ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: JAMES A. COLLINS, DIRECTOR,

TEXAS DEPARTMENT OF CRIMINAL JUSTICE

INSTITUTIONAL DIVISION, Petitioner v.

CARROLL F. YOUNGBLOOD

CASE NO: 89-742

PLACE: Washington, D.C.

DATE: March 19, 1990

PAGES: 1 - 37

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

IN THE SUPREME COURT OF THE UNITED STATES

JAMES A. COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,
Petitioner
v. : No. 89-742
CARROLL F. YOUNGBLOOD

Washington, D.C.
Monday, March 19, 1990

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:04 a.m.

APPEARANCES:

CHARLES A. PALMER, ESQ., Assistant Attorney General of Texas, Austin, Texas; on behalf of the Petitioner.

JON R. FARRAR, ESQ., Huntsville, Texas; on behalf of the Respondent.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

C O N T E N T S

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

PROCEEDINGS

(11:04 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 89-742, James A. Collins, Director, Texas Department of Criminal Justice v. Carroll F. Youngblood.

Mr. Palmer.

ORAL ARGUMENT OF CHARLES A. PALMER

ON BEHALF OF THE PETITIONER

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

This is a statutory habeas corpus case brought by a Texas state prisoner. The question presented is whether the ex post facto clause was violated when the state appellate court applied a statute that allowed it to reform the judgment to delete an unauthorized punishment.

In 1981 Carroll Youngblood abducted and sexually assaulted a young woman. He was tried the next year upon his plea of not guilty, and was found guilty of the offense of aggravated sexual assault by a jury. Thereafter, a separate punishment hearing was held before the same jury, in which the state proved that Youngblood had previously been convicted of a felony. The jury assessed punishment of life imprisonment and a $10,000 fine.

Following affirmance of his conviction,

Youngblood filed a state habeas application in which he complained that the fine that the jury assessed was not authorized by state law. The Texas court of criminal appeals agreed and granted relief. Acting pursuant to Article 37.10(b) of the Texas Code of Criminal Procedure, the court of criminal appeals reformed the judgment to delete the fine. Youngblood remains incarcerated pursuant to the life sentence handed down by his jury.

Texas law in effect at the time of the offense proscribed the conduct in which Youngblood engaged and provided that it could be punished by term of imprisonment up to and including life. This is not a case in which the law was changed to criminalize previously innocent conduct. Nor is it a case in which the range of punishment was increased subsequent to the commission of the offense.

There is no question but what Youngblood was on notice at the time he engaged in his actions that they could lead to the incarceration he presently is suffering. He cannot show an ex post facto violation under the test of Calder v. Bull, nor can he show that he was deprived of fair warning of the possible consequences of his actions.

QUESTION: But do you argue that this claim is barred by Teague v. Lane?

MR. PALMER: Your Honor, we have not briefed

that issue, and we have not chosen to rely on it. If the Court chooses to address that without reaching the ex post facto question, I think it is clear that it would be barred.

QUESTION: Do you understand Teague to be a jurisdictional rule or is it something you can waive?

MR. PALMER: I understand it to be jurisdictional, Your Honor. Certainly if it is not, well, then I would think we had waived it in this case. But given the conflicting opinions of the courts through which this case has travelled, both state and Federal, particularly the two concurring opinions in the court of appeals below, I don't think there is any question but what this would be a new rule under Teague and under Butler v. McKellar.

QUESTION: Mr. Palmer, you know, in the opinion, even in Calder against Bull, and you find in a couple other of our opinions, they do lay down -- like Beazell, for example -- they do lay down these three general principles that you have adverted to. But then there is kind of language indicating that something else might come along too, don't you think?

MR. PALMER: Well, there are decisions of this Court that contain language to the effect that changes which are procedural in nature may violate the clause if

they affect substantial personal rights. I would suggest to the Court that in every case in which the Court has found a violation due to a procedural change, it has fit within the Calder framework with two exceptions. And I think those two exceptions are readily distinguishable.

The first of those is Thompson v. Utah, involving the right to a 12-person jury under the Constitution. At the time of the offense, Utah was a territory and the defendant was entitled to the Federal right to trial by jury. At that time, in 1898, the Court was of the opinion that that right embraced the right to a 12-person jury. By the time the case was tried Utah had become a state and had passed a statute limiting the jury to eight persons. I think what animated the Court's decision in Thompson was the notion that the change in law had deprived the defendant of a right he possessed under the Federal Constitution. In addition to that --

QUESTION: Although clearly the right to jury trial did not apply to the states at that time.

