In the

ORIGINAL

Supreme Court of the United States

UNITED STATES,	:	
	:	
Petitioner	:	
	:	No. 80-1595
v.	:	
	:	
JOSEPH C. FRADY	:	

Washington, D. C.

December 8, 1981

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IN THE SUPREME COURT OF THE UNITED STATES

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Petitioner

v. No. 80-1595

JOSEPH C. FRADY,

Washington, D.C.
Tuesday, December 8, 1981

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 2:00 o'clock p.m.

APPEARANCES:

ANDREW L. FREY, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C. 20530; on behalf of the Petitioner.

DANIEL M. SCHEMBER, ESQ., Court-appointed, 1712 N Street, N.W., Washington, D.C. 20036; on behalf of the Respondent

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C O N T E N T S

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P R O C E E D I N G S

JUSTICE BRENNAN: We will hear arguments next in 80-1595, United States v. Frady. Mr. Frey, you may begin whenever you are ready.

ORAL ARGUMENT OF ANDREW L. FREY, ESQ.

ON BEHALF OF THE PETITIONER

MR. FREY: Thank you Mr. Justice Brennan, and may it please the Court:

In March 1963 Thomas Bennett was beaten and stomped to death in his home. Respondent and a co-defendant were apprehended after emerging from Bennett's home by police officers called to the scene by neighbors. They were covered with Bennett's blood and co-defendant Gordon had just discarded on the street a wallet that was taken from Bennett.

In November 1963, respondent was convicted of first degree murder and of robbery, and sentenced to death by the jury. On his appeal, the case was heard by the en banc D.C. Circuit, which reversed the sentence of death for procedural improprieties, but affirmed the conviction of first degree murder.

After a series of unsuccessful collateral attacks on his conviction and one successful one relating to his sentence, respondent commenced the present proceeding in 1979, nearly 16 years after he had been convicted.

The challenge in this proceeding is certain instructions which were given to the jury at his trial on the element of malice, which is one of the elements of first degree murder. Now, specifically, the instructions that the court of appeals addressed were three. The first was the instruction given in Sandstrom that a person is presumed to intend the natural and probable consequences of his act. The court did not rely on this instruction as a ground for reversal. I'm looking at page 27 of the Joint Appendix, and page 28.

The second part of the malice instruction that was troublesome was the statement that in determining whether a wrongful act is intentionally done and is therefore done with malice aforethought -- you should again bear in mind.

Now, it is correct, as the District of Columbia Circuit recognized several years after its decision on Frady's original appeal, that this is an improper statement because it is not necessarily the case that an intentional act is therefore done with malice.

Similarly, in discussing the significance of the use of a weapon in this case, on page 28 of the Joint Appendix, the district court said "The law infers or presumes from the use of such weapon, in the absence of explanatory or mitigating circumstances, the existence of the malice essential to culpable homicide." That

instruction also was disapproved by the District of Columbia Circuit in subsequent cases.

No objection was made by counsel to any of these instructions.

QUESTION: Mr. Frey, before you leave the specific instructions, do you happen to know whether these instructions were given to the jury in written form? Or were they just read orally?

MR. FREY: I'm afraid I don't know.

QUESTION: It appears they were read orally, but I can't really be sure.

MR. FREY: I'm not sure. I will come back to the instructions in a moment because there's another point I want to make about them, but first I'd like to summarize for the Court what the court of appeals held in ordering that habeas corpus relief be granted to respondent in this case.

First it held, citing this Court's opinion in Davis v. United States, that the standard of review of such a claim on collateral attack is plain error under Rule 52(b) of the Federal Rules of Criminal Procedure.

Secondly, it held that if the standard is not plain error, but rather the cause and prejudice standard of Davis and of Wainwright v. Sykes, then that was satisfied. The cause prong satisfied because it would have been futile to object to these instructions because they were standard

at the time they were given; the prejudice prong essentially satisfied because of the court's conclusion that it was not clearly harmless error in the circumstances of this case; it might have affected the jury's verdict.

Then the only remaining question in the Court of Appeals' analysis was whether the decisions in which the D.C. Circuit recognized these errors in the standard jury instructions should be applied retroactively, and the court held, relying on Hankerson v. North Carolina, that because they relate to the jury's determination of factual guilt or innocence, they do have to be applied retroactively.

Now, the decision, in our view, incorporates a number of serious errors. To characterize its result, I would say that first, it completely erases the distinction between direct and collateral attack in the federal system. Secondly, it renders the requirements of contemporaneous objection in Rule 30 of the Federal Rules of Criminal Procedure a dead letter. And it attaches to each new decision altering the Rules of Evidence or the proper form of jury instructions the consequence of invalidating large numbers of prior convictions obtained before the new decision was handed down.

Before I address the questions that the court of appeals addressed, I'd like to pause for a moment on the question of whether this is a constitutional or a

non-constitutional error. This is something of a morass and I'm not sure that I understand it totally, but it is significant because if it's not a constitutional error, then the failure to raise this point on appeal would appear to foreclose the issue under this Court's holding in Sunal v. Large.

Secondly, if it's not a constitutional error, while that does not absolutely foreclose relief under 2255, the standard announced in Davis two is that you must have a fundamental defect inherently resulting in a complete miscarriage of justice. Now, that standard, it seems to me, must be different from the harmless error standard that the court of appeals effectively applied in this case.

Indeed, if the error is non-constitutional, it seems to me that the decision of the court of appeals, recognizing the error, is not significantly different from a statute that would be passed by Congress to correct what it viewed as an improper jury instruction, and I don't think anybody could seriously contend that if Congress had passed a statute in 1967, that Frady would be able to come in and invoke that statute as grounds for collateral relief.

