OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: JOHN HENRY SELVAGE, Petitioner V.

JAMES A. LYNAUGH, DIRECTOR, TEXAS

DEPARTMENT OF CORRECTIONS

CASE NO: 87-6700

PLACE: Washington, D.C.

DATE: January 17, 1990

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IN THE SUPREME COURT OF THE UNITED STATES

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JOHN HENRY SELVAGE, :

Petitioner :

v. : No. 87-6700

JAMES A. LYNAUGH, DIRECTOR, :

TEXAS DEPARTMENT OF :

CORRECTIONS :

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Washington, D.C.

Wednesday, January 17, 1990

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:00 p.m.

APPEARANCES:

RICHARD H. BURR, III, ESQ., New York, New York; on behalf of the Petitioner.

ROBERT S. WALT, ESQ., Assistant Attorney General of Texas, Phoenix, Arizona; on behalf of the Respondent.

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P R O C E E D I N G S

(1:00 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 87-6700, John Henry Selvage v. James A. Lynaugh.

Mr. Burr.

ORAL ARGUMENT OF RICHARD H. BURR, III

ON BEHALF OF THE PETITIONER

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

As in the case of Johnny Paul Penry, the jury that sentenced John Selvage to death did so without being able to consider or give effect to the mitigating circumstances he proffered.

Unlike Penry's lawyers, however, John Selvage's lawyers did not object to this constitutional defect in his sentencing proceeding. As a result, when the pre-Penry claims in both of these cases got to the court of criminal appeals in Texas, in the Penry case the court denied the claim on the merits, and in Mr. Selvage's case the court denied the claim on the basis of the procedural default at trial, the failure to object.

The question before the Court today is whether the court of criminal appeals' ruling should prevent the Federal habeas courts from deciding the merits of Mr. Selvage's Penry claim.

When this question was first presented to this Court in Mr. Selvage's cert. petition which was filed back in March of 1988, no issue was raised concerning the adequacy of the state procedural ruling.

Since that time, however -- as a matter of fact, 15 months after that time -- when this Court announced its decision in Penry at the end of June 1989, and as a result of the Penry decision, there is now no state ground barring review of the merits of the claim.

Accordingly, in the time since the question was first presented in our cert. petition to the Court, a new threshold question has arisen: whether the default ruling in the state courts is now based on an adequate state ground.

QUESTION: And now is --

QUESTION: Are you saying you could right now go back to the Texas Court of Criminal Appeals and have your claim considered on the merits?

MR. BURR: Your Honor, we believe that if Texas law is applied properly, we could do that.

QUESTION: Well, certainly with -- the Texas Court of Criminal Appeals would know how to apply Texas law properly, I would think.

MR. BURR: I would suspect they would.

QUESTION: So do you suggest we vacate and remand?

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Is that it?

MR. BURR: Your Honor, I think that the Court is in a position, because of the clarity of Texas law and because of the posture in which this case is in -- we are here on a Federal habeas proceeding with the merits not having been reached because of the default ruling -- this Court certainly has the power, and, indeed, has usually given itself the obligation to determine whether the procedural ruling is an adequate state ruling.

The Court could look at state law, determine -- and we would ask that the Court do this -- that the ruling is no longer an adequate state ground and hold that there is no default which bars consideration of claim.

QUESTION: Well, would you be raising in the state court arguments that you have not raised previously in the state court?

MR. BURR: Not as to the merits we would not. The merits were presented in the state court.

QUESTION: No. As to the procedural bar.

MR. BURR: We would. The reason for that --

QUESTION: Well, why do we have jurisdiction if you haven't argued it to the state court?

MR. BURR: Justice Kennedy, the reason for that is this. The procedural rules in Texas at the time that the Penry case was decided, as a result of those rules excused

the procedural default at trial.

For that reason, the -- the ruling of the Federal courts, which was based on that default, is now no longer, we submit, an adequate ruling because there is no default. So, as a matter of Federal habeas procedure, we are here on a Federal habeas petition on a defaulted claim.

There is certainly a Federal interest in deciding whether there is still a viable state ground for this decision. If not -- and we submit this Court is empowered and certainly because of the State of Texas law ought to go ahead and decide the issue.

If there is no default, then the merits ought to be determined in the Federal proceeding.

QUESTION: Well, but did the -- the Fifth Circuit said that you were procedurally barred in this case. Is that --

MR. BURR: That's correct.

QUESTION: And you're saying that subsequent developments in Texas law after they ruled would lead anybody to say that you're no longer procedurally barred?

MR. BURR: Subsequent developments from this Court's decision and how that dovetails with Texas law. That's correct.

QUESTION: Well, surely the Fifth Circuit is better -- in a better position to know than we are whether

there's been a change in the law of the Texas procedural bar.

MR. BURR: Your Honor -- excuse me -- I don't think so for a couple of reason.

The rules of state law which are applicable here, we submit, are plain and unequivocal. If there was any doubt so that deference to the lower Federal courts who are closer to the state law might be of benefit, then I would certainly agree with you.

QUESTION: Well --

MR. BURR: But there is no ambiguity --

QUESTION: -- was Penry -- was Penry after the court of appeals' --

MR. BURR: Yes.

QUESTION: -- decision in this case?

MR. BURR: Yes, it was.

QUESTION: And you say Penry then is really the key to why this situation has changed.

MR. BURR: Penry is the triggering event.

QUESTION: You don't know what the court of appeals would say if it had an issue like this before it now.

