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THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-1974

TITLE JIMMY C. ROSE, WARDEN, Petitioner V.
STANLEY BARHAM CLARK

PLACE Washington, D. C.

DATE March 24, 1986

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IN THE SUPREME COURT OF THE UNITED STATES

JIMMY C. ROSE, WARDEN,

Petitioner

v.

STANLEY BARHAM CLARK

No. 84-1974

Washington, D.C.

Monday, March 24, 1986

The above-entitled matter came on for oral argument
before the Supreme Court of the United States at
1:51 p.m.

APPEARANCES:

W. J. MICHAEL CODY, ESQ., Attorney General of
Tennessee, Nashville, Tennessee; on behalf of
the Petitioner.

PAUL J. LARKIN, JR., ESQ., Assistant to the Solicitor
General, Department of Justice, Washington, D.C.;
as amicus curiae in support of Petitioner.

SCOTT DANIEL, ESQ., Murfreesboro, Tennessee; on
behalf of the Respondent.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Attorney General?

ORAL ARGUMENT OF W. J. MICHAEL CODY, ESQ.

ON BEHALF OF THE PETITIONER

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

On the night of December 30, 1978, Joy Faulk and
Charles Browning were shot to death in a rural area of
Rutherford County, Tennessee.

The Respondent Clark was indicted by the grand
jury on two counts of first degree murder. Following a jury
trial, he was convicted of the first degree murder of Joy
Faulk and given life imprisonment and the second degree murder
of Charles Browning and given ten years in prisonment.

The malice instructions were not challenged at
trial, but later challenged on appeal.

The state appellate court affirmed the jury verdict
and the Tennessee Supreme Court denied permission to appeal.

The petition for the writ of habeas corpus, which
alleged the malice instructions violated due process pursuant
to Sandstrom versus Montana, was granted by the district
court and this affirmed by the Court of Appeals for the Sixth
Circuit.

This grant of the petition for a writ of certiorari
is limited to the question of whether error in the trial

1 court's jury instructions on malice was harmless beyond a
2 reasonable doubt.

3 The facts in this case are extremely important.
4 Joy Faulk and the Respondent had been involved in a stormy
5 relationship prior to Faulk terminating that relationship
6 several months before the slayings.

7 Following their breakup, the Respondent threatened
8 on six different occasions to kill Faulk if he ever caught
9 her with another man.

10 Two weeks before the slayings, the Respondent
11 borrowed the murder weapon, a 25 caliber automatic pistol,
12 after untruthfully indicating that his own gun had been stolen.

13 Several days before the slayings, the Respondent
14 spoke to Browning's wife for the purpose of determining the
15 relationship and during the course of the conversation he
16 twice stated that he wanted to find out about Browning and
17 Faulk's relationship before he did what he had to do. And,
18 at the time he made those statements, he was in the possession
19 of the murder weapon.

20 Now, prior to the commission of the crimes, the
21 Respondent's truck was observed pursuing Browning's truck
22 in which Faulk and her two daughters were passengers along
23 the road. Some ten miles from this observation, Browning
24 pulled into a private driveway, either to let the Respondent
25 pass or to seek safety.

1 At that time, the Respondent parked his truck
2 immediately behind Browning's, thereby blocking any escape,
3 and left the lights on, then immediately went to the Browning
4 truck, put his pistol inside the cab and fired the weapon
5 at least four times at point-blank range.

6 Browning, who was, of course, the driver of the
7 truck, had a fully loaded 22 caliber pistol in his right
8 pants pocket. The pistol contained one spent cartridge which
9 the evidence is clear was positioned so that it could not
10 have just been fired. He could not have removed the pistol
11 from his pocket before he was shot.

12 Browning was shot once in the head from a distance
13 of six to eight inches and Faulk was shot three times, twice
14 in the head and once in the left shoulder, from a distance
15 of less than 18 inches. Both Browning's and Faulk's brains
16 were obliterated by the head wounds in this case.

17 Physical evidence at the scene indicated that the
18 Respondent fired his weapon almost immediately after causing
19 Browning to stop his truck. Browning's foot was still on
20 the brake pedal. The motor in the truck was on, the radio
21 was playing, the headlights were on, the driver's window
22 was down, and the passenger's window was up.

23 And, finally, after the Respondent fled the scene
24 of the murder, Faulk's two daughters who miraculously not
25 injured in the shooting, crawled over the bodies and were

1 found wandering around the roadway seeking assistance.

2 Shortly thereafter the Respondent led the police
3 on a high-speed chase at which time he discarded the murder
4 weapon prior to his apprehension by the police.

5 That night and at the trial, Joy Faulk's daughter
6 identified the Respondent as the individual responsible for
7 killing her mother and Browning.

8 Now, the primarily issue litigated at the trial
9 of this case was the identity of the murderer. The Respondent
10 sought to prove that someone else did it. He mentioned two
11 other individuals that he thought did it. But, given the
12 overwhelming evidence that he had committed the murder, the
13 Respondent, who did not testify, also attempted to say that
14 if he did it he was temporarily insane, he was voluntarily
15 intoxicated, he had amnesia and didn't remember it at the
16 time.

17 The jury instructions given in this case by the
18 trial judge were extensive and went into the first and second
19 degree murders and the elements of those offenses, told the
20 jury to consider the instructions as a whole, that the state
21 had the burden of proof, the Defendant had the presumption
22 of innocence, but the court gave the two Sandstrom type
23 instructions, one which said homicides are presumed to be
24 malicious in the absence of evidence to rebut, but that
25 rebuttal evidence could be direct or circumstantial and either

1 from the state or from the Defendant.

