OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: SCOTT LESLIE CARMELL, Petitioner v. TEXAS.

CASE NO: 98-7540

PLACE: Washington, D.C.

DATE: Tuesday, November 30, 1999

PAGES: 1-54

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IN THE SUPREME COURT OF THE UNITED STATES

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SCOTT LESLIE CARMELL, :

Petitioner :

v. : No. 98-7540

TEXAS. :

- - - - - - - - - - - - - - - - - -X

Washington, D.C.

Tuesday, November 30, 1999

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:07 a.m.

APPEARANCES:

RICHARD D. BERNSTEIN, ESQ., Washington, D.C.; on behalf of the Petitioner.

JOHN CORNYN, ESQ., Attorney General, Austin, Texas; on behalf of the Respondent.

BETH S. BRINKMANN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for the United States, as amicus curiae, supporting the Respondent.

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P R O C E E D I N G S

(11:07 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 98-7540, Scott Leslie Carmell v. Texas.

Mr. Bernstein.

ORAL ARGUMENT OF RICHARD D. BERNSTEIN

ON BEHALF OF THE PETITIONER

MR. BERNSTEIN: Thank you, Mr. Chief Justice. May it please the Court:

The respondent effectively asked this Court to uphold, for the first time in its history, a retroactive change in the substantive criminal law. And both Collins, 497 U.S. at 45, and Miller, 482 U.S. at 433 and 434, indicate that the Court has never and should never approve a retroactive change in the criminal law.

QUESTION: Why do you call this a change in the substantive law, Mr. Bernstein, rather than a change in the evidentiary rules?

MR. BERNSTEIN: Well, I think both precedent and history indicate that it's a change in the substantive law. The statute itself, which appears at page 2 of our brief, is a statute about, quote -- about when, quote, a conviction is supportable, closed quote. So, it is clearly, by its own terms, a sufficiency of the evidence statute and not a mere evidentiary rule.

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KM was capable of testifying before the change in the statute and after the change in the statute. The question was whether her testimony was sufficient by itself.

There's perhaps no more --

QUESTION: Well, it was sort of a witness competency statute, wasn't it?

MR. BERNSTEIN: I -- I don't believe --

QUESTION: I mean, that's what it's dealing with. The witness was a witness before and after, but would Texas allow that witness to be a competent witness?

MR. BERNSTEIN: I don't believe so, Your Honor. I don't believe it was any more a witness competency change than the change in Fenwick's case, which is what Calder's fourth category referred to.

QUESTION: Well, I thought it was pretty close to Hopt where -- where convicted felons were originally not considered competent to testify, and then there was a change and they were.

MR. BERNSTEIN: Well --

QUESTION: And someone would have been convicted after the change but not before if that's the only witness.

MR. BERNSTEIN: Well, as Hopt makes clear, it four times distinguishes changes in sufficiency of the

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evidence from changes in evidentiary rules. All that was changed in Hopt was an evidentiary rule, who could testify. The rule --

QUESTION: Well, it was a witness competency issue, wasn't it?

MR. BERNSTEIN: Yes. Hopt was and this is not. In Texas, a 5-year-old can testify and is sufficient by themselves under the old statute, as well as under the new statute. One would not suggest that a 14-year-old is less competent than a 5-year-old. The rule goes to sufficiency of the evidence every bit as much as the rule of two witnesses for treason in Fenwick's case went to sufficiency.

QUESTION: Well, but the statute, the Texas statute, talks about the testimony being corroborated or not --

MR. BERNSTEIN: That's correct.

QUESTION: -- which is exactly what the -- some of the other witness competency statutes talk about.

MR. BERNSTEIN: I -- I don't believe so. I believe the witness competency cases went to whether the person could testify at all, not whether the testimony had to be corroborated.

QUESTION: Well, take -- take the traditional common law rule that you can't convict someone on their

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own confession without some corroboration. Now, would you call that an evidentiary rule or what you call a --

MR. BERNSTEIN: I would call that a sufficiency of the evidence rule. And in -- and in fact, in one of the footnotes we cite a lower court case which reversed, based on Calder's fourth category, that kind of situation.

QUESTION: You spoke of the comparability of Mr. Fenwick. Wasn't the -- the prior rule in Fenwick, which was, in effect, dispensed with, the rule that there had to be two witnesses to the treasonous act?

MR. BERNSTEIN: Yes.

QUESTION: That, it seems to me, is not the kind of rule that we have here because, as I read the -- the prior Texas statute, it didn't require a second witness to the sexual act. It simply required corroboration, and that corroboration, for example, might be the testimony of a -- of a doctor who would examine the victim afterwards and -- and so on.

So, if -- if the -- if your argument is that this is like -- the change here is like the change in the Fenwick situation, that seems wrong to me. Could you comment on that?

MR. BERNSTEIN: Sure. The rule stated in Calder's fourth category is broader than simply a change from a two-witness rule to a one-witness rule. It is a

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change in any sufficiency of the evidence rule so that less evidence is --

QUESTION: It is certainly written broader.

MR. BERNSTEIN: Right.

QUESTION: There's no question.

But do you agree that this is not a situation like Fenwick's?

MR. BERNSTEIN: Well, you do need a second witness here in that some form of corroboration --

QUESTION: But not a witness -- not an eye witness to the act.

MR. BERNSTEIN: Well, the -- there's a split in the Texas courts as to whether you need an eye witness. Two courts suggest you need an eye witness, and three courts --

QUESTION: I thought it was enough if there was an outcry. It was corroboration or outcry.

MR. BERNSTEIN: Yes.

QUESTION: If she had simply told her mother earlier, that would have been it.

MR. BERNSTEIN: Yes, but even that requires a second witness. It requires the second witness to come in and confirm that the outcry has been made.

