TRANSCRIPT OF PROCEEDINGS

IN THE SUPREME COURT OF THE UNITED STATES

In the Matter of:	)	
	)	
DALE ROBERT YATES,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 86-6060
	)	
JAMES AIKEN, WARDEN ET AL.	)	
	)	

Pages: 1 through 44

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DALE ROBERT YATES,

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V. : No. 86-6060

JAMES AIKEN, WARDEN ET AL.

Washington, D.C.

Wednesday, December 2, 1987

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:49 p.m.

APPEARANCES:

DAVID I. BRUCK, ESQ., Columbia, South Carolina
(Appointed by this Court);
on behalf of the Petitioner.

DONALD JOHN ZELENKA, ESQ., Chief Deputy Attorney General of South Carolina, Columbia City, South Carolina;
on behalf of the Respondent.

C O N T E N T S

CHIEF JUSTICE REHNQUIST: Mr. Bruck, you may proceed whenever you're ready.

ORAL ARGUMENT OF DAVID I. BRUCK

ON BEHALF OF PETITIONER

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

The question in this case is whether a State in a refusal to give retroactive effect to this Court's decision in Francis v. Franklin to cases which were final on direct appeal when Francis was decided.

As in any retroactivity case, I think it may be helpful to review a little of the procedural history that got us to this question. Petitioner Dale Yates was tried and convicted of murder in 1981, two years after this Court's decision in Sandstrom v. Montana. His appeal was decided in late 1982.

No objection was raised at trial or on appeal to the unconstitutional jury instruction which is at the core of this case. However, that creates no procedural bar under South Carolina law under a very very well established line of South Carolina case.

Indeed, in his direct appeal opinion, the Court said that it reviewed the entire record of Mr. Yates' trial in favorem vitae as is South Carolina Supreme Court's invariable practice in capital cases alone. It has a rather strict

procedural default rule in non-capital cases, but it has no such rule in capital cases. And the Court said that it found no prejudicial error.

A little less than a year later, the South Carolina Supreme Court, for the first time, sustained a Sandstrom challenge to a series of burden shifting jury instructions involving the essential element of malice, which is an essential element of murder under South Carolina law.

The first of those decisions in 1983 was a case called State v. Elmore. A few months after Elmore, Yates filed a habeas corpus petition in the original jurisdiction of the State Supreme Court alleging that the jury instructions in his case which I think we all agree were materially identical to those involved in Elmore, created -- and I quote -- "an unconstitutional burden shifting presumption of malice." He alleged that it created a mandatory rebuttable presumption of malice, and he cited Sandstrom v. Montana as authority for that proposition. He also said that in light of Elmore and another case, State v. Woods that had also applied Sandstrom to strike down the same instructions, the South Carolina Supreme Court should apply its own decisions and uphold his constitutional claim.

The State responded, by the way, to this original petition by saying that they agreed that his petition should be consolidated with another appeal then before the State Supreme

Court to resolve the apparent issues. However, the respondent, the State of South Carolina, argued on the merits of the constitutional claim that in fact it was not a bad jury instruction, and presented exclusively Federal authority saying that the instruction could be distinguished from that involved in Sandstrom.

While his petition was pending, this Court decided Francis v. Franklin. Yates submitted the Francis decision to the State Supreme Court and said that Francis was absolutely on all fours, and required reversal.

About three weeks after it got the Francis decision, the State Court said that it had in a per curiam decision without opinion said that it had considered the petition for habeas corpus and concluded that it should be denied.

QUESTION: It did not cite Francis?

MR. BRUCK: It cited nothing. What I recited is exactly the words that the State Court used.

Yates then petitioned this Court for certiorari and this Court granted certiorari and remanded to the South Carolina Supreme Court for reconsideration in light of Francis v. Franklin.

On remand, the judgement occurred which is the subject of this matter here today. The State Supreme Court's opinion on remand begins by acknowledging in the first breath that the constitutional error involved here is a violation of

Francis v. Franklin. The way the Court put it was that the instructions here violated the principals of State v. Elmore, and involved the same infirmities as those addressed by the United States Supreme Court in Francis.

But immediately after saying that, the State Supreme Court then said, so the question before us is the retroactivity of State v. Elmore, completely ignoring the fact that it had just finished conceding, or acknowledging that this was a Federal Constitutional error that had been committed in the case.

The Court then said that retroactivity -- taking a couple of lines out of this Court's retroactivity doctrine which the State Court apparently misinterpreted to mean that the retroactivity of constitutional decisions is entirely a matter of State law, and then proceeded to say that they found the view expressed by Justice Harlan in Desist and Mackey to be persuasive, and therefore the Court would, as a matter of its own State law, not apply the doctrine condemning mandatory rebuttable presumptions, an essential element of the offense.

QUESTION: Well, Mr. Bruck, if the South Carolina Supreme Court does not discriminate against Federal claims, does this Court have authority to tell that Court what retroactivity law to apply in a State habeas proceeding to you suppose?

MR. BRUCK: The difficulty is that the claim is a

Federal one. I think the answer is, yes. The retroactivity of Federal Constitutional decisions is a matter of Federal constitutional law. And the State Court, in effect, was discriminating against that whole body of this Court's constitutional doctrine, when it said that we are simply not going to apply it.

