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IN THE SUPREME COURT OF THE UNITED STATES

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DOUG DRETKE, DIRECTOR :
TEXAS DEPARTMENT OF CRIMINAL :
JUSTICE, CORRECTIONAL :
INSTITUTIONS DIVISION, :
Petitioner :

v. : No. 02-1824

MICHAEL WAYNE HALEY :
- - - - - X

Washington, D.C.
Tuesday, March 2, 2004

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:10 a.m.

APPEARANCES:

R. TED CRUZ, ESQ., Austin, Texas; on behalf of the
Petitioner.

MATTHEW D. ROBERTS, ESQ., Assistant to the Solicitor
General, Department of Justice, Washington, D.C.; on
behalf of the United States, as amicus curiae,
supporting the Petitioner.

ERIC M. ALBRITTON, ESQ., Longview, Texas; on
behalf of the Respondent.

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P R O C E E D I N G S

(10:10 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in No. 02-1824, Doug Dretke v. Michael Wayne Haley.

Mr. Cruz.

ORAL ARGUMENT OF R. TED CRUZ
ON BEHALF OF THE PETITIONER

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

This case concerns the continuing vitality of the procedural default rule, an important bulwark to federalism, comity, and finality of judgments. This Court has consistently maintained that cause and prejudice can address problems with procedural default, and that the actual innocence exception should be applicable only in exceedingly rare cases.

QUESTION: Can -- can you tell me -- I don't want to derail the argument -- you've conceded that this sentence is unlawful?

MR. CRUZ: Yes, Justice Kennedy.

QUESTION: Well, then why are you here? Don't -- is there some rule that you can't confess error in your state or?

MR. CRUZ: No, Justice Kennedy, but the state is

1 here, because the state is concerned about the impact on the
2 procedural default rule, in particular the Fifth Circuit's
3 decision.

4 QUESTION: Well, so a man does 15 years so you can
5 vindicate your legal point in some other case? I -- I just
6 don't understand why you don't dismiss this case and move to
7 lower the sentence.

8 MR. CRUZ: Implicit in the procedural default --

9 QUESTION: And I'd say the same for the Government
10 of the United States.

11 MR. CRUZ: Implicit in the procedural default rule
12 is the premise that petitioner has a valid claim. In -- in
13 some ways this case, as the Fifth Circuit remarked, as the
14 judges dissenting from denial of rehearing en banc, in some
15 ways this case presents an usually pristine form, I mean,
16 it's almost a law school hypothetical, because the error is
17 so clean. There's a 3-day disparity --

18 QUESTION: At -- at the prisoner's expense.

19 MR. CRUZ: But that is inherent in any claim with
20 procedural default.

21 QUESTION: No, but it's not a -- it's not a -- as
22 if there's some new trial and -- and it's in doubt. It's
23 very clear he should not be in jail for, like what, 12, 14,
24 15 more years.

25 MR. CRUZ: It is very clear that there was an

1 error, and that if Mr. Haley had raised the error at trial,
2 that the trial judge would have and should have sustained --

3 QUESTION: But is it --

4 QUESTION: Well --

5 QUESTION: -- not also very clear that he's going
6 to spend over 10 year in jail when he shouldn't spend 10
7 years in jail?

8 MR. CRUZ: It is clear that he will spend 10 years
9 in jail when he had an objection he could have raised that
10 he did not.

11 QUESTION: Well, I understand that, but -- but if
12 the law were followed and everything went perfectly, he
13 would spend less than 2 or -- what is it, 2 or 3 years?

14 MR. CRUZ: Two years would be the max.

15 QUESTION: And he's going to spend 16 years in
16 jail, is that right?

17 MR. CRUZ: Yes, Justice Stevens.

18 QUESTION: Now, is that just, do you think?

19 MR. CRUZ: Maintaining the procedural default rule
20 is --

21 QUESTION: I understand that you want to preserve
22 the procedures, but do you think justice is being done?

23 MR. CRUZ: I think justice is being done because he
24 had a full and fair trial and an opportunity to raise his
25 errors, and there's no greater --

1 QUESTION: Well, let me ask you this. Why -- why
2 isn't there still an inadequate assistance of counsel claim
3 out there, and why shouldn't the court address that before
4 it gets into the question that it dealt with?

5 MR. CRUZ: Justice O'Connor, I think there is a
6 very strong argument that there was inadequate assistance of
7 counsel.

8 QUESTION: Well, why don't we vacate and remand and
9 let them deal with that?

10 MR. CRUZ: Justice O'Connor, I think that is
11 something that is open to the Court to do and I think that
12 is one of the fundamental problems with what the district
13 court did.

14 QUESTION: You don't think that that claim was
15 waived here? You don't urge us to make that finding, do
16 you?

17 MR. CRUZ: There is an argument that it was waived,
18 but I think the Fifth Circuit --

19 QUESTION: Well, except the court below didn't
20 decide that question.

21 MR. CRUZ: And I think the Fifth Circuit could
22 certainly deem the petitioner's pleading sufficient to
23 preserve that claim.

24 QUESTION: Yeah, I would think so too. I can't --

25 QUESTION: Are you saying you won't -- you won't

1 argue a waiver if it's sent back?

2 MR. CRUZ: If it's sent back, we would be prepared
3 to address the ineffective assistance claim on its merits.

4 QUESTION: And not raise any procedural impediment
5 to --

6 MR. CRUZ: Yes, Justice Ginsburg, that's correct.

7 QUESTION: The -- the -- another feature of this
8 case, what makes it so disturbing, is that the initial error
9 was the prosecutors, in -- when the prosecutor indicted him,
10 that indictment was incorrect, and then the rest followed,
11 relying on that original mistake of the prosecutor. So it
12 seems a -- really an ideal case for the prosecution to say,
13 we missed it, and then as a result of we -- what we, the
14 prosecutor missed, the court missed it, defense counsel
15 missed it, but it was our error and we should correct it.

16 MR. CRUZ: And, Justice Ginsburg, this case may
17 well, if the Court finds ineffective assistance, that would
18 suffice to correct this, because ineffective assistance
19 counts as cause, and in many ways this case illustrates why
20 cause and prejudice is ample to address error in sentencing
21 in non-capital sentencing and why there's not a need to open
22 the door to a new category of exceptions to procedural
23 default.

24 QUESTION: Well, this defendant certainly raised --
25 he raised the point in his pro se petition in the state

1 court and he raised it in the Federal court, the ineffective
2 assistance, but nobody paid any attention to him.

3 MR. CRUZ: The -- the claim was denied in state
4 habeas and the Federal habeas court did not address it
5 because it had already granted relief based upon his claim
6 that he was actually innocent of the sentence.

7 QUESTION: Did the prosecutor suggest that maybe
8 the court should have dealt with it, because neither court
9 gave any reason for rejecting that claim?

10 MR. CRUZ: I -- the -- the district court jumped
11 ahead in the process. Rather than address cause and
12 prejudice, the district court said that it didn't need to
13 address cause and prejudice because it found actual
14 innocence, and that's one of the -- the significant
15 problems, much like statutory interpretation, where a court
16 should --

17 QUESTION: Mr. Cruz, let me -- let me make -- get
18 clear what -- what -- what your position is. You're --
19 you'd be totally content if we don't resolve this question
20 that's before us about whether whenever there's a procedural
21 default that has clearly resulted and -- and with no
22 ineffective assistance of counsel, that has clearly resulted
23 in an injustice, you know, we -- we throw away all the
24 procedural rules. You -- you don't want us to address that
25 and just send it back and say, well, before you get to that

1 question, you have to resolve the cause and prejudice and
2 then leave -- leave dangling in the air the question, the
3 significant question, it seems to me, on which we granted
4 cert?

