OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: ROBERT SAWYER, Petitioner

V. LARRY SMITH, INTERIM WARDEN

CASE NO: 89-5809

PLACE: Washington, D.C.

DATE: April 25, 1990

PAGES: 1 - 40

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IN THE SUPREME COURT OF THE UNITED STATES

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ROBERT M. SAWYER, :

Petitioner :

V. : No. 89-5809

LARRY SMITH, INTERIM WARDEN :

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Washington, D.C.

Wednesday, April 25, 1990

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:57 a.m.

APPEARANCES:

CATHERINE HANCOCK, ESQ., New Orleans, Louisiana; on behalf of the Petitioner.

DOROTHY A. PENDERGAST, ESQ., Assistant District Attorney, 24th Judiciary District Court, Parish of Jefferson, Gretna, Louisiana; on behalf of the Respondent.

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P R O C E E D I N G S

(10:57 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in number 89-5809, Sawyer against Smith.

Ms. Hancock, you may proceed.

ORAL ARGUMENT OF CATHERINE HANCOCK

ON BEHALF OF THE PETITIONER

MS. HANCOCK: Mr. Chief Justice Rehnquist, and may it please the Court:

I represent the Petitioner, Robert Sawyer, and I'll be reserving five minutes for rebuttal.

Robert Sawyer is here today seeking a re-sentencing hearing as a remedy for his prosecutor's violation of the Eighth Amendment which occurred when the prosecutor made repeated references during closing argument to the fact that the jury's decision was not final, was reviewable and ultimately would be corrected on appeal.

Robert Sawyer was on the verge of receiving the relief for the Caldwell violation in his case from the Fifth Circuit Court of Appeals en banc when Teague v. Lane was decided, and the question of Caldwell's retroactivity was raised.

We submit that this Court should find that Caldwell does apply retroactively to this case under Teague and that the Court should grant a re-sentencing hearing,

because the Caldwell violation in this case was worse than in the Caldwell case itself. Here, for example, there were four episodes of repeated argument. It appears almost to be calculated argument.

QUESTION: In -- in Caldwell the bad statements came from a judge, did they not?

MS. HANCOCK: Your Honor, in Caldwell the context was that the prosecutor stood up in response to defense counsel and said, what the defense counsel's telling you is not true, it's automatically reviewable, your decision is not final.

Your Honor is correct that following those statements, the judge did affirm the truth of what the prosecutor was saying. So, it was a combined violation.

QUESTION: And here did the judge say anything?

MS. HANCOCK: No, Your Honor.

QUESTION: Did defense counsel object to the --

MS. HANCOCK: No, Your Honor, defense counsel did not object.

In this case, the Caldwell violations are revealed on page 3 and 4 of our brief where we cite from the transcript of a closing argument. Specifically, the messages came across as follows.

The jury was told, you yourself will not be sentencing Robert Sawyer to the electric chair. What you

are saying to this Court, to any appellate court, to the Supreme Court of this state, to the Supreme Court possibly of the United States, is that you are of the opinion that this is the type of crime that deserves the penalty. It is merely a recommendation.

In the second episode of argument, the prosecutor said, you are the people who are going to take the initial step and only the initial step. All you are saying to all the judges who are going to review this case is that this man could be prosecuted. No more, nor less.

Finally, Your Honor, in the third episode of argument, the prosecutor reached the level described in the Caldwell dissent where the court in dissent said -- the dissenter said, if you go so far as to tell the jury that the appellate court's going to correct them if they're wrong, then that is the most severe kind of violation imaginable. And even the dissent was willing to recognize that kind of statement would violate the Constitution.

It was in this third episode where the prosecutor said, don't feel like you're the one. It is very easy for defense lawyers to make each and every one of you feel like you are pulling the switch. That is not so. It is not so, and if you are wrong in your decision, believe me -- believe me, there will be others who will be behind you to either agree with you or to say you are wrong.

Finally, the last words the jury heard from the prosecutor in the second rebuttal closing argument were as follows: I ask that you recommend because all you are doing is making a recommendation. I ask that you recommend to this Court and to any other court that reviews Robert Sawyer's case that, as a jury, you recommend death penalty.

In this case, we have a situation where Caldwell's elements are met and an important starting point for understanding why Caldwell is old law and is, therefore, retroactive is to look at those Caldwell elements.

It is also important to recognize there are times when this Court sits -- often, I suppose -- to decide constitutional conflicts. There are also times, more rare, when this Court sits to ratify what state courts perceived to be constitutional requirements. Caldwell is a ratification case.

QUESTION: Ms. Hancock, I -- I take it you concede that all the cases that you say foreshadowed Caldwell were indeed state law cases.

MS. HANCOCK: Counsel in the Ramos decision -- but this Court noted that in looking at state court cases in the death penalty context, it is sometimes difficult to discern whether those cases are based on state law that is a narrow kind of state law or state law that is informed by Federal principles.