2 And, secondly, if a deadly weapon is used under
3 certain circumstances, then malice could be presumed to
4 support a second degree murder conviction unless it is
5 rebutted by other facts and circumstances.

6 QUESTION: General Cody, would you say that the
7 instructions here were like those in the case of Connecticut
8 versus Johnson and were conclusive presumptions or were these
9 instructions, in your view, rebuttable presumptions?

10 MR. CODY: Justice, they were very --

11 QUESTION: That had the effect of maybe shifting
12 the burden.

13 MR. CODY: Justice, I think very clearly they were
14 rebuttable presumptions. I do not believe there is any con-
15 tentation made that this was a conclusive presumption.

16 The Tennessee Court of Criminal Appeals held that
17 these instructions did not violate Sandstrom and, further,
18 that the Respondent could not have been prejudiced in view
19 of his sole defenses of non-participation and insanity.

20 The federal district court, however, found that
21 the element of malice was a disputed issue at trial because
22 of the defenses and refused to find it harmless.

23 QUESTION: Did you tell us, Mr. Attorney General,
24 that there was no objection to the instructions?

25 MR. CODY: There were no objections whatsoever

1 to the instructions during the trial. The error was not
2 alleged in the motion for a new trial, but some three months
3 after the trial in a supplemental motion for a new trial
4 the error was then claimed.

5 The Sixth Circuit, as I indicated, agreed with
6 the district court and declined to reverse the district court
7 despite its findings of the substantial evidence of the
8 Defendant's guilt. And, the Sixth Circuit indicated in its
9 opinion that were it not for its prior precedent that it
10 would inquire itself as to whether the evidence of malice
11 was so dispositive of intent to be able to say that the jury
12 would have found it unnecessary to rely on the presumption
13 in determining whether the erroneous instructions prejudiced
14 the Respondent. But, they felt bound by earlier precedent,
15 primarily, we believe, based upon the Kohler case out of
16 Michigan which allowed a diminished capacity defense to be
17 used. It is a proper defense in Michigan but it is not a
18 proper defense in Tennessee, and, of course, was not charged
19 in these jury instructions.

20 QUESTION: General Cody, can I interrupt you with
21 a factual question? As I understand it, with respect to
22 one of the killings, he was convicted of first degree murder
23 and with respect to the other it was second degree murder.

24 MR. CODY: Yes.

25 QUESTION: Which one?

1 MR. CODY: The first degree murder was the murder
2 of Joy Faulk, the woman who was shot twice in the head and
3 once in the shoulder. And, of course, this was the
4 Respondent's former girlfriend who he had said, if I ever
5 catch you out with someone I will kill you.

6 Browning, which was the second degree murder con-
7 viction -- It was based upon that he was the person that
8 she was found with on that occasion.

9 QUESTION: I take it the harmless error inquiry
10 would be whether there was no possibility or no reasonable
11 possibility that the first degree murder conviction might
12 have been a second degree murder conviction?

13 MR. CODY: I think the inquiry could go to both,
14 but I believe that it is very clear in this case that the
15 overwhelming -- First of all, on the first degree charge,
16 there is no question that premeditation and deliberation
17 and willfulness were all properly charged.

18 And, under Tennessee law, voluntary intoxication,
19 for instance, is not a defense to second degree murder.
20 It is only a defense to premeditation and deliberation aspects.

21 So, we believe that any jury which, under these
22 facts, would have found that the murder was committed pre-
23 meditatively and deliberately and wilfully. Under these facts,
24 multiple shots within the cab of the truck at point-blank
25 range would have also found malice and could have certainly

1 not have been harmful.

2 Now, maybe the court -- In response to your question,
3 belatedly the Respondent in this Court for the first time
4 has raised a self-defense claim. Self-defense was never
5 raised anywhere below, it was never argued, it was never
6 charged to find, but certainly with respect to the first
7 degree murder of Joy Faulk, who didn't even have a pistol
8 in her pocket and was sitting on the far side of the truck --
9 both victims were seated -- there could be no indication.

10 If the Court please, the State of Tennessee submits
11 first that the jury instructions in this case which incorporate
12 a rebuttable presumption on the element of malice alone,
13 are subject to analysis under the harmless error doctrine.

14 Second, that the existence of malice was not placed
15 in dispute by either of the two defenses raised by the
16 Respondent.

17 And, third and finally, in any event, the evidence
18 of malice in this case, on the facts and the entire trial,
19 is overwhelming and that the Respondent was not prejudiced
20 by the instructions.

21 QUESTION: Well, to urge -- Your first point is
22 that it is subject to harmless error analysis, that assumes
23 there was error. Is it conceded that there was error?

24 MR. CODY: Well, Justice --

25 QUESTION: Or do you say there is no problem in

1 the instruction if there is no issue about malice?

2 MR. CODY: It is difficult to answer that question.
3 We did not think that there was any basic error in this
4 rebuttable presumption, but the court has granted certiorari
5 only on the question of whether it was harmless and that
6 is the reason that we only raised that point.

7 QUESTION: So, you are suggesting that the narrow
8 question presented here is the harmless error question?

9 MR. CODY: Yes, that is the only question upon
10 which certiorari --

11 QUESTION: Because of the overwhelming evidence?

12 MR. CODY: Yes, if the Court please. And, we
13 think that an erroneous rebuttable presumption on malice
14 in this case shouldn't be in any way classified as error
15 so basic to denying a fair trial as to require an automatic
16 reversal regardless of the facts and legal significance of
17 the defenses.

18 And, we believe if the Court analyzes the record
19 in this case and the evidence and defenses presented that
20 it would find a harmless error clearly and reverse the Court
21 of Appeals.