Now, I think the error here was not of constitutional magnitude, and in this connection it seems to me that the important case is Sandstrom, but what is instructive is the contrast between Sandstrom and the

present case.

In Sandstrom, the issue was whether the defendant, who admitted killing the victim, had intended to kill the victim. And the principal difficulty that the court found in the instruction which was a focal instruction in the case was that it may have caused reasonable jurors to believe that if his actions were such as would be likely to bring about death, then they must find Sandstrom guilty, no matter what they felt about his own state of mind.

Now, many of the cases of this court, Cupp v. Naughten, Henerson v. Kibbe, United States v. Park, in discussing instructions, enjoin the examination of the instruction in the entire context. And without going into it in detail here, there was a fairly lengthy instruction on malice, and this instruction required the jury to find that there was a feeling of hatred or ill will on the part of the defendants. State of mind showing a hard regardless of social duty, a mind deliberately bent on mischief and so on.

And in giving the Sandstrom instruction about the presumption that one intends the natural and probable consequences of his acts, the judge went on to say if a man uses upon another an instrument of such a nature and in such a way and under such circumstances that such use would naturally and probably result in death, then you are not compelled to presume that he intended to kill from such

acts, but has the right --

QUESTION: What are you arguing now, Mr. Frey, that there's no constitutional error?

MR. FREY: I'm just making the point that in my view -- and I'm going to pass on from this unless there are any questions, this is not a constitutional error --

QUESTION: Oh, is that one of the questions you brought up here?

MR. FREY: Well, I think it is built into the question of what the standard --

QUESTION: Well, it isn't in so many words one of the questions you listed, is it?

MR. FREY: No, we didn't list that as a question, but I do think it is material to the Court's consideration of whether the failure to object at trial and to raise the issue on appeal, which is a question that we did present, should bar review.

But let me move on to the question, if I may, of whether plain error is the proper standard for review in a collateral attack.

I think the court has made several fundamental mistakes in reaching this conclusion. The first is that it has turned the Davis case topsy-turvy, because what Davis said is that --

QUESTION: Mr. Frey, I'm sorry, but you're leaving

the point that I don't think was entirely extraneous to your plain error point, because it seems to me -- aren't you saying that there must be constitutional error, and the mere fact that there is plain non-constitutional error is not sufficient ground for collateral attack?

MR. FREY: Except in the extraordinary case outlined in Davis.

QUESTION: Unless it meets the fundamental impact --

MR. FREY: And even then I'm not clear in light of Sunal v. Large what effect the failure to appeal would have.

QUESTION: I want to be sure I grasp what you were driving at. What you were saying is that this instruction read in context, even if it might have been plain error in the sense of reversible error, non-constitutional reasons, nevertheless is not the kind of error that's open to review on collateral attack.

MR. FREY: I think that is correct At least in --

QUESTION: Which would seem to me to be well within your first question, if I understand the first question.

MR. FREY: I believe it is. I wanted to make the point, but I think --

QUESTION: It just wasn't one of the separate question.

MR. FREY: It was not a separate question whether it was a constitutional or a non-constitutional error. I did want to make the point, but I do want to address the question of whether plain error is the proper standard.

I will assume in the rest of my argument that this is a constitutional error; that it doesn't matter whether or not --

QUESTION: Are you going to assume that it's a constitutional error that fundamentally tainted the trial, and then the question is whether plain error, given those facts, is --

MR. FREY: No, I'm not going to assume that it fundamentally tainted the trial because I don't know exactly what that means. I would rather cast it in a -- I will assume that it is an error of a nature unlike the Fourth Amendment suppression claim in Stone v. Powell that might be cognizable in a collateral attack proceeding, and try to address how the court should evaluate the failure of the defendant to make an objection and take an appeal at the time, and in that connection, whether the plain error standard is the proper standard, and also --

QUESTION: Or Wainwright.

MR. FREY: Or the Wainwright cause and prejudice standard. And secondly, if the cause and prejudice standard is the proper standard, whether the assumed futility of

objection is a ground.

QUESTION: The reason I come back to this point is that in the prior case, one of the arguments that was made is that the Wainwright standard simply doesn't apply if the error is sufficiently grave.

QUESTION: Well, that's what was held below, isn't it?

MR. FREY: Well, what the court held below was that Davis dictated the plain error standard in the federal context, because Davis said that you would have no more liberal access to collateral review than you would have to review on direct appeal in the case of a procedural default, and the court took that as a holding that you would have equal access to collateral review or to direct review.

Now, the use of the plain error standard, as I said, obliterates any distinction between collateral and direct review, and this is the distinction that the court has repeatedly recognized from Sunal v. Large if not earlier, up to the Addonizio case a couple of terms ago.

The second thing is that obviously, the consequences of applying the plain error rule on collateral attack are far more sweeping in a case like this, potentially hundreds of murder convictions are subject to collateral attack under the decision of the court of appeals. If you were confining it to cases on direct

appeal, you would have a much more limited impact.

Now, --

QUESTION: I take it that there's nothing about 52(b) on its face that would suggest a distinction, does there, between direct review or collateral?

MR. FREY: It doesn't on its face say that it's limited. However, --

QUESTION: Have we ever said so?

MR. FREY: I'm not aware that you have ever said so, no.

QUESTION: Incidentally, this is a 2255 proceeding?

MR. FREY: Yes, it is.

QUESTION: And that's a civil action, isn't it?

MR. FREY: That's correct.

QUESTION: I mean not a civil action, I'm sorry.