The crucial thing to stress here is that this is not -- no matter how much the State attempts now to recast this matter -- is not a case involving a State's construction of its own post-conviction remedy. That is not what happened here. It would not have made a nickel's worth of difference whether Dale Yates had raised his claim on direct appeal, had raised it at trial, had raised it all along. If the State Court had denied relief prior to its own final rather belated acknowledgment of the principles of Sandstrom in the Elmore decision, they would have come up with exactly the same decision if Yates had then later renewed his claim after he noticed that the State Supreme Court had begun to apply Sandstrom.

And I think the proof of that is in another line of South Carolina retroactivity decisions led by Truesdale v. Aiken, a case involving what the South Carolina Supreme Court believed to be a question involving the retroactivity of this Court's decision in Skipper v. South Carolina. And in Truesdale, the petitioner in Truesdale had raised his Skipper

claim well before Skipper on direct appeal. It met with no success. He then raised it again on post-conviction relief and the State Court came up with a decision very very similar -- a little short of it, but essentially the same decision as is involved in this case, saying that they again have decided to apply Skipper only on direct appeal and that they're adopting in effect the Justice Harlan view in collateral review.

This Court summarily reversed, I think correctly, I believe, recognizing that the retroactivity, as I say, of a Federal constitutional decision is not a matter that States have the authority to pick and choose. So we don't say that there's any discrimination between one sort of Federal claim and another, but simply that South Carolina has misinterpreted the Federal nature of the constitutional law.

QUESTION: What if this Court were to adopt the Harlan view? Would you lose?

MR. BRUCK: Not in this case because there is no retroactivity issue in this case. I think this Court would probably be more --

QUESTION: Because there was not a new decision, is that it?

MR. BRUCK: Because Francis simply applied by its very terms simply applied doctrine of --

QUESTION: But if we disagree with you on that, do you lose?

MR. BRUCK: If you disagree with me on that and decide to jettison the last 24 years of retroactivity and to jettison the Stovall, no, I don't believe so.

QUESTION: As we have already jettisoned a considerable part of it on the other side on direct appeal.

MR. BRUCK: Yes.

No, I don't believe so, because I think that as Francis, itself described the constitutional principle involved here as an axiomatic fundamental bedrock principle of due process that no one may be imprisoned, or in this instance, executed without having the State born its burden of proving his guilt beyond a reasonable doubt.

So we are dealing I think with something --

QUESTION: Francis certainly changed an awful lot of things that had been regularly going on.

MR. BRUCK: Well, that's true.

QUESTION: An awful lot of people didn't understand what bedrock due process was before Francis.

MR. BRUCK: Well, apparently so. There have been a number of States that have been giving these instructions. Be that as it may, that was the Court's holding, and I certainly think that we are dealing in Francis v. Franklin with a constitutional issue that is very close to the core of our basic of due process.

QUESTION: Well, what if the Supreme Court of South

Carolina had said in connection with its own State habeas that we're not going to entertain any challenges that go to jury instructions. That's just the kind of thing that we're not going to consider on collateral attack and we don't care whether they're State challenges or Federal challenges. And the Supreme Court of South Carolina had decided this case on that basis.

Do you think that you would have a Federal question to preserve here?

MR. BRUCK: No. Of course, that's not what they did.

QUESTION: I realize that.

MR. BRUCK: I don't quarrel at all with the proposition that a State can limit its Federal remedy. Now, of course that would not create under the circumstances of this case that would not create any sort of a Wainwright v. Sikes bar down the line.

QUESTION: No, but it would mean in their own State collateral review, they would not have to decide any claim, Federal or State, based on a jury instruction.

MR. BRUCK: I have not thought about that, but I'm inclined to think that they could have done it.

QUESTION: I realize that is not what they did.

So a State can circumscribe in some respects the kind of claims it's going to consider on collateral review.

QUESTION: Of course some answer to that question may

be indicated by the fact that we chiefly relied on Francis.

Isn't that what we did in this case?

MR. BRUCK: Yes, sir. Absolutely. The South Carolina Supreme Court was instructed to reconsider this case in light of Francis v. Franklin. And of course, there is absolutely no state procedural doctrine in South Carolina whatsoever that shuts the door on one procedural category of claims and not on others.

I realize the State has tried to identify some defect in the initial habeas proceeding papers. I don't know that that really needs to be responded to. Perhaps, if need be if that claim is renewed today, I may touch on it in reply.

But suffice it to say that I think the basic error that the State Court committed when they got this case on remand was their failure to recognize that there is a threshold test in any retroactivity case that must be addressed. And that is whether or not you are dealing with a new decision. And I don't think there are very many cases in which this Court more clearly indicated -- and I realize there was disagreement within the Court -- but the majority of the opinion of the Court clearly held that Francis v. Franklin simply applied one of the alternate holdings of Sandstrom v. Montana.

Some of the proof of how not new a decision in Francis was is that South Carolina had in other contexts, and with other instructions, already applied this very portion of

Sandstrom. And indeed, State against Elmore was an application of the principles of Francis before Francis was decided. Everything they needed to have applied Francis they could have gotten, and did get out of Sandstrom v. Montana.

So where a retroactivity issue came from in this case is something which I'm still struggling from the State's opinion to understand.

Of course, when we apply the Stovall factors, assuming that the Court is not inclined to use this case to reconsider the viability of the Stovall retroactivity doctrine, it's rather clear that this Francis v. Franklin or Sandstrom v. Montana, whatever principles one wishes to label them as, follow very clearly on the retroactive application side of the Stovall factors.