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Your Honor, we believe that it should be sufficient under this Court's decisions on retroactivity, sufficient evidence should be provided by state court decisions that are informed by Federal principles, that those Courts were indeed --

QUESTION: Were there any cases or do you cite any cases that relied on the Eighth Amendment as a ground for the result reached in Caldwell?

MS. HANCOCK: I can -- the Georgia and the Louisiana cases do cite Eighth Amendment cases in their decisions, as does the Mississippi Court. The Mississippi Court cites Ramos, for example. The Georgia and Louisiana states describe what they believe to be their standard of review, which is they have to look for arbitrary factors under the -- mandate in Gregg.

Your Honor, it should not be surprising that in the late `70s and the early `80s state courts were writing the kinds of opinions they were in these cases. Perhaps today one might look for a different pattern or demand a different pattern.

But with regard to the Caldwell problem, there was a rich tradition of pre-Furman death penalty law. Thus, any state court in the late `70s or early `80s would not only be looking to this Court's Eighth Amendment decisions but would naturally as a source of first resort being --

rely on those pre-Furman decisions.

One has to think about how state courts write death penalty decisions in order to understand why it would be so natural for them to rely on what is essentially state court decision making with many different sources being used, including Eighth Amendment. But not exclusively the Eighth Amendment and not just treating it as though there were no solution to this problem other than purely the Eighth Amendment.

QUESTION: Ms. Hancock --

MS. HANCOCK: Yes?

QUESTION: -- was the claim you're advancing now ever raised in the state courts?

MS. HANCOCK: It was not raised in the state direct appeal where Petitioner was represented by different counsel, Your Honor. It was raised in state post-conviction Claim 5 of our habeas petition. It was rejected when the Supreme Court denied our writ by a vote of four to three without opinion -- the Louisiana Supreme Court.

QUESTION: So, you feel that the -- any requirement of raising the point on the state side first has been satisfied?

MS. HANCOCK: Yes, the state has not argued.

QUESTION: I know it hasn't.

MS. HANCOCK: Yes. Right. The State v. Willie,

and other Louisiana cases, affirm the Louisiana Court's willingness to entertain --

QUESTION: I'm a little surprised the state hasn't raised it, but apparently they don't want to rely on it.

MS. HANCOCK: Yes, the Louisiana law appears clearly to find -- to not use any kind of procedural default doctrine in this area of the law, Your Honor.

QUESTION: Was the Donnelly case relied upon in the proceedings in the Louisiana Court on direct review?

MS. HANCOCK: Not to my recollection, Your Honor. In order --

QUESTION: Ms. Hancock?

MS. HANCOCK: Yes?

QUESTION: Even if you assume that Caldwell was -- was old law not -- not new law, would it -- would it be compelled from a holding that when the judge misrepresents the sentencing law you have to have a new sentencing proceeding? Would it be compelled to say that when counsel misrepresents it you have to have a new sentencing proceeding?

MS. HANCOCK: Your Honor, the lines of authority we rely on -- and please tell me if this is not responsive -- but the lines of authority we rely on are two. The compulsion coming down upon the state courts is coming from Zant v. Stephens, the Ramos decision, decisions which focus

on the unacceptability of false information.

It's not a question of the jury relying on somebody, one actor or another, but false information being interjected into the jury's deliberations. And that false information was clearly something a state court would have regarded as unacceptable. Those decisions suggest that false information makes it -- would make a jury's verdict unreliable.

Then we have a second line. The Caldwell problem stands where two doctrines -- where two lines of authority converge. That second line is the Lockett and Eddings cases which suggest that a sentencer, namely the jury here, cannot be precluded from considering mitigating evidence fully, as is their responsibility.

So, it is those two lines of authority upon which re rely.

In looking at the substance of the Caldwell rule, it is important to note that it is a narrow one. It is a narrow rule for a rare problem. It is the rare prosecutor who engages in argument, such as the argument that one finds in this case which was clearly prohibited under ABA standards. Indeed, if this Court were to look at grants of Caldwell relief since Caldwell and before Caldwell, this Court would find that it is the rare prosecutor who engages in this error.

The narrow rule that is created to solve this narrow problem is as follows. The statements must be false and misleading. The statements need to refer to the non-finality of the jury's verdict, to go to the heart of the jury's function to talk about the jury's decision-making power not being final. A highly specialized kind of argument.

Third, and perhaps most important, those statements must be focused, unambiguous and strong. And, finally, they must uncorrected. It is possible that if they -- if they are corrected, that -- that even these kinds of statements will be regarded as ones which have been taken care of.

If one thinks about the narrow contours of the rule, several features of Caldwell are revealed. It is -- Caldwell error, this is -- highly damaging. A prejudicial -- a prejudice test is in effect built into the rule itself, unlike other rules.

QUESTION: Well, if -- if this was so highly damaging, Ms. Hancock, why didn't the defense lawyer object when it was made?