22 With the Court's permission, I would like to leave
23 what remaining time for rebuttal.

24 CHIEF JUSTICE BURGER: Very well.

25 Mr. Larkin?

1 ORAL ARGUMENT OF PAUL J. LARKIN, JR., ESQ.

2 AS AMICUS CURIAE IN SUPPORT OF PETITIONER

3 MR. LARKIN: Thank you, Mr. Chief Justice, and
4 may it please the Court:

5 The Court has often recognized the harmless error
6 doctrine serves salutary purposes in the criminal process.

7 It is also clear from the Court's decisions that
8 an erroneous jury instruction may generally be analyzed for
9 its harmlessness in the particular facts of a given case.

10 The question here is whether the Court ought to
11 create an exception from those rules for instructions that
12 have an erroneous presumption. In this case, the presumption
13 is rebuttable, but the Court has looked at both rebuttal
14 and conclusive presumptions in the cases preceding this one
15 such as Sandstrom and Connecticut versus Johnson.

16 It is our position there is no reason to adopt
17 the per se rule in this area. And, it is also our position
18 that the analysis that the Court followed in United States
19 versus Frady directly controls this case.

20 The question in Frady came up in the context of
21 whether or not the Defendant had been prejudiced because
22 he hadn't objected at trial to the instruction.

23 But, the question of whether the Defendant is prejudiced
24 is simply the flip side of the question of whether the error
25 is harmless.

1 So, the analysis the Court followed in Frady should
2 apply here.

3 Two aspects of the decision in Frady are quite
4 important. First, the Court found no difficulty in analyzing
5 the record to decide whether or not Frady, in fact, had been
6 prejudiced.

7 And, second, the Court found that for three related
8 reasons he was not.

9 The first was that the government's proof in that
10 case of malice was overwhelming. That is also the case here.

11 The second reason was the erroneous instruction
12 did not affect the defense in that case of non-participation
13 that Frady had raised. That is also the case here.

14 Neither the defense of non-participation, voluntarily
15 intoxication, insanity or amnesia could have been affected
16 by this instruction.

17 And, finally, the last reason given in Frady why
18 the error there was not prejudicial was that the jury found
19 that Frady had premeditated and deliberated and that, too,
20 is the case here.

21 QUESTION: Frady was decided before Connecticut
22 against Johnson, wasn't it?

23 MR. LARKIN: That is correct, Your Honor.

24 QUESTION: Why do you think it wasn't cited by
25 any of the opinions in Connecticut against Johnson?

1 MR. LARKIN: That I don't know, Your Honor, but
2 I can say the Court clearly --

3 QUESTION: If it is controlling here, you would
4 have thought that it would have been cited by one side or
5 the other.

6 MR. LARKIN: Clearly, for that reason at least,
7 it hasn't been overruled.

8 The question analyzing Frady was whether the erroneous
9 instruction had affected the verdict in that case. The Court
10 was able to find that it did not. The Court gave a variety
11 of different reasons for it. Those are the same types of
12 reasons that should apply in a case such as this one.

13 Now, as Frady demonstrates, the error that occurs
14 in a case like this with an erroneous instruction of this
15 type, is not a fundamental defect in the trial process that
16 completely deprives someone of a semblance of a trial.

17 The instructions given in this case have been used
18 in Tennessee murder prosecutions since the time of Andrew
19 Jackson. They were used elsewhere nationwide, both in state
20 and federal cases, for some time thereafter, and this Court
21 had even approved a similar type of instruction in the Allen
22 case.

23 QUESTION: Does that make them right?

24 MR. LARKIN: Not necessarily. The rationale that
25 we understand the Court to have adopted in Sandstrom is that

1 there is a risk that the jury may misconstrue these types
2 of instructions.

3 But, that doesn't mean that they are necessarily
4 to be equated with a directed verdict. Instructions like
5 this take place along a continuum. At one end of the continuum
6 is an instruction that allows a jury to infer an ultimate
7 fact from a basic fact. The Court has never found any
8 constitutional problem with that type of instruction so long
9 as the evidence is sufficient to support it and so long as
10 the type of inference the jury is allowed to draw is one
11 that is entirely rational.

12 At the other end of the spectrum is a case where
13 you have an actual directed verdict, either in whole as where
14 the case is not allowed to go to the jury at all, or in part
15 where the case is allowed to go to the jury on one or more
16 issues.

17 The problem with an instruction like the type that
18 was found in Sandstrom is not that it necessarily amounts
19 to a directed verdict, it is just that there is some risk
20 that the jury may misconstrue how it should be applied.

21 But, where the evidence is overwhelming, it seems
22 to us quite unlikely that the jury is not going to be swayed
23 by that type of evidence.

24 If it is a problem of uncertainty, certainly isn't
25 present where there are other findings by the jury that are

1 untainted by the error. For example, in Frady, there was
2 a finding of premeditation and deliberation. That is also
3 the case here.

4 The erroneous presumption in this case affected
5 only the instruction on malice, not the instructions on willfulness
6 premeditation and deliberation.

7 The additional findings the jury made in this case,
8 therefore, show that they necessarily found malice regardless
9 of whether or not the error was brought to their attention
10 or otherwise.

11 Secondly, it is also not the type of error where
12 an inquiry is inherently impractical. This Court was able
13 to make that type of inquiry in Frady and the lower courts,
14 both state and federal, have found that they are able to
15 distinguish cases where there are erroneous presumptions,
16 conclusive or rebuttable. They are able to distinguish the
17 cases where they are harmless from the cases where they are
18 prejudicial.

