seems quite clear to me what I have just read.

QUESTION: -- that hasn't been the rule in Florida since 1919 -- what happened about the Chambers case that came to this Court? They didn't put that rule in that one.

MR. CASLER: Well, we are here on this case, too, Your Honor.

QUESTION: Yes, well, you're back to 1919, I want to bring you a little closer, to the Chambers case.

MR. CASLER: All I can say is that there was error in the Sykes case that should have been done this way, if it had been done this way we wouldn't be here. Not only that, if Florida followed this rule, there would never be any habeas corpus on the voluntariness of a confession.

QUESTION: I understand, under the Florida rule, all you have to do is to say one word, two words: I object.

MR. CASLER: That's true.

QUESTION: Isn't that what Florida says?

MR. CASLER: And if you don't say it, the judge has a hearing, Your Honor, before any confession is --

QUESTION: No, Florida says the only thing necessary to get a hearing, a full-blown hearing, is to say "I object".

MR. CASLER: That's true.

QUESTION: And that's too much to expect?

MR. CASLER: No, sir. No, Your Honor. But if you fail to do that, the court has a hearing.

QUESTION: Well, are you arguing that the Constitution requires the judge to hold a hearing on his own? Is that your argument here?

MR. CASLER: No.

QUESTION: Or is it --

MR. CASLER: But the petitioner was giving some guidelines, and I'm giving what I feel is guidelines based on our rule. The amicus is here on a federal rule, and the federal rule is totally different than this.

It says that if you don't do this, it's waived. And then you can come in and show cause. Our rule doesn't say that.

QUESTION: Well, let's see, are you saying that -- looking at the top of page 3 of your brief, subdivision (3) of the State rule, "The Court shall receive evidence on any issue of fact" and so forth.

MR. CASLER: Yes?

QUESTION: Now, are you saying that under your rule the practice has been and is that whenever the government, the State, offers an admission or confession, automatically the trial judge must say: Stop, we will have a hearing out of the presence of the jury.

MR. CASLER: Sends the jury out and we have a hearing. Yes, sir.

QUESTION: Is that what you're saying?

MR. CASLER: Yes, I am.

QUESTION: Is that what your rule means?

MR. CASLER: And I'm saying that's what the rule says and does, and that's why our Circuit followed this.

QUESTION: And so, are you arguing this just to explain why he didn't object? Or are you arguing that there's a federal constitutional requirement that a judge, absent any objection, conduct a hearing? Which are you arguing?

MR. CASLER: I'm arguing this to counter what the amicus curiae has said, trying to relate Federal Rule 12 to the -- what we were operating under.

QUESTION: Well, what has either approach got to do with our question -- our question here is whether the Federal Constitution has been violated, isn't it?

MR. CASLER: Well, yes, sir, and this is to --

QUESTION: Well, how was it violated here?

MR. CASLER: It was violated by allowing a confession to come in without any determination at any time anywhere as to voluntariness of that confession.

QUESTION: So you do argue that the Constitution requires the judge to hold a hearing on his own, absent any objection?

MR. CASLER: Yes, I do.

QUESTION: Well now, do you think, in this kind of a case, anyway, if you tie the objection to the Constitution, you would say this was contrary to the Fifth Amendment, if you were objecting, wouldn't you?

MR. CASLER: I would. Absolutely.

QUESTION: And that it's compelling a person to testify against himself?

MR. CASLER: That's correct.

QUESTION: Now, normally, in any trial, you make a person claim his Fifth Amendment objection, you always do, don't you?

MR. CASLER: When he --

QUESTION: If he thinks he's coerced into making an incriminating statement, he should state his objection. That's the normal Fifth Amendment rule, isn't it?

MR. CASLER: That's true.

QUESTION: Well, why should it be any different here?

MR. CASLER: I consider this rule, the confession and

admission coming in, no different than the waiver of a jury trial or anything else.

QUESTION: But this is a Fifth Amendment case. This is a Fifth Amendment objection, and normally you make people claim their privilege.

MR. CASLER: When they are a witness and they take the Fifth Amendment, if you are asking them questions.

QUESTION: Well, this person is claiming his privilege not to have his own statements used against him.

MR. CASLER: That's possible. I've never asked a defendant, "Do you want to take the Fifth Amendment?" in a trial. I do ask him whether or not they want the confession to come in. And if they do, we go to the judge and we tell the judge.

QUESTION: Well, in your own practice, when you're trying cases and the State offers an admission or confession, what do you do? You personally, what do you do?

MR. CASLER: When what, sir?

QUESTION: In your own practice, the State offers a confession or an admission, what do you do?