MS. HANCOCK: Your Honor, defense counsel in this case, as the record shows, and as the court of appeals in its panel opinion revealed --

QUESTION: -- which has been superseded, hasn't

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it?

MS. HANCOCK: Yes, that's right, but not this part of it.

QUESTION: You mean the -- the panel opinion remains dispositive of the case?

MS. HANCOCK: No, I merely want to illustrate to Your Honor's, question which I could directly answer better by saying that --

QUESTION: Well, why don't you?

MS. HANCOCK: -- the defense lawyer was not competent, Your Honor. He was only out of law school a few years. He was unqualified under state law to represent Mr. Sawyer. He waived his guilt-phase closing argument. He made a one-page closing argument at the sentencing phase.

Your Honor, this Court is not here today to decide the --

QUESTION: No, but you would think if this is such a terribly damaging thing, even a relatively unskilled lawyer would object to it.

MS. HANCOCK: Well, Your Honor, it may surprise you, but state cases before Caldwell did sometimes involve this fact pattern where a prosecutor would make these misleading statements. No objection would happen. The state courts would condemn the error and reverse. This is not a aberrational or exceptional case.

And in this case, Your Honor, there can be no fear of sandbagging or of strategy. The record shows plainly that this was a young inexperienced lawyer who made many mistakes and this was one of them.

Now, if you think about the features of the Caldwell rule, false and misleading, focused, unambiguous and strong, relating to the jury's responsibility, highly damaging, clearly this is error that is avoidable. Error like this is not something prosecutors will stray into, bump into in the heat of argument. This prosecutor went over into that forbidden zone and stayed there. And --

QUESTION: Ms. Hancock, it seems to me that you have to address the effect of this Court's per curiam in Maggio against Williams, decided in 1983, in which the Court summarily rejected a claim just like this.

MS. HANCOCK: Yes --

QUESTION: It makes it very hard to say that Caldwell is not a new rule in -- at least in -- in the view of this Court.

MS. HANCOCK: Well, counsel -- I mean, Your Honor, an answer to that question is provided by a glance at the district court's opinion in that case.

If you look at the district court's opinion what you discover is the counsel in that case made a Donnelly claim. In other words, the argument in that particular case

was very specifically that it was unfair, that it was inflammatory, that he made statements that were not allowed to be made under the scope of state law, the Code of Criminal Procedure. And he added -- blended, if you will -- the kind of inarticulate seed of a Caldwell claim by saying, well, and it also lessened the jury's responsibility.

Then that particular claim was abused, but the district court went ahead and considered it. And this Court held in the per curiam opinion that it was really too late for this counsel to be bringing up another claim which had been abused and, moveover, the district court acted properly in relying on Donnelly, as he did. And I believe the district court did act properly because that's the way the counsel painted it. It would not be appropriate to allow counsel to -- to make a claim that was really not made.

It was Justice Stevens in concurrence, who acting as perhaps defense counsel, might have or should have, noticed the -- the seeds of a Caldwell error, which in fact was at that time well established under all these state court precedents, was something that would be condemned.

When faced with the narrow problem of Caldwell error, state courts responded in the pre-Furman era and in the post-Furman era responded dramatically by condemning these kinds of arguments. They used the same reasoning that

was later adopted as Caldwell itself.

After Furman, state courts, mostly in the south, gave the same answer. They would not tolerate this kind of argument in a capital case. We have Georgia and South Carolina in 1975 -- pardon me, North Carolina. We have South Carolina and Louisiana in 1970 and 1980. Maryland, Mississippi, Kentucky, Oklahoma, more and more states join this group. And these states, in their opinions, relied on pre-Furman death penalty law logically, as well as on Eighth Amendment principles. They had two sources driving them toward the Caldwell rule.

If you are wondering how one can tell when state court decisions are informed by Federal principles, we would suggest two indicia which might be persuasive.

First, when state courts actually cite directly Eighth Amendment precedence, that suggests that they are cognizant of the Eighth Amendment principles and taking them into account and believe that they support the result.

And further, and most intriguingly, the use of these state court cases that were decided before Caldwell, when they come after Caldwell, they are treated interchangeably with the Caldwell opinion by the states. It's unusual, I would submit, for a state to treat its own decisions as though they were illustrations of a problem that was made up of Eighth Amendment law unless they really

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believe that those were the -- equal in significance, the same kind of decision, the same kind of law.

Your Honor, with regard to Caldwell, some of the characteristics which explain why Caldwell is old law also suggest strongly that Caldwell belongs in that small catalogue of rights under Teague which deserve retroactive application as bedrock rights.

While it is -- may usually be true that Teague's second exception was reserved for rights which are new, in fact, it's perfectly possible that a right that is very old may also be fundamental enough for Teague. And we submit there are two main reasons that Caldwell should belong in this bedrock rights category, as the ABA has suggested and as we argue.