5 MR. CRUZ: Justice Scalia, the first preference of
6 the State of Texas is for the Court to address the circuit
7 split and to clarify that there is no actual innocence
8 exception to non-capital sentencing. If the Court is not
9 inclined to do so, the State of Texas, our second preferred
10 outcome is to vacate the decision of the Fifth Circuit so we
11 don't operate under that precedent.

12 QUESTION: Why should we -- why should we not be
13 inclined to do so? Is it a constitutional question that we
14 shouldn't reach? I mean, do we have to do a sort of
15 jurisprudential striptease and decide this one case, leaving
16 open this question? I don't understand why we wouldn't
17 decide it.

18 MR. CRUZ: And Texas is not urging the Court not to
19 decide it. It is simply saying that is an avenue should the
20 Court decide to decide -- to rule on this case in a more
21 narrow ground, that is an avenue that would provide some
22 relief to Texas because it would vacate the Fifth Circuit
23 decision and it would allow ultimately for some relief for
24 Mr. Haley as well.

25 QUESTION: So you come back and fight another day?

1 MR. CRUZ: Well, or perhaps someone else would
2 fight in a different circuit.

3 QUESTION: But if the court views this as a
4 preliminary question, a question that the Fifth Circuit and
5 any other Federal court should have reached logically before
6 it reached the question on which it decided the case --

7 MR. CRUZ: Yes, Justice --

8 QUESTION: -- then we should put the court back in
9 the position that it should have been in if it handled the
10 case correctly.

11 MR. CRUZ: Justice Ginsburg, we certainly agree
12 that as a matter of thinking through procedural default,
13 that courts should begin with cause and prejudice, that the
14 actual innocence exception as a potential trump card should
15 not be jumped to first.

16 QUESTION: Well, that just means it made two
17 mistakes. Number one, if this theory that you're opposing
18 did exist, it shouldn't have reached it first, okay? It
19 should have reached it second. Mistake one. And number
20 two, according to you, is this theory doesn't exist anyway.

21 MR. CRUZ: And --

22 QUESTION: I don't see why it's more intelligent
23 for us to reach the first question than the second if -- if
24 there isn't any such thing as number one and number two. If
25 the only one that exists is number one, it seems to me we

1 should say so.

2 MR. CRUZ: And, Justice Scalia, I agree entirely
3 with your characterization of the errors made by the court
4 below.

5 QUESTION: May I ask this question? I always
6 thought there was a manifest injustice exception to the
7 procedural default rule, and as I understand it, the
8 Government concedes there was injustice at the end of their
9 brief. They say it's less significant, it's a less --
10 qualitatively less significance than if you put an innocent
11 man to death. But is it not manifest that there was
12 injustice in this case?

13 MR. CRUZ: Justice Stevens, I -- I do not believe
14 it is. It -- it is manifest that there was error --

15 QUESTION: Well, can you give me an example of when
16 manifest injustice would exist other than a death case?

17 MR. CRUZ: There are a host of instances in which
18 this Court has held that actual constitutional errors should
19 nonetheless not be addressed because the defendant has
20 procedurally defaulted that.

21 QUESTION: Well, I understand that, but is there
22 any -- any content to the manifest injustice exception in
23 your view?

24 MR. CRUZ: Absolutely there is. The paradigmatic
25 case --

1 QUESTION: Well, give me an example.

2 MR. CRUZ: -- is an individual was is innocent of
3 the crime.

4 QUESTION: Well, he's innocent of the crime he's in
5 -- in prison for.

6 MR. CRUZ: He is innocent only in the most
7 technical of legal sense. In the ordinary sense of the
8 word, he committed the theft, he committed the predicate
9 felonies --

10 QUESTION: No, but if the law were followed, he
11 would have been released a long time ago, would he not?

12 MR. CRUZ: If he had raised his objection.

13 QUESTION: What -- what actually -- what was he
14 charged with, Mr. Cruz? What was the substantive offense
15 and what were the recidivist offenses?

16 MR. CRUZ: He was charged with theft, and that was
17 enhanced to a state jail felony because he had committed two
18 prior thefts. And then upon sentencing, his sentence was
19 aggravated because he was a habitual offender and had two
20 prior felony convictions. Now, the indictment alleged that
21 they were sequential and it turned out that allegation was
22 incorrect.

23 QUESTION: Well --

24 QUESTION: They -- they were sequential. I mean,
25 one followed another. Isn't what it comes down to is that

1 he should have been -- he should have been given this longer
2 sentence for the second theft instead of for the third
3 theft?

4 MR. CRUZ: No, actually, Justice Scalia, the way
5 the statute reads --

6 QUESTION: As I understand it, the -- the -- the
7 theft that -- that was used for recidivism occurred 3 days
8 after, right, the --

9 MR. CRUZ: It's a 3 -- it's a 3-day disparity. The
10 first crime was delivery of amphetamines.

11 QUESTION: Yeah.

12 MR. CRUZ: And he committed that in 1988, but that
13 conviction did not become final until October 18th, 1991.
14 Three days before October 18th, 1991, he committed attempted
15 robbery, and the way the Texas statute reads, he has to
16 commit the second felony after the first felony conviction
17 becomes final.

18 QUESTION: But why did the first felony take so
19 long to become final? It took -- you say it took 3 years?

20 MR. CRUZ: It -- it did. I don't know the extent
21 to which that was discovery in the trial, but that -- that's
22 ultimately what the record reveal in terms of when that
23 conviction --

24 QUESTION: At -- at trial, do you think the
25 prosecutor would have, if he had noted this error, have the

1 duty to call the attention of the trial judge before the
2 trial judge imposed sentence?

3 MR. CRUZ: Absolutely, absolutely. And -- and --

4 QUESTION: But the trial obligation -- the trial
5 lawyer's obligation to do justice is -- is somehow missing
6 in your office?

7 MR. CRUZ: The state has an obligation to be candid
8 with the court, so at any point in which the state became
9 aware of this error, the state would be obliged to inform
10 the court, but that's a very different thing to say that
11 when there is a procedural default, when the defendant has
12 not preserved his error, that the state should not act to
13 vindicate that procedural default. There is an important
14 value in protecting the procedural rules in the State of
15 Texas, and that value is not served. I mean, ultimately,
16 this Court has said that the very narrow exception of actual
17 innocence should apply in very narrow circumstances. So
18 this Court has ultimately engaged in a balancing, a
19 balancing that derives from prior language in the -- in the
20 Federal habeas --

21 QUESTION: Well, narrow circumstances, when the
22 record makes it perfectly clear that an error has been
23 committed and an innocent person is in jail, that's -- what
24 more do you need?

25 MR. CRUZ: The difficult --

1 QUESTION: There aren't many cases like this.

2 MR. CRUZ: It is true that there are not many cases
3 where the state concedes error, but the difficulty with
4 pivoting the test on that is the basic operating premise of
5 every habeas petition. Where procedural default is raised
6 is that the petitioner has valid claim and this Court has
7 not hesitated to allow far more significant claims not to be
8 addressed because of procedural default.

9 QUESTION: Yes, but usually the valid claim is some
10 procedural error in the trial, something of that character.
11 It's not that he's totally innocent and everybody agrees
12 he's totally innocent.

13 MR. CRUZ: This -- this Court has addressed
14 procedural default in the context of forced confessions, in
15 the context of statements without Miranda rights, in the
16 context of psychiatry --

17 QUESTION: But that -- but -- but -- no, what you
18 need to satisfy Justice Stevens is -- is a case where the
19 mistake unquestionably caused the outcome of the --
20 unquestionably caused the outcome of the trial to be wrong.
21 All of the ones you just mentioned, it may have caused it to
22 be wrong, may not have, you don't -- the jury might have
23 convicted him without the confession, et cetera, et cetera.
24 Do you have any cases where -- where, as here, there is no
25 doubt that the procedural default produced a different

1 outcome in the trial?