MR. PALMER: That's what I am saying, Your Honor. At the time the defendant committed the offense Utah was not a state, and he possessed that right as a citizen of a territory.

QUESTION: So a change in jury size meets the ex post facto test?

MR. PALMER: Well, in the sense that the jury size question in that case was thought to be inherent in the constitutional right to trial by jury.

The second case, I think, which does not fit perhaps neatly within the Calder framework would be Kring v. Missouri. That was a case in which the defendant pleaded guilty to a less included offense. Missouri law provided that that plea of guilty represented an acquittal of the greater offense, which would have been a capital offense.

I think -- there are two things that can be said about Kring. One, it is very doubtful that Kring remains good law in light of later decisions of this Court regarding the effect of a guilty plea and withdrawal of that plea. But regardless of whether it does, in Kring the effect of the change in law was such that the defendant was subjected to a death sentence, which was not in effect at the time of the offense, not in effect if he had pled guilty to the lesser. So in that sense Kring represents a change in law that deprived the defendant of an absolute defense to punishment.

In this case that is not so. Youngblood was sentenced to life imprisonment. The result he seeks is a reversal and the right to a new trial, in which he again could be sentenced to a term of life imprisonment.

QUESTION: What was the absolute defense that the defendant was deprived of in Kring, did you say?

MR. PALMER: Well, Your Honor, the Court itself has not interpreted Kring consistently since that time. Later cases, later decisions of this Court contain language to the effect that Kring represents a case in which the defendant was deprived of the right not to be sentenced to death.

But if the Court will look at the decision in Kring itself, at page 450, the Court says flat out this is not a case in which the defendant was deprived of the defense. The Kring court characterized it as one in which the rules of evidence were altered so that the prior plea of guilty and acquittal of the greater had no force in the second trial.

QUESTION: That reasoning really doesn't hold up under the later cases, the reasoning that the Kring court used, does it?

MR. PALMER: I think it is quite questionable, Your Honor. And even if it did, I think Youngblood's case is readily distinguishable.

QUESTION: Would you explain why the right of the defendant to a reversal of his conviction or having it set aside and to get a new trial is not a substantial personal right under the former Texas law?

MR. PALMER: Well, Your Honor, to the extent that this so-called right existed under Texas law, I suggest the Court should defer to the Texas court's interpretation of that law. Prior to the enactment of 37.10(b), the Texas courts had consistently held that in cases of jury verdict error, they were powerless to fashion any remedy other than an entire new trial. There is no language in the Texas cases suggesting that this is a right of the defendant --

QUESTION: And so why isn't that a substantial right of the defendant to get a new trial?

MR. PALMER: Well, Your Honor, what I am suggesting to the Court is that it was not only not a substantial right, it was no right at all. It was a question of the authority of the courts, whether they possessed the power to dispose of a particular type of case in a certain way. And it was to correct that lack of power that the legislature enacted the statute. When the Texas courts applied the statute to --

QUESTION: Well, certainly under prior Texas law this sentence would have been set aside and the defendant would have had a new trial. Would you agree with that?

MR. PALMER: That is absolutely correct, Your Honor.

QUESTION: And the defendant presumably could

have gone to court to make sure that happened.

MR. PALMER: He could, Your Honor, but --

QUESTION: Based on the lack of power of the state court to remedy it.

MR. PALMER: That is true, Your Honor. My response is twofold. One, to the extent this Court -- that this question turns on Texas law, I think Texas law is clear that this was not seen as a right but rather as one of a lack of authority.

However, even if the Court characterizes it as a right, or disagrees with the Texas court's interpretation, it is far from clear that prior Texas law necessarily was advantageous to defendants in these type of cases.

In Youngblood's case, for instance, the permissible range of punishment was a term of imprisonment for 15 years to life. If Youngblood had received a sentence at the lower end of that range, and had he obtained a new trial, which is the result he is seeking in this case, he would have exposed himself to a life sentence on retrial, a greater punishment than was -- than had been handed down at the first trial.

QUESTION: Well, the, under the old law the conviction would just be set aside. The man would not be exposed to punishment at all.