First, Teague did establish some guidelines for bedrock rights. Those guidelines reveal that this Court will look to see whether a right has emerged over the years. Caldwell is one of those rare Eighth Amendment rights which did emerge and there was a powerful state consensus supporting it.

Second, Teague's guidelines focus on a few cases, cases that the Teague court suggest belong in the category, and Caldwell is similar to those kinds of cases, such as the Mooney case. And perhaps most importantly, the Teague opinion stressed with regard to bedrock rights the

significance of the liability and accuracy as the sort of the touchstone of the bedrock-right category.

QUESTION: Can you give me an example of any of our cases in the capital sentencing area in recent years that are not fundamental?

MS. HANCOCK: Well, Your Honor, that's a tough question since you've decided many cases and this is the first case to raise this question.

QUESTION: Well, but as you look back over our jurisprudence, it seems to me that most of them would fit within the guidelines you've just suggested. And if that's so, Teague's a dead letter.

MS. HANCOCK: I think, on the contrary, Your Honor, that Teague is not at all a dead letter, that Teague's demands are quite difficult to meet. And there are examples of rights which this Court might well find to be important, something that is necessary to a capital sentencing process, but not going to the heart of reliability. And --

QUESTION: Well, would you say that every capital sentencing procedure that reduces the risk of an unreliable determination falls within the second example?

MS. HANCOCK: Your Honor, that's a very difficult question to answer because whenever this Court writes Eighth Amendment opinions upholding defendant's rights, it is

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common for that to be said about the right, that they reduce the risk of unreliability.

However, that means that if the question to Your Honor's question is yes, then you have, and I have just accepted, a per se -- shall we say carte blanche -- validation of all Eighth Amendment rights into Teague. And I don't think that either Teague or Penry suggests that sweeping categorical judgments based on one line in an opinion would be enough.

Our position here is much narrower today. We would suggest that -- that the Teague inquiry should be conducted a case at a time. And one really has to think about the Eighth Amendment right in question. What does it do? What function does it serve? How close is it --

QUESTION: But it does seem your argument would sweep --

MS. HANCOCK: Oh --

QUESTION: -- in a great many of the --

MS. HANCOCK: Well --

QUESTION: -- of the criminal procedure rulings and I think that has to be a matter of concern. And, in any event, in this particular area, you certainly -- a defendant can fall back on the Donnelly due process claim if something is truly fundamentally unfair. Isn't that true?

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MS. HANCOCK: Yes. Let me address Your Honor's first observation and then speak about Donnelly.

Your first observation, may I answer and say that we are not making a sweeping argument. We are not seeking to have the words reliability in an opinion be the touchstone to a Teague solution.

Rather, we are arguing that Caldwell is almost unique, one of a small number of possible cases, because it has these features. It has already emerged right out of Skipper. One can think of other examples recently. Those rights are not as ancient as Caldwell. Finding 1877 support for some of this Court's Eighth Amendment rights is not automatically going to happen.

With regard to Donnelly, Your Honor, Donnelly was really the case that distracted and misled the Fifth Circuit majority blow. And yet -- and it is true that Donnelly and Caldwell do overlap. There are defendants who will be able to make claims under both categories.

However, the cases deal with vastly different problems. Donnelly relied on the -- so in fact the trial as to violate due process standard, which was not unique to closing argument. That was the standard of this Court used again and again for due process violations with regard to jury instructions, the admission of evidence. It was the garden variety due process expression of the test that this

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Court uses whenever an error is committed and the impact of that error needs to be weighed in light of the entire case.

A Donnelly situation involving a prosecutor, Your Honor, can happen in any case. The prosecutor can stray into an error, talk about something outside the record, say something bad about the defendant, and surely the due process test is appropriate for that kind of error for the same reason it fits all other traditional errors in all criminal cases.

The Caldwell test is for a different problem, a problem that is avoidable, a rare error, and the Caldwell test has a special prejudice component built into it. It must be false and misleading, focused, unambiguous and strong, et cetera.

QUESTION: Well, all of that lends support to the notion that it's certainly articulated a new rule.

MS. HANCOCK: No, Your Honor, superficially one might think that that is the case. But interestingly enough, Donnelly was not the basis for analysis that state courts used when they were perceiving the Caldwell error. In other words, Donnelly is a fair trial standard.

By the time Furman came down -- and surely after Gregg and in Lockett and Eddings and all the other Eighth Amendment precedence upon which we rely -- Donnelly standard is not in use. And the state courts are properly not even

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considering it.

Your Honor, we submit that the Fifth Circuit might very well -- the majority might very well have thought of Donnelly itself because they seem to decide Donnelly claims commonly coming up out of state courts. Whereas the Caldwell problem only comes along every once in awhile. State courts perceived that Donnelly and Caldwell treated very different problems and required very different solutions.

Thank you, Your Honor, I'll speak later.

QUESTION: Very well, Ms. Hancock.

Ms. Pendergast, we'll hear from you.