MR. CASLER: I file a motion to suppress five weeks before trial. Or the day I get it. I file a motion to suppress --

QUESTION: You wouldn't do what this trial lawyer did, then?

MR. CASLER: No, I would not.

QUESTION: Even if you knew that you were going to put your man on the stand and testify, and that under Harris v. New York he could be impeached with it?

MR. CASLER: I might have tried it. It would not have worked, Your Honor, in our Circuit; the judge would have had a hearing.

QUESTION: Now, you've been talking about the 1919 Florida case. Did this case go to the appellate review in Florida?

MR. CASLER: Never.

QUESTION: It just --

MR. CASLER: This is a Supreme Court of Florida case.

QUESTION: Well, which case?

MR. CASLER: This Stiner case, the 1919 case.

QUESTION: Was there any appellate review of the case we're arguing here today, before you went to federal habeas corpus?

MR. CASLER: The defendant, from jail, from prison, filed a motion to vacate with the trial judge. It was denied; no opinion. He filed a habeas corpus with the District Court of Appeals for the Second District in Lakeland, Florida. It was denied, with an opinion. The opinion said: We already considered these matters when it was here for appeal.

He filed a habeas corpus with the Supreme Court of

Florida. It was denied, and said they didn't have jurisdiction. I don't know why.

QUESTION: Well, under Florida law, hasn't the highest court of Florida said something about this case, subsequent to 1919?

MR. CASLER: Only that they denied habeas corpus because they lacked jurisdiction.

QUESTION: Well, did the District Court of Appeals consider the case on direct appeal?

MR. CASLER: Yes, --

QUESTION: And write an opinion?

MR. CASLER: -- but not on this point. Not on this point. They did not -- the attorney that handled the trial was the appellate counsel, and he did not raise this on appeal.

Subsequent to that time, after the defendant, from prison, filed a motion to vacate with the trial judge, then he went back to the district court that handled the appeal and did a habeas corpus, and the court entered a very short opinion denying it, said that it had been considered on appeal.

Then he went to the Supreme Court of Florida, and they denied it for lack of jurisdiction.

QUESTION: Well, on your theory, Mr. Casler, suppose this man had been sentenced to 35 years, and you came in 25 years after the trial with exactly the habeas corpus that we have before us now. Your argument is the federal court should

do just what it did here, even after 25 years?

This is only five years, isn't it, now?

MR. CASLER: He was sentenced to ten year, he's been in prison six years, he's supposed to be out within six months.

The -- I suppose so. But I -- Mr. Corces was giving guidelines to the Court. I can't see why, I really can't see why there isn't an automatic hearing, and there would be no habeas corpuses for voluntariness in any district court, in any federal district court; it would have been done.

I just can't see why this cannot be done in a trial court automatically, and there would be no problem.

QUESTION: Except you say the rule required the Florida court to do it automatically, --

MR. CASLER: That's correct.

QUESTION: -- and it didn't do it.

MR. CASLER: That's correct.

QUESTION: So even if the State were to provide what you say it has provided by rule, if the trial court failed to follow the rule, there would still be federal habeas.

MR. CASLER: That's true. That's true.

The federal rule -- I'm not going to delve into that, but it's totally different from our rule. It has to do with the suppression of all evidence. This rule I've recited, the court has to deal specifically and only with confessions,

it's drawn with particularity. The federal rule has to do with all -- suppression of all evidence. It also refers to, that it's automatically -- that it's not automatically, it's waived if you don't raise it. We have nothing in our rule to show this at all.

Now, getting to the --

QUESTION: Mr. Casler, your present client, the client to whom you were appointed to represent here, when he went in to the subsequent proceedings after trial, he has never called the attention of any court, until now, to what you claimis the Florida rule.

Now, does that mean that his counsel on trial and his separate counsel on appeal was not aware of what you say is the Florida practice?

MR. CASLER: I don't know. I don't know why the counsel at trial didn't raise this issue at trial. I don't know why he didn't raise this issue on appeal. I know that when I was appointed in the district court, I went to the rule immediately, because that was the practice; in the Fifth Circuit I went to the rule immediately. The Fifth Circuit, in my opinion, is correct. They say that there is a responsibility and that the trial judge should have a hearing.

QUESTION: So that two other Florida lawyers, whom your client has stipulated to have been effective counsel, apparently were not aware of this practice under the rule?

MR. CASLER: Your Honor, that was the same counsel that handled the trial did the appeal. And that was in 1972, when this rule came in. Now, whether he knew the rule or didn't know the rule, I'm not -- I don't know.