QUESTION: No question. Any -- I mean, any evidence depends ultimately on a witness --

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MR. BERNSTEIN: Right.

QUESTION: -- to get the evidence in.

MR. BERNSTEIN: So, under the old rule, the testimony of KM was not sufficient by itself. You needed at least somebody else to come in and corroborate whatever corroboration means under Texas law --

QUESTION: Yes.

MR. BERNSTEIN: -- or to come in and testify that there was a timely outcry.

QUESTION: What about -- what about the corroboration here that the -- the defendant himself passed that note to his wife, adultery with KM?

MR. BERNSTEIN: Well, we believe the corroboration issue, for purposes of this Court, has been waived. As we pointed out in our reply brief, corroboration was not argued below by the State of Texas, and Calder v. Kentucky would indicate that when an argument has not been raised below, the respondent cannot raise it here. It was also not raised in opposition to the petition for certiorari.

QUESTION: Well, what about as a matter of Texas law, though, since we're talking about the nature of this thing? Would that -- is there a Texas case that says that sort of corroboration is not sufficient?

MR. BERNSTEIN: Well, I think --

QUESTION: Can you answer that question yes or no?

MR. BERNSTEIN: There are two Texas cases that indicate eye witness corroboration is required. So, if those were the Texas rule, that would not be sufficient.

QUESTION: Well --

MR. BERNSTEIN: Under other Texas cases, that would be.

QUESTION: -- but presumably the defendant is an eye witness.

MR. BERNSTEIN: Presumably the defendant is an eye witness.

QUESTION: And he has said, adultery with KM. Why isn't that good enough?

MR. BERNSTEIN: Well, I think the principal reason it's not good enough is because the issue was not waived below.

QUESTION: Well, but as I say, I'm not -- I'm not talking about what's before us in this particular ex post facto issue, but I'm trying to get some feel for exactly what the Texas statute requires.

MR. BERNSTEIN: It -- it might well be good enough. There is a split in the Texas courts, and that particular situation has not been presented. And in addition, there were many counts alleged here, and that -

- that note wouldn't necessarily go to these four counts, as opposed to the more recent counts which do not fall within the ex post facto challenge.

QUESTION: Mr. Bernstein, would the argument you're making carry over to a case where the evidentiary rule that was changed was the rule that a defendant could bring up the victim's past sexual conduct?

MR. BERNSTEIN: No, it would not, Your Honor. Hopt has made clear, as did Collins in a footnote, that mere changes in evidentiary rules do not fall within Calder's fourth category. That would not -- the situation you described would not be a change in a sufficiency of the evidence rule. It would just be a change in -- in what evidence could be admitted.

It would also be like Thompson v. Missouri in that regard, which admitted documents which had not -- which would not have been authenticatable under the prior rule.

Admittedly, the distinction here is a fine one between sufficiency of the evidence, on the one hand, which is substantive, which we submit cannot be changed retroactively, and evidentiary rules on the other hand. But it is a distinction recognized in every pertinent body of the law. It's recognized in Erie where sufficiency of the evidence is substantive, but evidentiary rules

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themselves are only procedural.

It's recognized in Conflicts of Law, and I would refer the Court to Restatement Second, Conflicts of Law, section 133 and 134, comments B to each, where sufficiency of the evidence is recognized as substantive.

And it's -- this distinction between sufficiency of the evidence and evidence is also recognized in double jeopardy law in this Court's leading opinion in Lockhart v. Nelson.

This Court has never suggested, in either the civil or the criminal context, that sufficiency of the evidence is procedural and not substantive. And it is substantive because it is intertwined, inextricably intertwined, with the very question of guilt.

QUESTION: But when you say -- as you say, the line is very difficult to draw. How about the case where someone is tried for treason and only one witness testifies to an overt act? Is that an evidentiary rule or a failure of the case for sufficiency of the evidence?

MR. BERNSTEIN: Well, the Fenwick's defenders -- and we submitted yesterday a lodging of relevant pages of the debate in Fenwick's case -- specifically took the position that a change in the required number of witnesses was a substantive change equivalent to a change in the offense itself and specifically said that such a change in

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the minimum amount of proof was an ex post facto change.

Essentially -- it's interesting -- 303 years later, we're having the same argument here that the English Parliament had in 1696 because the arguments raised by my colleagues from Texas that a change in the -- in the minimum amount of proof is simply procedural and simply a matter of form were made by Fenwick's accusers.

QUESTION: But Fenwick's case was very much a bill of attainder, was it not?

MR. BERNSTEIN: No. I think -- it was a bill of attainder, but it was --

QUESTION: They were out to get him. They weren't changing the general law.

MR. BERNSTEIN: It was a bill of attainder, but it was also an ex post facto situation. And the debates that we provided the Court with yesterday in the lodging make that clear, particularly on pages 255 and 256, 262, 282, and 283, 312, and 320. They say, the defenders of Fenwick -- the accusers of Fenwick took the State of Texas' position, but the defenders of Fenwick, who I think the court of history has sided with and who certainly Calder and Justice Story sided with in his Commentaries on the Constitution -- the defenders of Fenwick said changing the minimum sufficiency of the evidence is a substantive change and is equivalent to making a new crime, is

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equivalent to changing the offense.

And that makes sense from a policy reason as well because one of the key policies of the Ex Post Facto Clause is to keep the legislature out of the business of adjudication. And there's nothing that the legislature could do to more put its thumb on the scale than to change the standard for determining guilt.

And I would cite the Court to one other case. In Miller v. Florida, the issue there was the standard for determining sentence. The defendant in that case could have gotten the exact same sentence under the old statute. The only thing that changed was the legislature put its thumb on the scale and said, we're going to make it easier to give the longer sentence. But the longer sentence --

QUESTION: Mr. Bernstein, all of these cases seem to be quite far afield from what we're dealing with here. What the Texas law did was to make a witness fully competent who hadn't been fully competent before. You needed something more. And in the old days, you know, there were all kinds of rules ranking witnesses in terms of their thought of credibility, like two Jews equal one Christian.