MR. FREY: Well, for purposes --

QUESTION: It's a continuation of the criminal case, isn't it?

MR. FREY: It's treated as civil for some purposes, and it's part of a criminal case for other purposes.

QUESTION: Is this for this purpose?

MR. FREY: Well, it's civil, for instance, for purposes of the time limits for petitioners to certiorari and the jurisdiction of this Court is civil.

QUESTION: But otherwise, hasn't it been regarded as simply a continuation of the criminal case?

MR. FREY: Even if it's regarded as a continuation of the criminal case, a kind of retrospective look at the case, the question is what are the appropriate standards to apply in making that look.

And I would make the point that the cause and prejudice standard seems to me to be responsive to the issue that's presented as to whether a procedural default should or should not foreclose a claim on collateral attack. Because it asks what are the state's interests in enforcing a default, and what is the defendant's excuse for the default. And that seems to me to be the proper inquiry to be made.

Now, if I can turn to the question then of presumed futility of objection as a proper showing of cause under the cause ane prejudice standard. This is the key issue both here and in the previous case, and I think underlying the viewpoint of those who find that futility of objection should be cause is the view that it's not fair to defendants and to their lawyers to expect them to anticipate rulings that are not evident at the time of the trial.

Now, it has a certain superficial appeal, but it does not seem to me to be justified on close analysis, and of course, I remind the court, as counsel for Ohio says,

that the consequences of applying it in the collateral attack context can be very grave indeed in terms of the numbers of cases that would be affected.

Now, proper analysis of this issue seems to me to require consideration of several subissues. The first question is what constitutes futility; is it that the trial court would likely reject the objection; is it that you have no prospect of succeeding on appeal; is it that you have no prospect in this court? I would say when you're dealing with a federal law or constitutional issue, short of an authoritative holding by this Court it seems to me difficult to characterize any ruling as futile to object to.

The second question is, does it make any difference whether the lawyer in this particular case actually refrained from objecting on account of a judgment that he made regarding futility. There's no evidence that that was the basis for the failure to object in this case.

And there are two possibilities. One is to do what the court of appeals did and presume that all lawyers who didn't raise this objection did so because they thought it would be futile, in which case many defendants will be getting relief on a purely windfall basis totally unrelated to the actual reason for the default. Or the alternative is to conduct what will be, I think, a very difficult and taxing inquiry into the lawyer's actual motives in not

making an objection to something that was potentially objectionable.

Now let me turn to the next question which is, does it matter whether the lawyer was right or wrong in his decision that it would have been futile. In our view, the respondent should not prevail in either case.

Let me say preliminarily that any assumption that if the court of appeals indulged that respondent's counsel was right in judging that it would have been futile to object seems to me completely unsupportable because the court of appeals, shortly thereafter, in fact observed on its own these errors, and in the course of doing so it noted that it must have been just a slip of tongue by the judge, which surely would have been corrected if he had noted it.

Now, if the lawyer's assumption that it would be futile to object was wrong, then it seems to me his mistake is no different from many others that defense lawyers, being human, make during the course of a criminal trial. For example, the failure to call a helpful witness, the failure to pursue a line of cross examination that would have been useful, or many other things.

Now, the standard for assessing whether such mistakes justify a new trial on collateral relief, I think, is the Sixth Amendment of ineffective assistance of counsel standard. And in response to the question that Justice

White asked during the last argument, my view is that it is not, I think, correct to equate a mistake on the part of the lawyer in raising a useful claim with ineffective assistance of counsel. The mistake may be of such a magnitude and may have such a fundamental effect in undermining the defendant's prospects of success at trial and be so prejudicial that in all the circumstances, the court will judge it to be a constitutional violation.

In any event, my point here is simply that a mistaken judgment about the futility of raising an objection is really no different from any other kind of mistake that a defense lawyer can make.

Now, I note in this connection that the contemporaneous objection rule does perform a very important function because by insisting on a contemporaneous objection, you do improve the chance that the error will be avoided or corrected at the trial, that it will not occur.

QUESTION: Well, this was the basis for the decision Davis won, was it not? The language of 12(b)(2).

MR. FREY: Well, there was a statute that was being interpreted, but that's the policy that underlies the statute in large part.

QUESTION: Yes.

MR. FREY: Now, Davis one is different from this case because it involved the grand jury question and had

nothing to do with the reliability of the guilt determining process in the sense that this case arguably does. I assume my brother will suggest that it has a substantial effect. I don't agree, but --

QUESTION: But let's just assume for purposes of history that you go from Davis one to Francis v. Henderson to Wainwright v. Sykes, and you have specific language in Davis one; it's carried over in Francis v. Henderson, and in Wainwright v. Sykes it's perhaps elaborated on, but it expresses more a feeling or mood rather than any precise standard or any measurable thing as if it were dealing with mathematical equations.

MR. FREY: But I think it does express a policy. It doesn't explain what cause means and what prejudice means, but it certainly reflects a policy which this Court has adopted, that there has to be an excuse for a procedural default before the habeas corpus defendant will be allowed to come in and seek relief. He has to justify it.

That's what we're talking about now; is what constitutes this sufficient justification. And I have indicated that in my view, a mistaken belief that it would be futile to object cannot possible be a sufficient justification.

So let's now turn to the perhaps more difficult question; that is, assuming that the lawyer is right in his

view that that objection would be futile, whatever is necessary to satisfy that -- let's say the situation in Sunal v. Large where the appellate Second Circuit had definitively rejected claims by other defendants, and this Court had denied certiorari on those claims. So let us say, if it can ever be said, that the lawyer is correct in assuming futility. Nevertheless, substantial reasons exist for enforcing the procedural default and for not treating this accurate assessment of futility as cause.