First and foremost, we consider the purpose of the rule. And the purpose of this rule is to insure that the State bears its burden of proof and that only the guilty are convicted and the innocent are acquitted. That is at the very heart of the truth seeking function in criminal trials, as this Court very clearly stressed in Francis.

At that point, the second two factors under this Court's cases really fall out of the picture. But even if we look at them, justifiable reliance on the old rule, after Sandstrom v. Montana, and really after Mullaney v. Wilbur in 1975, there could have been no justifiable reliance on any

notion that States were entitled to shift the burden of persuasion on an essential element of an offense.

QUESTION: How about the Patterson case? I mean, certainly that indicated that Mullaney should not be construed as broadly as it might have been. In fact, it cut back rather sharply on Mullaney. So it wasn't just one great big progress onward and upward as you would suggest.

MR. BRUCK: Well, yes, that's true. But Patterson nevertheless it used an analysis of the elements test. It focused on what the elements of the crime were. And here, certainly malice is an element of murder and no one could have read Patterson to think that it is justifiable to shift the burden of persuasion on the element of malice under South Carolina law.

In any event, Sandstrom v. Montana which followed Patterson could not really have been much clearer on this point, although the instructions are probably most easily read in Sandstrom as a conclusive presumption. That issue was in doubt, and the Court said whether it be conclusive of whether it be mandatorily rebuttable, it is no less unconstitutional. That was two years before this person's trial, three years before his direct appeal. And there could not be any conceivable justifiable reliance on any prior rule, State or Federal.

Finally, we have impact on the administration of

justice. The impact in this case is truly negligible. South Carolina naturally is concerned about applying rules to cases which are already final, but I would stress that South Carolina has an extremely rigid system of procedural default in all but capital cases. So that anyone who didn't raise this and properly litigate it both at trial and on direct appeal, there is no interest of justice exception, there is no fundamental error exception under 9 Capital South Carolina criminal law so there are very very few cases in the pipeline.

And in any event, there is no right for South Carolina now to be able to claim that that's a valid factor to consider.

QUESTION: You would say that Francis -- any Francis-type case would be foreshadowed by Sandstrom?

MR. BRUCK: Yes, sir. I would think, any. The Court simply denied in Francis there was any new law being made. It was simply an instruction which was clearly of the mandatory rebuttable type.

QUESTION: Well, the Court said in Francis that such inferences, permissive inferences do not necessarily implicate the concerns of Sandstrom.

MR. BRUCK: Yes. The problem is here that South CArolina itself, as our State Supreme Court has recognized over and over again, is that we're not dealing with a permissive inference but rather with a mandatory rebuttable presumption.

Malice is presumed from x, y, and z facts.

QUESTION: Well, why has the case been discussed in the South Carolina Courts as if it's the retroactivity of Francis v. Franklin rather than the retroactivity of Sandstrom?

MR. BRUCK: Well, there'd be no issue of retroactivity of Sandstrom because Sandstrom occurred two years before this man's trial. The bubbling up of this retroactivity issue is frankly a mystery to me. The petitioner did ask the State Supreme Court to apply the state decisions applying Sandstrom retroactively. We thought it simply the most tactful way of putting the matter, but we also made clear the Federal constitutional character of the claim in the habeas papers.

But I confess to complete bewilderment as to how this case became a retroactivity case when there is new law to be applied by the State Supreme Court. Clearly, what has somehow happened in this case is that we have a State Supreme Court which simply has denied that the retroactivity or that the obligation -- whether you call it retroactivity or not -- the obligation of a State court to apply Federal law in its courts, whether it be civil, criminal, post-conviction, or direct appeal, is a matter of Federal, not State law. And that's where we got off onto this -- South Carolina Supreme Court on remand -- onto this tangent.

The State argues beyond the retroactivity issue, the State puts a great deal of effort in their brief to argue that

in fact this isn't such a bad instruction and that it is not an unconstitutional instruction. This is a claim which it has pressed over and over again without success. In the South Carolina Supreme Court it has recently been rejected by the Fourth Circuit in Hyman v. Aiken, a Federal habeas case from which the State has not sought review in this Court.

It is really a matter which is all but settled, and for the reasons set forth in our brief, I would suggest that the South Carolina Supreme Court and the Fourth Circuit have correctly identified the constitutional infirmity of both of the malice instructions at issue here. And don't really feel that the State's position has any merit on that score.

They also argue that this Court ought to make the first determination of whether the error was harmless. I've argued at some length in the Reply Brief that in view of both of the two theories of prosecution that were used in this case and applying South Carolina law and the particular form of the law of parties in accomplice liability under South Carolina law, that the States harmless error argument has no merit.

I would simply stress here that this again was pressed vigorously before the South Carolina Supreme Court. The South Carolina Supreme Court did not expressly reject the harmless error argument, but I should think that if under South Carolina law and under the facts of this case, the South Carolina Court had seen merit in the harmless error argument,

it is most unlikely that they would have gone off into the area of retroactivity.

QUESTION: I think that's probably true. But why should we get into doing harmless error analysis here?

MR. BRUCK: I'm sorry, why should you?

QUESTION: Yes, why should we, you know, if we agree with you on the rest, why shouldn't we just remand and give them a chance to determine whether they think it was harmless or not?