It seems to me that that's -- that's the kind of rule we're dealing with here. This 14-year-old was regarded as not a fully competent witness, and then the

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legislature recognizes that she is a fully competent witness.

MR. BERNSTEIN: Well, but the same would have been true in Fenwick's case. The single witness was recognized as not fully competent by himself to sustain a conviction.

And I agree with you, Justice Ginsburg. The old law may well have been outmoded, stereotypical, and a very bad policy choice. But the point is it was wrong as a substantive policy choice. And what ex post facto law teaches is when a legislature changes its substantive policy choices, it must change them prospectively and not retrospectively.

QUESTION: But I don't see how you can call it substantive, if it's just going to witness competency. It's just labeling something rather than thinking through what it really is.

MR. BERNSTEIN: I think it is more than labeling because it is the rule here. It was the rule on adjudication of guilt. It was the standard. A -- to quote the statute, a conviction is not supportable absent both the victim testifying and either corroboration or outcry.

That's different than an evidentiary rule. If it were just an evidentiary rule and there were an error

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on appeal, you would have a retrial. Under this rule, if there is insufficient evidence because there was no corroboration or outcry, you have acquittal, which is another example of a substantive difference versus just a procedural difference.

QUESTION: Well, the statute is -- is set out in the Texas courts -- I mean, it doesn't read quite the way you say. It says, a conviction under -- is -- is supportable --

MR. BERNSTEIN: Right.

QUESTION: -- on the --

MR. BERNSTEIN: Is supportable only if.

QUESTION: It doesn't say, only if.

MR. BERNSTEIN: Well, it says if the victim informed any person, other than the defendant.

QUESTION: Well, I'm simply suggesting that if you're going to quote a statute, you should probably do it in hic verba.

MR. BERNSTEIN: Absolutely, Your Honor. The statute says, a conviction is supportable on the uncorroborated testimony of the victim of the sexual offense if the victim informed any other person within 6 months. I would submit that is substantively indistinguishable from a statute that says that a conviction is supportable only if there's corroboration or

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outcry in addition to the victim testifying.

And to return to the judicial function versus the legislative function --

QUESTION: Well, let me ask a question about this witness -- as I understand it, this witness was competent before.

MR. BERNSTEIN: Sure.

QUESTION: The witness could testify before.

MR. BERNSTEIN: Absolutely. If this -- under the old statute, if there had been a second witness, ready to testify, just like in Fenwick's case, and that witness got waylaid or didn't make it to the court, the court wouldn't say, well, this witness is incompetent. The court would say, we have insufficient evidence and we must dismiss.

QUESTION: What is the law in Texas in respect to a person who's not a minor accused -- a person accused of a crime involving a victim who's not a minor?

MR. BERNSTEIN: There is still a corroboration or outcry requirement for those above 18.

QUESTION: I don't know whether to think about this as a witness -- as a witness qualification case, in which case I guess you'd have a hard time, or to think of it as a change in the amount of proof case, which is what you're arguing.

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MR. BERNSTEIN: It's --

QUESTION: So, looking at it in context, I don't know what to make of the context. It's certainly an odd system that says, where the child is the victim, you can go on uncorroborated testimony.

MR. BERNSTEIN: Right.

QUESTION: But where an adult is the victim, you need either corroboration or outcry.

MR. BERNSTEIN: Right.

QUESTION: Is there any rationale for that?

MR. BERNSTEIN: I -- I think there is no competency rationale for that. The notion that a 5-year-old is more competent than a 25-year-old or a 35-year-old makes no sense. So, the statute clearly is not a competency statute. It is a statute about when do -- when does the legislature have sufficient confidence that there is minimally sufficient evidence to convict someone.

QUESTION: In other words, you're saying that -- is this right -- that with an adult who's a victim we think, for whatever set of circumstances, whether right or wrong -- and they may be wrong in my opinion or yours or somebody else's and right in theirs. But whether right of wrong, the victims here -- we're going to need special, extra evidence. But where it's a victim at stake who's a child, it's so serious we don't need that special, extra

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evidence.

MR. BERNSTEIN: When the -- when the victim under the current statute is below --

QUESTION: I mean, that's -- that's the way you want me to look at this statute.

MR. BERNSTEIN: -- 18, yes. And there are many States that have eliminated corroboration for victims over 18.

I mean, the -- but I think that it's also important to remember that Calder's fourth category is a bright line rule. I think the -- the greatest value of the four Calder categories is that they are bright line rules.

QUESTION: Well, but we've already seen that this is scarcely a bright line rule since both from the bench and -- and I think your response, it's very difficult to draw the line you're talking about.

MR. BERNSTEIN: I don't think it is difficult to draw the line. I think, as I mentioned in those four or five areas of law, all those areas have treated sufficiency of the evidence as substantive, and evidentiary rules only, such as Justice Ginsburg's example, as procedural.

QUESTION: Well, yes, but the -- the trick is in the classification.

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MR. BERNSTEIN: Well, even Texas --

QUESTION: I mean, Justice O'Connor suggests that you don't just get where you want to go by labeling.

MR. BERNSTEIN: Well, even Texas in their brief said at page 18, I believe, that this is a sufficiency of the evidence rule. And it has all the characteristics of the sufficiency of the evidence rule. Failure to satisfy the rule requires acquittal, not a new trial. Failure to satisfy an evidentiary rule requires a new trial. Failure to satisfy a sufficiency of the evidence rule requires acquittal.

QUESTION: Mr. Bernstein, would you clarify one thing? You said something about 18 was the dividing line, but this child was -- wasn't she 14?