MR. BURR: The Fifth Circuit or the court of criminal appeals?

QUESTION: The Fifth Circuit.

MR. BURR: The Fifth Circuit, we would certainly

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argue, that they ought to do as this Court should do, that they should find that there is no longer an adequate state ground on the basis of Texas procedural rules.

QUESTION: But they haven't had any chance to say that again since Penry?

MR. BURR: They have not. Not to my knowledge. Certainly not in our case, and to my knowledge, they have not had that opportunity in any other case.

QUESTION: Well, would the state argue abuse of the writ for your not arguing this sooner or --

MR. BURR: The state did argue abuse of the writ in the Federal district court and in the Fifth Circuit. It has not argued that before this Court. So my guess is that -- I certainly don't want to suggest something to the state, but --

QUESTION: Well, even if you --

MR. BURR: -- it probably would.

QUESTION: Even if you're right, what are you going to do about Teague on the Penry claim, on the merits?

MR. BURR: Your Honor, Teague, as the Court knows in Penry, the Penry decision was held to be retroactive, so there would be no Teague problem in terms of retroactivity. The Penry rule would apply because Penry itself decided that the rule would be retroactively applied. So, there is no Teague problem.

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QUESTION: I thought Penry decided it wasn't a new rule. I mean, it was applying existing law, was it not?

MR. BURR: Yes, Justice O'Connor, that's --

QUESTION: It wasn't a retroactivity decision at all.

MR. BURR: No, no.

QUESTION: It was a question of determining that that was the existing state of the law.

MR. BURR: That's correct. So it's my understanding under the principles of Teague and -- and other cases addressing retroactivity that, because it's not a new rule of law, persons like Mr. Selvage could have the benefit of the Penry substantive ruling.

Let me review, if I could, for just a --

QUESTION: Now, your cert. petition didn't raise this procedural question?

MR. BURR: It did not, Justice O'Connor, for one reason. At the time that we filed our petition, which was back in March of 1988, neither Franklin had been decided nor Penry. And until actually Penry was decided, the state procedural rule which forgives a prior failure to object was not triggered. It -- it was triggered only by this Court's ruling at the end of last June in Penry.

Let me describe that procedural rule for a moment, if I could. It is probably most often quoted from a case called Ex parte Chambers. The Court has formulated the

rule in Chambers as follows, and I quote. "A defendant has not waived his right to assert a constitutional violation by failing to object at trial if at the time of his trial the right had not been recognized."

Now, that rule has been applied according to, we submit, four parameters. First of all, the Court has made plain that it applies if a supervening subsequent decision of this Court recognizes a claim which at the time of trial would have been novel -- novel in the sense of Reed v. Ross -- that the constitutional theories and principles were simply not available to put the claim together. That is not our case.

The second parameter where Chambers forgives a prior default is that if the claim is, as the state courts put it, futile. And what the state courts in Texas mean by futile is that the tools were there to make the claim. It had been made on all the constitutional grounds to the Texas Court of Criminal Appeals and categorically rejected.

At that point Texas law does not require that a defendant continue raising claims that it has categorically rejected with no new theory available.

In that situation -- indeed, that was the situation in which the Chambers case was decided -- it involved the Smith v. Estelle error where prior to Smith v. Estelle the

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court of criminal appeals had categorically rejected Fifth and Sixth Amendment claims based upon psychiatric testimony concerning future dangerousness.

After Smith v. Estelle came down, in Chambers in a state habeas proceeding in a case which had not raised this issue at trial, the court granted relief, holding that Smith v. Estelle was the precise kind of change in law from this Court which triggers this exception to the procedural default --

QUESTION: There is a certain irony -- a certain irony in your argument if what you're saying is that you would argue to the Texas court that Penry was a change in the law. And yet we held in Penry that it was not a change in the law.

MR. BURR: Certainly from the perspective of state law, Justice Rehnquist, it was a change. Up until Penry --

QUESTION: Well, you mean, state -- state law is not governed by the Federal Constitution?

MR. BURR: No. Not at all. From the perspective of the court of criminal appeals' application of the Eighth Amendment, they had been up until Penry -- the court of criminal appeals had categorically rejected every Eighth Amendment argument.

QUESTION: Yeah, but why should you be excused from

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raising the Federal constitutional claim or why should your client be excused from failing to raise the Federal constitutional claim that would have -- that would have been a winner under Penry?

MR. BURR: Well, Your Honor, it would have been a winner under Penry after Penry.

QUESTION: Well, Penry raised it, didn't he?

MR. BURR: Penry did.

QUESTION: How did he have enough foresight to raise it?

MR. BURR: A handful of lawyers did keep raising this claim, both in the Texas courts and in Federal habeas.

QUESTION: Well, in -- as we -- you say that Teague was no problem because Penry was old law, anybody should have known it.

QUESTION: Yeah.

MR. BURR: Well, Your Honor, I think the -- the reconciliation between the Teague aspect of Penry and the argument we're making here is this. As the majority recognized in Penry, the principles embodied in Jurek, Woodson and Lockett were the principles which controlled the ruling in Penry.

And for that reason there was no evolution of legal principle. There was simply an application of those principles to the peculiar factual situation of Penry's

case. So, for that reason it was not a new rule of constitutional law.

Now, at the time of trial -- indeed, well before trial -- after this Court's opinion in Jurek, trial lawyers in Texas began complaining that the Texas scheme precluded the consideration of mitigating circumstances. When those circumstances were not relevant in a mitigating way to the special issues, they didn't get considered.