ORAL ARGUMENT OF DOROTHY A. PENDERGAST

ON BEHALF OF THE RESPONDENT

MS. PENDERGAST: Mr. Chief Justice, and may it please the Court:

The issue here -- here is the retroactivity of Caldwell v. Mississippi to Sawyer's case. Caldwell v. Mississippi cannot be applied retroactively because it is a new rule of law and it fits within -- it does not fit within the second exception of Teague v. Lane.

Caldwell is a new rule of law because it extended the Eighth Amendment to an area formerly regulated by due process and by state law. Before 1985, no case had addressed prosecutorial argument in the light of the Eighth

Amendment. Prosecutorial argument had always been dealt with under -- due process analysis or under state law analysis.

The prior cases of -- from Furman to 1985 from this Court dealt with the Eighth Amendment as applied to procedures by which states would impose a death penalty and dealt with substantive issues which should go before the jury, such as aggravating circumstances, mitigating circumstances, jury instructions and things that the court would tell the jury. But never before had argument, mere argument, been raised to the level of the Eighth Amendment until Caldwell.

Now, we know from this Court, most recently in Boyde v. California, that argument is considered different from jury instruction and evidence, that a jury is told that they are not to rest their verdict on argument that mere argument. Their verdict is to rest on evidence and on jury instructions.

And so, when we talk about argument, we are talking about a different entity from what the cases had dealt with prior to Caldwell. And there is no Federal case law to have predicted or dictated the outcome in Caldwell which applied the Eighth Amendment to prosecutorial argument. And we know that from Caldwell itself.

If we look at the Caldwell opinion, Justice

Marshall used Donnelly as a comparison, but then he used state law cases and the development of analysis on prosecutorial argument in the state law. Plus, he used the ADA standards. But there was no Federal case law for him to use that dictated the outcome in Caldwell.

Also, if we look to the various circuits, such as the Tenth Circuit and the Fifth Circuit, the Federal analysis up until 1985 of prosecutorial argument was under the due process clause. Even in Sawyer's brief they cite no cases, no Federal cases, which could have predicted Sawyer's outcome.

Nevertheless, this Court has just recently told us in Butler v. McKellar that when we look at a case on Federal habeas, that it is sounder to apply the law that was in place at the time that the conviction became final. Sawyer's conviction became final in July of 1983. In July of 1983, this Court issued two very critical opinions that are applicable to Caldwell and Sawyer. That is, California v. Ramos and Maggio v. Williams.

Now, California v. Ramos is the case where this Court sanctioned the California statute that okayed the governor -- the information that the governor could commute a sentence of life in prison. This Court said that that was not --

QUESTION: We -- we said it didn't violate the

Federal Constitution.

MS. PENDERGAST: Exactly, and that it was not an arbitrary factor. I -- a state court could have assumed that post-conviction -- in 1983 that it was okay to give the jury information on post-conviction procedures. In fact, the Mississippi Supreme Court in Caldwell used Ramos as a reason to affirm that death penalty. It was a four-four decision. And the four-member plurality used Ramos. The four --

QUESTION: In -- in this case to -- to affirm the conviction?

MS. PENDERGAST: Oh, no. In Caldwell, the Mississippi Supreme Court, it was a four-four decision. And the four dissenting justices did not quarrel with the use of Caldwell. They dissented based on state law.

The second case is Maggio v. Williams. And that was the case out of Louisiana where the prosecutor did tell the jury about the mandatory statute that mandates an automatic direct appellate review of death penalty cases. He used -- and he used that statute to tell the -- to urge the jury to vote for the death penalty.

When this Court reviewed it, it issued a per curiam opinion and said of the four issues on that case, the contentions warrant little discussion. But in the per curiam opinion this Court did review -- briefly review the

issues, and in response it acknowledged that the District Court had viewed the improper prosecutorial arguments under the Donnelly -- under the Donnelly due process and -- despite the fact that this could have been dismissed for abuse of the writ.

So, in 1983 this Court could have applied the Eighth Amendment to prosecutorial argument and it did not. And between 1983 and 1985, there were no Federal cases which predicted the outcome in Caldwell.

And that's my basic premise for arguing that Caldwell is a new rule of law if you look at the precedents out of this Court and out of the Federal circuits around the country up until 1985.

The petitioner urges this Court to rely on the development of the jurisprudence in various states in order to say that Caldwell is not a new rule. If this Court would rely on state court jurisprudence developed based on state law in order to say that Caldwell is an old rule, that would in itself would be a new rule for this Court and would be inapplicable to Sawyer here on collateral review. Because this Court as -- most recently as Dugger v. Adams, said that the availability of a claim under state law does not establish a claim that was available under the U.S. Constitution.

And I submit to you that the -- all of the state

cases that the petitioner does cite address improper argument based on state law or based on no argument at all. That some of the cases just merely say this argument was improper and they vacate the sentence or reverse the conviction. So that the state law -- if this Court says Caldwell is an old rule because of state law jurisprudence, that in itself would be a new rule and would be not available to Sawyer here on collateral review.