2 MR. CRUZ: We do not have any cases like that, but
3 that aspect simply goes to prejudice, and this Court has
4 repeatedly cautioned that the actual innocence exception
5 should not be used to transform cause and prejudice just to
6 prejudice. There's no doubt that this error caused
7 prejudice. The only question is if there was cause for not
8 raising it, and in terms of asking -- I mean, Justice
9 Stevens asked me about, is this a manifest injustice. There
10 seems nothing on the face of it that is plain to me that
11 allowing an individual to be convicted and to remain
12 convicted and serve in jail or even be executed based on a
13 forced confession is somehow a lesser injustice than
14 allowing Mr. Haley to serve a sentence --

15 QUESTION: I think it's a lesser injustice if he's
16 really guilty of the crime.

17 MR. CRUZ: But in this case, Mr. Haley is guilty of
18 the theft, he's guilty of the predicate offense --

19 QUESTION: He is not guilty of what he's in prison
20 for.

21 MR. CRUZ: Only in the sense --

22 QUESTION: And I don't think the 3 days is an
23 argument that has any merit. You'd make the same argument
24 if it was 10 years. You'd make the same argument.

25 MR. CRUZ: It is -- it is true that 3 days or 5

1 days or whatever does not matter. What matters, and what we
2 are urging, is that Mr. Haley had multiple avenues to
3 challenge this. He could have challenged this at trial. He
4 could have challenged this on direct appeal.

5 QUESTION: If he could deliberately refuse to do it
6 in order to trap the state into some kind of mistake, is
7 this a case of, you know, in our original case that we talk
8 about gamesmanship and so on, do you think this is
9 gamesmanship on his part?

10 MR. CRUZ: You know, we don't have reason to
11 suggest that Mr. Haley in this instance was engaged in
12 gamesmanship with respect to this error, but the record is
13 susceptible to an interpretation that his counsel was
14 engaged in gamesmanship with respect to whether or not Mr.
15 Haley pleaded to the enhancements. Because what happened at
16 trial is Mr. Haley's attorney urged the trial court, my
17 client doesn't want to plead, please go ahead, he's not
18 going to plead. The trial court did what the counsel asked
19 and he immediately, on direct appeal that was his principal
20 challenge, and that is one possible interpretation of the
21 record is the counsel was attempting to sandbag. There was
22 a line of state court cases saying it was mandatory error
23 not to plead.

24 QUESTION: Well, if the counsel sandbagged for the
25 purpose of getting a 16-year sentence instead of a 3-year

1 sentence, doesn't that demonstrate that he was incompetent?

2 (Laughter.)

3 MR. CRUZ: It may well, and I certainly wouldn't
4 urge that counsel engaged in good strategic decisions, but
5 it may have been a strategic decision with respect to urging
6 the court to commit an error under state law that caused the
7 counsel not to notice the disparities in the enhancements.

8 QUESTION: In one of the proceedings, Texas did
9 take the position that there -- this was not ineffective
10 assistance of counsel. The reply brief I think makes it
11 clear that you're not disputing that the -- that the
12 ineffective assistance of counsel claim is alive and well.
13 But there was a time you took a different view.

14 MR. CRUZ: That -- that is correct, and we agree at
15 this point there is a very significant argument of
16 ineffective assistance of counsel, and I would note that the
17 court of criminal appeals in Texas has found ineffective
18 assistance of counsel in almost precisely the same
19 circumstance where a counsel failed to notice the non-
20 sequential nature of felonies used to enhance a habitual
21 offender in the decision of *Ex parte Scott*, which is found
22 at 581 S.W.2d 181.

23 If there are no further questions, I'd like to
24 reserve the balance of my time.

25 QUESTION: Very well, Mr. Cruz.

1 Mr. Roberts, we'll hear from you.

2 ORAL ARGUMENT OF MATTHEW D. ROBERTS

3 ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

4 SUPPORTING THE PETITIONER

5 MR. ROBERTS: Mr. Chief Justice, and may it please
6 the Court:

7 The actual innocence exception applies in the
8 extraordinary case where a prisoner has been convicted of a
9 crime that he did not commit. The Court shouldn't extend
10 that narrow exception to the very different situation where
11 the prisoner is guilty of the crime of which he was
12 convicted.

13 QUESTION: Well, what should we do in this case
14 with someone who -- who is serving an unjust sentence under
15 the law?

16 MR. ROBERTS: Well -- well, Your Honor, even if
17 this Court holds that the actual innocence exception doesn't
18 apply to non-capital sentencing, respondent may well be
19 entitled to relief here.

20 QUESTION: On the inadequate assistance claim?

21 MR. ROBERTS: On the ineffective assistance claim,
22 and I --

23 QUESTION: Do you urge that that's waived, or can
24 the court below address it?

25 MR. ROBERTS: We don't believe that it's waived,

1 Your Honor.

2 QUESTION: Thank you.

3 QUESTION: Why not go to that first and tell them
4 to do that, because this is just very difficult, that that
5 would be the reason? The reason it would be difficult is
6 because actual innocence is simply a way at getting at
7 manifest injustice, I think, and a reason that this fits in
8 the manifest injustice is we feel differently about
9 substantive laws that govern how long a person is going to
10 be in prison than we do about procedural laws, and
11 sentencing is an aspect of that.

12 But if you take that and say, look, this is an
13 absolute obvious case where there was just wrong sentencing,
14 it's not actual innocence, it's wrong sentencing, but it's
15 so obvious, it's so clear that this is just unjust. Once
16 we're down that path, I mean, how do we draw a line between
17 that and every sentencing error? Now, I'm just --

18 MR. ROBERTS: That -- that's --

19 QUESTION: -- I'm getting you to --

20 MR. ROBERTS: -- but that's right, Your Honor --

21 QUESTION: -- I know that's just what you were
22 going to say --

23 MR. ROBERTS: -- and that's our primary -- that's
24 our primary concern here.

25 QUESTION: All right. But is the answer then not

1 to deal with it when it's clear?

2 MR. ROBERTS: Well, the -- the Court certainly
3 could do that. There is a danger I think in -- in
4 addressing the actual innocence exception in a case where
5 there's cause and prejudice and so you don't need to address
6 it, and in a case where the error is -- is clear when what
7 the real concern is when it's not that clear about whether
8 somebody's actually innocent.

9 QUESTION: So you're saying it would be wise to
10 send it back, is that right?

11 MR. ROBERTS: It -- it -- yes, except that, you
12 know, certainly our -- our primary interest in the question
13 here is in the question that's divided the circuits and in
14 making clear that there isn't a broad actual innocence
15 exception as applied to -- to non-capital sentencing.

16 QUESTION: Perhaps when it's clear it will always
17 be the case that there's been ineffective assistance of
18 counsel. How -- how could it be, you know, clear as day and
19 ineffective assistance of counsel not -- not have
20 intervened?

21 MR. ROBERTS: That -- that's -- that's right, Your
22 Honor. It may well frequently be the case, which is why you
23 wouldn't need the actual innocence exception for that -- for
24 that circumstance. But -- but our concern is that a rule
25 that applies to the exception where the prisoner is guilty

1 of the crime and is claiming only that he's suffering an
2 excessive prison term, if taken to its logical conclusion,
3 that would open up final judgments where a criminal
4 defendant is belatedly claiming that a sentencing guideline
5 was incorrectly applied to him and that he's therefore
6 innocent of the sentence.