MR. BRUCK: That would suit me fine. I really think that is certainly what this Court's precedents envision I think in almost every situation, even the very case in which you held that there could be harmless error under Francis v. Franklin, you then remanded to the Federal Court in habeas to allow that determination to be made. And that certainly would seem to be the most reasonable way to proceed in this case.

I think South Carolina when the case is remanded will grant this person a new trial, but that is between us and them.

If there are no further questions, I would like to save some time in rebuttal.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Bruck.

We'll hear now from you, Mr. Zelenka.

ORAL ARGUMENT OF DONALD JOHN ZELENKA

ON BEHALF OF RESPONDENT

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

We submit that the question before this Court is whether a State Court has the ability in collateral review proceedings to establish its own procedures and develop how it is going to review new case law precedent arising out of its own Court and other courts.

We submit that in this situation, the retroactive application is not compelled, either constitutionally or otherwise, in the Yates decision. We contend that it was simply a determination by the South Carolina Supreme Court of the limits of the type of review it would give in State habeas proceedings.

In that situation, a somewhat unique situation that was presented before this Court, it said it would only look at certain situations and those situations were if the trial court that entered the conviction lacked subject matter jurisdiction over that situation, and secondly, if the criminal conduct involved in the case was not subject to criminal sanction.

QUESTION: Mr. Zelenka, explain to me why the Court chose not to consider Francis v. Franklin on the remand?

MR. ZELENKA: It would appear that they did decide that essentially on the facts by that one sentence that they

had when they held that this charge was similar to the charge addressed in State v. Elmore and similar to the charges addressed in Francis v. Franklin. However, I would submit that --

QUESTION: What does that mean? I don't understand. What do you think they decided with regard to Francis v. Franklin?

MR. ZELENKA: What I think they decided was the limitations of the type of relief and the type of review they would give in State habeas corpus proceedings in its original jurisdiction.

QUESTION: Well, is it a decision just not to consider Federal claims?

MR. ZELENKA: No, it's a decision only to consider those claims that hold that the trial court's jurisdiction was null and void or that the particular conduct involved was not subject to criminal sanctions in the case. If any decision falls outside of those decisions, then it will not consider those retroactively in its original jurisdiction in these matters.

There is a State post-conviction relief proceeding that Mr. Yates proceeded to apply on that does provide certain relief in constitutional cases. And it would provide relief on constitutional issues, if those issues were not raised or could not have been raised in the direct appeal.

Mr. Bruck has argued somewhat convincingly, I would submit, that in favorem vitae review applies in this case and in any capital case in South Carolina. But a close reading of those cases would reveal that they're talking about the direct appeal situation where they have a much broader review.

There is no case in South Carolina that sets out the proposition that in favorem vitae review does exist in State collateral proceedings either under the Uniform Post-Conviction Relief Act, or under the habeas procedures in its original writ. We cited the case of Tyler v. State which says that it is not a substitute for an appeal.

So when the Court had this matter before it, they had a situation that was not raised on direct appeal, was not objected to on direct appeal in a case that occurred two years after the Sandstrom v.Montana decision came down, which the petitioner argues set the bedrock precedent for this case.

Subsequent to the appeal in this decision, the South Carolina Supreme Court did hold that under a very similar charge to the charge in this case, that they held as a matter of State law that it violated the Constitution.

QUESTION: If you're right, Mr. Zelenka, why does the Supreme Court's opinion in this case discuss retroactivity so elaborately?

MR. ZELENKA: It discussed retroactivity to the extent that they considered the retroactivity of State v.

Elmore and whether State v. Elmore was essentially a decision that applied new law or applied something that could have been presented previously to it under more timely procedures.

QUESTION: Didn't they also consider whether Francis v. Franklin should be applied retroactively?

MR. ZELENKA: I think implicitly in that decision has to come from the Supreme Court's decision that they held that it did not apply retroactively to this decision.

QUESTION: That's a holding really on Federal constitutional law, isn't it?

MR. ZELENKA: It's a holding on Federal constitutional law to the extent that they looked at whether those procedures, or that issue, that claim could be presented to it at that time. And they held it could not under their own State procedural law because it did not hold that particular criminal conduct to have divested the trial court of jurisdiction or held a criminal conduct to be not --

QUESTION: So you're saying when they're talking about retroactivity, they're saying that only if a new decision divests the Court of jurisdiction or makes the conduct not criminal will the Supreme Court of South Carolina consider it?

MR. ZELENKA: Only in those two situations, according to this decision, they would consider it. But if it's in any other situation, the retroactivity issue will not be considered unless it was properly presented in a State post-conviction

relief format or had a reason as to why it was not previously presented under State law.

Now, the South Carolina Supreme Court allows in State post-conviction relief that issues that were presented or asserted in direct appeal cannot be reasserted in State post-conviction relief or State habeas corpus proceedings. Now, that is the same situation that would apply here.

This case and these issues as presented by Mr. Bruck could have been presented on direct appeal. Furthermore, he had the opportunity under our State Post-Conviction Relief Act to reflect as to why, if they weren't presented on direct appeal, why they weren't presented. For example, a Sixth Amendment denial. It could have been presented that way, if he chose to present it that way.

QUESTION: Let me be direct about it. Do you feel that the Supreme Court of your State complied with the mandate of this Court?

MR. ZELENKA: I think it complied with a mandate of this Court --

QUESTION: Implicitly?

MR. ZELENKA: -- to the extent that they looked at the Francis v. Franklin issue under the procedures that it had established upon review of situations that were presented to it, and to whether those particular issues could be presented in a habeas corpus format.