MR. BERNSTEIN: Under the new statute, 18 is the dividing line. Under the old statute --

QUESTION: But she wasn't trusted as -- isn't that basically what it is? If it's a child of 5, we think that she couldn't possibly have consented or wanted this, and when 14 was -- Texas once thought was the age at which the victim becomes incredible.

MR. BERNSTEIN: Under the old statute, but even now under the new statute, the younger the victim is, the more power that one witness' testimony has.

QUESTION: Let's go in again to your statement

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about the difference between the new trial and -- and the judgment of acquittal. In what cases do you say that the -- an evidentiary rule would require simply a new trial or where there was not -- the witness was incompetent?

MR. BERNSTEIN: Well, that's the rule in Texas that an evidentiary error only requires a new trial and not an acquittal, and it's also the rule --

QUESTION: Suppose in -- suppose in Texas you had a -- a -- this second witness who testifies, but then on appeal, that testimony is stricken because of hearsay or something like that, no confrontation. New trial then or?

MR. BERNSTEIN: Well, actually this Court has a double jeopardy precedent exactly on point, Lockhart v. Nelson, which holds that in that circumstance where there is an evidentiary error and the remainder of the evidence is by itself --

QUESTION: Insufficient.

MR. BERNSTEIN: -- insufficient, new trial. Not -- not -- it does not violate double jeopardy to have a new trial in that circumstance.

QUESTION: Well, so -- so then doesn't that indicate that this could be something other than a substantive rule?

MR. BERNSTEIN: No, because under Texas law --

and we cite these cases in our brief, both our opening brief and our reply brief, under the -- both the old statute and the new statute, when it's not satisfied, the -- the required remedy is acquittal and the required remedy on appeal, when it's ruled it's not satisfied, is remand for judgment of acquittal. So, it is not treated as merely an evidentiary error under Texas law. They don't send it back and say, now let's see if you can come up with your second witness.

QUESTION: What are we dealing with here? This -- this -- your client I guess was convicted of several counts.

MR. BERNSTEIN: Yes, 13.

QUESTION: And we're dealing here with only some of those counts?

MR. BERNSTEIN: Only four of those counts. Some of those counts -- some of the other nine counts were before the victim had an age under 14 and so did not need corroboration or outcry under -- under either statute, and some of the later counts are after the statutory change. There may be an argument on remand about whether overruling the four counts here has some spill-over effect on those counts, but that was not sought by the petition and that's not before the Court.

QUESTION: And the underlying goal of the Ex

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Post Facto Clause you think is served by adopting your position here?

MR. BERNSTEIN: I -- I think three purposes.

QUESTION: If so, how?

MR. BERNSTEIN: Well, I think, as I said, the ex post facto jurisprudence of this Court has always recognized this substantive versus procedure distinction. I won't belabor that.

The second --

QUESTION: I -- may I interrupt? It seems to me in Collins we said that -- that that distinction is not very useful, didn't we?

MR. BERNSTEIN: I think Collins was addressing something else. A number of earlier cases had suggested that procedural rules, if they provided substantial protection -- in other words, a lot of protection, if they helped a lot, if they worked a lot to the advantage of the defendant -- were not covered by the Ex Post Facto Clause. But the Court in Collins, I believe at page 45, made clear that substantive rules -- and I realize the two words are close, substantive and substantial -- are -- are in a different category than procedural rules that help a lot.

QUESTION: I interrupted you when you were answering Justice O'Connor's question.

MR. BERNSTEIN: Yes. In addition, to the

substantive versus procedure distinction, which I think is important --

QUESTION: Well, I -- I was really hoping you'd address the underlying goals of the clause.

MR. BERNSTEIN: Sure.

QUESTION: What are we trying to protect people from?

MR. BERNSTEIN: I think we are trying in this case to protect the system from the legislature putting its thumb on the ultimate adjudication of guilt for past conduct. Obviously, they can put their thumb on the adjudication of guilt prospectively. They can define --

QUESTION: Well, this isn't a very sympathetic case with somebody who's been abusing his stepdaughter.

MR. BERNSTEIN: This is --

QUESTION: So, we're concerned because he should have known that she was over 14?

MR. BERNSTEIN: This is a very unsympathetic case, I would agree, based on the findings below. But the ex post facto jurisprudence of this Court indicates it doesn't matter how unsympathetic the case is. It doesn't matter how bad the old rule was. Both Story and Harlan, in quotes we have in our brief, say that. If you recognize a bad crime or a bad man or a bad, old rule exception to the Ex Post Facto Clause, you might as well

lift the clause out of the Constitution because the legislature always believes it's changing a bad rule for a good rule, and the legislature always believes that its substantive changes --

QUESTION: But, Mr. Bernstein, if the -- one of the prime bases, I think you would agree, for the ex post facto bar is it's not fair to have a crime be one thing when the defendant commits it and another when he's subject to conviction. Now, here there can't be any question about fair warning or notice to the defendant. He couldn't have anticipated that the child wasn't going to tell her mother.

MR. BERNSTEIN: It is correct, Your Honor, that one of the important concerns is reliance, and it is also correct that we do not raise a reliance argument. But as Miller v. Florida and Weaver make clear, reliance is not the only concern. This concern about separation of legislative and judicial functions is cited in both Miller v. Florida and Weaver v. Graham, and it traces actually back to Calder, which mentions on page 389 this concern that we do not want legislatures changing the ultimate standard for adjudicating guilt for past offenses any more than we wanted legislatures changing the ultimate standard for determining the sentence in Miller v. Florida for past offenses.

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QUESTION: But here, Mr. Bernstein, unlike the Fenwick case where they wanted to get this person, there's no indication that any -- that the legislature was doing anything but updating its rules of evidence, bringing them in line with the more modern trend.