I also think that petitioner is misguided in using Butler v. McKellar as a guidance that that discussion of state cases in Butler supports their view of Caldwell being an old rule. In Butler v. McKellar this Court used the state court's interpretation of Edwards v. Arizona. So, what we have are state courts interpreting Federal constitutional law and coming to opposite conclusions. And this Court felt that then Robertson would be a new law.

But what petitioner has in her brief are state courts interpreting state law and coming to either similar conclusions or opposite. But what we don't have for Caldwell purposes --

QUESTION: Well, Ms. Pendergast, there certainly is an impressive array of cases from state courts showing a long history of condemnation of false and misleading prosecutorial arguments that diminish the jury's sense of responsibility. Isn't that so?

MS. PENDERGAST: That's so, Your Honor. But those cases were decided under a due process analysis, and they were not decided --

QUESTION: Well, does it --

MS. PENDERGAST: -- under an Eight Amendment --

QUESTION: -- does it indicate that at least the Caldwell rule comes close to being essential to fundamentally fair proceedings?

MS. PENDERGAST: No. Nevertheless, I argue to this Court that this does not qualify as a second exception, that it is not a watershed rule which implicates the fundamental fairness of the trial.

QUESTION: Well, that has to be your argument, of course. And yet it is ironic, isn't it, that today the rule would be the other way? And here's a capital case.

MS. PENDERGAST: Your Honor, I don't -- this case here does not rise -- arise to the level of -- the argument here does not rise to a Caldwell violation level if we -- if you look at the entire record. But --

QUESTION: Well, I have looked at the entire record, and I think I disagree with you mildly on that one.

MS. PENDERGAST: I can -- I do -- Caldwell is not a watershed rule. The watershed rules are right to counsel, right to due process, right to present a defense and the right to a fair and an accurate trial. A fair trial not

produced by mob violence. An accurate trial not based on perjured testimony.

When we look at the sentencing hearing --

QUESTION: Would you tend to say that a rule essential to the fundamental fairness of the proceeding could be a watershed rule?

MS. PENDERGAST: I think a watershed rule has to be essential to the reliability of the outcome of that trial and without which we feel like you would not have a reliable verdict. And my argument is that a Caldwell -- you -- it's an enhancement. You could have a Caldwell violation and still have a reliable verdict.

If I don't give a defendant a right to counsel, then I call into question the reliability of that verdict. If I don't allow a defendant to put forth a defense, the reliability of that verdict is totally unacceptable.

But a Caldwell -- you could have a Caldwell violation and still have a reliable verdict. It's an enhancement. Caldwell is a prophylactic rule that enhances the reliability. It's a prophylactic rule that reduces the risk of unreliability, whereas the right to due process is -- ensures the risk of reliability. A watershed rule is a positive statement which ensures the risk -- ensures the reliability of the outcome of the trial.

Caldwell is a prophylactic rule that does not --

that reduces the risk of the reliability of the trial. I liken it to hearsay. I think that the hearsay rule is a good analogy, because in the hearsay rule we do not let evidence in that is -- that has questionable reliability. And what is the point of excluding hearsay evidence but to reduce the risk of an unreliable verdict.

And yet, we have exceptions to the hearsay rule. When evidence has a high indicia of reliability, we allow it into -- in front of the jury, such as business records. Well, Caldwell is the same sort of rule designed to reduce the risk of unreliability. There could be exceptions to Caldwell. In fact, Ramos gives us a type of an exception to a Caldwell-type comment, that we can tell the jury something about post-conviction procedures. When, in fact, we could --

QUESTION: Well, does -- does Caldwell stand for anything more than the proposition that the information may not be misleading?

MS. PENDERGAST: It stands -- you cannot mislead the jury. The information may be improper, but it has to -- Caldwell says it has to mislead the jury.

QUESTION: So --

MS. PENDERGAST: So, you have two things --

QUESTION: So if you want to bring something under the head of Caldwell, I would -- I would think you would

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have to show that the information is -- is inaccurate or false.

MS. PENDERGAST: Yes, Your Honor.

QUESTION: And so that if one refers to -- to some further proceeding, and there is such a further proceeding, that information would -- would not be prohibited by Caldwell?

MS. PENDERGAST: I think Caldwell would not necessarily prohibit it. I think we could give jurors accurate information regarding post-conviction procedures. And perhaps --

QUESTION: At least -- if there was any constitutional objection to it, it would not be because of a Caldwell case?

MS. PENDERGAST: Probably not.

QUESTION: But counsel --

QUESTION: But that's misleading with respect to the Caldwell. I mean, it can't be misleading with respect to the jury's role --

MS. PENDERGAST: Exactly.

QUESTION: -- and responsibility.