7 QUESTION: Well, suppose -- suppose this were the
8 Federal system. Would the Department of Justice take the
9 position that it would not ask sua sponte that this sentence
10 be reduced?

11 MR. ROBERTS: We -- we well might not have appealed
12 from the district court judgment in this case. If the
13 Government takes an appeal, the Solicitor General office has
14 to -- has to approve those appeals and we would certainly --

15 QUESTION: That's one tremendous advantage the
16 Government has over individual criminal defendants' lawyers,
17 isn't it? They choose the facts they want to bring here.

18 (Laughter.)

19 QUESTION: Well, they do, don't they?

20 MR. ROBERTS: Well, we certainly would -- would
21 take into account the entire situation in -- in making a
22 determination on that, Your Honor.

23 QUESTION: You think there might be some doubt that
24 the Department of Justice would insist that --

25 MR. ROBERTS: I -- I hate to predict it --

1 QUESTION: -- a 10 -- a 10-year -- an unlawful 10-
2 year term?

3 MR. ROBERTS: -- in any case, but I would expect
4 that if it was clear that there was cause and prejudice that
5 was -- that a case involved a situation where the prisoner -
6 -

7 QUESTION: Forget cause and prejudice. Suppose the
8 term is unlawful and it's conceded to be unlawful. Are you
9 taking the position the Department of Justice says he has to
10 be held anyway?

11 MR. ROBERTS: I -- I --

12 QUESTION: I'm -- I'm astounded by that.

13 MR. ROBERTS: I'm not -- I'm -- I'm not taking the
14 position of that, Your Honor. I just -- I hesitate to -- to
15 make a prediction about some future case where I don't know
16 all the facts. I certainly think that if -- if, in a case
17 like this where a prisoner was clearly entitled to -- had --
18 had cause and prejudice and was entitled to relief, that we
19 would call that to the attention of the -- of the district
20 court or to the attention of the court of appeals.

21 QUESTION: Mr. Roberts, you now say ineffective
22 assistance of counsel claim, I think you answered that that
23 was preserved. But I noticed that you were very careful in
24 your brief to say twice if -- if Haley preserved the
25 ineffective assistance of counsel --

1 MR. ROBERTS: Right.

2 QUESTION: -- argument.

3 MR. ROBERTS: We -- I -- I -- we think that it's a
4 question to be decided by the -- the court of appeals on --
5 on remand, Your Honor, and the state had made arguments
6 about whether it was preserved or not. Justice O'Connor
7 asked me my opinion as to whether the -- whether the claim
8 was preserved, and in -- in our view it was, but that would
9 be a question for the lower court to -- to decide, and
10 apparently the state is no longer arguing that -- that it
11 wasn't preserved.

12 As I said, our -- our -- the -- the issue that
13 we're primarily concerned about here is a broad extension of
14 the actual innocence exception to an erroneous prison term,
15 and that would involve substantial societal costs, because
16 the challenges to the findings --

17 QUESTION: Would it involve all those costs if we
18 can find the exception to cases in which the state
19 acknowledges the error?

20 MR. ROBERTS: Well, that would certainly be a far
21 less problematic exception.

22 QUESTION: Would it be problematic if we limit it
23 that way?

24 MR. ROBERTS: No, Your Honor, except to the extent
25 that it -- it extended -- extends actual innocence beyond an

1 offense which has a special constitutional status.

2 QUESTION: Are we free to write this code of
3 criminal procedure? I mean, I can understand all these
4 arguments being made to, you know, to Congress or -- or to
5 the state legislatures for writing a code of criminal
6 procedure, but what is -- what is the --

7 MR. ROBERTS: Well, well, the --

8 QUESTION: -- justification for this --

9 MR. ROBERTS: -- these rules are --

10 QUESTION: -- something which has never been done
11 in -- in a couple of hundred years is -- is -- is part of
12 due process?

13 MR. ROBERTS: No, Your Honor. My understanding is
14 that the actual innocence exception and the procedural
15 default rules are court-made limitations on the jurisdiction
16 -- on the exercise of discretion by the Federal habeas
17 court, and so the court's exercising its -- its supervisory
18 authority over the courts.

19 QUESTION: No, but the Federal habeas court has to
20 be relying upon some law to -- to undo the state conviction,
21 right?

22 MR. ROBERTS: Yes, Your Honor. There has to be an
23 underlying claim.

24 QUESTION: Yeah.

25 MR. ROBERTS: But we're talking here about the

1 actual innocence exception, which is a gateway to
2 consideration of that underlying claim. There -- there
3 still has to be an underlying constitutional claim, and --
4 and that --

5 QUESTION: Mr. Roberts, why is it --

6 MR. ROBERTS: -- that's an issue that's not before
7 the Court whether there is -- is such a claim.

8 QUESTION: Why is this qualitatively different from
9 the rule in Jackson against Virginia that if there's no
10 evidence to support the conviction, we set it aside, then
11 you presume the guy's innocent?

12 MR. ROBERTS: Well -- well -- Jack -- Jackson, Your
13 Honor, is based on Winship, which is based on the
14 requirement of proof beyond a reasonable doubt of the
15 elements of the crime. When you're talking about sentencing
16 --

17 QUESTION: Well, when the record is perfectly clear
18 that --

19 MR. ROBERTS: -- there is no such constitutional
20 requirement.

21 QUESTION: When the record is perfectly clear that
22 one of the elements hasn't been proved, why he had a -- why
23 isn't it the same here? The record establishes that one of
24 the elements necessary for this conviction has not been
25 proven, the order of the -- the two crimes.

1 MR. ROBERTS: Well, I -- I respectfully disagree
2 with that, Your Honor. That -- the elements of the crime
3 have all been proved. They're not -- they're not disputed.
4 What's disputed is -- is a factor leading to enhancement in
5 the sentence. If this was an element of the crime, we would
6 agree with you that the actual innocence exception applies
7 here.

8 QUESTION: If Apprendi had come out the other way,
9 or if we extended Apprendi to recidivism?

10 MR. ROBERTS: If you overruled Almendarez-Torres,
11 we would agree that the actual innocence exception applies
12 in this particular case.

13 QUESTION: Doesn't scare me.

14 MR. ROBERTS: But again, our concern is with broad
15 application of the actual innocence exception to sentencing
16 and to the many findings that are involved there, and the
17 fact is that the Court hasn't overruled Almendarez-Torres.
18 We're talking about even in this case just an erroneous
19 sentence. We're not talking about an innocence of an
20 offense with the special constitutional status that that
21 entails and the special stigma that's attached to innocent,
22 to an offense.

23 QUESTION: But Mr. Roberts, aren't we talking about
24 justice? You -- at the end of your brief you say, this is
25 qualitatively less significant than it -- than killing

1 somebody for the wrong crime, but it is unjust, isn't it?

2 MR. ROBERTS: It -- there's -- there's certain
3 unfairness involved, but the -- the manifest injustice
4 exception is not directed at -- at every --

5 QUESTION: The manifest injustice --

6 MR. ROBERTS: -- at every unfairness, and --

7 QUESTION: No, but it's a -- it's a -- it's
8 directed at injustice that is manifest, not the
9 disqualitatively more than severe than it, and here it's
10 manifest.

11 MR. ROBERTS: I -- it -- what the Court has done in
12 -- in determining the application of exception is to weigh
13 the -- the degree of injustice that would be involved in
14 denying review against the substantial costs involved in --
15 in reviewing claims when there's -- the prisoners
16 inexcusably failed to raise them in the proper forum and the
17 proper time, and --

18 QUESTION: And you have difficulty weighing 15
19 years of an unlawful sentence and saying that that's not a
20 manifest injustice? That's a difficult exercise?