First of all, I come back to the consequences of a rule that does treat it as cause whenever you have a change in the law. Whenever you have a change in the law with regard to a proper instruction, with regard to a commonly occurring evidentiary ruling, with regard to any of the things that may come up at trial with some frequency, the effect of saying that the lawyer couldn't have known that the law would change and therefore, everybody who had this issue treated adversely to them in their trial is entitled to collateral relief is quite substantial.

And that, I think, was the point of footnote 8 in Hankerson. It was an effort to confine this effect, while still recognizing the retroactivity that people who had felt the claim was important enough that they were going to raise it and try to insist upon it and try to get it litigated, the court felt it was not fair to deprive them of the

benefit, but the people who didn't, this was a limiting principle that I think makes a lot of sense.

Secondly, if you are going to say that there is no penalty attached to the default, that if a lawyer looks at a particular issue that he might raise and says there's no point in my raising it, therefore I won't, and if it's all right for him to say that and he has full access to collateral attack when somebody else does raise it and does prevail, you've removed the incentives to counsel for raising claims that may bring about improvements in the law.

In fact, if somebody who raised it, as in Davis two, and lost -- if somebody who raised it and lost might be foreclosed on the ground of law of the case, but somebody who didn't raise it would have access to collateral relief, you would actually have created some disincentives to raising claims like this.

Another point about the contemporaneous objection rule and the reliance on the default as a ground for foreclosing access to collateral relief, is that a contemporaneous objection is one of the best ways we have of judging whether the issue was important to the defense in the context of the particular case. It seems to me that the court cannot indulge the assumption that every potential issue that was in a case on which the law at some time in the future changes, indulge the assumption that that was

important to the defendant and justifies giving him collateral relief, even though he didn't say a peep about it at trial and he didn't raise it on appeal.

Now, if I can sum up, the issue here is a balance between the interests of our system in finality in criminal cases against the concern in our system that substantial injustice not be done, that innocent defendants not be incarcerted. These are important values, and obviously, we don't insist on the same degree of finality in criminal cases that we do in civil cases.

Nevertheless, it does remain of significant value in our system and the court has often recognized it, and it's not to be overriden lightly, but only when there are compelling justifications for such an action. This is so even when the defendant and his attorney are not at all blameworthy with respect to some error at trial. And I think I can best illustrate this point for you by reference to the treatment of motions for a new trial on the basis of newly discovered evidence.

If you have newly discovered evidence which raises some question about the defendant's guilt; that is, it might have affected the outcome of the trial, there are two points to notice about it. First of all, if the lawyer did not exercise due diligence in discovering this evidence, even though the client is in no way to blame for this, relief of

new trial is foreclosed for the lack of due diligence. This is to ensure that the trial itself is the main event, as the court said in Wainwright, and not a tryout on the road.

That is analogous to the lawyer who mistakenly thinks that an objection would be futile.

Now, even where the newly discovered evidence could not have been found in the exercise of due diligence, and the defendant and his lawyer are therefore in no way to be blamed, the witness comes back from Tibet and suddenly discloses information, we don't apply a standard like the court of appeals applied in this case that if it might have affected the trial; the standard that is applied is that it would have to probably have resulted in an acquittal before a new trial is granted.

Now, this may seem harsh, but it is the accommodation that our system makes between two competing important interests; the interest in finality and the interest in not incarcerating innocent defendants.

If the Court accepts the reasoning of the D.C. Circuit in this case, there is no balance struck between those interests; there is no value afforded to finality in criminal cases. There is nothing but a harmless error inquiry in every case when a defendant comes up with some new principle or some new fact which he can call to the Court's attention years and years later.

I'd like to reserve the balance of my time for rebuttal if there are no further questions.

ORAL ARGUMENT OF DANIEL M. SCHEMBER, ESQ.

ON BEHALF OF RESPONDENT

MR. SCHEMBER: Mr. Justice Brennan, and may it please the Court:

The government has briefed this case as if Mr. Frady were a federal prisoner convicted of a federal offense and who has filed a post-conviction relief motion raising only federal issues. All three of those premises are false, and the government completely overlooks this aspect of the case.

Mr. Frady is a District of Columbia prisoner. He was convicted of a local crime. His motion for post-conviction relief raised instruction errors which said, in effect, that the instructions given at the trial improperly informed the jury as to what the government had to prove in order to establish the elements of the offense of first degree murder.

He also raised the claim that these instructions were also erroneous under Mullaney and Sandstrom, the constitutional issue.

QUESTION: You say he raised these at the trial?

MR. SCHEMBER: No, I'm referring, Your Honor, to his post-conviction relief petition.

Now, the federal district court in the District of Columbia and the court of appeals, they sit in a unique jurisdiction, and this case dates from a time period when the federal court in the District of Columbia served as both a local court and the federal court, exercising both Article I and Article III power.

In hearing the post-conviction relief petition, the district court was exercising a remaining vestige of that Article I power which was not taken away in 1970 when most of that power was transferred to the superior court.

In this circumstance, where you have a D.C. prisoner convicted solely of a D.C. offense prior to the Court Reform Act, having to come back to the court which sentenced him, as 2255 says, with a claim that his conviction is improper under District of Columbia law and that's the only forum he can go to to make that claim, the district court has an obligation to afford relief if District of Columbia law in fact affords relief.

This was the basic premise of the court of appeals' reliance on the Green and Wharton cases, the primary precedents which the court invoked to grant relief in this case. Green and Wharton involved the two instructions that were involved in the Frady case, and --

QUESTION: You don't deny, do you, that it was a 2255 proceeding?