That claim was raised in numerous angles, through numerous angles. Every time the court of criminal appeals, who, when it heard that claim, rejected it saying -- distinguishing it indeed on its reading of Jurek and Woodson and later on its reading of Lockett.

QUESTION: But our cases have said that futility is no reason for failing to object.

MR. BURR: Your Honor, let --

QUESTION: Then you're -- you're really saying it would have been futile to take that to the Texas Court of Criminal Appeals.

MR. BURR: Let me separate the two concepts of futility because there is a concept in state law that is quite well recognized, and it is the concept that under the state law rule, the Chambers rule, where a constitutional --

QUESTION: No, I'm talking about the futility

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described in our cases where we're talking about Wainwright against Sykes.

MR. BURR: Sure.

QUESTION: Just the fact that you don't think the highest court of the state would have accepted your argument doesn't mean you're -- you're excused from making it.

MR. BURR: Let -- let me address that, then, squarely. It really gets us to the cause argument, but I'm happy to go there.

Our argument on cause asks the Court to consider whether there is a third kind of cause. Not the same as futility described in Engle v. Isaac, and not the same as novelty described in Reed v. Ross. There is no question this is not a novel claim. The constitutional principles were available.

So the question is how is our situation different from the situation described in Engle v. Isaac. We submit it's different for a number of reasons.

In Engle v. Isaac the petitioner at trial did not raise a claim because of his view that state law rulings based on state law were dead against it. Indeed, after the state law rulings -- the last state law ruling on the issue -- two cases from this Court had been decided, the Winship case and Mullaney v. Wilbur, which called into

serious question the continuing validity of the state law ruling.

Mr. Isaac did not go back to the state courts and present those new constitutional arguments based on cases from this Court, indeed, based on cases litigating from those principles in other state and Federal courts. He did not go back to the state courts.

QUESTION: Just as you haven't.

MR. BURR: Just as I haven't. But for quite a different reason. For quite a different reason. And that is how we distinguish ourselves from the kind of futility that the Court recognized in Engle.

What the Court recognized in Engle is that there is reason to go back to the state courts if there is some new light to be shed on prior state rulings. Certainly there was new light in the situation of Mr. Isaac. There were two decisions from this Court and there were a number of decisions from lower state courts and Federal courts.

In our case there was nothing of the sort. What happened by the time of Mr. Selvage's trial, which occurred in February of 1980, was that the -- what became the Penry claim, the pre-Penry defect in the statute, for lack of a better term -- had been presented to the court of criminal appeals in -- under every conceivable -- on every conceivable basis, Eighth Amendment basis.

The argument had been made that the defines -- that the terms of the special issues were not defined enough to allow consideration of mitigation. The court of criminal appeals said no.

The argument was made that mental illness which, as the Court recognized, like the mental retardation of Henry, has an aggravating side and a mitigating side, only got consideration as aggravation. The court of criminal appeals said no.

An argument was made, well, if -- if all the special issues are answered yes, there still may be mitigating evidence that leads the jury to think life is the appropriate sentence. The court of criminal appeals said no.

And finally, the last theory that was presented was, look, at the very least the jury ought to be given a kind of a soft nullification instruction. They ought to be told that in answering the special issues if you think mitigation should lead to a life sentence, you can answer them no. The court of criminal appeals said no.

And on every -- in every one of those decisions the court relied on Jurek and Woodson and in the last -- last couple of decisions, Lockett, saying, our job here is to guide discretion.

And we let all relevant mitigating evidence in, but

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it has to relate to these three special issues. And if it doesn't relate to them, then you're asking us to unguide discretion.

Some of the Justices on this Court saw that as the problem in the Penry case, and that is the view that the court of criminal appeals had.

QUESTION: After Penry it was clear that that was wrong?

MR. BURR: That's right. That's right.

QUESTION: And -- and you didn't go back to state court --

MR. BURR: Well, Your Honor, we were --

QUESTION: -- once -- once it was clear that it was --

MR. BURR: -- in this Court and had been in this court for 15 months at that time.

There -- there probably is no legal barrier to Mr. Selvage going back into state court right now. The constitutional and Federal habeas problem with that is that Mr. -- Mr. Selvage has had a ruling in Federal habeas that his claim cannot be reached on the merits.

We believe, and believe without any hesitance, that the state law basis for that default has now been eroded, that we should be able to gain relief on the merits in the state courts.

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QUESTION: Yes, but your -- your argument about that has been eroded. You keep relying on the state law ground. But the adequacy of the procedural default rule is a Federal question.

MR. BURR: That's correct.

QUESTION: And if -- if, as a Federal matter, this constitutional rule of Penry was perfectly foreseeable, I don't know why the state, if it wanted to, couldn't rely -- couldn't insist that you raise it in the trial court.

If there is some state law basis for saying, well, we don't want to enforce this rule any more, why, they don't have to. But I don't know why -- why is as a Federal constitutional matter this rule isn't -- isn't an adequate one.

MR. BURR: Justice White, you've described the state law rule quite well. As a matter of fact, the courts -- the Texas courts have said when a claim is recognized on its constitutional theories, presented to us, and we reject it, you don't have to keep raising it.

If -- if -- in fact, you don't have to object at trial anymore. If -- if subsequently the Supreme Court say we were wrong, you may come back into state court.