MR. BERNSTEIN: I would agree, Your Honor, there's no indication that they wanted to get Carmell, but I believe that the clause and the purpose of the clause, especially as rephrased by Justice Story, goes to a change in a rule of sufficiency of the evidence that -- that category four is not limited to attainder cases. And I think the citations that we gave to Fenwick's debates -- to the debates in Fenwick's case show that Fenwick's defenders made the additional argument that Chase was right to view that as an ex post facto case. They made the additional argument that the change in the rule itself, separate and apart from the attainder considerations, was a legislative practice that should not happen, and we think that was adopted into the Constitution.

QUESTION: Does it matter that in the -- in the attainder -- or in the treason cases, the individual who commits his treasonous act very carefully in front of one witness only knows that he has a defense, whereas here, as was pointed out a moment ago, when these acts are

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committed, the -- the putative defendant has no way whatsoever of knowing --

MR. BERNSTEIN: But Fenwick didn't --

QUESTION: -- whether there is going to be a defense?

MR. BERNSTEIN: But Fenwick didn't know that he had a defense. He apparently committed his treasonous act in front of two witnesses. He just caused the second witness to abscond. In fact, in Fenwick they had an out-of-court declaration from the second witness.

QUESTION: No, but the -- at the -- I suppose the core of the -- of the old treason rule did, in fact, give a defense and give a person a right to rely defensively upon his care in -- in committing his arguably treasonous act or making the treasonous statement in front of one person only --

MR. BERNSTEIN: I don't --

QUESTION: -- whereas, there's no comparable argument that can be made here.

MR. BERNSTEIN: I don't think it went to reliance and there's no indication of a reliance interest in the debates in parliament in Fenwick's case. I think it went to a legislative determination that this is such a serious offense that we need a heightened amount of evidence. Now, as I say, legislatures can change that

determination, but Calder's fourth category and the debates in Fenwick and Justice Story would indicate that they can't change it retroactively.

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

QUESTION: Very well, Mr. Bernstein.

General Cornyn, we'll hear from you.

ORAL ARGUMENT OF JOHN CORNYN

ON BEHALF OF THE RESPONDENT

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

The State of Texas respectfully submits that this Court cannot reverse Carmell's convictions at issue here today consistent with Collins v. Youngblood, which this Court decided just 9 years ago. As the Court noted in Collins, the language in category four of the Calder formulation by Justice Chase was not intended to prohibit application of new evidentiary rules in trials for crimes committed before the changes, citing this Court's decision in Hopt and in Thompson v. Missouri.

Indeed, in 1925 when this Court was confronted in Beazell with a ex post facto case, it omitted entirely the fourth category in the Calder formulation.

QUESTION: Well, it depends on what you mean by evidentiary rules, and -- and the normal meaning I think

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is -- is what evidence is admissible and what isn't admissible. This is not that kind of a case. This evidence was admissible before and it was admissible after. It goes to, you know, the sufficiency of the evidence. I wouldn't normally call that an evidentiary rule.

MR. CORNYN: Justice Scalia, I believe this is equivalent to the Court's decision in Hopt where previously the testimony of convicted felons was not permitted to support a conviction and then later that -- that was taken away. So, it was --

QUESTION: Well, that is an evidentiary rule. The evidence couldn't come in before and it could come in afterwards. It's a rule pertaining to the exclusion or admission of evidence, but it wasn't a rule as to how much evidence you need to convict of the crime. Isn't that a basic distinction?

MR. CORNYN: As I understand this Court's -- this Court's writings, the only sufficiency rule that's of constitutional dimension would be the requirement of proof beyond a reasonable doubt.

QUESTION: Do you agree with Mr. Bernstein that under Texas law under the previous statutory regime, that if there was a conviction without the extra -- without the second witness, it then goes up -- it's reversed for that

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reason -- there can be no new trial?

MR. CORNYN: It would result in an acquittal. Yes, sir, I do agree with that.

QUESTION: Well, that does indicate it's a sufficiency of the evidence problem under Texas law at least.

MR. CORNYN: Well, we would suggest that you can -- we -- the same problem I think that -- that counsel and I and the Court perhaps are struggling with over whether this is a competency or sufficiency rule is the same problem the Court has had and -- and counsel have had over the years dealing with whether mere procedural changes are excepted from the ex post facto rule.

QUESTION: But -- but doesn't his argument that a reversal for want of the required witness commands an acquittal show that under Texas law at least this is a -- a sufficiency of -- of the evidence problem?

MR. CORNYN: We do believe it is a sufficiency rule but not one of constitutional significance.

QUESTION: What -- what is the difference? I mean, suppose that -- it's hard to imagine an example, but suppose a State had a rule that in certain cases you had to have proof stronger than a reasonable doubt, double reasonable doubt, beyond a shadow of a doubt, and then one day they changed it and made it just ordinary reasonable

doubt. Would that invoke ex post facto in your opinion?

MR. CORNYN: I don't believe so, Your Honor. I --

QUESTION: So, you think there is no such thing as sufficiency --

MR. CORNYN: The only --

QUESTION: -- under the ex post facto --

MR. CORNYN: Under the ex post --

QUESTION: You're saying even if it has to do with sufficiency completely and only --

MR. CORNYN: We believe that --

QUESTION: -- it's still the ex post -- why not?

MR. CORNYN: Excuse me.

Justice Breyer, we believe that's now -- that sort of protection provided to an accused in the criminal case is now provided under the Due Process Clause under this Court's decision In re Winship that the -- assuring a criminal defendant a proof beyond a reasonable doubt is the constitutional standard.

QUESTION: And in the treason case? I -- I have your answer to that. I -- I understand it. Thank you. What about the treason case?

MR. CORNYN: In the -- in the case of Sir John Fenwick?