MR. SCHEMBER: Yes, it was, Your Honor. 2255 applies to any prisoner who was sentenced by a court created by act of Congress. Therefore, it applies to Mr. Frady. 2255 then tells the prisoner what court you have to go to, and 2255 says it's the sentencing court. The sentencing court in this case was the United States District Court. Why was the United States District Court the sentencing court in this purely local case? It was the sentencing court because this case arose prior to the Court Reform Act of 1970. Prior to that time, the U.S. District Court had jurisdiction to try all local felonies, and served in that capacity as both a local court and a federal court in a similar manner as the federal courts throughout the country.

It is for that particular reason that this case, which contains both federal constitutional issues and local issues, finds it way back into the United States District Court.

The cases relied upon --

QUESTION: Are you going to argue that for that reason the contours of the 2255 proceeding differ, to the extent that there are local issues or issues of local law as to which there were errors? Is that it?

MR. SCHEMBER: My contention, Mr. Justice Brennan, is that in a case such as this kind, a unique case which only arises because of this unique circumstances and in a

few years we won't have anymore cases of this kind due to the passage of time and the fact that the Court Reform Act was passed in 1970, my contention is that 2255 states that the forum in which a pre-Court Reform Act prisoner must seek relief is the United States District Court because that's the sentencing court.

QUESTION: What I'm trying to get at is how does that differ -- how does that change the issues that this case presents from a 2255 and some other federal district --

MR. SCHEMBER: 2255 affords relief for prisoners incarcerated in violation of the Constitution and laws of the United States, and it also provides relief in cases that are otherwise subject to collateral attack.

A case of a D.C. prisoner in federal court here in the District of Columbia because of this unique circumstance is properly there under 2255, and if --

QUESTION: I don't suggest the government to suggest that the case wasn't properly there, this 2255 proceeding is properly there.

MR. SCHEMBER: No. The point is can claims under local law be made there.

QUESTION: That's what I'm trying to get at. What claims under local law are here in addition to the federal Constitutional claims?

MR. SCHEMBER: The claim that the instructions

were plain error; that the instructions were erroneous because the jury was not properly informed as to what the prosecution had to prove to establish the elements of this D.C. offense.

QUESTION: And are you saying that's an error of local law?

MR. SCHEMBER: yes, Your Honor.

QUESTION: Although it might also be an error of constitutional dimensions?

MR. SCHEMBER: That's correct, Your Honor.

QUESTION: But the same error would be both. Is that it?

MR. SCHEMBER: Yes, Your Honor.

QUESTION: All right.

MR. SCHEMBER: We maintain that under the Green and Wharton cases, which are valid local precedents; they are decisions --

QUESTION: You're saying then that the scope of review under 2255 is broader in the District of Columbia than it is in any other federal court.

MR. SCHEMBER: That is, in effect, the case, Your Honor.

QUESTION: What if it came up in a federal enclave conviction?

MR. SCHEMBER: Are you referring to --

QUESTION: In the assimilated crimes, military reservations.

MR. SCHEMBER: Well, under the Assimilative Crimes Act, essentially that act federalizes local offenses and makes them a federal offense under the Assimilative Crimes Act. That's not what's going on here. This is a District of Columbia offense, and it's tried as a District of Columbia case, and it is in -- it was in federal court in 1963 solely because at that time the U.S. District Court for the District of Columbia had unique jurisdiction, unique in this country, to try local and federal offenses.

QUESTION: Mr. Schember, is this something like that if there's an error of district law, entirely apart from whether or not the error might also be of constitutional dimensions, that in effect, if the court of appeals rested its judgment on the reparation of an error of district law, that's like a state court deciding a case on a state ground and therefore, it's none of our business here to review it?

MR. SCHEMBER: That's my contention, Your Honor. That this decision of the United States Court of Appeals rests on an adequate independent ground of District of Columbia law. That is reflected in the Green and Wharton decisions upon which the court relied in reaching its result.

QUESTION: But those decisions just go to whether

the instruction was error. They are not local law decision saying the scope of review under 2255 is plain error, are they?

MR. SCHEMBER: They are local decisions in the sense that they were decided prior to February 1, 1971, --

QUESTION: But they don't go to the question of what is the scope of review on collateral attack, do they?

MR. SCHEMBER: They do not expressly address that question, of course, because they were --

QUESTION: They established the fact that these instructions were erroneous as a matter of District of Columbia law.

MR. SCHEMBER: That's correct.

QUESTION: But that still leaves open the question whether on collateral attack in the District of Columbia or anywhere else in the federal system, the federal court may review a matter of local law.

MR. SCHEMBER: I turn to that question next. Indeed, that was the question that the U.S. Court of Appeals had to decide, or the district court as well. Here, the court was presented with a District of Columbia case with a District of Columbia error in it, and the question is can the U.S. Court of Appeals grant relief in the 2255 proceeding?

Our contention here is that since the 2255

proceeding is the only avenue open to the prisoner in this situation, that as a matter of equal protection the United States Court of Appeals and the district court has to afford relief that would have been available -- that is available under District of Columbia law and would have been afforded had this case not been a pre-1970 case, but --

QUESTION: Well, equal protection with what? Comparing this litigant with what other litigant who's being treated more --

MR. SCHEMBER: The other category of litigants would be those tried and convicted of murder with these erroneous instructions in the Superior Court of the District of Columbia.

QUESTION: Well, they couldn't have collateral attack if this is not the right rule.