Now, the reason that presents a Federal habeas procedure question is that that very rule now triggered by

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Penry erodes the adequacy of the state law ruling in this case. And so the Federal question --

QUESTION: But we don't --

MR. BURR: -- the adequacy question --

QUESTION: We don't know that you're right about your -- your state law rule, do we?

MR. BURR: Your Honor, the state has presented no -- no argument that I've been able to discern that speaks --

QUESTION: That should be (inaudible) court of appeals to -- to do that.

MR. BURR: That is certainly a -- well, I -- I think that the appropriate result here would be to ask the question to the court of criminal appeals in Texas for this reason.

QUESTION: Well, we can't -- we can't remand it to them.

MR. BURR: There -- the Texas Court of Criminal Appeals has a certification procedure for this Court certifying a question to it. Indeed, prior to the briefing in this case we asked the Court do that, not because we though there was any lack of clarity in state law, but because we thought this Court might prefer to have the state court decide its procedural rule first. The Court declined to do that.

But there is -- and it's discussed by both parties in

the motion for certification papers -- there is a procedure for certifying a question from this Court.

QUESTION: There is also a procedure to ask the court of appeals to look at it in the first instance since there --

MR. BURR: Certainly.

QUESTION: -- has been a decision --

MR. BURR: Certainly.

QUESTION: -- since then that you claim makes a difference.

MR. BURR: In the Fifth Circuit?

QUESTION: No. There's been a decision here that -- that might have --

MR. BURR: That --

QUESTION: -- might lead to a different result than the court of appeals --

MR. BURR: There's no question about that. All I'm suggesting is that from the perspective of -- of judicial economy and, I believe, fairness, the -- the better procedure would be if there is any question about state law, for this Court to ask the state courts directly that question.

QUESTION: Well, then it would have to -- we'd have to wait for them. Then it would have to come back here.

MR. BURR: Well, Your Honor, I don't believe --

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QUESTION: And the court of appeals might solve it all for you.

MR. BURR: I don't believe that the delay would be very long because the court of criminal appeals has a case before it right now raising the very same issue. The case of Harvey Ervin, Ex parte Ervin. The case has been briefed. It was argued in mid-September, and it is awaiting decision.

I believe it is awaiting decision, awaiting this Court. I believe that it is a question of after Ualphonse that -- that has developed by the cert. grant here.

QUESTION: Why are they --

MR. BURR: So I don't think it would be much of a delay.

QUESTION: Why are they waiting?

MR. BURR: Your Honor, I -- I don't know. My guess is --

QUESTION: Well, you -- you say that there is a state law rule. There must not be if they're waiting.

MR. BURR: No. I -- I don't know if they're waiting. They have not decided the case. That's speculation on my part.

If they wait, it would probably be a political decision to wait and not a legal --

QUESTION: Well, maybe we shall wait for them.

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(Laughter.)

MR. BURR: That is certainly an option.

QUESTION: We certainly have waited long enough in this.

MR. BURR: The thing that's important -- I -- I think what you -- what you've suggested does have some crucial significance. This question ought to be resolved one way or the other, up or down, before the -- the questions of cause and miscarriage of justice should be addressed.

Because if it is resolved, as we say it should, then this Court need not in this case look at questions of cause and miscarriage of justice, because there won't be a state law ruling barring relief in Federal -- or barring a merits decision in Federal court.

QUESTION: Mr. Burr --

MR. BURR: Yes.

QUESTION: -- can I ask you -- you're describing, and let's assume it does exist -- a state law rule which says that even though you should know enough from Supreme Court cases to raise the issue, nonetheless, if we have been erroneous enough to reject that claim in the past, you don't have to raise it before us. Right? That's --

MR. BURR: In order to preserve --

QUESTION: Yeah.

MR. BURR: -- the client's right --

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QUESTION: Now, you --

MR. BURR: -- to relief later.

QUESTION: You would acknowledge that had your client sought a direct appeal from the decision of the court of criminal appeals, we would have rejected it because the Federal issue had not been preserved below, right? But you're saying that when he next goes into Federal habeas we should entertain the same issue.

MR. BURR: No. I think there's -- there's --

QUESTION: Why? But I think you are.

MR. BURR: -- there's no difference for this reason. If a direct appeal were -- or a cert. petition -- had been taken from the direct appeal --

QUESTION: Yes.

MR. BURR: -- if Penry had intervened, then we would have been making the same argument to this Court at that point in time.

QUESTION: And we would have rejected it. We would have said it's -- it's old law, you should have raised it below, wouldn't we? Isn't that what we would have said?

MR. BURR: If -- from this Court's ruling as a Federal court imbued with the retroactivity framework, it is old law. But --

QUESTION: So we would have said you -- we won't entertain it since you didn't raise it below.

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MR. BURR: I don't think so because --

QUESTION: We wouldn't say that?

MR. BURR: -- if -- if the issue had -- there is a question, I think, about whether the issue had been presented on the direct appeal. If the issue had been presented in the direct appeals and rejected because it had not been -- there had been no objection at trial, then the case would have come here in the very same posture on the basis of the state courts' resting their decision on a state procedural rule.

Then the question of the adequacy of the state rule would have been a question, a Federal question, for this Court to look at, just as it is now.

QUESTION: But you think that if the Federal court -- if -- if the state court would have entertained it, we would -- we would entertain it even though we thought it was old law?

MR. BURR: If the state court's reason for not entertaining it was its state procedural rule --

QUESTION: Uh-huh.

MR. BURR: -- as I believe we're both agreeing it would have been --

QUESTION: Uh-huh.

