

The Burger Court Opinion Writing Database

United States v. Frady

456 U.S. 152 (1982)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

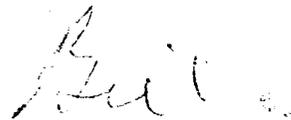
February 10, 1972

Re: United States v. Frady (No. 80-1595)

Dear Sandra:

I will circulate a dissent in due course.

Sincerely,



Justice O'Connor

Copies to the Conference

P. 9

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Brennan

Circulated: MAR 5 1982

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1595

UNITED STATES, PETITIONER *v.* JOSEPH C. FRADY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[March —, 1982]

JUSTICE BRENNAN, dissenting.

I have frequently dissented from this Court's progressive emasculation of collateral review of criminal convictions. *E. g.*, *Engle v. Isaac*, — U. S. —, — (1982); *Sumner v. Mata*, 449 U. S. 539, 552 (1981); *Wainwright v. Sykes*, 433 U. S. 72, 99 (1977); *Stone v. Powell*, 428 U. S. 465, 502 (1976); see also *Davis v. United States*, 411 U. S. 233, 245 (1973) (MARSHALL, J., dissenting). Today the Court takes a further step down this unfortunate path by declaring the plain error standard of the Federal Rules of Criminal Procedure inapplicable to petitions for relief under 28 U. S. C. § 2255. In so doing, the Court does not pause to consider the nature of the plain error Rule. Nor does the Court consider the *criminal* character of a proceeding under § 2255 as distinguished from the *civil* character of a proceeding under 28 U. S. C. § 2254. Because the Court's decision is obviously inconsistent with both, I dissent.

I

A

The Court declares that the plain error Rule, Fed. Rule Crim. Proc. 52(b), was intended for use only on direct appeal and is "out of place" when the prisoner is collaterally attacking his conviction. *Ante*, at 11. But the power to notice

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 9-10

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Brennan

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1595

UNITED STATES, PETITIONER *v.* JOSEPH C. FRADY

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APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[March —, 1982]

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The Court declares that the plain error Rule, Fed. Rule Crim. Proc. 52(b), was intended for use only on direct appeal and is "out of place" when the prisoner is collaterally attacking his conviction. *Ante*, at 11. But the power to notice plain error at any stage of a criminal proceeding is funda-

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 16, 1982

Re: 80-1595 - United States v. Frady

Dear Sandra,

Please join me.

Sincerely yours,



Justice O'Connor

Copies to the Conference

cpm

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 10, 1982

Re: No. 80-1595 - United States v. Frady

Dear Sandra:

I await the dissent.

Sincerely,

T.M.
T.M.

Justice O'Connor

cc: The Conference

© Brennan II

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 17, 1982

Re: No. 80-1595 - United States v. Frady

Dear Sandra:

I shall certainly be with you in the result, and I may join the opinion. For now, however, I shall wait to see Bill Brennan has to say.

Sincerely,

Justice O'Connor

cc: The Conference

To: The Chief Justice
 Justice Brennan
 Justice White
 Justice Marshall
 Justice Powell
 Justice Stevens
 Justice O'Connor
 Justice Souter

From: Justice Blackmun

Circulated: Mar 1 1982

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1595

UNITED STATES, PETITIONER *v.* JOSEPH C. FRADY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
 APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[March —, 1982]

JUSTICE BLACKMUN, concurring in the judgment.

Like JUSTICE BRENNAN, I believe that the plain error rule of Fed. Rule Crim. Proc. 52(b) has some applicability in a § 2255 proceeding. In my view, recognizing a federal court's discretion to redress plain error on collateral review neither nullifies the cause and prejudice requirement articulated in *Wainwright v. Sykes*, 433 U. S. 72 (1977), nor disserves the policies underlying that requirement.