Now, Mr. Corces said --

QUESTION: He might have realized it would be very difficult for him to explain to the court why he didn't object. Maybe that was the reason he didn't raise it on appeal.

MR. CASLER: It could have been. I really don't know.

QUESTION: We're just speculating.

MR. CASLER: Now, in Florida, Mr. Corces says that if you don't raise this issue in Florida, then you've waived it. You can't bring collateral attack.

There is a myriad of cases that I've cited in my brief on pages 15 and 16 that are contrary to this. The Florida holding is: a procedural default of failing to appeal is not equivalent to an express waived of a constitutional right, and will not preclude collateral attack of an unlawful conviction.

I am not going to read all these cases, they are all saying the same thing. Holding that failure to object at a trial to a denial of a fundamental right does not act as a procedural default to estop collateral attack. It is not necessary for a defendant to have objected at trial at all.

There are at least 10 or 15 cases on pages 15 and 16 that hold that.

QUESTION: Do you think there should be a different approach to this kind of a case, where there was no challenge to the commission of the act, that is, the shooting, that only a plea and confession and avoidance, that is, self-defense?

MR. CASLER: I don't know.

QUESTION: Isn't it a perfectly logical thing for a man who is going to say, "Yes, I shot him, but I did it in self-defense" to fail to object to a policeman testifying to his statements?

MR. CASLER: Except that the statement that he made doesn't tie into self-defense at all, as the Fifth Circuit pointed out the facts in their opinion, said that the facts of what he --

QUESTION: Well, self-defense assumes an admission of having performed the act, does it not?

MR. CASLER: No question about it. He said, "I shot him", and then he went into a long detail that had nothing to do with self-defense, in the confession.

QUESTION: Do you think what the State courts did here are contrary to the cases that you cited at the bottom of page 15?

Is there a -- should the State courts have entertained a collateral proceeding?

MR. CASLER: Absolutely. Absolutely.

QUESTION: Well, how are we to understand the State law here, when the latest, apparently the latest announcement of State law is that such claims that aren't pressed at trial are not available on federal habeas, on State habeas?

MR. CASLER: The --

QUESTION: Which is what happened here.

MR. CASLER: That is correct. The habeas in the appellate court in Florida, the district court in Lakeland, the defendant did file there from jail, his own motion with that court. That court did enter an opinion, it's cited in the brief, and said that they had already considered this. That's what the opinion says.

Now, the petitioner and the amicus have pointed out that the district court that made that opinion made a mistake. Well, I don't know whether the district court made a mistake in that opinion or not.

QUESTION: Well, you appealed the denial of State habeas.

MR. CASLER: Yes.

QUESTION: And what did the --

MR. CASLER: Appealed the denial of State habeas, no. I was appointed -- the defendant went to the district court of Florida, and then he went to the Supreme Court of Florida. Then he filed in the district court of the federal

government, of the United States District Court.

QUESTION: Yes.

MR. CASLER: That's when I was appointed to represent him.

QUESTION: I understand.

MR. CASLER: Up until that time, he had no counsel whatsoever in his habeas proceedings.

QUESTION: But did he take his State habeas claim to the State Supreme Court?

MR. CASLER: Yes. And denied --

QUESTION: And what, a hearing was denied?

MR. CASLER: Denied for lack of jurisdiction, that's all the statement that was in the opinion: denied for lack of jurisdiction.

QUESTION: And did it go to an intermediate court?

MR. CASLER: You mean to a federal court?

QUESTION: No, did it go to an intermediate appellate court? Did it go to the Florida Court of Appeals?

MR. CASLER: That was the Supreme Court of Florida. That was the highest court.

QUESTION: I know.

QUESTION: It went to the District Court of Appeals, too, didn't it?

MR. CASLER: The District Court of Appeals is the lower court.

QUESTION: Yes, but I think what Mr. Justice White is referring to, by an intermediate State appellate court?

MR. CASLER: Well, they made a ruling and entered an opinion and denied it. Then the defendant went to the Supreme Court of Florida, which is the highest court, and they denied the -- summarily denied it, saying they didn't have jurisdiction.

QUESTION: But your claim certainly includes an assertion that the Florida courts didn't follow the controlling Florida law.

MR. CASLER: Absolutely. Absolutely.

QUESTION: Mr. Casler, did you make the -- negotiate the stipulation that trial counsel, who also took the appeal, I understand, on direct review, was competent?

MR. CASLER: Did I prepare it?

I prepared it in the defense --

QUESTION: No, did you negotiate it?

MR. CASLER: No.

QUESTION: Did you advise your client on it?

MR. CASLER: I talked -- yes, Your Honor.