MR. PALMER: No, Your Honor. The conviction

would be reversed and the state would be free to retry him again and seek whatever punishment was permissible, up to and including life.

QUESTION: I know, but he has been convicted and illegally sentenced. Is that right?

MR. PALMER: He --

QUESTION: And the appellate court says this is an illegal sentence, and his conviction is hereby set aside.

MR. PALMER: That is correct.

QUESTION: And you get a new trial. And until there is another conviction, you are not exposed to punishment at all. And that's a -- that seems to me pretty close to even Calder.

MR. PALMER: Well, Your Honor, it fits none of the categories of Calder. And I think it's a common sense matter what is important is to remedy the harm that --

QUESTION: Well, it certainly affects punishment. He may not be punished at all after a new trial.

MR. PALMER: He may not be.

QUESTION: And at the very least, he is not going to be punished for quite a -- until quite a bit later.

MR. PALMER: Well, that turns, I suppose, on

whether or not he is freed on bond pending the retrial.

QUESTION: And please correct me if I am wrong, but it seems to me that he is not liable for a greater sentence either, under the Pierce case, under --

MR. PALMER: No, Your Honor --

QUESTION: -- under double jeopardy. Maybe under ex post facto, but not under double jeopardy.

MR. PALMER: No, Your Honor, that is not correct. This Texas rule upon which Youngblood relies applied only -- the prior rule applied only to jury sentencing, which Pierce controls. In cases where the court assessed punishment, the Texas courts have always been free to reform the judgment. It is only in cases of jury sentencing that the slate was wiped clean and he was entitled to a whole new trial.

QUESTION: And Texas takes the position that after an appeal the defendant can be subject to a greater sentence than he originally received, without any showing of new evidence shaping the sentencers' determination?

MR. PALMER: No, Your Honor. Texas law was that, in a case such as this where you had a permissible punishment, a term of imprisonment, and an impermissible one, this fine, and the court was the one -- the sentencer, the appellate court could excise the fine and the term of imprisonment would stand.

It was only in cases where the jury assessed punishment that prior Texas law provided for an entire new trial.

QUESTION: Under Texas law, if the -- under the old law you vacate the sentence and remand for a new trial, and it ran -- the jury would have sentenced in the next trial.

MR. PALMER: Yes, Your Honor.

QUESTION: He wasn't exposed to any greater -- I mean the limits of the sentence would be the same, but the jury might, the second jury might not impose the same sentence as the first jury.

MR. PALMER: Exactly, Your Honor.

QUESTION: And it might be greater?

MR. PALMER: Certainly, Your Honor.

QUESTION: Yes.

MR. PALMER: Youngblood relies on language in Weaver v. Graham to the effect that an ex post facto law is one that is retrospective and disadvantages the defendant. While he is correct to the extent that those two elements must be present for an ex post facto violation to be found, there is no authority for the proposition that those two factors, standing alone, violate the ex post facto clause. Indeed, if Youngblood were correct on this point, there would be no basis for

the numerous decisions of this Court to the effect that procedural changes normally do not offend the clause.

Youngblood has characterized this case as one in which he was deprived a substantial personal right. The court of appeals likewise characterized the case. We would suggest that that approach is flawed because it ignores this Court's admonitions, most recently in Weaver v. Graham and Miller v. Florida, to the effect that it is the lack of fair warning, not the concept of a vested right, that is the touchstone of the ex post facto clause.

The amicus on behalf of Youngblood has suggested this case is one in which Youngblood was deprived of an absolute defense to punishment. I think I have made the point, I would like to make it again, that that is not the case, because, of course, the state could retry him and repunish him, and in fact punish him more severely.

QUESTION: In this case how could he be punished more severely? He got a life plus ten year -- $10,000 fine.

MR. PALMER: In this case he could not, but if his --

QUESTION: But in this case he could not.

MR. PALMER: But in similar cases he could, Your Honor. In another case he could.

QUESTION: He might get less.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

MR. PALMER: He might get less, he might get more, he might get acquitted.

QUESTION: Exactly, exactly.

MR. PALMER: We would suggest to the Court that, as the Federal government has, the case that is most analogous to this is Mallett v. North Carolina. In that case the Court upheld the retrospective application of a statute which provided the government the right of appeal that it did not possess at the time of the defendant's trial.