21 MR. ROBERTS: I -- Your Honor, the -- the -- it --
22 it's certainly an unfairness, but there are substantial
23 costs to -- to extending it to these many -- there are many
24 factors that are involved in sentencing, and the fact is the
25 prisoner's still guilty of the offense of conviction here,

1 Your Honor.

2 QUESTION: Thank you, Mr. Roberts.

3 Mr. Albritton.

4 ORAL ARGUMENT OF ERIC M. ALBRITTON

5 ON BEHALF OF THE RESPONDENT

6 MR. ALBRITTON: Mr. Chief Justice, may it please
7 the Court:

8 This Court has repeatedly recognized that the --
9 the systemic concerns that underpin the procedural default
10 doctrine must yield to the imperative of correcting a
11 fundamentally unjust incarceration, an incarceration that is
12 beyond the statutory maximum sentence, whether it be a
13 capital sentence or a non-capital sentence, is fundamentally
14 unjust. The Court has never limited this exception to a
15 capital sentence context and it should not do so today.

16 QUESTION: Well, it has never extended it beyond
17 the capital sentence context either, has it?

18 MR. ALBRITTON: That is correct, Your Honor.

19 However --

20 QUESTION: And there is some suggestion in our
21 cases that other claims ought to be addressed before
22 resorting to that, such as inadequate assistance of counsel.

23 MR. ALBRITTON: Your Honor, I agree that this
24 Court's precedents suggest that ineffective assistance of
25 counsel, cause and prejudice, should be addressed first.

1 However, this Court has never expressly held that. Your
2 Honor, in relation to the question that I've been asked
3 about, should this Court just remand for consideration of
4 the ineffective assistance of counsel claim, I would
5 respectfully suggest that that is not appropriate.

6 In this case, Your Honor, the petitioner --

7 QUESTION: Why not? You think that counsel's
8 performance was adequate here?

9 MR. ALBRITTON: Your Honor, I think it was grossly
10 inadequate. However, the question presented by the
11 petitioner in this case, Your Honor, is only whether the
12 actual innocence exception to the procedural default rule
13 concerning Federal habeas corpus claims should apply to non-
14 capital sentence here.

15 QUESTION: Yes, but if it's our view that the court
16 below addressed that out of order too soon when it had an
17 alternative, certainly we could vacate and remand.

18 MR. ALBRITTON: You could, Your Honor.

19 QUESTION: Yes.

20 MR. ALBRITTON: Again, I would respectfully suggest
21 that's inappropriate. The State of Texas could have argued
22 and presented the court with that particular question, that
23 is, whether or not the court should have reached cause and
24 prejudice first. However, the State of Texas did not ask
25 the court to consider that claim.

1 QUESTION: But we -- we haven't in -- in at least
2 two or three cases when we have a question of certiorari,
3 we've said that there's a logically preceding question that
4 has to be decided before we can get to that. So it seems to
5 me this might be that kind of a case.

6 MR. ALBRITTON: Your Honor, I am familiar with that
7 precedent, and I understand that the Court could --

8 QUESTION: Well, I guess you'd like your client out
9 of jail?

10 MR. ALBRITTON: That's absolutely correct, Your
11 Honor, and the state didn't --

12 QUESTION: Doesn't sound like it.

13 (Laughter.)

14 QUESTION: Well, you -- you'd rather do it sooner
15 rather than later, right? You'd rather have us say let him
16 free rather than send it back down and try it all over
17 again?

18 MR. ALBRITTON: Absolutely, Your Honor.

19 QUESTION: That seems reasonable.

20 MR. ALBRITTON: If it's remanded, he's going to be
21 incarcerated while it goes back through the court of appeals
22 and through the district court, and if this Court decides
23 that, this issue, that it cannot reach the issue presented,
24 the Court can certainly dismiss this case as improvidently
25 granted and Mr. Haley will no longer have to suffer under

1 the danger of this clearly --

2 QUESTION: Mr. Albritton, let me -- let me ask you
3 this. In this case there is a statute that would not have
4 allowed the additional sentence to be imposed unless these
5 things were sequential. Suppose that wasn't the situation.
6 Suppose what you are -- we're dealing with was a real
7 sentencing factor of the sort that a judge can take into
8 account under a law which says the judge may sentence from
9 10 to 30 years, all right?

10 MR. ALBRITTON: Yes, Your Honor.

11 QUESTION: It's up to the judge. And in sentencing
12 him to the maximum, the judge makes a mistake of fact. It
13 is later found that when the judge said I'm giving him 30
14 years because, you know, he's been a really bad person in
15 light of this background, and it turns out that background
16 didn't exist, all right? Would you be making the same
17 argument here?

18 MR. ALBRITTON: I absolutely would not, Your Honor.
19 As we've argued in our brief --

20 QUESTION: That does make it sound like what this
21 is is Almendarez-Torres, that -- that -- the -- the
22 difference between the hypothetical I just posed to you and
23 this case is simply that the law would not allow the
24 additional time to be imposed unless the fact was found,
25 whereas in the discretionary case, the law would have

1 allowed it.

2 MR. ALBRITTON: Your Honor, we do not believe that
3 the Court need reach Almendarez-Torres. However, the rule
4 we propose is certainly consistent with this Court's Sixth
5 Amendment rule in Apprendi. It's also consistent with --

6 QUESTION: Well, how -- how do you limit it to that
7 kind of a situation then? How -- how do you -- how do you
8 give me the answer that you've just given me, that even
9 though you -- you -- you show that the judge who imposed a
10 discretionary sentence was absolutely wrong for the basis on
11 which he imposed that discretionary sense, you wouldn't
12 allow that to be reviewed. Why -- what's the basis for
13 that?

14 MR. ALBRITTON: Several reasons, Your Honor. First
15 of all, this Court's decision in Sawyer v. Whitley
16 specifically adopted an eligibility test, and that
17 eligibility test draws the line at where that person is
18 statutorily eligible. This Court specifically rejected the
19 notion that it should consider discretionary factors in the
20 capital context mitigating evidence.

21 Thus, Your Honor, our rule about statutory
22 eligibility is tethered specifically to the Court's ruling
23 in Sawyer. Additionally, Your Honor, that rule that we
24 propose is well-rooted in this Court's habeas doctrine
25 dating back to Townsend v. Burke, Your Honor. This Court

1 has recognized that a sentence that falls -- the severity of
2 a sentence that falls within a statutory range is not
3 amenable to habeas review. Additionally, the recent case,
4 Your Honor, of Harris v. the United States, where the issue
5 was whether Apprendi applied to mandatory minimums. This
6 Court held -- actually, part of the opinion is a plurality
7 opinion, but the holding is that the -- it does not matter
8 if the sentence is more based on some false fact. The issue
9 is, is it within range of punishment authorized by the
10 legislature, Your Honor.

11 QUESTION: I understand that. I just don't
12 understand why it makes any sense if you've shown and can
13 know for sure that the only reason the judge imposed the 30
14 years was that he believed a certain fact was true which in
15 fact was not true, and that is demonstrated, and he said,
16 I'm opposing 30 years because of this, otherwise, you know,
17 this would be a 10-year sentence. And I -- there's just as
18 much injustice there, it seems to me.

19 MR. ALBRITTON: Well, Your Honor, the difference is
20 in an error in what constitutes a fundamental miscarriage of
21 justice, and we would respectfully suggest that when a
22 sentence is imposed outside of any range authorized by the
23 legislature, that is fundamentally unjust.