QUESTION: Well, this is the first time it decided it, though?

MR. ZELENKA: This is actually one of the first --

QUESTION: It decided to adopt the Harlan view both ways.

MR. ZELENKA: This is at that time one of the first two cases that they adopted the Harlan view.

QUESTION: For their own procedures?

MR. ZELENKA: For their own procedures. And they clearly state throughout this decision that they're looking at the retroactivity of State Court decisions.

QUESTION: But of course, did they think that this case, that Francis made new law, or what was their case, the Elmore case?

MR. ZELENKA: The Elmore case occurred before Francis v. Franklin, after Sandstrom. They never made a decision within the Yates decision, whether Francis applied new law or not. What they implicitly held we think is that Francis did not fall under one of the two categories that they would look at a situation, divesting the trial court of jurisdiction of the conviction or the situation where the conduct alleged here was not subject to criminal sanctions.

QUESTION: Well, I take it that Elmore was decided after the trial in this case?

MR. ZELENKA: Elmore was decided after the trial in

this case, but before the State post-conviction relief review, and a Woods case was held subsequent and during the State post-conviction relief review and then he petitioned at that third stage while the State post-conviction relief review was pending on appeal to ask this Court in its original jurisdiction to look at the State v. Elmore case and apply that retroactively.

We would submit that that unique situation that he was looking for. In fact, in his petition itself he is saying, we are seeking the ability to argue the applicability of State v. Elmore and State v. Woods to this factual situation. The South Carolina Supreme Court denied both times to apply it to this situation.

He's asserting that there is in favorem vitae review in the South Carolina decisions at any stage during the proceedings. We would submit that the Yates decision itself clearly stands for the proposition that under South Carolina law, in favorem vitae review does not exist at all proceedings, because they acknowledge in this case that the jury charges in State v. Elmore were similar to those that were found in violation -- excuse me -- that the jury charges in this case were similar to those found in violation in State v. Elmore.

QUESTION: May I ask you a question on the sequence of events.

State against Elmore was decided in 1983. Now, that's before Francis against Franklin?

MR. ZELENKA: Yes, sir.

QUESTION: And that case had an instruction identical with Francis against Franklin, I mean, for all purposes, this Court assumed that it was the same, did it not, your State Supreme Court?

MR. ZELENKA: Similar to it.

QUESTION: So that when they held the instruction bad in the Elmore case, they were not relying on Franklin, because it hadn't been decided?

MR. ZELENKA: No, sir.

QUESTION: So they must have been relying on Sandstrom against Montana, is that right?

MR. ZELENKA: Well, they could have been relying on Sandstrom v. Montana. They did not say it in their decision. Or they could have been relying on their own State Constitution.

QUESTION: Does the Elmore case cite any Federal precedent in it? I haven't read it, I have to confess.

MR. ZELENKA: No, it does not.

QUESTION: It did not. I see.

MR. ZELENKA: There was a case that preceded that, State v. Madison, where they held there was a jury charge somewhat similar to the jury charge in this particular case. They found that it was not violative of the Constitution, but then they held in Madison a similar charge that should have

been given.

QUESTION: Has your State Supreme Court ever cited and followed Sandstrom against Montana?

MR. ZELENKA: Have they ever cited and followed Sandstrom? They've cited it and they've cited Francis in a recent decision.

QUESTION: No, I meant Sandstrom against Montana. Have they ever cited and followed Sandstrom against Montana, do you know?

MR. ZELENKA: They have -- to tell you the truth, I cannot recall specifically a case that has cited the Sandstrom situation. We have relied essentially on State law decisions of State v. Elmore, State v. Lewellyn, which stand for very similar concepts of the Sandstrom case. And they've relied on those. But in a recent case, State v. Patrick, they did acknowledge that the Francis situation applied to that.

QUESTION: Mr. Zelenka, I don't entirely understand what the South Carolina Court is doing here. If we do not have a retroactivity case in front of us, if I think this is not a retroactivity case, then would the South Carolina Supreme Court's determination that this does not come within one of the only two categories that we entertained review in, would that be wrong?

MR. ZELENKA: No, it would not.

QUESTION: Doesn't the limitation to those two

categories only apply in retroactivity cases?

MR. ZELENKA: No, not necessarily. It would apply in any situation if the individual --

QUESTION: Any collateral?

MR. ZELENKA: -- claimed that he was not indicted, that the Court did not have jurisdiction over him, or a situation where he was charged with criminal conduct that subsequently was determined not to be criminal conduct.

QUESTION: And those are the only bases on which you can collaterally attack a judgment on habeas in South Carolina?

MR. ZELENKA: No, sir. In State habeas under this decision, that would be it, but under collateral review, they have much broader abilities to do challenges under Sixth Amendment violations and similar violations in the Uniform Post-Conviction Relief Act.

QUESTION: I don't understand what you're saying.

Why is this decision different from all others?

MR. ZELENKA: Because this decision fell in a different procedural mode than the normal collateral review that's done in South Carolina. It did not fall within the Uniform Post-Conviction Relief Act, which sets out the ability to do challenges under the United States Constitution, generally. The Uniform Post-Conviction Relief Act is more analogous to 28 U.S.C. 2254 than the State habeas proceeding that he went in and he asked to apply in the original

jurisdiction of the Court.

QUESTION: And you say under this procedure, the only things he could have raised were those two categories?