MR. SCHEMBER: They could very well, Your Honor. That is the point of our brief. Under the District of Columbia law, the failure of the prisoner to have raised the instruction errors at trial, or on direct appeal, does not constitute a waiver of the error. It changes the standard of review, of course, to plain error due to the operation of Rule 30 and there's an analogous Rule 30 in the District of Columbia, but --

QUESTION: Isn't there any collateral review for a District of Columbia prisoner other than under 2255?

MR. SCHEMBER: Yes, there is, Your Honor. If that prisoner was sentenced in a District of Columbia court, then the proceeding --

QUESTION: What's his collateral relief?

MR. SCHEMBER: There's a statute created by the Court Reform Act --

QUESTION: No, are we talking about since the Reform Act?

MR. SCHEMBER: Pardon me, Your Honor?

QUESTION: Are we talking about the situation since the Reform Act?

MR. SCHEMBER: That's correct, Your Honor.

QUESTION: I gather of course these felonies, District of Columbia felonies, are tried in the Superior Court, are they not?

MR. SCHEMBER: Yes, sir.

QUESTION: And then if there is to be collateral relief, there's a special statute, you're telling me?

MR. SCHEMBER: That's correct, Your Honor.

QUESTION: And if there's a determination that there has been some kind of error of District of Columbia law, then there's no review in this Court?

MR. SCHEMBER: The question of the degree of the review of a District of Columbia Court of Appeals decision under the District of Columbia collateral attack statute, I

believe has not been raised in this Court as to the scope of the review.

QUESTION: What's you suggestion? Do we have to review cases like that? Say no.

MR. SCHEMBER: Your Honor, the closest thing you've had I believe would be the Palmore case and Swaine v. Presley.

QUESTION: Palmore was nothing like this.

MR. SCHEMBER: No, it is not, Your Honor. You haven't faced this issue precisely. My suggestion would be that the intent of the Court Reform Act was to make the District of Columbia Court of Appeals the highest court of the jurisdiction --

QUESTION: So in other words, to treat this kind of case where it's purely District of Columbia law, exactly as we're required to treat a state supreme court case.

MR. SCHEMBER: Absolutely, that is my contention. ANd it is simply because the U.S. Court of Appeals and the U.S. District Court have this remaining vestige of Article I jurisdiction stemming from this earlier period --

QUESTION: Did the Court of Appeals suggest at all that it was applying local law?

MR. SCHEMBER: It did so indeed by relying upon its own precedents, Green and Wharton, which --

QUESTION: Did it do so explicitly, or did it

purport to apply general federal law?1

MR. SCHEMBER: It expressly relied on Green and Wharton.

QUESTION: But those were decided before the Court Reform Act.

MR. SCHEMBER: Yes, they were. And as such, they are valid precedents of local law, since they were decided -- the date is a little bit different for that issue. Since those cases were decided prior to February 1, 1971, and since they resolved local issues, they are valid local precedents. Until the District of Columbia Court of Appeals expressly overrules, which of course it has not.

QUESTION: Yes, but in the section of the opinion dealing with the standard of review, they didn't cite those cases; they relief on Davis, Fay v. Noia and Rule 30 and Rule 52(b).

MR. SCHEMBER: Those cases were indeed cited.

QUESTION: They're the only cases cited. The cases that you're relying on are on the question of whether there was error; not in the part of the opinion dealing with the scope of review.

MR. SCHEMBER: That's correct, Mr. Justice Stevens. What I am maintaining in this Court is that when the federal district courts in the District of Columbia are faced with a situation of this kind, as a matter of equal

protection they must grant relief --

QUESTION: Well, equal protection with what? Many state collateral review systems do not allow review of a matter that would just be raisable on direct appeal. They have a similar standard to the 2255 standard, fundamental error, constitutional error and that sort of thing.

MR. SCHEMBER: That's correct, sir. However, examination of District of Columbia law indicates that relief is not foreclosed due to failure to raise the issue.

QUESTION: What is the District of Columbia case on which you rely for this proposition?

MR. SCHEMBER: Your Honor, a series of cases culminating in the Hargett decision. The Hargett decision stated that -- well, I have to back up. The Atkinson case is cited by both the government and Mr. Frady, and the Atkinson case basically held that collateral relief is available for issues not raised on direct appeal under exceptional circumstances.

Then the Hargett case, a District of Columbia Court of Appeals decision, held that exceptional circumstances exist when there's been a denial of a basic right not limited to constitutional rights. It is clear under District of Columbia law, that the failure to object to instructional errors at trial and the failure to appeal on those issues does not constitute a procedural forfeiture

constituting a waiver. So long as you can show that there was a denial of a basic right, not necessarily a constitutional right, District of Columbia law affords relief and does not place a procedural bar to reaching the merits and obtaining relief.

QUESTION: Well what, in this case, is your submission, was the fundamental right under district law that was denied Frady?

MR. SCHEMBER: The right to have the jury properly instructed as to the government's burden of proof to establish the offense of murder. There were three instructional errors in this case; the Mullaney error is here, the Sandstrom error is here and the effect of these multiple instruction errors was to essentially relieve --

QUESTION: Well, has that kind of error been held to be fundamental error as a matter of District of Columbia law?

MR. SCHEMBER: They are -- well, they have been held fundamental errors under United States constitutional law in Mullaney and Sandstrom, and certainly -- and they were held erroneous under Green and Wharton, and Green and Wharton are valid local precedents because they were decided prior to February 1, 1971.

QUESTION: Do they deal with errors found to be fundamental?

MR. SCHEMBER: They dealt with the very errors involved in this case.

The question that the U.S. Court of Appeals faced in light of its prior precedents in Green and Wharton, which were direct appeal cases, was whether the degree of prejudice of this type of error, recognized to be plain error in Green and Wharton, was sufficient to warrant relief on collateral attack.