QUESTION: Why?

MR. CASLER: I explained to him what the competency was of an attorney, what the competency wasn't, and the --

QUESTION: Well, why would you, you had not been on the case before, why would you want to stipulate something

like that?

MR. CASLER: All right. Judge Hodges, the district court judge in Tampa, --

QUESTION: That's a federal district court.

MR. CASLER: Federal district court. -- told the defendant that without that, that he had to go back to the State courts. And he said, "I'm not going back to the State courts. I've been in jail two years" --

QUESTION: Oh, I see, to exhaust his State remedies on his counsel claim.

MR. CASLER: And he said, "I'm not going back to the State courts." And I says, "Well, the only way the judge, Judge Hodges, is going to let you come in here is to sign a stipulation that your counsel was competent". And I explained to him what he was doing. He decided to do that.

QUESTION: I see. Thank you.

QUESTION: Do you -- I think you indicated it, but I want to be clear -- you acknowledge that on rebuttal or on cross-examination of the defendant, after he had taken the stand, that his statements could have been established under Harris v. New York by way of impeachment?

MR. CASLER: Yes, but I don't know if -- if he had not make the statement that he made --

QUESTION: Well, I'm assuming that -- let's assume for the moment that the government had not put in these

admissions to the police in its case-in-chief, do you agree when he once took the stand the State could impeach him?

MR. CASLER: Yes, I do. Certainly.

But there again I feel that there would have to be -- that the statements were voluntarily made, not coerced or taken under some other circumstances; but then the statements could have been used.

The fact of procedural default, I've set out as best I could with all the cases from the State of Florida that we just -- the cases that relate to procedural default.

I don't believe I have anything else to say.

Thank you.

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

Mr. Corces.

REBUTTAL ARGUMENT OF CHARLES CORCES, JR., ESQ.,

ON BEHALF OF THE PETITIONER

MR. CORCES: May I clarify a couple of things for the Court?

First, the rule of procedure has been in Florida since 1968, not 1972. It's cited in the brief as a 1972 rule, but that rule has been in effect in Florida since 1968. But since, every year, Florida seems to publish the Rules of Procedure, I cited them as a 1972 rule.

QUESTION: Do you have a Florida case that says if you don't make it you waive it?

MR. CORCES: Yes, sir, it's cited in the briefs.

One other point, I went through every case cited by the respondent in his brief, there is not one case that holds that it's not a waiver if you fail to object; not one case.

QUESTION: But what do you do with Henry v. Mississippi?

MR. CORCES: Henry vs. Mississippi?

QUESTION: That was a procedural default at the trial, claimed default at the trial.

MR. CORCES: Yes, sir. Well, in Henry vs. Mississippi, I believe this Court remanded for a determination as to whether or not --

QUESTION: Yes, but what was the rule? What did -- how could it remand it -- what was the basis for its remand? The basis for its remand was that it must be determined whether there was deliberate bypass.

MR. CORCES: By counsel.

QUESTION: Yes.

MR. CORCES: Yes, sir.

QUESTION: Well, what do you do with that? What do you do with that?

MR. CORCES: Well, sir, I submit that, to that extent, the better guideline is in Davis.

QUESTION: So you say, for you to win you have to

chew up Henry v. Mississippi a little bit? You said you didn't need to overrule the holding of Noia.

MR. CORCES: No, sir.

QUESTION: Then how about Henry?

MR. CORCES: Well, I think Henry, if it please the Court, was primarily concerned with the adequate State ground. Henry was concerned --

QUESTION: Well, it's the same question in a way, I think.

QUESTION: I thought Henry said the problem with the fact situation was you didn't know whether there was a deliberate bypass or not.

MR. CORCES: Did not --

QUESTION: But the rule was still deliberate bypass. And if my memory serves me, ultimately the Mississippi Supreme Court found that there had not been.

MR. CORCES: In so far as counsel was concerned, that's correct, sir.

QUESTION: Yes.

QUESTION: Well, was Henry a habeas hearing?

MR. CORCES: No, sir, it was direct certiorari.

QUESTION: On appeal.

MR. CORCES: Direct appeal, yes, sir.

QUESTION: Well, then, that is a State ground question.

MR. CORCES: It's an adequate State ground question,

yes, sir.

QUESTION: Which Fay v. Noia said was a different situation.

MR. CORCES: Yes, sir. Fay v. Noia says that detentions implicit are sufficient.

MR. CHIEF JUSTICE BURGER: Very well. Thank you.

MR. CORCES: Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:15 o'clock, a.m., the case in the above-entitled matter was submitted.]

- - -