19 QUESTION: Mr. Larkin, can I interrupt? It is
20 pretty much the same question I asked before, but are you
21 saying it is perfectly clear that they would have found him
22 not guilty or they could not have found a murder one conviction
23 to be a murder two conviction? That is the thing that puzzles
24 me. I would have thought the evidence is overwhelming as
25 to murder one on both victims, but the jury apparently didn't.

1 MR. LARKIN: Well, I would explain that the same
2 way the trial judge explained it here. Page 132 in the record
3 contains the trial judge's order denying the motion for a
4 new trial and making sentences consecutive.

5 There he said he found that there were two cold-blooded
6 killings, one premeditated and the other flowing out of the
7 first.

8 It seems to me what happened here in this case
9 was the jury thought that the killing of Faulk was premeditated,
10 probably largely because there had been numerous threats
11 made by the Respondent that he would kill her if he found
12 her with another man and also because she was shot multiple
13 times and Browning was shot only once.

14 Now, the evidence would be sufficient to support
15 premeditation and deliberation as to both, but what probably
16 accounts for what happened here is just that the jury thought
17 premeditation and deliberation probably requires thinking
18 about it for a long time.

19 QUESTION: If that is true then, maybe the harm
20 of the presumption was that it was prejudicial as to the
21 one that was found guilty of second degree murder. Maybe
22 without the instruction they would have found manslaughter
23 or something else.

24 MR. LARKIN: Well, there was no basis in the other
25 jury instructions for allowing them to reduce the second

1 degree murder verdict to manslaughter which require provocation
2 and passion.

3 As the Attorney General discussed, Browning was
4 found in the car. His foot was on the brake pedal, his gun
5 was in his pocket. It hadn't just been fired where the empty
6 cylinder was located showed that. He was shot once through
7 the head instantaneously.

8 It is clear that there was no evidence presented
9 to support the claim that there was a manslaughter or self-
10 defense theory. The only evidence of any type that the
11 Respondent offered in this respect was a statement that Mitzi
12 Faulk, six-year old daughter of Joy Faulk, had made, to the
13 two people who picked her up that night after the killing,
14 in which she said they were fighting, Clicker and Browning
15 had guns and they were fighting. On the stand, Mitzi denied
16 that there was any type of fight there.

17 So, the only evidence he has that would justify
18 anything less than a second degree murder conviction was
19 this one particular type of hearsay statement.

20 QUESTION: Did the Defendant undertake to prove
21 an alibi in any way that he wasn't there and that two other
22 people had committed the crime?

23 MR. LARKIN: That was his primary defense at trial,
24 yes, Your Honor. Of course, the alibi he tried to present
25 was weakened by the fact that neither he nor anyone else

1 were able to pinpoint where he was, and that is because he
2 said he had amnesia at the time.

3 Also, the two people who were supposed to have
4 committed this crime, Joy Faulk's ex-husband, Sam, and Charles
5 Browning's wife, were both seen by several witnesses at a
6 bar for the entire evening. So, even his alibi defense was
7 quite weak.

8 But, in any event, if that type of defense is raised,
9 as it was raised in Frady, it is clear that erroneous instruction
10 on malice doesn't affect the question of who did the killing.

11 QUESTION: If the jury in this case had found him
12 guilty of both in first degree, would you make the same argument?

13 MR. LARKIN: Yes. That would even be a stronger
14 case.

15 QUESTION: Well, how can you make a different argument?
16 You say it was harmless error. How could it be harmless
17 if it could come out two different ways? You admitted it
18 yourself. You have argued here -- You and the General have
19 argued this is the clearest case of premeditated murder that
20 ever came down the block.

21 MR. LARKIN: The evidence clearly --

22 QUESTION: The jury didn't agree.

23 MR. LARKIN: The jury didn't agree as to Browning.
24 They clearly did agree as to Faulk.

25 We think the reason looked at in a common-sense

1 fashion, which is the way the jury probably looked at the
2 evidence, is just that there were threats made against the
3 life of Joy Faulk before the time the killings took place.

4 QUESTION: Well, how can it be so clear? How is
5 it so clear?

6 MR. LARKIN: The evidence in this respect as to
7 the threats --

8 QUESTION: Didn't the other man have a gun in his
9 pocket?

10 MR. LARKIN: Yes, he did.

11 QUESTION: So, it is clear.

12 MR. LARKIN: And, the gun was not out of his pocket.

13 QUESTION: It is clear he had a gun.

14 MR. LARKIN: And the gun had not just been fired.
15 So, when all the evidence is considered as a whole, we think
16 that the defenses of --

17 QUESTION: I am not arguing that it isn't possible
18 for the jury to say it, but to say that it is clear that
19 the jury had to come out this way and no other way. I don't
20 see how you can say that.

21 CHIEF JUSTICE BURGER: Your time is up.

22 MR. LARKIN: Thank you.

23 CHIEF JUSTICE BURGER: Mr. Daniel?

24 --

25 --

1 ORAL ARGUMENT OF SCOTT DANIEL, ESQ.

2 ON BEHALF OF THE RESPONDENT

3 MR. DANIEL: Mr. Chief Justice, and may it please
4 the Court:

5 The Petitioner takes the position based upon a
6 view of the facts which I think Justice Marshall's last question
7 kind of pinpointed.

8 They view the facts only in their view of how it
9 had to be from their standpoint of looking at it rather than
10 looking at it in a multitude of ways in which a jury can
11 consider.

12 If they are arguing sufficiency of evidence, that
13 is one thing, but they are not. That is not the point here
14 raised at issue.