MR. ZELENKA: We think that's what this decision stands for, yes, sir.

QUESTION: Whether it's a change in the law or not.

MR. ZELENKA: Whether it's a change in the law or not. Those matters should necessarily then be brought under the Uniform Post-Conviction Relief Act.

QUESTION: Then are you also saying, assume you prevail in this Court on the theory that you espouse, that this particular petitioner should go back to South Carolina and invoke the Uniform Post-Conviction Relief Act before he would have exhausted his State remedies?

MR. ZELENKA: The problem with his attempt to invoke the Uniform Post-Conviction Relief Act is that he is probably procedurally barred because South Carolina has, under Rule 50 of the Supreme Court Rules, a successive application.

QUESTION: So you're saying that is not actually an available remedy at this time?

MR. ZELENKA: That would not be an available remedy.

QUESTION: And it also was not an available remedy at the time of the decision we're reviewing now?

MR. ZELENKA: It was an available remedy to the extent that the application for post-conviction relief was

pending when Elmore was decided. I mean, he could have sought the Sandstrom issue under Elmore. Now, Francis v. Franklin had not yet been decided, so under the Francis issue, it would not be available.

QUESTION: But are you telling us -- I just want to be sure I understand you -- are you telling us that the way you read this decision that they in effect are saying, you've pursued the wrong remedy and you should have pursued the Uniform Post-Conviction Relief Act?

MR. ZELENKA: No. I think what we're saying is, you don't have that remedy available to you under the State habeas corpus proceedings. I think that's all they're saying. I don't think they're saying --

QUESTION: And where in the opinion do you find them saying that?

MR. ZELENKA: The only part of the opinion that I would assert that I find them saying that is in their conclusion in which they state that collateral attack of a criminal conviction -- and this is at the Joint Appendix, page 34, the top of the page, collateral attack of a criminal conviction --

QUESTION: What page, please?

MR. ZELENKA: Page 34 of the Joint Appendix.

Collateral attack of a criminal conviction on the basis of legal precedent that developed after the conviction

became final must be reserved for those cases in which the trial court's action was without jurisdiction or as void because the defendant's conduct is not subject to criminal sanctions.

QUESTION: But that's retroactivity, and I asked you whether this decision would apply whether or not the claim was based on retroactivity or not. This is retroactivity talk. Legal precedent that developed after the conviction became final.

Now, I'm saying, what if I believe that the claim here is not based on legal precedent that developed after the conviction became final? This decision wouldn't bar it from being brought.

MR. ZELENKA: It would not bar it from being brought under the Uniform Post-Conviction Relief Act, if he could show a reason why he did not or could not raise that at the time of the original action.

QUESTION: Well, that's fine, but it's a different point. It seems to me that what this decision says, if I don't believe that this case is one involving new law, then this decision's wrong. Isn't that right?

MR. ZELENKA: No. Because they're looking at any type of legal precedent, any case that comes down. What I think the South Carolina Supreme Court is saying that every time a new decision comes out, that does not automatically

allow an individual to come to the Court to enter the Court to kill the finality that existed on that conviction at that time.

QUESTION: This is not a new decision. There's no new decision he's relying on. Imagine I think that he's relying on you know, Sandstrom, all the way back. It's been clear for years and years. If that's what I think then this decisions' wrong?

MR. ZELENKA: If that's what you think, then this decision is wrong to the extent that it would apply to the Francis situation.

QUESTION: So if we think that Francis was just a plain open and shut application of Sandstrom, we reverse?

MR. ZELENKA: Not necessarily, because there are significant procedural bars in this case. It would most appropriately then be a remand to determine whether bars existed.

QUESTION: All right, all right. But nevertheless, the decision was wrong.

MR. ZELENKA: No, I wouldn't say that the decision --

QUESTION: I thought that's what you said in answer to Justice Scalia.

MR. ZELENKA: He determined that the decision was wrong to the extent that it pointed to Francis and whether Francis was new law. I would submit that the question is that the judgment was correct because they denied it in this

situation because they were not going to open up the Courts to a situation that could have been presented, a claim that could have been presented previously. They determined that there was no reason for the opening up of the judgment in this case.

QUESTION: Well, that's a different ground, though. If we remand, they can decide that this is excessive application or that he's procedurally barred or something else. But that's not the basis that this decision rests on.

QUESTION: It would be strange -- I guess we've made mistakes before, but if we vacate and remand for reconsideration in light of Sandstrom, there must have been some federal issue presented to us. In light of Francis, there must have been some federal issue presented to us, namely the issue of this instruction, and I suppose that it had been represented to us that the issue had been raised on direct appeal in the State Courts.

Was it?

MR. ZELENKA: It was not raised on direct appeal in the State Courts and it was not raised in the Uniform Application of Post-Conviction Relief. A petition in the original jurisdiction of the Court was made that requested the South Carolina Supreme Court to apply the principles of State v. Elmore and State v. Woods to this case.

QUESTION: Is the opinion of the South Carolina Supreme Court dated December 22, 1982, the per curiam that

appears, begins on page 10 of the Joint Appendix? Is that the opinion of the Supreme Court of South Carolina which we vacated or remanded?

MR. ZELENKA: No, it is not. The opinion that was vacated is on page 27.

QUESTION: Was that on collateral?

MR. ZELENKA: Yes, that was on State habeas corpus, and all it said was we have considered the petition for the writ of habeas corpus and conclude that it should be denied.