QUESTION: Well, no, just imagine that a statute

says you have to have two witnesses and they change it and say you don't have to have two witnesses.

MR. CORNYN: We believe that would be a -- a sufficiency rule and really no different than if the court -- excuse me -- the legislature decided to change the rules allowing the admission of the hearsay, certain kinds of hearsay evidence. Certainly under a previous rule that would exclude that evidence, if the legislature or the court -- and depending on the jurisdiction -- decided to promulgate a new rule which allowed the admission of what heretofore had been hearsay evidence which would --

QUESTION: General Cornyn, could you comment on this aspect? This is a -- this is a very interesting and tricky case, but one of the things that seems to run through the cases your opponent relies on is that they are crime-specific to the particular crime at issue, whereas the rules you rely on seem to me changes in the rule that apply across the board like all convicted felons can testify and changes in hearsay. Do you think that's a possible valid distinction?

MR. CORNYN: No, Justice Stevens, I don't believe that that is a valid distinction in the sense that one would be prohibited and one would be allowed. We believe all changes in the rules of evidence would be allowed, as this Court said in Collins.

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Indeed, although I'm not aware this Court has ever had occasion to decide, under an ex post facto challenge, the specific validity of Federal rule 412, the Federal rape-shield rule, 413 allowing for evidence of similar crimes in sexual assault cases, and rule 414 providing for evidence of similar crimes in child molestation cases, we think that those kinds of rules, which have been indeed upheld as against an ex post facto challenge by lower courts, would certainly be permitted under this Court's rulings and particularly under the -- under the Collins decision.

QUESTION: Well, General Cornyn, you -- you appear at least to be acknowledging that you think in this case the legal change that was made affected the sufficiency of the evidence that was required. You -- you go that far.

MR. CORNYN: Well, only in the sense --

QUESTION: Yes? You acknowledge that I think here in Court and in your brief.

MR. CORNYN: Yes -- yes, Your Honor.

QUESTION: But you go on to say, but it's not constitutionally significant.

MR. CORNYN: That's correct, Your Honor.

QUESTION: Well, what kind of a line should we draw then? How do we know when it's constitutionally

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significant if that's the line? Your opponent says the line is whether it's an evidentiary change or a sufficiency of the evidence change.

MR. CORNYN: We believe --

QUESTION: And there's some justification in our jurisprudence for that line. But you apparently want us to draw a different one, and what is it?

MR. CORNYN: We believe in either of those cases, whether you label it a sufficiency of the evidence question or an incompetency question as the Court has cited in Hopt, that they would not violate -- those kinds of changes would not violate the Ex Post Facto Clause.

As a matter of fact, this Court has never struck down a legislative enactment as violative of the fourth category in Justice Chase's Calder formulation. And in fact, over the years, as the Court has had occasion to rule in ex post facto cases, it has, as I said, in Beazell omitted the fourth category entirely in 1925, and then of course, in this Court's decision in Collins, not only made the Ex Post Facto Clause's coverage more succinct as covering only alterations in the definition of crime or in the increases in punishment, but explicitly said that changes in the rules of evidence should not be banned by the Ex Post Facto Clause.

QUESTION: General Cornyn, you -- you cited

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Beazell twice and it did not mention the fourth category, but it did say that changes in rules of evidence can be applied retroactively if they -- and this is the Court's words -- operate only in limited and unsubstantial manner to defendant's disadvantage. And here one couldn't say that about this rule because it was a difference between enough evidence to convict and not enough evidence to convict.

MR. CORNYN: Well, we do believe, Your Honor, Justice Ginsburg, that this did operate in a -- in a general manner that was permitted under the Ex Post Facto Clause. None of the core concerns that animated the Founders' adoption of the Ex Post Facto Clause as it applies to the States --

QUESTION: May I call your attention to one other thought, General Cornyn? You -- you stressed the fact that some of our opinions just kind of ignored the fourth category in -- in Calder. But in Collins itself, the Court concludes the holding in Kring can only be justified if the Ex Post Facto Clause is thought to include not merely the Calder categories, but any change which alters the situation to a party's disadvantage. Doesn't that suggest that all four Calder categories have vitality?

MR. CORNYN: Justice Stevens, we believe that

the fact that the Court overruled Kring and Collins, as it did Thompson v. Utah, represents a contraction or at least, if not a contraction, a more succinct statement of the coverage of the Ex Post Facto Clause which we believe is more faithful to the original understanding of the Framers, as the Court stated in -- in Beazell.

None of the core concerns which animated the Founders' adoption with ex post facto law-making are present in this particular case.

QUESTION: What are those core concerns? I mean, let's take the third category. Every law that changes the punishment and inflicts a greater punishment than the law annexed to the crime. There's no reliance interest there. The person, when he -- when he did the deed, knew it was wrong, knew it was unlawful, knew -- knew it -- it was punishable, and just increasing the -- the penalty -- I think that's an insignificant reliance interest, that he didn't expect to be punished that much. Certainly we wouldn't take account --

MR. CORNYN: I would agree, Justice Scalia, that that would not serve a -- a reliance interest, but it would -- it would concern the vindictive law-making aspect.

QUESTION: Well, what -- what if the legislature changed the penalty from a maximum of 1 year to a maximum

of 20 years?

MR. CORNYN: Well, I believe that would be prohibited under --

QUESTION: Well, but would you say that -- there was some reliance interest, that someone might go out and commit a crime -- I'm willing to serve a year for it, but I'm not willing to serve 20 years for it?

MR. CORNYN: Perhaps, Your Honor. It's hard to imagine, but perhaps. Certainly the elements of the crime, as defined by the legislature and as is present here, have not changed. The facts required for the prosecutor to prove in order to obtain a conviction were exactly the same. The only requirement of the Texas -- of the Texas statute under some circumstances is that there be corroboration. And, of course, out of the 15 counts of the indictment, upon which Mr. Carmell was convicted, we're talking about 4 here which occurred during a period of time after she turned 14.