15 And, before I go into the matters that I want to
16 specifically address for the point of view of my own presenta-
17 tion, are some matters which the Petitioner has stated here
18 which I think need to be touched upon.

19 First of all, they said the malice instruction
20 was not challenged at the trial. I think this is pointed
21 out clearly in the briefs and the record that under Tennessee
22 law you are not required to object to the instructions at
23 the time it is given. It is proper to object to them under
24 the rules by including that in your motion for a new trial
25 which we did appropriately and timely.

1 The Court of Appeals acknowledging this, then con-
2 sidered the matter and heard it on the merits with regard
3 to this. So, there is no question about any waiver aspects
4 here.

5 Now, they have stated here as to the facts, their
6 view of the facts, and just to give you an illustration,
7 they say someone was following them for ten miles. The only
8 evidence of what was going on was that the -- There was nothing
9 done. The police officer saw the cars, didn't pursue it.
10 There wasn't any high speed chase at that time, there wasn't
11 anything going on. He simply followed and said he didn't
12 see any reason to do anything.

13 QUESTION: Are you now arguing there is some doubt
14 about the guilt of this man? I thought we had the case only
15 on the issue of harmless error.

16 MR. DANIEL: Well, we did, and I wasn't intending
17 to do that. I respond to that only because they argued a
18 moment ago -- They have given what I think is a biased
19 interpretation of what actually occurred as to whether or
20 not the jury could have, under another view of the facts,
21 determined whether the evidence was overwhelming from their
22 standpoint of looking at it. I would not concede that point
23 is all I am saying.

24 QUESTION: You mean you do not concede the evidence
25 of guilt was overwhelming here?

1 MR. DANIEL: No, Your Honor, I do not. We concede
2 it was great evidence, substantial evidence viewed from one
3 standpoint, but not so overwhelming as to dictate the result,
4 and clearly, I think, is the indication of Justice Marshall's
5 question a moment ago, it shows the conclusions could not
6 be that concrete as the Petitioner takes the position of
7 the facts.

8 Now, what we suggest and what we have submitted
9 throughout the case is -- And, they state again that the
10 primary issue at trial was that someone else did it. Let
11 me explain that at the trial, my client, Mr. Clark, through
12 the testimony of two psychiatrists who testified in his behalf,
13 was found to have amnesia, such that they said, first of
14 all, we don't know if he was there, but we are convinced
15 that he doesn't know if he was there. If he was there, he
16 has absolutely no recollection of having anything to do with
17 the events here.

18 So, that is the evidence that we offered and which
19 we presented at trial. I don't believe there is any question
20 about that.

21 They said that if, in fact, he committed the crimes
22 he was not guilty by reason of insanity and this was the
23 defense we relied upon as well as the fact that we, from
24 the outset, contended, number one, Mr. Clark, the Defendant,
25 had no recollection of the events, had insanity, therefore.

1 could not present an alternative version out of his own mouth.
2 The only witness to it was a little girl, a six-year old
3 girl, whose testimony, by the statement of the trial judge,
4 was so contractive and impeached, and he said impeached,
5 that he allowed into evidence out-of-court statements that
6 she had made in which she had said specifically, and there
7 are other witnesses who agreed, that they are fighting, they
8 have guns, they are fighting, so that there was clearly a
9 fight going on.

10 QUESTION: Mr. Daniel, you spoke a moment ago of
11 the psychiatric testimony supporting your client's amnesia
12 defense. I wouldn't think there is anything inconsistent
13 about saying that if he was there he has totally forgotten
14 or has no recollection and still, if he was there, he might
15 have had the malice required for first degree murder.

16 Do you see anything inconsistent between that sort
17 of amnesia you are talking about and the intent to kill?

18 MR. DANIEL: Amnesia in and of itself was not
19 preclude intent to kill, no, I wouldn't argue that.

20 What I am saying is our evidence was -- our
21 psychiatric evidence was that if, in fact, he did the acts
22 charged, he was not responsible for them because he did not
23 have the mental capacity at the time the actions were --

24 QUESTION: That wouldn't be amnesia, that would
25 be --

1 MR. DANIEL: No. The amnesia I referred to because
2 it precluded us, if, in fact, he was there -- You know that
3 is still an issue, at least in my mind, irrespective of how
4 the jury resolved that. But, that he could not out of his
5 own mouth testify to something he had no recollection of.

6 QUESTION: Mr. Daniel, did any psychiatrist say
7 that your client lacked the capacity to have malice?

8 MR. DANIEL: They said that he lacked the capacity
9 to conform his conduct to the requirements of the law.

10 QUESTION: That is right. Does that have anything
11 to do with malice? There are plenty of people who know exactly
12 what they are doing, but they are just unable to conform
13 to law.

14 MR. DANIEL: If Your Honor please, under the terms
15 of Tennessee definition of insanity, and Petitioner conceded
16 this in their brief, that we presented what would have been
17 a valid insanity defense under the Tennessee law.

18 QUESTION: With respect to the issue of malice?

19 MR. DANIEL: With respect to the issue of whether
20 or not he had the ability to -- Malice requires intent.

21 QUESTION: Yes.

22 MR. DANIEL: And, it requires the ability to formulate
23 and carry out an intent.

24 QUESTION: Are you arguing that he did not intend
25 to kill?

1 MR. DANIEL: I am arguing that he did not intend --

2 QUESTION: Then I come back to my original question.
3 Can you cite me anything the psychiatrist said that he lacked
4 malice?