There is recognition in District of Columbia law that direct appeal and collateral attack are not the same thing. But the difference lies not in whether a forefeiture or waiver exists, but in the degree of prejudice that must be shown.

Now, I have to admit --

QUESTION: Counsel, even if you are correct and you're examining the question from the standpoint of prejudice, as I understand it, Mr. Frady asserted he wasn't even around at the time of the trial. He wasn't even there. And yet, you have a jury that found on the facts first degree murder. There wasn't even a need to deal with inferred malice, was there? How was he possibly prejudiced under the facts of this case where he says he wasn't even there. And yet, the jury found he was and found the evidence to support first degree murder?

MR. SCHEMBER: Well, Your Honor has eloquently

stated an argument that many judges that have reviewed this case have made. Other judges have taken the opposing view, and I think for this reason.

It is true that the malice -- in light of the defense, the third man defense, I was not there; it was someone else who did it -- as to that specific defense, that was raised by the defense. No, the malice instructions cannot be deemed to be prejudicial to that defense.

But the fact that that was one of the theories that the defense urged does not mean that that relieves the government of the burden of proving malice. And the government's case, the government's evidence here fairly raised the question whether this was murder or manslaughter, as the trial judge so held. And I would note that the trial judge was hardly receptive to this collateral relief motion, but nonetheless at the trial had held that malice is an issue. Manslaughter is an issue, and gave an instruction on manslaughter.

On direct appeal, one judge of the court of appeals held that the evidence of pre-meditation and deliberation, viewed in the light most favorable to the government, was insufficient as a matter of law. Other judges disagreed.

On collateral attack, again the issue of prejudice came up; again, the question of what is the evidence of

malice, is it clear, is it not clear, and the panel held below that the evidence of malice was equivocal. On en banc review there was quite blistering dissent by other members, but the net result was that the court of appeals as a whole sustained the judgment of the panel, that there was sufficient doubt as to the evidence of malice to render multiple instruction errors on that issue sufficiently prejudicial to warrant relief in this case.

Now, the question becomes what should this Court do in light of this divergence of opinion on this kind of assessment of the facts and assessment of the evidence. I suggest that the Court take guidance from its decision in the Fisher case. This is a District of Columbia case, it's a local case, and the judgments of the judges of the District of Columbia Circuit exercising the remaining vestige of their Article I jurisdiction should be deferred to on a question of this kind.

I admit there has been sharp division of opinion on the question, but I would submit that under the Fisher case cited in our brief, that it is not appropriate for this Court --

QUESTION: Do we have an intimation that they thought, that the majority thought they were exercising their remaining vestige of their Article I jurisdiction?

MR. SCHEMBER: You have to pull it out of the

opinion. I admit that. But it is very direct in the fact that they relied on their own precedents of Green and Wharton The government concedes those are non-constitutional precedents, and if they are not decisions under constitutional law, what are they?

They are decisions under District of Columbia law, holding that the instructions given did not properly inform the jury as to what the government had to prove to establish the District of Columbia offense of murder. And that, Your Honor, is a local question. And that was the basis for the holdings in Green and Wharton, and Green and Wharton were the cases that the Frady court relied upon in granting relief in this case.

The question that the government raises in their petition asks this Court to hold that a procedural default did occur, though District of Columbia law says one did not, and that the issue is absolutely waived. Where does this waiver come from? Rule 30 does not impose a waiver because all Rule 30 does is change the standard of review from normal allegation of error to plain error. It's not a procedural forfeiture.

This Court has recognized that principle in the Namet case. This Court has also recognized that the mere failure to appeal does not result in a procedural default changing the standard of review on collateral attack.

That's clear from Fay v. Noia, that's clear from Kaufman v. United States, that's clear from Humphrey v. Cady. All cases in which this Court has held that the mere failure to appeal does not by itself carry implications for the standard of review on collateral attack.

QUESTION: How much of Kaufman do you think is left after Stone v. Powell?

MR. SCHEMBER: At least the proposition that failure to appeal by itself does not impose a procedural default changing the standard of review on collteral attack. That principle was reaffirmed in Humphrey v. Cady, Your Honor. And it is also implicit in Fay v. Noia, and that indeed is what is also left of Fay v. Noia, I would maintain.

So if we have a situation where failure to object at trial merely changes the standard of review to plain error, and failure to appeal does not change the standard of review at all, how can the government leap to the conclusion tha failure to raise the instruction error at trial somehow triggers the cause and prejudice standard when the issue is first raised on collateral attack?

Where the court came to that conclusion in previous decision was from the express provisions of Rule 12 in the Davis case, which expressly applied the standard of cause and prejudice to the error raised there. And the

court extended that principle in Wainwright v. Sykes and Francis v. Henderson where the state courts had held a procedural default to have existed, and held the claim absolutely barred.

There, this Court, as a matter of comity and respect for the state court rulings held that well, if the states are going to hold the claim absolutely barred, we will at least require a showing of cause and a demonstration of prejudice, a lesser standard of review than the state court imposed in those cases.

QUESTION: Incidentally, Mr. Schember, I take it all of the rule governing 2255 actions, even as to the District of Columbia errors that you mentioned in your submission, would apply, wouldn't they? For example, Rule 12, isn't it, of the 2255 rules gives the reviewing court an option to take either the criminal Rules of Procedure or the civil, whichever are the more appropriate.

MR. SCHEMBER: That's correct.

QUESTION: And here I gather the court of appeals picked out 52(b) of the Rules of Criminal Procedure, didn't they?