24 QUESTION: But the other could be, couldn't it? I
25 mean, that's -- what I don't understand about this area, and

1 you've read the cases and so you may be able to be clearer than
2 I am and can correct me, I've thought that the real key
3 concept is not actual innocence. It's very hard to apply
4 that to a sentence. You're guilty of the crime, you're not
5 innocent of the sentence. That doesn't make sense, but
6 rather manifest injustice, and the key word is manifest.

7 And so one could have manifest injustice in
8 millions of possible situations. You don't need absolute
9 clarity as to it applies to in between the guideline but not
10 beyond the guideline, but the key word is manifest, and it
11 has to be unjust and injustice first and foremost has to do
12 with being behind bars when the law says you shouldn't be,
13 directly and simply, not through some procedural device.

14 So thinking about it in that way, I would like you
15 to tell me what cases of this Court stand as obstacles to
16 the way I'm thinking about it?

17 MR. ALBRITTON: Your Honor, I believe that Sawyer,
18 we believe that Sawyer v. Whitley stands as an obstacle to
19 that approach, because in Sawyer, Your Honor, the Court
20 specifically rejected the notion that factors that affect
21 the sentence within the discretion of the sentencing body
22 are not to be considered in the determination of whether or
23 not somebody -- or a petitioner is actually innocent of that
24 sentence.

25 QUESTION: You see what I -- what I'm basically

1 interested in is, is the -- the concept actual innocence
2 simply a subdivision of the broader concept manifest
3 injustice? And so that actual innocence of the crime
4 itself, where manifest, is a basis for doing whatever
5 happens in habeas law. And if I know whether that's a
6 subdivision, I then would have a better handle on the case.

7 MR. ALBRITTON: Your Honor, I -- it is our position
8 that innocence has been adopted as a touchstone for the
9 determination of whether or not there is a manifest
10 injustice. The Court has determined that that properly
11 takes into consideration, that focus on innocence takes into
12 proper consideration the systemic interest in federalism,
13 comity, and finality.

14 Your Honor, although the -- the concept of
15 innocence of punishment is awkward and recognized, Mr. Haley
16 is actually innocent of the fact alleged that caused for the
17 sentence that is more than eight times the statutory --

18 QUESTION: Everybody's going to say they're
19 actually innocent. All -- I mean, you know, not everybody,
20 but, you know, a very high percentage of prisoners in prison
21 say, I was actually innocent, and the prosecution says, no,
22 you're not actually innocent. So if that's really an
23 excuse, actual innocence, and if in fact that's really an
24 excuse in respect to a sentence, then why wouldn't every
25 case be open to the Federal habeas judge relitigating the

1 lawfulness of the conviction in terms of the evidence and
2 relitigating the sentence in terms of what was reasonable?

3 MR. ALBRITTON: Those concerns, Your Honor,
4 underpin the reason for the high standard of proof in the
5 first instance, that is, clear and convincing evidence.
6 Those concerns also, Your Honor, inform the reason for the
7 rule we proposed, and that is there is only a fundamental
8 miscarriage of justice when a sentence is imposed that under
9 the true facts no sentencing body, judge or jury, could have
10 ever done.

11 QUESTION: All right. In your view, under the true
12 facts, a prisoner says the true facts are X, the state says
13 the true facts are not X, and what's supposed to happen?

14 MR. ALBRITTON: The court has to decide if the
15 petitioner has shown by clear and convincing evidence that
16 he or she, but for a constitutional violation, would not
17 have been eligible for that sentence.

18 QUESTION: So -- so in your -- in your view, every
19 crime in a state court and every sentence in a state court,
20 at least a big subset, are open to relitigation in the
21 Federal court on the standard of whether there is clear and
22 convincing evidence that adds the factual matters, it was
23 that the -- the state court was wrong?

24 MR. ALBRITTON: No, Your Honor, not a large subset,
25 only the subset of cases where the petitioner receives a

1 sentence for which he or she is statutorily ineligible.

2 QUESTION: In -- in your -- in your view, Mr.
3 Albritton, there's no requirement that this evidence be
4 newly discovered, I take it?

5 MR. ALBRITTON: That is correct, Your Honor.

6 QUESTION: Mr. Albritton, it's a small subset of
7 the state court cases, but it's a -- it's a -- it's a total
8 -- it's not a subset at all of the Federal cases, right?
9 Because we have a guideline system where, by statute, you
10 are not allowed to impose any more than what the guidelines
11 permit, right?

12 MR. ALBRITTON: That's not actually entirely
13 accurate, Your Honor.

14 QUESTION: Well, unless you -- sure, you -- you can
15 make a finding that -- where that finding hasn't been made
16 that this is somehow extraordinary, you cannot, by law,
17 impose more than a certain amount of sentence.

18 MR. ALBRITTON: In the -- in the Federal context,
19 Your Honor, there are two things that are operating. One
20 are the guidelines, but the second is the statutory range of
21 punishment. The legislature has determined that within the
22 application of the guidelines, that a sentence, up until and
23 including the statutory maximum under some circumstances is
24 appropriate.

25 QUESTION: Oh no.

1 QUESTION: Yeah, but this guideline says the
2 statute says, Judge, you must apply the guideline range
3 unless. Now, there are many situations where it isn't even
4 arguably unless, okay?

5 MR. ALBRITTON: Yes, sir.

6 QUESTION: So that means there is a statutory
7 requirement that the judge impose the guideline sentence,
8 four extra units or points if you had a gun, say. The
9 prisoner says, I didn't have a gun. The state says, I did
10 have a gun. And now you want to relitigate whether he had a
11 gun or didn't have a gun, whether the victim was seriously
12 hurt or only gravely hurt, whether there was a threat or a
13 brandishment or an actual use of the gun, all of which add
14 points, and what you're saying is all of those things would
15 be relitigated in a habeas court, as long as the prisoner
16 colorably can say, I have evidence that will show clearly
17 and convincingly the judge was wrong.

18 MR. ALBRITTON: That is not correct, Your Honor.
19 Under the rule we propose, the Federal court would only have
20 to engage in this exercise if the petitioner could establish
21 by the requisite proof that he or she received a sentence
22 above the statutory maximum. While it may be error in the
23 application of the guidelines and there can be factual
24 inaccuracies --

25 QUESTION: No, you were saying that, but judge -- I

1 knew you were saying that, but I think Justice Scalia's
2 question was that he can't find, nor can I find, a logical
3 basis for making that distinction. That's the problem.

4 QUESTION: The sentence is unlawful if it goes
5 above the guidelines, which is why it can be set aside by
6 the appellate court. It is unlawful.

7 MR. ALBRITTON: Your -- Your Honor, the difference
8 between unlawful and a fundamentally unjust is an important
9 distinction. As this Court has historically held from the
10 early notions of habeas when, even when habeas review in the
11 first right, regardless of default, was much more
12 circumspect, the Court could always reach and always issue
13 the writ where a petitioner received a sentence that is
14 outside the statutory range. So it's a difference in the --
15 a situation where there may be an error and there may be
16 some injustice, and a situation where the -- the injustice
17 is fundamental, Your Honor. That's the distinction.

18 QUESTION: Mr. Albritton, there's -- there's one
19 misfit here. You -- you're trying to transpose to the
20 sentencing area the actual innocence of the crime, precedent
21 from the death penalty area. But this Court has said in
22 Herrera that the actual innocence, first it has to be new
23 evidence, and second, that it's only a gateway. And you
24 say, well, sure, it's only a gateway here, the gateway is
25 Jackson, sufficiency of the evidence. But the very same

1 thing that proves the actual innocence of the sentence is
2 what establishes that you win on the constitutional point.
3 And in the -- in the death cases, there isn't that -- this
4 is not overlap, this is total coincidence.