MR. BURR: -- and if under the state procedural rule the Penry decision had had the effect we say -- that is,

it had forgiven the default essentially -- then this Court should be in a position and should decide that the state ground of decision in the state courts is no longer adequate, that it has been eroded by the very operation of state law.

QUESTION: Uh-huh.

MR. BURR: That is -- that is the argument.

Now, Justice Rehnquist -- I'm sorry -- one -- to -- to get back to a question that I think you were asking as to why we shouldn't go back to the Fifth Circuit, there's another reason.

If the Texas Court of Criminal Appeals or if, indeed, the Fifth Circuit, if it were asked to decide this question, said, no, that Penry doesn't trigger this exception to the default rule and we -- and we then have a ruling that there is an adequate state ground for the default, we then would be in a position to get to cause and miscarriage of justice.

This Court has already indicated by its --

QUESTION: (Inaudible) file a new petition for collateral relief in Texas.

MR. BURR: Well, no -- not -- I'm saying if -- if the court of criminal appeals or if the Fifth Circuit said that the default has not been forgiven as a result of Penry and we still are in a default posture and there's

been a definitive resolution, that we still are defaulted after Penry, then the questions that the Court has already said it wants to address -- that is, the question of cause in this context and the question of miscarriage of justice -- ought be addressed.

All we're saying is that before we get into those thorny and difficult questions, let's be sure it's not an academic exercise. That's all. And we think that the most efficient and fairest way to do that is either to simply wait and let the court of criminal appeals take its course or to ask them through the certification procedure how does the ruling in Penry, if at all, affect your ruling of procedural default in this case.

QUESTION: What would you say if the -- if the Texas court, different from what you think -- how you think it would answer, came back and said, well, the -- there was no good excuse for not raising the issue at the time and we haven't changed our mind?

MR. BURR: If -- if that is so, then --

QUESTION: Then -- then would we -- would you be in a position to have us say that it was not an adequate statement of --

MR. BURR: I think we would be in a position to argue that it was not consistently and -- and appropriately applied, as it had been before. But that is a question

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that I think should be reserved for another day.

If I could just say a couple of more words about cause, then I would like to reserve the rest of my time. If we get to the cause question now, I think it is terribly important for the Court to -- to --

QUESTION: What are you doing to -- what are you talking -- cause for what now?

MR. BURR: Assuming for the moment that the state procedural ground is an adequate one, and the Court appropriately gets to the question of cause and miscarriage of justice --

QUESTION: Cause for what?

MR. BURR: Cause for the default.

QUESTION: Uh-huh.

MR. BURR: A cause under Wainwright v. Sykes. We think the Court needs to take close -- make close scrutiny of what we say is a third kind of cause. Again, it's related to the novelty cause exception, and it is related to Engle v. Isaac futility. But it is a distinctly different creature.

It is a creature defined by the very reasons that Justice O'Connor said in Engle v. Isaac. Futility, as defined there, was a cause. And that is there was some reason to go back to the state courts with a Federal argument.

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The reason was because of rulings of this Court, rulings of other Federal courts, rulings of other state courts or other grounds of state law. There was some reason to go back into state court and to shine some new light on an old question and ask the court to reconsider that question.

At the time of trial of John Selvage that could not have been done. That was February of 1980. At that point, the court of criminal appeals in Texas had rejected every conceivable constitutional challenge to this defect in the Texas scheme. It had rejected it on the basis of its reading of this Court's decisions -- Jurek, Woodson, and Lockett. What else do you have?

There was nothing else anywhere else to utilize to go back to that court and say, please look at this again. There were no other Federal court decisions. There were no decisions from other jurisdictions because nobody -- no other jurisdiction had a statute like Texas.

There was simply nothing counsel could do. Counsel would be put in the position -- and this is really what the state's argument suggests -- counsel would have been put in the position of going to the court of criminal appeals and saying, I want you to reconsider my challenge to the preclusion of mitigation consideration at trial because you're wrong.

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And the court of criminal appeals would say, well, we -- we disagree with your analysis of Jurek, Woodson and Lockett and --

QUESTION: Your time has expired, Mr. Burr. Thank you.

MR. BURR: Thank you.

QUESTION: Mr. Walt, we'll hear now from you.

ORAL ARGUMENT OF ROBERT S. WALT

ON BEHALF OF THE RESPONDENT

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

On April 1st, 1980, Johnny Paul Penry presented mitigating evidence he perceived had value beyond the scope of Texas' special issues. Accordingly, he objected to the charge in compliance with state procedure and requested a special instruction to allow the jury to consider that mitigating evidence beyond the scope of the special issues.

Less than two months earlier John Selvage presented evidence to the -- to his jury. Mr. Selvage did not request any special instruction. Ten years later, after direct appeal, after two rounds of state and Federal habeas corpus, Mr. Selvage now comes before this Court and perceives -- perceiving mitigating value beyond his -- of his evidence beyond the special issues and asks to be

afforded the same rule that was afforded Johnny Penry.

Johnny Penry complied with state procedure, preserved his error and obtained relief from this Court. John Selvage, who had no such respect for state procedure, should not receive the same treatment.

Selvage, though raising on certiorari a question of whether his procedural default was -- should be excused for cause or in fact even if his procedural default is -- there is no cause, that the default would result in a fundamental miscarriage of justice. That's what he raised on certiorari.

He now comes before the Court and claims that in fact he is entitled to an additional claim -- to review of an additional claim, and that is whether a procedural default exists at all.