5 MR. DANIEL: Well --

6 QUESTION: That he was incapable of possessing
7 malice?

8 MR. DANIEL: What they said was that he -- as I
9 pointed out before, that he was incapable of, in their
10 opinion --

11 QUESTION: Of conforming to the law.

12 MR. DANIEL: Of conforming. And, as I presented
13 and as I think we presented it to the jury in the fashion
14 that his conduct was such that it could not be voluntary
15 and that is the essence of that defense, and we used it straight
16 out of the Tennessee requirements so that he had to give
17 his opinion exactly as the Tennessee law requires on that.

18 And that the Tennessee courts have interpreted
19 as going for voluntary, saying it cannot be voluntary unless
20 it is a produce of the free will. If he cannot control it,
21 he did not have the intent and cannot conform his conduct.
22 It is the determination that he didn't have the intent necessary
23 for malice.

24 QUESTION: Mr. Daniel, why don't you argue the
25 case we asked you to argue?

1 MR. DANIEL: I apologize for getting off on that.

2 QUESTION: I mean, it is your case.

3 MR. DANIEL: I respectfully agree with Your Honor.

4 I was simply trying to respond to a matter that they raised
5 there.

6 What we suggest to the Court and what we submit
7 and argue in this case is that the jury here clearly had
8 before it a contested issue; that is there was a contested
9 issue we contested all the way through. That is that there
10 was fighting going on. We contested whether or not there
11 was malice from day one, from the opening shot and the opening
12 statement. We claimed and attempted to show through every
13 means possible that there were other explanations, there
14 were fights or there was provocation, principally that there
15 was no evidence as to what, in fact, had happened or how
16 it happened. It was credible. And, that the jury instructions
17 on the issue itself went to and said that you are to presume
18 intent, you are to presume malice and malice it defined as
19 intent. They said this is presumed unless rebutted. That
20 here we had a defendant that was incapable of even recollecting
21 the events, assuming he was there, could not present any
22 evidence contrary to this.

23 This undercut our entire case. It told the jury
24 before it could to any of the other issues that malice was
25 presumed unless rebutted.

1 QUESTION: Now, on the question of malice, does
2 this record show with respect to the examination by the
3 psychiatrist whether he had any recollection of having
4 threatened to do these killings?

5 MR. DANIEL: No, there was no evidence to that.

6 QUESTION: The psychiatrist didn't ask him whether
7 he recalled that when they are dealing with his capacity
8 for recollection?

9 MR. DANIEL: The psychiatrist, as I recall it,
10 in essence said that he had no -- He said he would never
11 have done anything like that and had no recollection of ever
12 having threatened or having done anything that would harm.

13 And, indeed, the lay witnesses themselves said,
14 that although he made some threats at times he also on other
15 occasions said I would never do anything to her, I would
16 never hurt her, anything of this nature.

17 So, the psychiatric testimony did not anywhere
18 state in any way, shape or form that he ever threatened or
19 claimed to have harbored any intent to harm her.

20 QUESTION: The presumption, of course, was rebuttable.
21 Let's assume that you had no psychiatric evidence whatever.
22 Do you think the evidence in this case would have rebutted
23 the presumption of malice?

24 MR. DANIEL: Do you mean the evidence in the sense
25 that we were --

1 QUESTION: You had no psychiatric evidence to enable
2 you to argue insanity. That would leave you with all the
3 facts that were outlined by your opponent in this case.
4 He had threatened to kill his former girlfriend five or six
5 times, he followed her car down the road, he fired three
6 shots into her at close range. In spite of those facts,
7 are you suggesting that unless you had had the defense of
8 insanity that the evidence did not rebut successfully your
9 position?

10 MR. DANIEL: Oh, no. Your Honor, please, if the
11 insanity defense were not there, our claim would be identical.
12 We would not be changing the argument I am making right now.

13 QUESTION: So you don't have to rely on insanity?

14 MR. DANIEL: Don't have to rely on insanity. That
15 is in addition to the other defense, because -- this is what
16 I was going into to begin with -- the facts -- First of all,
17 I don't agree with their statement of the facts, they are
18 reaching conclusions, but, nevertheless, the issue of intent
19 is one which to be submitted to the jury where we contest
20 that issue. In essence, by the ruling of the court, constituted
21 a directed verdict on that particular issue of intent, whereas,
22 we were contesting it. We are entitled to the presumption
23 of innocence. If we didn't have the other evidence, statements,
24 that there was a fight, of a gun in the pocket of a man with
25 a bullet in the chamber, whether or not it had been fired

1 five minutes before or an hour before or could have, you
2 know, all these types of things.

3 There was absolutely nothing that the jury was
4 required to accept that would have required them to reach
5 the conclusion without this presumption that malice was intended.

6 Malice must go to the second degree as well as
7 the first degree offense.

8 Now, the Tennessee Supreme Court in the recent
9 case of State against Martin, which I attached a copy to
10 my brief in this Court, came out with a decision in which
11 in essence it has now acknowledged the erroneous presumption
12 here. It reversed a murder case in that one on its own
13 initiative even though the error wasn't raised because it
14 was a death penalty case.

15 But, in that case, they have now conceded that
16 even though premeditation is found specifically, that premeditation
17 was clearly proved in the Martin case, but that this was
18 not sufficient to dictate a finding of malice and it reversed
19 on the issue of malice while finding premeditation was fully
20 established even though there were substantial eye-witnesses
21 to it, because it held that malice is a separate issue and
22 that malice in order to be found cannot be presumed under
23 its view of the law now and that since it cannot be presumed
24 it found that this was a separate issue which must be tried
25 by the jury upon proper instructions irrespective of whether

1 the evidence with regard to premeditation was clearly suf-
2 ficient and that is what it found.