QUESTION: That was denial without opinion.

MR. ZELENKA: It was denial without an opinion.

QUESTION: Well, did the writ of habeas corpus raise the --

MR. ZELENKA: Okay, the original writ requested reconsideration in light of State v. Elmore and State v. Woods, because those decisions came out after the direct appeal in State v. Yates, the decision you were initially pointing to. Now, while that decision was pending before the South Carolina Supreme Court, Francis came out and he petitioned to supplement. And shortly after his petition to supplement, this decision came down.

QUESTION: Well, a good answer to the remand would have been, this is procedurally barred.

MR. ZELENKA: That's correct. And that is one position that we presented to the South Carolina Supreme Court.

QUESTION: But that is not the way it wrote.

MR. ZELENKA: We submit they didn't need to address that issue.

QUESTION: May I also point out, if I read this correctly, the Order on page 27 doesn't just deny the petition for habeas corpus but it also denies the petition seeking review of the denial of the application for post-conviction relief.

MR. ZELENKA: That's correct.

QUESTION: So apparently, your opponent pursued both remedies.

MR. ZELENKA: He pursued both remedies before and that was on appeal.

QUESTION: Before we remanded it?

MR. ZELENKA: Before you remanded it.

QUESTION: But our remand was in a case that both invoked the post-conviction relief statute and the writ of habeas corpus. Is that not correct?

MR. ZELENKA: It was our understanding from the remand and the particular request within the particular petition that he was seeking the writ of certiorari only under the writ of habeas corpus.

QUESTION: Because in the order at least, he was seeking review of applied to both, that much is clear.

MR. ZELENKA: That would be correct, yes.

QUESTION: But you think he bifurcated it in effect and only wanted the relief from half of it?

MR. ZELENKA: That would --

QUESTION: Did he proceed pro se here, or did he have counsel?

MR. ZELENKA: He had the same individual counsel he has here today representing him, along with a member of the Appellate Defense Commission of South Carolina in the post-conviction relief appeal. And he also had counsel in the State post-conviction relief proceedings when he raised a Sixth Amendment challenge based upon a closing argument of a solicitor that was similar to the Thompson v. Aiken argument and the South Carolina Supreme Court implicitly rejected that with a denial of the certiorari petition done pursuant to Rule 50 of the South Carolina Supreme Court rules.

We would submit that the South Carolina Courts have the ability to fashion the types of relief that it is going to give and fashion the types of procedures that it's going to give in those situations, as long as it does not discriminate in those claims that are presented to it.,

In this situation, we submit that the South Carolina Court established its own common law and that they were not going to look at the issues as presented in Elmore similar to the issues as presented in this case in its original jurisdiction. Further, we would submit that the South Carolina

Court --

QUESTION: Under the theory that they were retroactive?

MR. ZELENKA: On the theory that they were retroactive. But in addition, we would submit that because it was a sense of a procedural bar because of the situation in Elmore that if it was a Sandstrom issue as he urged in that particular case that that issue could have been raised previously.

QUESTION: Where is that?

MR. ZELENKA: It's not within the decision. That was within his argument that he made before the South Carolina Supreme Court.

We would further submit that the jury charges in this particular case did not violate Francis v. Franklin in that they did not, when closely viewed, shift any burden of proof on any of the particular elements of the crime. It was merely first a definition of the sense of malice that it is the doing of an unlawful act without just cause or excuse, and second that malice is implied or presumed from use of a deadly weapon is really no presumption at all because it was followed immediately by the sentence that said, when all the facts and circumstances are presented surrounding the use of the weapon, that presumption is removed, and ultimately is for the jury to determine under all the facts and circumstances of the case

whether in fact malice existed in the heart and mind of the killer.

We would further submit that this case does present a situation where there was harmless error. Now while we understand that the proceedings that are before the Court does not mandate this Court to determine harmless error, we think that if the State of South Carolina and the South Carolina Supreme Court was in error in this particular order, that a remand would be appropriate for the Court to determine the issue of harmless of error. But we think the facts and circumstances of this case, as we have briefed, support a conclusion that any error was harmless beyond a reasonable doubt.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Zelenka.

Mr. Bruck, you have nine minutes remaining.

ORAL ARGUMENT OF DAVID I. BRUCK

ON BEHALF OF PETITIONER - REBUTTAL

MR. BRUCK: If I might just briefly answer --

QUESTION: Let me ask you one question if I may. Just glancing through the opinion of the Supreme Court of South Carolina on direct appeal in 1982, it gives no intimation that any challenge to this jury instruction was made on direct appeal.

Is that correct?

MR. BRUCK: That is correct, there was none. Appointed trial counsel handled the trial and the direct appeal, and the trial court post-conviction relief proceedings, all the same court appointed lawyer.

QUESTION: What business was there raising it in the proceeding in this case? Wasn't that it was an original habeas?

MR. BRUCK: This claim was brought in --

QUESTION: In the Supreme Court of South Carolina?

MR. BRUCK: -- original habeas jurisdiction of the South Carolina Supreme Court at the same time as the post conviction appeal was being heard. The State's response was that they did not object to consolidating the two cases for the purpose of, and I quote, "resolving the apparent issues." It is only when the State began to lose that they --

QUESTION: What was raised in that State collateral proceeding?

MR. BRUCK: The primary issue was improper jury argument which was also a matter which could have been raised.

QUESTION: When was the Sandstrom Francis instruction issue first raised anywhere in the South Carolina courts?