I was listening to Mr. Burr. Mr. Burr was referring to the Ex parte Chambers case. There are two matters which I would like to just briefly discuss with the Court as -- as to Chambers.

First, when he applied for a stay of execution in the United States District Court for the Southern District, Houston Division, in his application for a stay he acknowledged that the procedural bar was -- was properly imposed, but he cited the Justice Brennan's dissent in the Streetman v. Lynaugh case in which Justice Brennan said

Franklin is pending before us, Franklin if -- if he receives relief, would constitute a new rule.

Now, I submit to the Court that Ex parte Chambers existed prior to his commencement of even state collateral review. And if he perceived that what Mr. Franklin would receive would have been a new rule, then he was obligated at all times to have presented that claim both in -- both in the lower Federal courts and, in fact, in the state courts. He failed to --

QUESTION: Mr. Walt --

MR. WALT: Yes, Your Honor.

QUESTION: -- both you and Mr. Burr have referred to -- is it a Texas decision in Ex parte Chambers? Is that what you're talking about?

MR. WALT: Yes, Your Honor. Ex parte Chambers is a case -- and briefly it is discussed in both --

QUESTION: When -- when was it decided?

MR. WALT: Oh, boy. Your Honor, I believe it was decided in 1985.

QUESTION: Thank you.

MR. WALT: Chambers stands for the proposition that a novel claim -- and state law defines novelty -- will in fact be excused, failure to object. And Chambers relies on prior state precedent. So that is not exclusively constitutional.

QUESTION: The Fifth Circuit, though, would have had Chambers when it decided the present case, would it not?

MR. WALT: Certainly, if it had been raised.

QUESTION: But it didn't have Penry then?

MR. WALT: It didn't have Penry, Your Honor, but it did have -- it did have the idea that Franklin was pending before the Court. And, in fact, the Court recognized that Franklin -- the reason it excused abuse, to be exact, is the fact that they stated they would be blind, that the potential for a new rule was present in -- in -- with the Franklin case before this Court.

QUESTION: To -- to what extent did Selvage concede that there had been procedural default?

MR. WALT: He conceded -- the first time on his application for his stay of execution, he stated, in fact, that the default was properly imposed, but that it would now be -- it would subsequently be excused under this Court's novelty -- under this Court's novelty exception under Reed v. Ross because of -- Franklin would announce a new rule.

QUESTION: And that was in a pleading filed with the Texas Court of Criminal Appeals?

MR. WALT: No, Your Honor. It was with the pleading filed with the United States District Court for the Southern District of Texas, the district court below.

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In Ex parte Chambers the Court recognized, as I stated, a novelty exception. And that is exclusively a matter of state law.

I believe this Court has stated in Smith v. Murray that, of course, the states are always free to rethink their positions, and we believe that the proper consideration of this matter should be to address whether the -- as this Court should -- address rather whether the Federal court below -- both the district court and the Fifth Circuit Court of Appeals -- properly applied Federal law. Not what -- not to speculate what state law would be in the future.

Mr. Selvage is obviously free to go back into state court and obtain relief if in fact Ex parte Chambers is the white horse case that he claims it is.

I would also suggest that Ex parte Chambers is simply not that type of case, and there are two reasons.

First off, as -- as Mr. Burr correctly states, the Ervin case -- and I believe there are approximately three other cases, including Walter Bell which was up before this Court in which the state had previously imposed a procedural bar -- those cases are pending before the court of criminal appeals.

If in fact Penry dictates a new rule under state -- a novel rule under state law, then of course Mr. Ervin, Mr.

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Bell and the others would have already received relief.

QUESTION: Is that a possibility that that is the situation in Texas?

MR. WALT: I don't believe that there is any possibility. And the reason I don't think there's any possibility, Your Honor, is because we have had two cases subsequent to Penry's decision, and that would be Ex parte Pastor, Ex parte Billy Joe Woods, in which procedural bars were in fact imposed in the -- to back up.

In the state procedure the trial court makes findings of -- findings of fact and conclusions of law and then they would be forwarded to the court of criminal appeals. The court of criminal appeals would either reject or accept the findings, or it can just deny relief without accepting the findings.

QUESTION: These are decisions of the Texas Court of Criminal Appeals?

MR. WALT: They were both decisions of the Texas Court of --

QUESTION: Since Penry?

MR. WALT: Pardon me? Since Penry, Your Honor.

QUESTION: And so in circumstances similar to this case, they imposed the procedural bar despite Penry?

MR. WALT: Identical, Your Honor.

QUESTION: Is the pending case -- I believe it's

called Harvey -- on all fours with those case -- cases?

MR. WALT: Harvey Ervin is a different case. Walter Bell might be on all fours. Harvey Ervin definitely is not on all fours because Ervin was tried prior to Lockett. So Lockett very well may have been -- may be the -- the cutoff point as far as -- as far as state procedure.

MR. WALT: (Inaudible) Bell is the same case?

MR. WALT: I believe Walter Bell -- and I apologize to the Court --

QUESTION: Is that case still pending in the court of criminal appeals?

MR. WALT: It is being -- it is being held essentially while the pending --

QUESTION: Well, if it's -- if it's already been -- if the same issue has already been decided in two other cases, why are they holding it?

MR. WALT: I -- I think Mr. Burr might have hit it on the head, that ever since Penry where --

QUESTION: Well, I know, but you've said that since Penry they've just -- they've imposed the procedural bar despite Penry in cases just like this.