Here, as in Mallett, the statute in question simply provided the government with authority which it did not possess before. Here, as in Mallett, the prior lack of such authority should not be construed as the equivalent of a personal right. We would suggest that Youngblood had no more right to have his case disposed of in a particular way than Mallett did to avoid a successful appeal by the government. If Mallett is still good law, and Youngblood has not suggested that it is not, it controls the disposition of this case.

If there are no further questions, we would ask the Court to reverse the decision of the court below for the reasons I have offered, as well as those stated in our brief and the brief of the Federal government.

QUESTION: Thank you, Mr. Palmer.

Mr. Farrar.

ORAL ARGUMENT OF JON R. FARRAR

ON BEHALF OF THE RESPONDENT

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

According to the Texas court of criminal appeals decision in Bogany v. State, the jury's verdict in this case was void at its inception and unenforceable. The respondent had a fundamental right to reverse on new jury trial. The retrospective application of Article 37.10(b) has disadvantaged the respondent by depriving him of the right to reverse on new jury trial.

The court of appeals concluded that the right to have one's guilt retried by a different jury, with its attendant possibility that the outcome might be different the second time around, is comfortably encompassed within the category of rights considered substantial. And the court of appeals found that the statute here is ex post facto. The State of Texas, however, seeks to enforce the judgment, even though it was void when rendered as a matter of Texas law. The respondent is being deprived --

QUESTION: Can it fairly be described as void when rendered, after the legislature has said that it is subject to appellate reformation?

MR. FARRAR: I would say it is void in the sense

that in the Bogany decision Georgia said it was void at its inception. It was not enforceable, had absolutely no meaning whatsoever according to Texas law as of that time.

QUESTION: Well, then the legislature comes along, as I understand it, and says the appellate courts can reform a sentence like that.

MR. FARRAR: That is what the legislature is intending to do, yes, Your Honor.

QUESTION: And there was no problem with that under Texas law, was there? The Texas -- the Texas court said yes, that is fine, we'll go ahead and do it.

MR. FARRAR: The majority of the court and the Ex parte Johnson case agreed that that was okay. The dissenting opinions disagreed with that. Again, the respondent is being deprived of his liberty without the benefit of a valid conviction. In Miller v. Florida, the Court stated that the test to be employed to determine whether a statute is ex post facto consists of two major elements. It must be retrospective, and it must disadvantage the offender affected by it. The court of appeals employed the Court's test, and found that the statute here is ex post facto.

The state's argument does not utilize nor attempt to acknowledge the Court's test as stated in Miller, which was following a prior decision in Weaver.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

Instead the state insists that no statute is ex post facto unless it falls within one of the four categories of cases in Calder v. Bull.

I would suggest that the Court has never limited the ex post facto clause to these four categories. In fact, Justice Chase, when he wrote the decision, he listed the four categories and went on to say that all these and similar laws are manifestly unjust and oppressive.

QUESTION: Well, then, but that really doesn't offer the Court any standard at all, Mr. Farrar, to say we have these three categories that are rather easily identifiable, and then anything else that is manifestly unjust or oppressive. What does that mean? I mean, obviously I should ask Justice Chase, but he is not around.

MR. FARRAR: I would use a response written by Justice Stone in Beazell v. Ohio. And he indicated that, whether a procedural change in the law, as we have here, is ex post facto would be a matter of degree, keeping in mind that we want to determine if the individual is deprived of a substantial personal right. So that is the underlying issue.

QUESTION: But what -- what -- how does the phrase substantial personal right really help us, other than say it's a matter of degree. If it's a little tiny

change in procedure, probably no harm. If it's a big change in procedure, then does that mean the defendant is -- can invoke the ex post facto clause?

MR. FARRAR: I think you need to look at whether utilizing the standards of the Court in a few of the more recent cases such as Weaver v. Graham and in Miller v. Florida, the Court indicated that we are trying to determine whether the new statute is more onerous. And I would add one extra thing to that.

QUESTION: Is more onerous, you say?

MR. FARRAR: The new statute is more onerous than the old statute. But when you look at the case, or what seems important in case after case after case, it is whether the new law on its face is more onerous. By just looking at the statute itself, if you are going to have a clearly different result, and it is going to harm the defendant or the respondent, then -- and I want to go beyond just the idea of harm, where there is clearly depriving the respondent of the rights that he had under the old law, then it is more onerous.