5 MR. ALBRITTON: Your Honor, in this Court's opinion
6 last week in Banks v. Dretke, the Court recognized, as it
7 had previously in Stickler v. Greene -- Strickler v. Greene,
8 that it is not unusual for the same facts to be used and an
9 overlap between those facts for the inquiry as to whether or
10 not the merits of the claim can be reached and the merits of
11 the claim. As the Court held in Banks last week, Your
12 Honor, the -- the same evidence was used to establish both
13 cause and prejudice, as well as the underlying merits of the
14 -- of the Brady violation.

15 It's not surprising that the same evidence would
16 be involved in this situation, Your Honor, because, after
17 all, the inquiry is extremely similar, and that is the
18 innocence of the petitioner and whether or not the state
19 proved as a due process matter the allegations that it was
20 required to.

21 Your Honor, this -- this rule is a narrow rule for
22 the reasons we discussed. It does not reach the sentencing
23 guideline issues. This holding under Apprendi -- under --
24 this Court's holding in Apprendi, Your Honor, requires all
25 elements other than arguably some or some recidivist

1 allegations under Almendarez-Torres are required to be
2 alleged and proved to a jury beyond a reasonable doubt so
3 that if a person is charged with a drug offense and the
4 difference in 50 grams and 51 grams affects the statutory
5 maximum, his or her actual innocence of that quantity is
6 already covered subject to -- subject -- is already subject
7 to the fundamental miscarriage of justice exception
8 irrespective of what the court holds in the application of
9 Sawyer to non-capital sentences.

10 QUESTION: What -- and what -- what's your
11 authority for that? Where -- where have we said that? Is
12 that part of your submission or are you saying that that's
13 existing authority?

14 MR. ALBRITTON: Your Honor, that's -- first of all,
15 I believe, Your Honor, the Government just conceded that.
16 Secondly, Your Honor --

17 QUESTION: But do you know on what basis?

18 MR. ALBRITTON: Yes, sir. This Court has held in
19 Schlup --

20 QUESTION: Okay.

21 MR. ALBRITTON: -- that if you're actually innocent
22 of the elements of the offense, then -- and you're able to
23 establish that -- then the fundamental miscarriage of
24 justice exception applies. If the quantity of cocaine is an
25 element of the offense for Apprendi purposes --

1 QUESTION: Okay.

2 MR. ALBRITTON: -- the failure to -- the innocence
3 of that fact would make the petitioner subject to the --

4 QUESTION: And that goes back to the Almendarez-
5 Torres discussion you had with Justice Scalia?

6 MR. ALBRITTON: Your Honor, it -- no, sir, it does
7 not, because Almendarez-Torres only concerns certain
8 recidivist allegations. Apprendi applies to every other
9 factors that raises --

10 QUESTION: I -- I --

11 MR. ALBRITTON: -- the statutory maximum. Your
12 Honor, this rule can -- the exception that we're talking
13 about can be administered with relative ease. As the Court
14 discussed in Sawyer, that's an important consideration in
15 determining whether or not the exception should be applied.
16 The issue presented to a Federal district judge of actual
17 innocence of a non-capital sentence is easier to determine
18 and it's more objective than, for instance, the
19 determination Federal district judges are called upon to
20 determine whether or not a petitioner is statutorily
21 eligible for the death penalty.

22 For instance, in the State of Texas, the state
23 must prove beyond a reasonable doubt that the petitioner
24 constitutes a future danger. In the State of Louisiana, for
25 instance, the state has to -- one of the statutory

1 aggravating factors are that the crime was committed in a
2 heinous manner. Those inquiries are more subjective and
3 less objective than the inquiry required under the
4 application the -- of the exception that we propose.

5 Additionally, Your Honors, the equities weigh
6 strongly in favor of applying the rule in non-capital
7 sentences. Justice Scalia asked a question as to why this
8 rule may be necessary because there would always be
9 ineffective assistance of counsel, and frankly there's an
10 answer to that. And that answer is, there will not always
11 be a meritorious -- under a meritorious claim and there will
12 not necessarily be ineffective assistance of counsel for one
13 reason at least, and that is, under Carrier, this Court held
14 that to rely on the ineffective assistance of counsel as
15 cause in Federal court, that claim had to have been raised
16 below in the state court.

17 So there could be a scenario, this scenario, if
18 Mr. Haley had not properly raised ineffective assistance of
19 counsel below in state habeas or on state appeal as required
20 by state law, he would not be entitled to rely on that
21 ineffective assistance of counsel for cause in Federal
22 court, and so the court would be presented again with this
23 fundamentally unjust situation.

24 QUESTION: Well, and there are also cases under
25 Ferretta where the defendant decides to represent himself.

1 MR. ALBRITTON: That is correct, Your Honor. Your
2 Honor, what is unusual about this case additionally, as
3 pointed out by the Court, the prosecutors -- we're -- we
4 don't suggest purposefully -- but the prosecutors
5 nevertheless caused the injustice in this case. The State
6 of Texas prop -- improperly alleged that Mr. Haley's second
7 conviction or second prior offense was committed before --
8 or after the first became final.

9 QUESTION: Well, are -- would you say, taking it
10 from there to the future dangerous, that the -- the
11 prosecutor was in error in the sense you refer to if he
12 alleged that the petitioner is going to be a future danger?
13 Are all these allegations just going to be turned out that
14 way?

15 MR. ALBRITTON: Not necessarily, Your Honor,
16 because a prosecutor in good faith could certainly believe
17 that the evidence would be sufficient to prove future
18 dangerousness beyond a reasonable doubt.

19 QUESTION: Well, are -- are you suggesting the
20 prosecutor in this case deliberately, when he alleged the
21 thing, knew that it was not -- wouldn't stand up?

22 MR. ALBRITTON: I'm not suggesting that, Your
23 Honor. However --

24 QUESTION: But then -- but then it really isn't a
25 basis for distinguishing the two examples I gave you for

1 just you to say, well, in the first case the prosecutor
2 acted in good faith.

3 MR. ALBRITTON: Even if the prosecutor did not do
4 this intentionally, Your Honor, the error and the injustice
5 originated with the prosecutor. Not only did the prosecutor
6 --

7 QUESTION: Well, but you could say that about an
8 allegation of future dangerous too. You have the -- that's
9 alleged in the complaint, isn't it?

10 MR. ALBRITTON: If future dangerousness is alleged,
11 in reviewing the evidence there's a good faith belief to
12 believe that there -- that person constitutes a future
13 danger, that would be different than in this situation where
14 all the prosecutor had to do was look at its state's exhibit
15 number 6, Your Honor, and read the dates. The prosecutor
16 could have discerned --

17 QUESTION: Well, or the defendant's attorney could
18 have done that too, I suppose.

19 MR. ALBRITTON: Absolutely, and he should have,
20 Your Honor. Additionally, Your Honor, one of the -- the
21 reasons for the narrow fundamental miscarriage of justice
22 exception is this notion of gamesmanship, and as pointed out
23 in the briefs, it is our position that there would never be
24 any rational incentive for a petitioner to engage in
25 gamesmanship when there was conclusive evidence that

1 established he or she was not statutorily eligible for the
2 sentence.

3 Mr. Haley's case is a perfect example. Even
4 though Mr. Haley was diligent and filed his state writ very
5 shortly after the court of criminal appeals in Texas denied
6 discretionary review, he's ended up spending 4 years more in
7 prison than he was even authorized for under the statute.