QUESTION: Can we assume in this case, if we take it as a beginning point -- and you may argue about it, but if we take as a beginning point that it is an ex post facto law to lessen the government's burden of proof, do you lose?

MR. CORNYN: I do not -- I do not believe that we lose under those circumstances. Indeed, lower courts

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have certainly confronted that in dealing with, for example, the rape-shield laws in interpreting this Court's decisions in Hopt, Thompson v. Missouri, have said that that is not an ex post facto violation. Under, of course, the Court's decision in Hopt, where previously convicted felons could not testify and then could testify, that sort of more ready admission of evidence to support a conviction was found --

QUESTION: Again, from a policy standpoint, I'm trying to understand the purposes of the Ex Post Facto Clause. It seems to me that if the burden of proof that the government must meet cannot be lessened, this falls under that -- that same rationale.

MR. CORNYN: I believe, Justice Kennedy, it really relates to the mode of trial and the sort of practices that this Court has typically called procedural, that is, what evidence is going to be admitted, the sort of changes that the Court has certainly approved, which is labeled procedural, which have operated to the distinct disadvantage of criminal defendants in Daubert in 1977 involving a change in the death sentencing procedures, Mallet v. North Carolina where the Court upheld a change in the law which permitted the State to appeal which it had not been -- had that right previously.

Of course, in Beazell where felons were required

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to be tried separately and then -- and thereafter were allowed to be tried jointly, all of -- all of these cases, Collins, which allows the appellate court to reform an unauthorized verdict -- all of those have operated to the distinct disadvantage of the defendant, but have been labeled procedural rules which affect the mode of the proceedings and do not go to core concerns that the Framers sought to protect under the Ex Post Facto Clause.

QUESTION: Your basic point in answer to Justice Kennedy is you say a rule of law that made it tougher to convict somebody by raising the burden of proof, if we could imagine such a thing, would not fall within the Ex Post Facto Clause.

MR. CORNYN: I believe that's correct, Justice Breyer.

QUESTION: Then if that -- if we don't accept that, then do you lose on the ground that this -- is that -- in other words, I'm trying to see if that's the basic issue. If -- if it is the case there could be some substantive rule, you know, of amount of proof that would fall within the Ex Post Facto Clause, then would you lose on the ground that, you know, as they argue, this is such a case? This is a case involving the amount of evidence, et cetera.

MR. CORNYN: I don't believe we would lose in

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that -- in that case. I think this is really more -- and if I understand Justice Kennedy's question, the question is whether if -- if the change in the rule allows more evidence to be admitted than had heretofore been allowed, this Court has already answered the question in -- certainly in the Hopt case and in Thompson v. Missouri where it says the fact that more evidence is allowed, or conversely in the rape-shield context lower courts have said the fact that less evidence is allowed in terms of questioning the reputation of a -- of a complaining witness --

QUESTION: But this isn't a question of more evidence being allowed. It's a question of how much evidence is required for a conviction. It's a quite different question.

MR. CORNYN: Justice Scalia, I -- I don't see the difference between what we're talking about here and, say, a change in the hearsay rules, such as I mentioned earlier, which would exclude certain testimony that would have been required for a conviction which --

QUESTION: But the difference is you get exactly the same evidence in two separate trials, one conducted before the stat and one -- one, you get an acquittal; the other, you get a conviction. So, it's really not just an evidentiary rule.

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MR. CORNYN: Well, we -- Justice Stevens, we disagree with -- with the amicus, the National Association of Criminal Defense Lawyers, which suggests the fact that it's case dispositive in the sense that in one case you get an acquittal; one, you get a conviction.

QUESTION: I know, but the point is it's case dispositive on the same evidence, whereas all these other cases, you say, well, the difference in the rule, let more evidence in or kept some evidence out, but here you've got exactly the same evidence in two cases. In one you get an acquittal; in one -- one, a conviction.

MR. CORNYN: Perhaps a more significant distinction that I should make is the fact that under Texas law corroboration need not duplicate the testimony with regard to the elements of the crime, but only tend to connect the accused with the crime. So, it need not, in that sense, be more evidence from the standpoint of bolstering the testimony, but really I think relates to the historical skepticism with which the testimony of a -- - a child sex abuse victim has been -- has been considered.

QUESTION: What -- what do you make of the fact that if there is a conviction without the adequate amount of evidence, as required by the statute, on appeal that conviction will not only be set aside for a new trial, but

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the conviction will be reversed and the defendant will be released as -- as having been tried and found not guilty? Whereas, if there's just an evidentiary mistake, in Texas as elsewhere, if there's been a conviction, the defendant can be retried again. Is -- is that a correct statement of Texas law?

MR. CORNYN: I believe it is and --

QUESTION: Well, that seems to me to indicate a -- really a significant difference between rules of evidence and -- and the rule that's at issue here.

MR. CORNYN: It could only, Justice Scalia, represent some anomaly of -- of Texas law and some difference in treatment of the lack of evidence under Texas law as opposed to other jurisdictions --

QUESTION: Well, let's assume that the neighboring jurisdiction, New Mexico, treats it as -- as procedural. I -- I suppose that we could have a Federal ex post facto rule that is different between the two States. We accept the State's characterization of its own law. Or is that incorrect?

MR. CORNYN: Well, no, no. The -- our characterization of this law is that it -- that it is procedural. It is an evidentiary rule change and does not violate the Ex Post Facto Clause. And so, to the extent the Court would defer to the interpretation of the State,

insofar as the -- the coverage of its rule, then -- then we would suggest that the conviction should be upheld.

If there are no more questions, for all these reasons we would ask the convictions be affirmed. Thank you.