QUESTION: Well, supposing it is -- supposing there is a change in the rules of evidence, so that between the time the act was done and the time the fellow is tried the rules of evidence are more liberal, and critical evidence comes in because the state has expanded

its hearsay rule, evidence perhaps without which he wouldn't have been convicted. Is that a violation of the ex post facto clause?

MR. FARRAR: The -- it depends on how the statute is written, Your Honor. The determining factor, as pointed out in the amicus brief on behalf of Wilbert Evans, is that if the new statute is neutral in its face and does not deprive the defendant of any of the basic rights that he had under the old law, and then it is applied evenhandedly --

QUESTION: Well, let's say it is applied evenhandedly. It is applied to this fellow just like everybody else. The legislature wasn't out to get this fellow. But it does deprive him of the right to object to the admission of very damaging incriminating evidence on the grounds of violation of the hearsay rule.

MR. FARRAR: Again, the attitude that I have is that if the statute is neutral on its face, it is fine. It would be admissible.

QUESTION: No problem there. It is not a violation of the ex post facto clause?

MR. FARRAR: Again, I want to focus on the idea that you have here that the cases that this Court has ruled were okay to apply retrospectively and were not ex post facto had the basic elements that they were neutral

on their face, they were applied evenhandedly to all the parties, and if there was a harm, it was simply on a case by case basis. It was not clear on the face of the statute that the harm would result. In those cases the statutes were okay.

On the other hand, in the cases where the statutes were ruled to be ex post facto, in most of those cases the harm was obvious by looking at the statute itself. In Miller v. Florida, for example, the presumptive sentencing guidelines had an increase in the sentencing. And from the very face of the statute there was harm, it was more onerous, it was ex post facto.

The same thing is true in Weaver v. Graham, where the new statute on its face had deprived the individuals of the amount of gain time that they had under the previous statute. And then, again, the statute on its face deprived these individuals of their benefits that they had under the old law.

QUESTION: Mr. Farrar, under the Dobbert case, changes in sentencing procedures that don't increase the quantum of punishment are not thought to be ex post facto laws. How do you distinguish this from that?

MR. FARRAR: I think the way I would distinguish Dobbert from the other two cases is that if the changes on their face are beneficial, or the Court uses the term

"ameliorative," then the statute is okay. And as the Court pointed out, the Florida statute was -- the Florida legislature was trying to adopt additional protections for individuals that were being charged with capital murder.

QUESTION: Well, here the legislature is trying to eliminate the portion of the sentence that is unlawful.

MR. FARRAR: That is, of course, the argument that the state has taken. They have dropped the fine; it is beneficial. But the fact of the matter is you need to look at the rights provided to the defendant or the respondent under the old law versus what he has under the new law.

Under the old law, as decided by the court of criminal appeals in the Bogany decision, Respondent had a right to reverse a new trial. And then after 37.10(b) was enacted, he was disadvantaged by taking away that right. Instead of having his case affirmed -- instead of having his case reversed and a new trial ordered, he had his case affirmed. And so what you are looking at, the two points you are looking at is what occurred under the old law versus the new law, not what should have occurred under the old law but did not versus what occurs under the present law.

QUESTION: If we disagree with you and think that what the defendant here was seeking was basically a

new rule, is the claim barred under Teague against Lane?

MR. FARRAR: I would have to say basically the same thing that the state has. Since they have not discussed the Teague decision, I have not dealt with it particularly either.

But there is one point I want to make, and in Texas law if the court says there is a fundamental error it can be brought up on an application for writ of habeas corpus. Normally speaking, if you just have a basic error, obviously it is a way for purposes of habeas corpus litigation. So the court of criminal appeals is indicating that the type of error here is so extreme that it is a fundamental error, and it can be brought up at any time.

And another example of that was in the 1985 case held out, or decided in March in Ex parte Spaulding. Prior to that the state had attempted to utilize the Governor's pardon and commutation powers to simply drop the fines. This was the first scheme that the state had to remedy the problems in Bogany. But the court of criminal appeals indicated that simply dropping the fine didn't help the matters any. The verdict was still void at its inception. This is a fundamental right. This was a writ of habeas corpus case, and it could be dealt with now, and the case was reversed.