8 Additionally, Your Honor, in discussing the
9 state's interest in this case, it is the Federal habeas
10 court that in actuality is vindicating the Texas substantive
11 law. Now that does not mean, of course, that there is no
12 interest of the state in its procedural laws. However, that
13 recognition indicates that, in effect, there's a wash of the
14 interest here, which would not undermine the application of
15 the fundamental miscarriage of justice exception in this
16 context.

17 QUESTION: And it's -- it's a little, I suppose,
18 patronizing in -- in some sense for us to say that the
19 district courts, Federal courts are vindicating Texas'
20 interest in its own laws, although it's pretty obvious Texas
21 doesn't care about it in this case.

22 MR. ALBRITTON: Certainly the -- the state doesn't
23 seem to care about that interest with its position here.
24 However, I don't think it's -- we do not think it's
25 patronizing, Your Honor, because the Court is always

1 required to balance the equities of the situation and
2 determine whether the exception to the procedural default
3 rule should apply. And in this case, we think that it is
4 quite relevant that you're discussing -- and it would be so
5 in all cases such as this that, under the rule we propose,
6 because the sentence would always be outside the range
7 authorized by the legislature for this particular conduct.

8 Your Honors, in relation, briefly here at the end
9 to Almendarez-Torres, we agree with the Solicitor General
10 that if Almendarez-Torres does not control, then this case
11 is -- is very easy and there need not be any application of
12 Sawyer, and that is because, as I said earlier, he would be
13 actually innocent of the enhanced offense of theft by
14 habitual offender. As pointed out in our brief, Almendarez-
15 Torres is not controlling because in this case there is an
16 additional -- there is something else that must be proven in
17 addition to the fact of the prior convictions, and that is
18 the date of the commission of the second prior felony
19 offense. For that reason --

20 QUESTION: Well, isn't that pretty much the tail
21 wagging the -- the tail wagging the dog, I mean, if -- if
22 you say that the date of the offense is -- is a separate
23 element?

24 MR. ALBRITTON: Your Honor, the State of Texas in
25 its judgment specifically required not only the -- in this

1 circumstance, not only the existence of two prior felony
2 convictions, but that the second was committed after, excuse
3 me, the conviction of the first.

4 QUESTION: Yes, but you're -- you're telling us
5 that the -- that the existence of the prior offense is not
6 an element, right, but -- but that the date of the prior
7 offense is -- is --

8 MR. ALBRITTON: That -- that is incorrect, Your
9 Honor. What we allege is that it is not the focus on the
10 sequence of the convictions. When sequence is used, it is
11 shorthand to describe the -- when the second offense was
12 committed, and the date of commission of that offense is
13 something separate and apart from the fact of those prior --
14 of that prior conviction. So, Your Honor, we would
15 respectfully suggest that takes this outside of Almendarez-
16 Torres, and therefore the Court can -- can determine that
17 Mr. Haley is actually innocent of the enhanced offense of
18 theft by habitual offender.

19 Finally, Your Honor, in conclusion, I would
20 respectfully request the Court not to remand to the State of
21 Texas -- excuse me, to the courts below, unless it reaches
22 the question presented and decides it contrary to the Fifth
23 Circuit. If the Court decides that the ineffective
24 assistance of counsel claim should have -- or cause and
25 prejudice should have been reached first, since it was not

1 presented in the question presented, the Court should not
2 reach any issue in this case. Mr. Haley should be able to
3 go about his life and not be subject to a day more in prison
4 that the state concedes is unlawful, and as the court
5 advised -- as the state advised the district court, if this
6 Court were to reverse, it intends to put Mr. Haley back in
7 prison for an additional 10 years that it specifically
8 admits is unlawful and not authorized by the legislature,
9 and a remand presumably would result in the same sort of
10 injustice visited upon Mr. Haley by the state.

11 For those reasons, Your Honor, I respectfully
12 suggest that the Court affirm the judgment of the Fifth
13 Circuit and hold that Mr. Haley has sufficiently established
14 that he is actually innocent, reach the merits of the claim,
15 and -- and that's the only issue the Court needs to resolve.
16 Thank you very much.

17 QUESTION: Thank you, Mr. Albritton.

18 Mr. Cruz, you have three minutes remaining.

19 REBUTTAL ARGUMENT OF R. TED CRUZ

20 ON BEHALF OF THE PETITIONER

21 MR. CRUZ: Thank you, Mr. Chief Justice. I'd like
22 to quickly revisit an exchange Justice Scalia had with Mr.
23 Albritton concerning Almendarez-Torres, and make the point
24 that even if this Court were at some future date to decide
25 to overrule Almendarez-Torres, which I don't believe is

1 presented in this case, that would not necessarily mean that
2 the actual innocence exception would extend to non-capital
3 sentencing. The inquiries are altogether different. The
4 former, what was at -- the case at common law at the time of
5 the founding. The latter is, as the exchange illuminated, a
6 question of what 28 U.S.C. Section 2254 provides.

7 And I would note 2255, with respect to Federal
8 habeas, explicitly includes in its statutory text as one of
9 the grounds for granting habeas that a sentence is, quote,
10 in excess of the maximum authorized by law. That's in 2255.
11 It is not in 2254. The only ground for granting habeas in
12 2254 with respect to a state conviction is if someone is
13 held in custody of violation of the laws or Constitution of
14 the United States.

15 And so it is altogether possible that this Court
16 could decide at some future date to -- to overrule
17 *Almendarez-Torres* and then yet nonetheless decide that in
18 looking to the ends of justice that now repeal language from
19 the habeas statute, that there is not an obligation to
20 excuse procedural default for every single conceivable
21 sentencing error.

22 QUESTION: But can I -- I just -- this is a case in
23 which you yourself concede he shouldn't be in jail under the
24 substantive law of Texas, and it is a case where you
25 yourself agree there is a very big claim that the lawyer was

1 incompetent. If we send this back, is Texas going to move
2 to revoke his bail?

3 MR. CRUZ: The -- the state is willing to allow the
4 ineffective assistance case to be litigated before
5 proceeding to reincarcerate Mr. Haley, so we will wait until
6 that -- that claim is resolved before -- before --

7 QUESTION: He's out while it's being litigated?

8 MR. CRUZ: He -- he is out right now and the state
9 will leave him out until his claim is resolved with respect
10 to that. With respect to the balance, which is -- which is
11 ultimately how this Court has analyzed the actual innocence
12 exception, on the one side I would submit there is very
13 limited need for extending the actual innocence exception to
14 non-capital sentencing. Cause and prejudice can address
15 situations where relief is merited, such as perhaps Mr.
16 Haley's.

17 On the other side, there is the risk of expanding
18 that. Non-capital sentencing, unlike actual innocence, I
19 didn't do it, of the crime, unlike actual innocence of
20 death, non-capital sentencing is virtually ubiquitous.
21 Interestingly, Mr. Haley's amici law professors in footnote
22 13 of their brief acknowledge the ability of the slippery
23 slope to extend beyond just increasing the statutory maximum
24 to sentences within a range and to a whole host of factors
25 that the states used for sentencing factors, facts --

1 factors such as the amount of drugs, such as the value of
2 stolen goods, such as the status of a victim, whether the
3 victim is elderly, whether the victim is a police officer.

4 QUESTION: What has been the -- the experience in
5 the circuits that have adopted this rule applying the actual
6 innocence to sentencing? There are two circuits, aren't
7 there?

8 MR. CRUZ: There have been relatively few cases
9 that have come up since those decisions, but I would note
10 first of all we don't know what unpublished decisions are
11 out there, and secondly, there's a significant difference
12 between a circuit decision allowing an exception and a
13 decision of this Court.

14 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Cruz. The
15 case is submitted.

16 (Whereupon, at 11:11 p.m., the case in the above-
17 entitled matter was submitted.)

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