MR. SCHEMBER: Yes, Your Honor, that's correct.

QUESTION: Do you rely on that at all as a latitude which Rule 12 of 2255 gives the court of appeals?

MR. SCHEMBER: I would say it was certainly

correct for the U.S. Court of Appeals to look to Rule 52(b) of the Criminal Rules in determining the proper standard of review.

QUESTION: Well, that's what it did. They just selected that one, did it not, as the proper standard here? Plain error standard.

MR. SCHEMBER: Yes, it did, Your Honor, and I would supports its analysis. It is clear that the analysis that the court of appeals needed to go through was to say all right, there appear to have been two procedural failings; one, a failure to appeal. Does that affect the standard of review? Humphrey v. Cady, Kaufman, Fay v. Noia, they say no.

Well, there was another procedural failing. There was a failure to object at trial. Well, what's the consequence of that? Well, 52(b) says the consequence of that is to change the standard of review to plain error and analyzing the case under that standard, the court of appeals granted relief and properly so.

In summation, I do maintain that since District of Columbia law affords relief here, the decision of the U.S. Court of Appeals rests on an adequate independent ground of local law and must be affirmed on that basis.

But second, even if this Court reaches the question that the government has raised in its petition, the

application of the cause and prejudice standard here is entirely inappropriate since the application of that standard is premised on a finding of a procedural default which normally bars the claim. And since that is not the case with instructional errors, it would be inappropriate for the Court to extend Davis, Wainwright v. Sykes and Francis v. Henderson to this kind of instructional error, which the Court --

QUESTION: Let me ask you one more question about your local law argument. Although the cases, the D.C. cases, allowing collateral attack for plain error as a matter of local law, which you cite in your brief, do certainly support that proposition, the way they state the plain error standard in the quote on page 9 of your brief is under the plain error standard apparently in the District, "the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the very fairness and integrity of the trial."

Now, when you state it that way, it's pretty much like the 2255 standard, isn't it?

MR. SCHEMBER: Your Honor, the ultimate standard under District of Columbia law is whether there is a probability of a miscarriage of justice. I would note that the U.S. Court of Appeals in the Frady decision invoked that very standard and held that on the facts of this case, these

instructional errors created a probability of a miscarriage of justice because they meant that Mr. Frady may have been improperly convicted of murder when he was only guilty of manslaughter.

Now, this was the point that I was discussing previously; there is division of opinion among the judges as to whether in fact the evidence in this case on the question of malice is such that there was sufficient prejudice to warrant relief under that kind of a miscarriage of justice standard. That is a question which is nicely balanced among the judges, and under the Fisher case should not be disturbed by this Court.

JUSTICE BRENNAN: You have three minutes, Mr Frey.

ORAL ARGUMENT OF ANDREW L. FREY, ESQ.

ON BEHALF OF THE PETITIONER - Rebuttal

MR. FREY: Thank you, Mr. Justice Brennan.

Let me start off by putting out to Mr. Justice Stevens that the case that you were looking at was a direct review case. We have addressed this question of local law, which I think is a complete red herring, in our reply brief. Let me just say that first of all, there is nothing in the opinion of the Court of Appeals in this case that remotely suggests that they would apply a different rule if this case had arisen as a result of a murder on the Capitol grounds or some other federal enclave in the District of

Columbia.

Secondly, there is nothing in the decisions of the local courts that remotely suggests that they would excuse a procedural default on collateral attack. What there is are decisions are saying that they are going to strictly enforce procedural defaults on direct appeal, and only consider under the plain error standard a very limited category of cases. It is difficult, I think impossible, to convert that into an understanding that they would be very liberal with such claims on collateral attack.

Now, with regard to the question that Mr. Justice Brennan asked whether this is like an adequate state ground claim, it is not like an adequate state ground claim because the District of Columbia courts are not state courts, and in fact, the United States Supreme Court is the highest expositor of District of Columbia law, even local law questions, as I learned somewhat to my chagrin in the Whalen case a few years ago --

QUESTION: But there are a number of our cases, aren't there, Mr. Frey, which have suggested a reluctance to review pure questions of District of Columbia law?

MR. FREY: Well, but as I say, the last --

QUESTION: Well, Miller and United States, Fisher and a number of others --

MR. FREY: There are cases, Southall Realty. But

in Whalen there was no reluctance to review a purely local law question. The point is you can review it.

In this case I don't think it's material because --

QUESTION: Well, nothing I said suggests that we can't review it.

MR. FREY: No, I understand that, but I'm just saying --

QUESTION: But we've been very reluctant to.

MR. FREY: I'm just saying it is a little different from an independent state ground question.

Now, on the question of harmless error, the question that Justice O'Connor asked, I do think that it may have been that if this objection had been preserved at trial and raised on direct appeal, there would be arguably be a close question I think as to whether the error would be harmless and the conviction ought nevertheless to be affirmed.

The instuction on manslaughter was given because there was some evidence which the jury might not have credited about premeditation involving the driving by the premises beforehand, the picking up and putting on gloves before they went into the premises, the conversation at the restaurant and so on.

Now, let me close on the question of futility and the point about the effect of a failure to appeal. I don't

often quote Justice Douglas but in this case I think his words in Sunal v. Large are appropriate.

He discussed the question of assumed futility and he said he did not think -- I see my time is up, so you can read it for yourselves. Thank you.

JUSTICE BRENNAN: Thank you, gentlemen, the case is submitted.

(Whereupon, at 3:00 p.m. the oral argument in the above-entitled matter ceased.)

CERTIFICATION

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United States v. Joseph C. Frady - 80-1595

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BY Suzanne Young