QUESTION: Mr. Farrar --

MR. FARRAR: (Inaudible) fixed that all this was fundamental.

QUESTION: Mr. Farrar, in deciding whether something is ex post facto, I guess you have to decide what the relevant point of time is. And I suppose that if you had a law that reduced the state's juries from, I don't know, from 12 to nine people, after someone had been tried with a nine-person jury, that would be ex post facto.

But it seems to me what has happened here is that the state's appellate procedure was changed before your client underwent that appellate procedure. There is, the state has not said retroactively that it is okay to impose both sentences, both the fine and the imprisonment. It still said you are right, that was invalid before; it is still invalid. But we are -- this law intervened between your client's wrongful conviction and the appeal. All the state said is we are going to have a new procedure, which your client had not yet undergone. He hadn't undergone it and then the state went back and changed it. Why -- why is that ex post facto?

MR. FARRAR: What seems strange in this case is that the court of criminal appeals in Bogany determined after the respondent was actually convicted that this type

of right existed. And they indicated that the type of error was so strong or so fundamental that he had the right to bring it up on a writ of habeas corpus.

And so the scenario that we have focuses on when the right was recognized by the court, and what the court of criminal appeals indicated an individual could do with the right.

If the court said -- if the court of criminal appeals has said that all that we have here is a basic error that can be brought up on direct appeal, on direct appeal on its way for any other purpose, then we would not have a case here. But the court of criminal appeals made it very clear that this is such a fundamental type of error that it can be brought up on a writ of habeas corpus anytime here and out. And so it is a right defined by the --

QUESTION: Where a procedure does not exist, antecedently you have a right not to have that procedure. That is basically what your -- what your argument is. Here, the procedure did not exist, the procedure for the supreme court of the state to simply eliminate the unlawful portion of the sentence. And your argument is you had a right not to have that procedure exist, which was taken away when, after the wrongful conviction the statute was passed, and then that procedure was applied.

But that is a very far-reaching rule. I don't -- do you know a case of ours that, or of anybody's, that would support that?

MR. FARRAR: I would not interpret the focus of the Bogany case in that light. Of course, Judge Teague has indicated when the decision came out in Bogany that your scenario basically exists. And he regretted later on in the Johnson case, when the court of criminal appeals first applied the 37.10(b) to this case, he indicated perhaps he opened up -- I'm going to use, for lack of better words -- a bag of worms, and suggesting to the legislature go ahead and make the changes. And so there would be precedent for what you are saying.

But I think, again, the point is what right existed, as interpreted by the court of criminal appeals, under the law in existence at the time of the offence. Again, there was not the right here to impose the fine, and according to the Texas law at that time, there was a void judgment.

QUESTION: May I ask this question, your opponent and you have been asked about the application of Teague to the whole -- this whole problem. And the answer, I suppose, is whether these old cases are new law or not as to the extent that the court of appeals is out there finding them. But may I ask this, was the Bogany

case new law as a matter of Texas law?

MR. FARRAR: The particular error involved here was first recognized in Bogany, and in that sense certainly it is new law. In the sense that it was consistent with Texas traditions for a long time, though, it was not.

QUESTION: And of course, they have since applied it retroactively. But had they elected not to apply Bogany retroactively, you would have no case.

MR. FARRAR: That is correct. If the court had decided that there was a waiver principle, and that we were out of court and went tough, then we wouldn't be here.

There's a couple of points where -- about three points I want to focus on before I close up. First I want to talk about Mallett v. North Carolina. Just as the state indicated, the Federal amicus brief focuses on this case extensively and places all its marbles in that case.

Basically, the respondent would suggest that what was going on in Mallett was that under the old law the defendant had a superior right to appeal from the intermediate court of appeals to the highest court of appeals. The state did not have that same right.

Under the new law the state was given the same right that the defendant had previously. Again, the

statute on its face was being applied neutrally. It was being applied to both parties the same way. They both had the right to appeal to the intermediate -- or highest court of appeals from the intermediate court of appeals. And the defendant was not being deprived of any of his rights, unless one could say that you have a right to keep the other party from having the same type of rights. I would not say that.

QUESTION: But under the theory that you and Justice Scalia were discussing a moment ago, might not someone on your side argue that the defendant had a vested right in seeing that there was no procedure for the state to appeal to the Supreme Court of North Carolina, since it never had that before, and it is a benefit to the defendant not to have the state have the right to appeal.