MR. WALT: I believe that there -- I believe -- I cannot speak for the court. I would suggest some possibility that the court of criminal appeals is -- is, of course, waiting for this Court's pronouncement as to

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what constitutes novelty or fundamental miscarriage of justice for --

QUESTION: Well, except that if the previous cases were controlling, you'd think that Harvey would just be immediately issued.

MR. WALT: It certainly, if the Ex parte Chambers were controlling, I think that they would have immediately issued --

QUESTION: Well, what about the other cases you just mentioned --

MR. WALT: The other two cases --

QUESTION: -- since Penry?

MR. WALT: -- James Emory Pastor was executed and --

QUESTION: What's -- what's the name?

MR. WALT: James Emory Pastor, P-a-s-t-o-r.

QUESTION: And -- and -- procedural bar was --

MR. WALT: procedural bar there were -- it was procedural bar and alternatively on the merits just as -- as this case was, Your Honor.

QUESTION: And that was since Penry?

MR. WALT: That was subsequent to Penry.

QUESTION: And what's the other case you mentioned?

MR. WALT: The other was a Billy Joe Woods. That case has never made it into the Federal system. I believe that he has gone --

QUESTION: Were there -- were there opinions in that case?

MR. WALT: The opinions were entered but they are not -- they are unpublished opinions. That's -- that's quite common in the court of criminal appeals.

QUESTION: And Pastor and Woods both unpublished?

MR. WALT: Pastor is, although this Court probably has a copy of the Pastor opinion and the Pastor findings. Because of the pending executions we do in fact forward those to the Court, to your --

QUESTION: Was there a petition for cert. in Wood?

MR. WALT: No. Not off -- not off state collateral review, Your Honor. There was a petition for certiorari in Woods but it was off direct appeal. It did not raise this issue.

QUESTION: Well, did he raise -- that was long before Penry?

MR. WALT: No, Billy Woods was not that long before -- well, it was before Penry. I don't know if it was long --

QUESTION: Yeah, well, all right. On direct appeal it was before Penry?

MR. WALT: Yes. Yes. But the issue was not raised on direct appeal.

Focusing --

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QUESTION: Is it -- is it 100 percent certain that if we decide this case on the basis that for present purposes we'll assume that the court below figured out the Texas court correctly, what the Texas rule was about default? Is it 100 percent certain that if that is wrong, this defendant can go back into the Texas courts?

MR. WALT: Absolutely. There is no -- there really is no viable abuse of the writ posture. And, in fact, if there is any abuse of the writ concept in the Texas courts in capital cases, it would certainly be excused by the fact that -- if he is correct, that this is a change in the law, then he would be certainly free to go back into state court. There is no -- there is nothing to stop that.

Mr. Penry -- oh, excuse me, I'm sorry. Mr. Selvage asserts that cause exists for his procedural default. As this Court noted -- as some of the questions that I've heard noted, Lockett v. Ohio clearly predated Mr. Penry -- or, Mr. Selvage's trial.

This Court's opinion in Penry dictates the result on -- as far as whether there is novelty for his procedural bar. Clearly, a claim that is dictated by precedent that exists prior to the trial, a person can never claim novelty as an exception to the procedural default.

Selvage asserts that his default involves a claim of basic trial process -- pardon me. Excuse me, I'd like to back up for a moment.

The concept of futility -- and this is nothing more than futility -- has been firmly established that that cannot constitute cause for a procedural default. It was established in Engle; it was reaffirmed in Smith v. Murray. It was -- and particularly in Smith v. Murray. I believe that that is probably more on point than would be even Engle.

In Smith v. Murray, it was a constitutional claim that was presented to the state courts. And that was whether there was a violation -- or the defaulting claim was one of whether there was an Estelle v. Smith error for -- in having the psychiatrist testify in violation of the Fifth and Sixth Amendment.

In that case, specifically, the -- this Court found that that claim had been percolating and that even though the state court -- even though counsel could reasonably have concluded that the state court would never have granted him relief, the fact remains that the tools were available for him to formulate a constitutional challenge.

There simply is no difference in this case. In this case, for instance, Mr. Selvage suggests that the state rule foreclosed consideration of the claim.

If one looks at the existence of the state -- of the state law at the time, there could be nothing further than the truth. The claim -- most of the cases that Mr. Selvage cites involve not as applied constitutional challenge but, rather, facial challenges.

In each of the cases, even though they state that mitigating evidence couldn't be considered, it was in the abstract, stating that because the concepts of deliberate -- the "deliberately" was not defined, for instance; therefore, it was somehow -- somehow might have allowed in the abstract the -- that mitigating evidence could not be considered.

In -- in none of those cases did -- did the Petitioner -- or did the Appellant state that he presented mitigating evidence which could not be considered. As I understand the difference between "as applied" and "facial challenges," is a person -- especially in the Penry context, it would be the idea that I have mitigating evidence; it cannot be considered.

Certainly, none of those cases stand for that proposition.

The one case that does stand for the proposition is Quinones v. State. Quinones was decided one month prior to Selvage's trial. Quinones had not sought, and this Court had not ruled on certiorari by the time Selvage's

trial resulted.

Even if the Court were to somehow adopt any concept of foreclosure one case subsequent to Lockett -- and no determination of certiorari by this Court could hardly constitute foreclosure.

This Court has -- turning to the question of whether there is a fundamental miscarriage of justice -- this Court has recognized that principles of finality underlying the procedural default obviously have to give way where such fundamental miscarriages have resulted.