Despite the Court's assertions that Rule 52(b) was intended for use only on direct appeal and that the Court of Appeals ignored "long-established contrary authority," *ante*, at 11, 12, I find nothing in the Rule's seemingly broad language supporting the Court's restriction of its scope. In fact, the plain error doctrine is specifically made applicable to all stages of all criminal proceedings, which, as the dissenting opinion points out, include the collateral review procedures of § 2255. See *post*, at 2, 4-5, and nn. 5, 6. Even more striking, § 2255 Rule 12 explicitly permits a federal court to "apply the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure, whichever it deems most appropriate, to motions filed under these rules." 28 U. S. C. § 2255 Rule 12.*

* Although § 2255 Rule 12 does not "mandate by its own force the use of any particular rule of civil or criminal procedure," *ante*, at 14, n. 15, it does afford a federal court discretion in determining whether to apply the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure. The Court's extended discussion, in the same footnote, of the Advisory

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 10, 1982

80-1595 United States v. Frady

Dear Sandra:

Please join me.

Sincerely,



Justice O'Connor

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LFP/vde

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

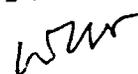
February 10, 1982

Re: No. 80-1595 United States v. Frady

Dear Sandra:

Please join me in your opinion for the Court.

Sincerely,



Justice O'Connor

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 16, 1982

Re: 80-1595 - United States v. Frady

Dear Sandra:

Please join me.

Respectfully,



Justice O'Connor

Copies to the Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Burger
Justice O'Connor

Justice Stevens
MAR 17 1982

Initiated: _____

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[March —, 1982]

JUSTICE STEVENS, concurring.

Although my view of the relevance of the cause for counsel's failure to object to a jury instruction is significantly different from the Court's, see *Wainwright v. Sykes*, 433 U. S. 72, 94-97 (STEVENS, J., concurring); *Rose v. Lundy*, — U. S. —, — (STEVENS, J., dissenting); *Engle v. Isaac*, — U. S. —, — n. 1 (STEVENS, J., concurring in part and dissenting in part), I have joined the Court's opinion in this case because it properly focuses on the character of the prejudice to determine whether collateral relief is appropriate.

1P.12

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall ✓
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: Justice O'Connor

Circulated: FEB 10 1982

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~~SDP
[unclear] (but case)~~

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1595

UNITED STATES, PETITIONER *v.* JOSEPH C. FRADY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[February —, 1982]

JUSTICE O'CONNOR delivered the opinion of the court.

Rule 52(b) of the Federal Rules of Criminal Procedure permits a criminal conviction to be overturned on direct appeal for "plain error" in the jury instructions, even if the defendant failed to object to the erroneous instructions before the jury retired, as required by Rule 30. In this case we are asked to decide whether the same standard of review applies on a collateral challenge to a criminal conviction brought under 28 U. S. C. § 2255.

But

I

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Joseph Frady, the respondent, does not dispute that nineteen years ago he and Richard Gordon killed Thomas Bennett in the front room of the victim's house in Washington, D. C. Nonetheless, because the resolution of this case depends on what the jury learned about Frady's crime, we must briefly recount what happened, as told by the witnesses at Frady's trial and summarized by the Court of Appeals. See *Frady v. United States (Frady I)*, 121 U. S. App. D. C. 78, 348 F. 2d 84 (en banc), cert. denied, 382 U. S. 909 (1965).

The events leading up to the killing began at about 4:30 p.m. on the afternoon of March 13, 1963, when two women saw Frady drive slowly by Bennett's house in an old car. Later, at about 7:00 p.m., Frady, accompanied by Richard

pp. 2, 3, 8, 9, 13, 14, 15, 19

To: The Chief Justice
 Justice Brennan
 Justice White
 Justice Marshall ✓
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice Stevens

From: Justice O'Connor

Circulated: _____

Recirculated: **MAR 8 1982**

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

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UNITED STATES, PETITIONER *v.* JOSEPH C. FRADY

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PP 8, 10, 11, 14, 15, 16, 17, 22

To: The Chief Justice
 Justice Brennan
 Justice White
 Justice Marshall ✓
 Justice Blackman
 Justice Powell
 Justice Rehnquist
 Justice Stevens

From: Justice O'Connor

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3rd DRAFT

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SUPREME COURT OF THE UNITED STATES

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