MR. FARRAR: That is what I was getting at basically, but I do not feel like it would be a deprivation of the rights of the defendant. That is going to be arguable, and of course, the state, making the best case scenario, would want to make you believe that somebody did not have that sort of right either, I guess.

But my point is that under the new law, simply all that happened is the state was given the same rights as the defendant, and that was it. And the defendant still wasn't being deprived of any of the rights that he

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

had under the old law, and in this particular case we don't have that at all.

QUESTION: (Inaudible) the superior court reversed the conviction, didn't it?

MR. FARRAR: That is again --

QUESTION: And at the time of his -- under the law when he -- when he committed the offense, he would have had a new trial.

MR. FARRAR: That is correct.

QUESTION: And the new law was that the state, there wouldn't be a new trial, the state could appeal and maybe have the conviction reinstated.

MR. FARRAR: That is correct. What I have focused --

QUESTION: That is not a substantial right?

MR. FARRAR: Again, I have focused on --

QUESTION: He had a right to a new trial, which has been taken away from him.

MR. FARRAR: What I think the Court has focussed on in its past decisions, though, is what rights were defined on the face of the statute. If you have an individual case that happens to work to an individual's harm, and it just happens to apply that way in this particular individual case, then that was just the unfortunate act that occurred in that individual case.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

But if the statute is neutral in its face, then it can be retrospectively applied. But if it is not neutral in its face, if it is on its face clearly detrimental, clearly more onerous, then it is ex post facto. And that is the distinction I would make in most of the cases where relief was granted or not granted, whether the statute on its face was more onerous or not.

I also want to talk about part of the government's -- U.S. government's comment that Bogany is simply a windfall for the respondent. In actuality, if Article 37.10(b) is allowed to be applied retrospectively, the real windfall would be for the state, because the state would be allowed to enforce a judgment that was otherwise void according to the law in Bogany -- or according to the court of criminal appeals decision in Bogany. And so the state is trying to seek a windfall in this case in trying to find a way to do so.

Again, as I indicated a little bit ago, the state has been doing everything that it could to undo the effects of Article 37.10(b). Judge Garza commented that he could be sympathetic with the state, but wanted to do something to avoid the retry of these individuals. But he said it may be wise public policy, but wise public policy does not justify the use of ex post facto legislation.

Justice Chase also discussed the same basic idea

and said that the British used to justify its use of ex post facto legislation to say it was necessary for the safety of the kingdom.

Basically, we have the same sort of attitude being expressed both by Judge Garza and Justice Chase, that statutes were being made because it seemed reasonable for a public policy perspective. But again, as Judge Garza is indicating and as Justice Chase was indicating, if it violates the ex post facto clause, it is not admissible or allowed.

Again, the framers of the Constitution did not buy the argument that you ought to be able to utilize ex post facto legislation for the benefit or for the necessity of the government or the country. If it deprives an individual of the basic right, then it is ex post facto.

Finally, there is one other point that seems very important to me. If Article 37.10(b) is allowed to be applied retrospectively, it will seriously undermine the traditional role of the appellate courts in this country. It would stand for the proposition that anytime a legislature does not like the effects of an appellate decision, then they can come back and pass a new law, apply a label on it that it is procedural in nature and apply it retrospectively.

And the effect of that sort of proposition would be that the basic notion in our form of government that a law ought to be applied -- or a decision by appellate court ought to be applied consistently to everybody else in the same posture, would be eroded, because you have no idea from one case to the next -- the members of the public wouldn't have any idea from one case to the next whether the law would be applied consistently to them.

And the facts of this case, again, after Bogany was decided, numerous individuals filed applications for writs of habeas corpus. Numerous inmates were having their cases reversed, and the court wanted to stop that, understandably so, maybe. But if they deprive an individual of a right that they had --

QUESTION: May I ask if the first time it was decided they could get their conviction, it was in the Johnson case, wasn't it?

MR. FARRAR: Johnson was the first case that applied Article 37.10(b), that is correct.

QUESTION: What if the day before Johnson was decided this legislation had been passed? Would it be retroactive? Say, we didn't -- the issue had not been resolved in the Johnson case, but the legislature stepped in right away and saw this potential and said it is okay to correct sentences by eliminating the fine?