The case of Carrier -- Murray v. Carrier first addressed the question of what constituted a fundamental miscarriage of justice.

In previous cases, both in Engle -- in Engle and in fact Carrier, they rejected the concept that there would be a fundamental miscarriage of justice -- this Court rejected the concept that a fundamental miscarriage of justice would constitute an undermining of the fact -- reliability of the fact-finding process. It rejected the concept that if -- that the error impacted on fundamental -- the fundamental fairness of the trial.

This Court stated that that was nothing more than the -- a restatement of the prejudice prong of Sykes.

The one thread that runs through the -- this Court's jurisprudence in regard to the -- in regard to what a

fundamental miscarriage of justice is, is that whatever happens, a fundamental miscarriage of justice must be a far narrower focus than whatever would constitute cause under -- under Wainwright v. Sykes.

To have any -- any larger focus than that, or the same focus, would in fact undermine the cause and prejudice standard.

Therefore, this Court adopted the concept that there would be fundamental miscarriage of justice only in the event that a defendant could show that the error probably resulted in the conviction of a person who was actually innocent. The Court specifically --

QUESTION: Well, of course, the problem is how to apply that in the capital sentencing context. How does that point --

MR. WALT: Absolutely.

QUESTION: That's the difficulty.

MR. WALT: And this Court has -- this Court has, of course, encountered that problem, has expressed a -- a -- a problem with it. How to -- how to translate actual innocence into the concept -- into the concept of capital sentencing.

The -- the -- this Court was undoubtedly -- undoubtedly aware of the problem that resulted from the fact that we have used the concepts of guilt and innocence

and translated it, which is a -- a question of historical fact -- and translated those into the concept of a largely -- of a profoundly moral question of whether somebody should -- should live or should die.

Now, this Court has, of course, decided that certain classes of persons are not eligible for a death sentence. Persons who are under the age of 16. Persons who are -- persons who would fit within the Enmund or Tison rule. Those people are -- and -- and -- those people are not eligible for sentence and obviously a defendant who -- those would be historical facts that a court could conclude.

So if, of course, Penry, alleged Penry error resulted in the exclusion of evidence that would establish that, we could of course demonstrate that a person was actually innocent or the death sentence in that regard.

Amicus for the state suggest that this Court should go no further and just avoid entering the subjective morass of morality which would inevitably result from this Court adopting, particularly the rule of that Mr. Selvage suggests, any concept that somehow he deserves -- that a Federal court, years after the fact, would state that he deserves the death penalty, number one, in my opinion, it would -- would do nothing more than restate what the prejudice prong of -- of Strickland v. Washington is since

in effect of assistance of counsel is in fact a standard for cause to excuse a procedural default. To repeat nothing more than the prejudice standard of Strickland would in fact negate in effect of assistance of counsel as cause for a procedural default.

Since this Court obviously intends -- or, certainly appears to want to have a far narrower focus than that which constitutes cause, it necessarily has to be a greater -- a narrower inquiry than whether a person deserves a death sentence.

Moreover, to say that he -- to have a habeas court ten -- in this case, ten years later, decide what -- whether a person deserves a death sentence is -- is nothing more than to ask for de novo fact-finding on a moral question when the Court has neither heard the evidence, viewed the evidence, viewed the demeanor of the witnessed who testified; and, in fact, would amount to -- would amount to nothing more than a habeas court imposing its moral judgment on -- on fact-finders who very well may never have possessed the identical moral judgment.

Thus, the state has suggested a standard which would -- which would, I think, narrow the discretion -- so narrow the discretion of the -- of the habeas court reviewing for a fundamental miscarriage of justice and actual innocence of the death penalty. And that would be

to revise the Jackson v. Virginia standard so that -- to force the habeas court to look through the eyes of a rational juror.

If the jury were properly instructed, if it were presented with the evidence, would that jury -- would a jury -- or could a habeas court conclude that no rational juror would have reached the same result, that being a death sentence?

We fell that adopting that standard, if a standard is to be adopted at all -- and I'm -- I -- we agree entirely with amicus that we should probably stop at the -- whether they fit within an excluded class of the death penalty -- but if this Court is to adopt a standard, it must take pains to avoid the -- the idea of imposing moral judgment years after the fact -- upon -- upon the proper -- the proper vehicle -- the proper fact-finders which would be, of course, the jury or a judge in a --

To adopt Mr. Selvage's rule, the Court would do -- pardon me.

In -- I would wish to close at this point and I would ask the Court to recall that it has taken great strides to ensure the reliability -- or assure -- ensure the preeminence of a trial and the direct appeal process. It's commenced with Wainwright v. Sykes, it concluded at this point in Teague v. Lane.

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To adopt -- to adopt Selvage's proposal as to what constitutes cause would be nothing more than to allow Selvage to do what Penry could not do, and that would be a de facto overruling or Jurek v. Texas.

To adopt his concept of actual innocence would do nothing more than ask -- than render a trial as a preliminary hearing, at which -- a preliminary hearing to be reviewed years later de novo by a Federal habeas judge who neither heard nor viewed the evidence and would be imposing his moral judgment upon the proper fact-finders.

If the Court has no further questions, we ask that the matter be affirmed and the judgment of the court below be affirmed.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Walt.

The case is submitted.

(Whereupon, at 1:54 p.m., the case in the above-entitled matter was submitted.)

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No. 87-6700 - JOHN HENRY SELVAGE, Petitioner V. JAMES A. LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS

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

BY alan friedman

(REPORTER)