MS. PENDERGAST: Exactly. Exactly. I submit to you --

QUESTION: Not just any type of other misleading information?

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MS. PENDERGAST: No, Caldwell addresses was the jury misled as to its role as sentencer.

And I submit to you one other idea that could lead us to a conclusion that Caldwell does not fit within the second exception and that is, we could eliminate argument from the sentencing hearing. Eliminate the argument, then you wouldn't even need a Caldwell and you could still suppose that these -- or believe that the sentencing hearing, after all the evidence is submitted, then we just send the jury away to make a determination without argument. And that sentencing hearing could be still reliable even without argument. So --

QUESTION: Yes. Yes, but I'm a little puzzled. There was argument in this case?

MS. PENDERGAST: Yes. Yes.

(Laughter.)

QUESTION: And it was misleading?

MS. PENDERGAST: I do not think this jury was misled.

QUESTION: You don't think that -- well, that isn't the question I asked. Maybe the jury wasn't because of the instructions that came in later. But the argument itself was misleading, would you not agree?

MS. PENDERGAST: I would not condone some of the things the prosecution said.

QUESTION: I know you wouldn't condone it, but would you agree it was misleading?

MS. PENDERGAST: Yes, I would agree that --

QUESTION: Thank you.

MS. PENDERGAST: -- some of it was misleading.

If this Court decides to do a merits analysis, I have -- I think we have to remember that several courts, including -- five courts reviewed the merits of this case and found that this jury was not misled.

The Louisiana Supreme Court did review this case on direct review. Under Rule 28, the Louisiana Supreme Court is mandated to review all sentencing hearings for passion, prejudice and arbitrary factors. And the Supreme Court did review this, although it did not address these remarks, in 1982. That same year the Louisiana Supreme Court did reverse two other cases for improper prosecutorial argument.

So, I submit to you that this Louisiana Supreme Court in 1982 did look at these arguments. In fact, it did address on its own the prosecutor's reference to pardon. And in Louisiana, the Louisiana Supreme Court has made it clear that in the death sentencing hearing, it is not necessary even for the prosecutor to object. They will look at anything and comb the sentencing hearing for any passion, prejudice or arbitrary offenses.

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QUESTION: You mean for the defense counsel to object, don't you?

MS. PENDERGAST: Yes, I do.

QUESTION: You just said prosecutor.

MS. PENDERGAST: I'm sorry. That the defense counsel does not even have to object in order for them to review what they consider would be passion, prejudice or arbitrary factors. So --

QUESTION: Why do you suppose here it was that the state court did give relief to the defendant?

MS. PENDERGAST: Because it did not rise to the height of a -- well, what we call now as a Caldwell violation. Because I think that when you look at the context in which it was said that these remarks are not so offensive as to reduce -- diminish the jury's sense of responsibility. I think the jurors were well educated from the voir dire, from the judge's instructions.

QUESTION: But you are -- you are making the argument that even assuming it would rise to the level of a Caldwell violation in our view, that the defendant should not get relief?

MS. PENDERGAST: Yes, I am. I think that when you look at the comments they were said in -- in a string. None of them were focused. These comments were not focused. They were said in the midst of an argument. They were said

-- references, brief references. No one was told this would be reviewed. It was said in a string of references in order to encourage the jurors to believe that people would support them no matter what they did, to alleviate some of their personal guilt for having to make this decision.

But the prosecutor did even undermine his own statements by saying -- so that I contend that the prosecutor gave conflicting remarks. The prosecutor said things like the decision is your hands. It is a difficult decision. You will decide. So, I think he undermined his own remarks that are complained of here today.

Also, it's very important that the court did not re-enforce this argument, that the court told these jurors before the penalty phase, that you -- that this will be a binding recommendation. The court said, "The jury in a capital case is given authority to make a binding recommendation to the trial judge as to the sentence that should be imposed."

And I think that if you look at the entire context in which these remarks were said and remember that the judge's instructions at the end of the guilt phase, at the end of the penalty phase, all encouraged the jurors to take their role seriously and emphasized that they would determine, that it was their decision to make. And I don't think that these jurors were misled by the brief innocuous

comments that this prosecutor said.

QUESTION: Would you agree that every judge on the Fifth Circuit felt there was a Caldwell violation?

MS. PENDERGAST: No, I would not agree to that.

QUESTION: And explain it for me.

MS. PENDERGAST: In the en banc opinion, we have -- the -- they review the case for prejudice and, if I may, Your Honor, the opinion says, "If Sawyer were able to show actual prejudice, he would be able to proceed under the more general fundamental fairness standard of Donnelly. Yet, Sawyer has not contended that such prejudice exists here and we, after a thorough review of the record, can find none."

And I submit to you, if they can find no prejudice under Donnelly, then certainly they did not find a prejudice under Caldwell, and that we have the panel decision which found two to one there was no prejudice under Caldwell. We have a district court judge found no prejudice under Donnelly or Caldwell. And I think there have been plenty -- then we have the district -- state district court judge which found no prejudice.