MR. BRUCK: It was first raised in the original jurisdiction of the State Supreme Court in January, 1985.

QUESTION: And I take it that the suggestion is that that claim was procedurally barred?

MR. BRUCK: That is not a suggestion that can fairly be made on any basis in South Carolina law. What that is is the State's unsuccessful argument to convince the State Supreme Court to create a procedural bar. There is none.

South Carolina has made the reasoned judgment that in capital cases --

QUESTION: And I suppose that if there had been a procedural bar, the opinion in this case, they wouldn't have needed to go to all the trouble of writing an opinion in this case. They could have just said, procedurally barred.

MR. BRUCK: Absolutely. But the South Carolina Supreme Court would not do that because that is not the law. It has not ever been the law. The State cites a non-capital case from the 60s, dealing with a procedurally barred trial claim that couldn't be raised on habeas and that's all the authority. The authority on the other side is a case called Thompson v. Aiken, cited at footnote 5 of the Petitioner's brief.

Thompson v. Aiken, a trial arising in the very same courtroom as this one did, involved an improper jury argument by a solicitor which was not raised on direct appeal, it was not objected to at trial, on post-conviction relief, the petitioner filed a collateral attack, raising for the first time, the solicitor's improper jury argument, it was rejected at the trial court level, and on appeal, the South Carolina

Supreme Court granted relief, reversed, said that in effect, we missed it on the first go around but we have subsequently decided in other cases that these arguments are improper. We cannot distinguish the argument here from the argument there. Therefore, this man is entitled to a new sentencing hearing.

The Thompson v. Aiken, I think totally disposes of this whole nest of procedural arguments which South Carolina has raised without success below, and now tries to renew here.

QUESTION: Well, what about what it says up here that this kind of State habeas proceeding is limited to the two little circumstances that are mentioned by Mr. Zelenka?

MR. BRUCK: I think it is only the State's brief that says that. The State Supreme Court never said so in its opinion, and the part of the opinion that Mr. Zelenka read to Justice Scalia as the Justice pointed out dealt only with retroactivity.

QUESTION: On page 34 of the Joint Appendix if I'm reading where I think Justice O'Connor was referring to, it says, collateral attack of a criminal conviction on the basis of legal precedent that developed after the conviction became final must be reserved for those cases in which the trial court's action was without jurisdiction, or is void because the defendant's conduct is not subject to criminal sanction.

Now, that's the majority opinion of the Supreme Court of South Carolina.

MR. BRUCK: Yes, it is. Yes, it is. That, again, by its terms applies only to retroactivity. In any event, that was not the law the Court applied in Thompson v. Aiken. Since they applied their own precedents retroactively, it seems that they have reserved this doctrine specially for Francis v. Franklin.

QUESTION: Are you saying that the law in South Carolina has changed since September 29, 1986, when this opinion issued?

MR. BRUCK: No, I'm not. What this is is a retroactivity holding and they have not changed the scope. This only kicks in once they identify some new legal doctrine by its very terms on the basis of legal precedent that developed after the conviction became final.

If the precedent had been there all along, and it was in this case, this claim would be cognizable under South Carolina law even though it was raised for the first time on collateral review. That is a well settled principle in South Carolina.

QUESTION: Would it be cognizable in this form of State habeas proceeding do you think?

MR. BRUCK: There is no reason to believe otherwise.

QUESTION: Despite its language saying it wouldn't be?

MR. BRUCK: When they are speaking of collateral

attack, they are referring equally to habeas and to the proceedings brought under the statutory procedure, the Uniform Post-Conviction. Those terms have been used interchangeably.

State against McClary, the first time they said they would not apply Elmore retroactively was a statutory Uniform Post-conviction Relief Act proceeding. They have drawn no distinction.

Truesdale v. Aiken, the Skipper case that this Court summarily reversed, that was a Uniform Post-Conviction Relief statutory proceeding where the claim had been raised at trial, it had been raised on direct appeal, it had been raised at the trial level in collateral attack, and there was never a habeas proceeding. The distinction that the State has attempted to create between a State Constitutional habeas corpus remedy that was utilized here and post-conviction relief is simply a creation of counsel for the respondent.

It is not to be found in South Carolina law, and I don't see how you can find it in this opinion, except perhaps arguably where there is as in this case an essentially imaginary retroactivity issue.

Justice Stevens inquired whether or not the South Carolina Supreme Court has ever recognized that Sandstrom is involved here, and the answer to that is, yes. There are two cases, both of them are cited in my Reply Brief. One is State against Peterson, and the other is State against Patrick, both

of which refer really in string cites or in something like string cites to Elmore, Francis v. Franklin, and Sandstrom v. Montana, as all standing for the same proposition. I don't think there is the slightest question under South Carolina law that Elmore is simply the application of Sandstrom, and the Supreme Court has essentially admitted as much in those cases.

If there are no further questions, that's all I have.

Thank you very much.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Bruck.

The case is submitted.

(Whereupon, at 2:36 p.m., the case in the above-entitled matter was submitted.)

REPORTER'S CERTIFICATE

DOCKET NUMBER: 86-6060

CASE TITLE: Dale Robert Yates v. James Aiken, Warden et al.

HEARING DATE: December 2, 1987

LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the United States Supreme Court and that this is a true and accurate transcript of the case.

Date: 12/2/87

Margaret Daly
Official Reporter

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