3 So, we submit to the Court that the Tennessee Court,
4 even now by its own findings, by its own determination, has
5 reached the position that we have taken throughout. It has
6 taken perhaps five years to get there because of various
7 different evolutions of the case, I guess, but now we submit
8 that their decision in that case is controlling here as to
9 the Tennessee law aspects of the case.

10 QUESTION: Do you suggest that there was not abundant
11 evidence on the malice issue apart from the instruction?
12 Just looking at the evidence, do you say this record does
13 not contain overwhelming evidence of malice?

14 MR. DANIEL: I say it contains sufficient evidence
15 of malice just as in the case --

16 QUESTION: First, he had threatened the man. Second,
17 he was seen to have pursued him, and, third, while pursuing
18 him, he was himself armed, and, fourth, he blocked the victim's
19 car so that the victim couldn't get away. How could you
20 find more evidence of malice than that?

21 MR. DANIEL: Well, first of all, the pursing.
22 There was no showing that there was pursuing in any fashion
23 other than just simply driving behind him. There wasn't
24 any chase at that time. The police officer who was behind
25 them saw them and didn't see any conduct wrongful there.

1 QUESTION: Well, when it is coupled with going
2 ahead of the man and blocking the victim's car, does that
3 tell you something about the purpose of the pursuit?

4 MR. DANIEL: We don't have any proof of that that
5 is credible proof.

6 QUESTION: Well, is there not something there on
7 which reasonable people could draw certain inferences?

8 MR. DANIEL: Well, if you feel that you are required
9 to accept the state's testimony of a little girl who was
10 the only eye-witness, who the judge said was impeached, and
11 who admitted that she had been told by her father what to
12 say at the trial -- her father being the other man we suggested
13 who possibly could have committed the offense -- then you
14 can draw certain conclusions. But, her testimony was wholly
15 incredible.

16 QUESTION: I thought you had earlier conceded that
17 the evidence here was overwhelming. Now you are challenging
18 the evidence.

19 MR. DANIEL: No, if Your Honor please, you asked
20 me that question earlier, I believe, and my response, as
21 I understand it, was that it was not overwhelming. That
22 is the position we have taken specifically in our brief,
23 it was not overwhelming, that it was sufficient.

24 If the question was simply sufficiency of the evidence
25 to establish the fact, I wouldn't argue that. But, to say

1 that it is overwhelming so that it dictates that conclusion,
2 I respectfully submit --

3 QUESTION: Well, then, let's take your position
4 that it is merely sufficient to support the verdict. Then,
5 why is it relevant to be dealing with these peripheral things
6 about suggesting that maybe he isn't really the guilty man.

7 MR. DANIEL: Well, if Your Honor please, we contended
8 throughout the case that, number one -- Our defense was this:
9 Number one, that we do not believe he committed the offense.
10 He said I would not have any reason to do it, I loved her,
11 I wouldn't have done it.

12 Number two, if, in fact, he committed the offense,
13 he did so as a result of mental illness over which he had
14 no voluntary control and over which his will had no -- He
15 was unable to formulate the intent and had no ability to
16 conform his conduct, and, likewise, he did not have the intent,
17 malicious intent, irrespective of the mental element; that
18 it arose out of a fight, a provocation or a heat of passion
19 type of thing which would reduce it to manslaughter. And,
20 this is what our position was.

21 If we were to go back and again try the case
22 tomorrow, I can't concede that my man committed something
23 he says I don't remember doing and wouldn't have done, I
24 loved her.

25 So, I am in the position of having to argue these

1 things without a client who can testify as to what occurred,
2 assuming he was there without conceding he was there.

3 QUESTION: He wouldn't have killed her because
4 he loved her.

5 MR. DANIEL: That is his --

6 QUESTION: Did he love the man too that he killed?

7 MR. DANIEL: No, Judge -- Excuse me, Mr. Justice
8 Marshall, I am sure he didn't love the man and I wouldn't
9 say that. I am simply saying as it respects the female victim
10 in the case, his position throughout and through all the
11 psychiatric was that he loved her and he couldn't conceive
12 of ever having had any reason or --

13 QUESTION: But, he didn't testify.

14 MR. DANIEL: No, no, he didn't. He couldn't.
15 He wasn't there or didn't recall any facts about the incident
16 and had no way to present any evidence as to what actually
17 did occur. There simply was no thread of direct evidence
18 as to what happened in this case. It is simply a case of
19 circumstantial evidence in which the only witness who
20 allegedly present was admittedly impeached according to the
21 trial judge and testified as we mentioned before.

22 I further submit this and this is a point I think
23 is necessary here, the only issued that was raised here is
24 the harmless error, whether or not the evidence beyond a
25 reasonable doubt. Both the district judge and the Sixth

1 Circuit panels, who presumably are reasonable and competent,
2 experienced jurists, agreed with the position we have taken
3 here with regard to the effect of this error and their ruling
4 in this case related to a thorough consideration of the
5 factual aspects as the trial judge went at some length to
6 detail and point out. I am not just coming out of left field.
7 This is a matter that the jurists who have considered this
8 matter before on this particular issue particularly went
9 into and evaluated.

10 Now, they did so under the harmless error doctrine.
11 They applied the Chapman rule of beyond a reasonable doubt
12 and since that has already been applied here, I respectfully
13 submit there is no reason for this Court to determine what
14 other type of harmless error rule could apply in some other
15 case under different facts and hypothetical circumstances.

16 We submit that the federal courts below have evaluated
17 the error based upon the Chapman rule, have reached the logical,
18 proper conclusions under that that rule and that should dictate
19 the holding of this Court in this case because of the fact
20 that they have made their ruling and the fact that they con-
21 sidered the issues presented to them in this case.