QUESTION: What's your understanding of the difference between the prejudice inquiry under Donnelly and under Caldwell?

MS. PENDERGAST: My understanding would be the same as the Fifth Circuit. That it would be like a -- an

intertwining of a Donnelly fundamental fairness error -- I mean -- excuse me -- a fundamental fairness analysis to decide -- like where you could -- would compare the facts of Donnelly and the facts of Caldwell with the facts of this case and to see if there would be a Caldwell-type error. Does it reach to the level of the objectionable elements of Caldwell? And then, if it does -- then, if it does reach that level, then we have to have a reversal.

QUESTION: And there is -- if it reaches that level, as you understand it, then there isn't a further inquiry as to prejudice?

MS. PENDERGAST: Right. That's how I understand the Fifth Circuit opinion, and I am urging this Court to affirm the Fifth Circuit opinion.

QUESTION: And -- and in your view, is that the new aspect of the -- of Caldwell rule?

MS. PENDERGAST: Excuse me, Your Honor, would you --

QUESTION: In your view, is -- is that the new aspect of the Caldwell rule?

MS. PENDERGAST: I think the new aspect of the Caldwell rule is the application of Eighth Amendment to argument, prosecutorial argument, which is -- it's such a different entity, never would we have --

QUESTION: You mean it's simply -- it's simply

the -- the -- the constitutional source of the rule, but not its application?

MS. PENDERGAST: Exactly. I think it's the fact that --

QUESTION: In application it's essentially the same as Donnelly?

MS. PENDERGAST: It's essential -- it incorporates Donnelly. It incorporates Donnelly to decide if there is --

QUESTION: Well, that sounds to me like an old rule.

MS. PENDERGAST: But the new rule part is that we have never before raised argument of counsel to the level of an Eighth Amendment violation.

QUESTION: Well, isn't a new consequence of Caldwell that if there is a Caldwell violation, there is no further prejudice inquiry. If there is -- in Donnelly there is a prejudice inquiry.

MS. PENDERGAST: Exactly. Exactly.

QUESTION: Well, that means the rule isn't the same, that just labelling it Eighth Amendment isn't the answer. That, in fact, the test is different.

MS. PENDERGAST: The test would be different --

QUESTION: What is your position?

MS. PENDERGAST: My position is that the test is different for an Eighth Amendment violation, and that we go

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to -- once we find that there is this error, then there is no test for prejudice and that would be the difference in a Caldwell. Specifically -- and that's what makes Caldwell a new rule, because the Eighth Amendment demands a heightened scrutiny and the reliability that this sentence of death is the appropriate sentence for this defendant in these circumstances for this crime.

QUESTION: Thank you, Ms. Pendergast.

Ms. Hancock, you have four minutes remaining.

REBUTTAL ARGUMENT OF CATHERINE HANCOCK

ON BEHALF OF THE PETITIONER

MS. HANCOCK: First, Your Honor, the -- the date of final conviction is this case was April 2nd, 1984. The Fifth Circuit unanimously treated that as the date properly under Teague. That was the date cert. was denied.

The state here suggests that the date should be July. If that were to be true, this Court would have to hold that when cert. is granted and a judgment is vacated, that's not a -- somehow that's a final conviction. Teague sensibly uses the cert. denied date, because it provides a bright-line boundary for the last opportunity for review of Federal questions following a state appeal. Now, Ramos was decided the same day that the conviction was final.

Second, it's quite clear that the Darden case in a footnote recognized the dramatic difference between

Caldwell error and Donnelly error. This Court established a wall between the two doctrines, recognizing the unique aspects of Caldwell.

Essentially the state's argument would do away with that wall, would blend back by various means the Donnelly analysis into a Caldwell inquiry, whether by modifying the correction standard or by other means.

The Fifth Circuit made a mistake that really was based on its belief that Caldwell added something to Donnelly. With all due respect for the Fifth Circuit majority, Caldwell dealt with a problem that was an old capital sentencing problem. Donnelly dealt with a problem that was a generic, fair trial, every kind of case problem. And when Caldwell came down, it ratified and echoed the consensus of what the rule should be for this old capital sentencing problem.

Thus, Caldwell didn't add something to Donnelly. It reinforced a particular line of thought about a particular problem, and it was really in some ways a coincidence that the two cases dealt with closing argument.

Finally, Your Honor, on the merits we submit that we have met the Caldwell standard, the Caldwell formula, which is strict and demanding, that we are similar to those rare cases where relief has been granted. And we seek to have this Court reaffirm Caldwell, reaffirm that wall

between the doctrines and grant a re-sentencing hearing where a verdict may be determined by a jury that is not misled about its sentencing responsibilities.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Ms. Pendergast. The case is -- oh, pardon me, Ms. Hancock.

The case is submitted.

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

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BY alan friedman

(REPORTER)