MR. FARRAR: I would say it would be ex post facto, and --

QUESTION: Even though we wouldn't -- never would know how Johnson was going to be decided? I suppose that was -- you know, it was a close case.

MR. FARRAR: Certainly. I had, for example, a case at the time that was decided -- Article 37.10(b) went into effect June 11, 1985. I had a case decided June 17, 1985, the exact same facts as here, and the case was reversed, just like the Bogany cases.

The state came back with a motion for rehearing and said Article 37.10(b) just went into effect, and we think you ought to have a rehearing on this case because it is simply a procedural change in the law. And when, about a week after the Johnson case came out, my case was decided on rehearing and the exact same results came out as we have in the Johnson case or in the respondent's case. And so your scenario that we basically have has in fact happened in Texas.

And again, in this particular case as well, pursuant to 11.07, the Code of Criminal Procedure, the rules for filing applications of writs of habeas corpus in Texas, the -- Youngblood had filed his application for writ of habeas corpus. It went to the trial court; the trial court recommended that relief be granted based upon

the body of decision. And that was in about February 1985, and then the case sat at the court of criminal appeals for a final decision.

In the meantime, Spaulding was decided, and then the legislature came back immediately after Spaulding was decided to pass Article 37.10(b). And then, finally, my case was decided after the effective date of Article 37.10(b). Basically, the scenario that you have here is the legislature is trying to curtail all these individuals from being able to have the same rights as the court of criminal appeals defined in Bogany v. State.

Again, the, one of the underlying reasons for the adoption of the ex post facto clause -- the state focused on one, that is the concept of notice.

The other is to prevent arbitrary and vindictive legislation on the part of the government. Here, if the, I believe that the government is engaging in vindictive and arbitrary legislation to cut off the possibility that anybody else could be able to obtain relief as defined by the court of criminal appeals in Bogany. Clearly the basic underlying notion of the ex post facto clause is applicable in this particular case.

If there is no further questions, I will close at this time.

Thank you very much.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

QUESTION: Thank you, Mr. Farrar.

Mr. Palmer, do you have rebuttal?

REBUTTAL ARGUMENT OF CHARLES A. PALMER

ON BEHALF OF THE PETITIONER

MR. PALMER: Very briefly, Your Honor.

Youngblood has relied to some extent on the language in Ex parte Spaulding to the effect that prior to the passage of the statute an unauthorized jury verdict was a nullity and voided in its inception. That language must be examined in light of what the court of criminal appeals subsequently said in Ex parte Johnson. Johnson, as you have just been told, was the first case to come before the court after the statute was enacted. Johnson got his judgment reformed to have the fine deleted, as did Youngblood.

The court of criminal appeals discussed prior Texas law under which it had no reformation authority, and then went on to say, and I quote, in this sense a judgment and sentence were considered void since there was no way to cure the infirmity. Since these cases were decided, however, the legislature has enacted a new law that enlarges the authority of courts to reform judgments, thus providing a way to cure the infirmity. To the extent that such verdicts were void under Texas law, they were void for the reasons stated by the Johnson court.

Indeed, Judge Campbell, who was the author of the Spaulding opinion, filed a concurring opinion in Johnson in which he explained that the only thing that was truly void was the unauthorized fine, and that once the statute was applied to delete that fine, the remainder of the verdict was valid and could be enforced.

The only other comment I would like to make is a lot of the argument today has focussed on whether or not Youngblood had a right and whether or not that was a substantial right, and whether he was harmed by the application of the statute to his case. Well, I have tried to convince the Court that this is a case of whether or not the court's possessed authority regardless, not whether it was a right of the defendant.

It seems to me that what is the more fundamental right involved here is that of a defendant to have an error-free trial. That is exactly what Youngblood got. He presented no evidence whatsoever in the guilt, innocence or punishment phases of the trial. There is absolutely no suggestion that there was any error affecting either phase of that trial. The only error was this lagniappe, this fine tacked on to the term of imprisonment. That harm was removed when the Texas court reformed the judgment, and there was no harm existing after that, and no right to any other result.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Palmer.

The case is submitted.

(Whereupon, at 11:47 a.m., the case in the above-entitled matter was submitted.)

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

No. 89-742 - JAMES A. COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, Petitioner V. CARROLL F. YOUNGBLOOD

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

BY Lona M. May

(REPORTER)