22 We further --

23 QUESTION: May I ask you a question about Tennessee
24 law, Mr. Daniel? In this case, as I understand it, the Tennessee
25 Court of Appeals didn't think there was any error at all,

1 therefore, didn't confront the question of whether it might
2 have been harmless had there been error.

3 Does Tennessee follow a harmless error rule in
4 cases like this in other state cases, do you know, or have
5 they decided?

6 MR. DANIEL: No, they follow a harmless error
7 rule.

8 QUESTION: Is it the same test as in Chapman against
9 California?

10 MR. DANIEL: Basically it is the Chapman test,
11 Your Honor.

12 QUESTION: Does Tennessee in cases generally follow
13 the general rule on inconsistent verdicts of juries, the
14 general law on that subject?

15 MR. DANIEL: Generally, I would say so, Your Honor.
16 They have not reversed simply because of an inconsistent
17 verdict. They have held verdicts that were inconsistent
18 in several different types of cases.

19 QUESTION: Mr. Daniel, was the weapon recovered?

20 MR. DANIEL: The weapon that was used in --

21 QUESTION: Yes.

22 MR. DANIEL: It was recovered, yes, Your Honor.
23 It was introduced. It was recovered under unusual circum-
24 stances. Again, it was found some three weeks after the
25 event and was introduced as being the weapon that was alleged

1 to have --

2 QUESTION: Any fingerprints?

3 MR. DANIEL: No, there were no fingerprints on
4 it. It had been out in the weather and they claimed there
5 was no way to obtain fingerprints at that time.

6 Furthermore, nobody saw it being disposed of and
7 when they talked about a high-speed chase and so forth, that
8 again is contested and there wasn't really any --

9 QUESTION: Did not the testimony show that the
10 pistol was the same one borrowed from his friend?

11 MR. DANIEL: Yes, testimony did show that it was
12 Mr. Terry Hill's pistol and it was the same one he had borrowed
13 earlier. There were some other aspects of that which I have
14 gone into at length in the brief and I won't go into all
15 of that, but at any rate that much it was. That is correct.
16 It was, according to the testimony, loaned to my client.

17 We, again, submit that the controlling rule here
18 is the fact that we have right to rely upon the presumption
19 of innocence and that the Court cannot, in keeping with the
20 process and justices that have been followed by this Court
21 throughout, say that in essence directing a verdict on an
22 issue that is contested in a case and where they Defendant
23 cannot, due to his mental condition, is unable to, assuming
24 he even was there, testify, present evidence, rule that he
25 was obligated to rebut this type of evidence as the instruction

1 would require him to do and it was denied the presumption
2 of innocence.

3 The presumption of innocence, if we had had that
4 alone -- simply go into court and say we want to rely on
5 a presumption of innocence, that that presumption alone should
6 have been enough to allow us to make the jury confront the
7 issues head on without a presumption telling them what they
8 are supposed to do unless we rebut it.

9 And, that really gets down to the crux of the
10 matter. Although we think we have a much stronger say as
11 the trial -- district judge and the other judges in the Sixth
12 Circuit pointed out, we nevertheless submit that to adopt
13 the position taken by the Petitioner in this case is simply
14 do away with the presumption of innocence in a case where
15 there was strong evidence and allow the court simply to take
16 a position that, well, all right, we don't think there is
17 enough evidence and there is strong evidence on this, it
18 really makes no difference to us whether or not this issue --
19 the jury was allowed to fairly consider this issue without
20 placing the burden to rebut it on the other side.

21 And, under this posture, we just don't think that
22 the position taken by the Solicitor General or by the Petitioner
23 in general can be a proper position to be adopted.

24 Finally, in closing, I will simply state that
25 we submit that that is one issue that this Court doesn't

1 need to reach. That it simply is a matter that that issue
2 has already been properly and fairly decided by the district
3 court and the Sixth Circuit and that the presumption that
4 clearly was erroneous and clearly prejudicial to each of
5 the defenses, which we attempted and feel like we did present
6 at length at the trial.

7 CHIEF JUSTICE BURGER: Did you have anything further,
8 Mr. Attorney General?

9 ORAL ARGUMENT OF W. J. MICHAEL CODY, ESQ.

10 ON BEHALF OF THE PETITIONER -- REBUTTAL

11 MR. CODY: If the Court please, with your indulgence,
12 just mention two very short points.

13 One, the evidence in this case which I recited
14 in the opening statement, I believe, is taken almost verbatim
15 from the Tennessee Court of Criminal Appeals' findings.

16 And, with respect, I believe, to Justice Powell's
17 question about the psychiatrist's knowledge of the prior
18 threats, on page 129 of the record, Dr. Roger White,
19 Psychiatrist, is asked, would it have helped you to have
20 known past threats that this Defendant made toward the victim?
21 The answer was in this particular case and considering the
22 special nature of my contact with him, probably not. My
23 opinion is based largely on my contact with him and his
24 response to a special form of examination.

25 QUESTION: General Cody, can I ask just one last

1 question, please?

2 MR. CODY: Yes, sir.

3 QUESTION: Is it your position that we should
4 make the harmless error determination or send it back to
5 the Court of Appeals to do so?

6 MR. CODY: That this Court should.

7 Thank you.

8 CHIEF JUSTICE BURGER: Thank you, gentlemen.

9 The case is submitted.

10 (Whereupon, at 2:41 p.m., the case in the above-
11 entitled matter was concluded.)
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CERTIFICATION

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#84-1974 - JIMMY C. ROSE, WARDEN, Petitioner V. STANLEY BARHAM CLARK

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

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