QUESTION: Thank you, General Cornyn.

Ms. Brinkmann.

ORAL ARGUMENT OF BETH S. BRINKMANN

FOR THE UNITED STATES, AS AMICUS CURIAE,

SUPPORTING RESPONDENT

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

A law such as article 3807 that eliminates a requirement of victim corroboration does not violate the Ex Post Facto Clause because it does not expand the definition of the crime and does not increase the punishment.

The label of substantive here that petitioner attempts to place on the law is not useful. It's really beside the point. His emphasis on the fact that this defendant would have been entitled to an acquittal is not dispositive.

In Collins, the Court overruled Kring v. Missouri, and that was exactly the situation in that case. A plea to a second degree murder conviction stood as a

complete acquittal to a first degree murder prosecution. And under the first rule in effect the defendant would have been able to go back and be acquitted of first degree murder. Yet, that law was changed and originally the court in Kring held that that violated the ex post facto to apply it. But in Collins, the Court overruled that and that was the proper --

QUESTION: But I suppose Mr. Bernstein's point and our discussion in this context is just to show that this is a sufficiency of the evidence rule, and if you accept that, then does petitioner prevail here?

MS. BRINKMANN: No. I have to say I think that label is also unuseful. Unfortunately, Justice Kennedy, this change in the law only went to one manner of obtaining a conviction here. It was only in cases in which victims testified. The State of Texas could still prosecute people for -- under the aggravated sexual assault through other evidence when victims didn't testify.

This just went to, I think as the Attorney General of Texas properly stated, a -- the history of a lack of confidence in the credibility of these witnesses, and there were two ways in which sufficient credibility could have been introduced to permit admissibility for this testimony to go to the jury. One was outcry and one

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was corroboration. And to look at both of those under State laws are very instructive.

The outcry evidence, for example, if the child had told her mother within 6 months or a year, depending on which law applied, would come before the jury not for the truth of the matter asserted. It was excluded as hearsay for that purpose. It only came in as evidence that she told someone. So, that has nothing to do with the sufficiency of the evidence.

QUESTION: It -- it has to do with whether -- whether the defendant could be convicted or not.

MS. BRINKMANN: So did Kring, Your Honor. I mean, I think --

QUESTION: Without that evidence, he couldn't be convicted.

MS. BRINKMANN: But, Your Honor --

QUESTION: And the new law says that without that evidence he can be convicted. I mean, how is that any different from changing the -- or maybe you think that that's okay too, changing the burden of proof from one standard to another so the government now does not have to prove quite as much in -- in order to get a conviction. Would -- would that be covered by --

MS. BRINKMANN: No, it would not. We don't believe that would be an ex post facto violation.

QUESTION: It wouldn't.

MS. BRINKMANN: No. The Ex Post Facto Clause is aimed at letting people conduct their affairs in accordance with law. When a person commits an act that they believe is not criminal, it is fundamentally unfair under the Ex Post Facto Clause to then prosecute that person later for that act. That's what the -- the clause was aimed at.

QUESTION: So, you reject the third category as well as the fourth.

MS. BRINKMANN: No, Your Honor.

QUESTION: Well, the third category makes unlawful, under the ex post facto provision, increasing the penalty. So long as you knew it was -- it was wrong, no harm done in increasing the penalty.

MS. BRINKMANN: And also it does not increase the punishment. I think the Chief Justice --

QUESTION: You're going to just tag that on. But -- but I mean, that gives away your -- your whole -- your whole thesis of reliance --

MS. BRINKMANN: Oh, we don't think so at all.

QUESTION: -- being the fundamental concern.

MS. BRINKMANN: It's not reliance, Your Honor. It's the unfairness of prosecuting someone after the fact for something that was in fact not a crime at the time

they committed it. That is different --

QUESTION: It was a crime in -- in category three. It was a crime in category three. All you're doing is saying, you know, we thought about it, and that crime is really more serious than we really thought originally. And he knew it was wrong and we're going to increase the penalty.

MS. BRINKMANN: I think the point is, as the Chief Justice made before and in his opinion for the Court in Collins, in fact, that the difference between, for example, 1 year or 20 years is comparable to the --

QUESTION: It only applies when you increase it 20 -- 20-fold. If you just increased it, you know, a couple of months, it would be okay?

MS. BRINKMANN: No. The difference is, Justice Scalia, it changes the legal consequences of the conduct. When that conduct was committed, there was certain legal consequences at that point in time. What the Ex Post Facto Clause is aimed at is later changing that and applying it to that person who acted at that point in time.

QUESTION: Well, it changes --

MS. BRINKMANN: It changes the legal consequences. These rules do not change the legal consequences.

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QUESTION: It changes the legal consequence for innocent people who are around uncorroborated -- they now have to worry about the uncorroborated child's testimony. And I can easily see that, as a practical matter, affecting how people behave, particularly the innocent ones when they're around children without corroboration in certain circumstances. I mean, do you see? So, if we're talking about real behavior of people, this may affect more than most.

MS. BRINKMANN: But, Your Honor, the concern of the Ex Post Facto Clause was not with people relying on something so they could get away with a crime. It was --

QUESTION: No, no. It's the opposite. I'm thinking of the innocent person. In any crime, there's a shadow area around the crime that people tiptoe around, and you suddenly bring in uncorroborated children's witnesses and the person operating in, let's say, the shadow area without corroboration could really have his behavior affected --

MS. BRINKMANN: Your Honor, I --

QUESTION: -- in terms of knowing or believing what the criminal consequence would be. Now, maybe it should be, but at least previously he thought it wasn't and now -- it's like treason. Suppose you took away any

witness requirements. There you'd have the uncorroborated victim of the treason. You see, that might affect people's behavior. It might have in the 18th century.

MS. BRINKMANN: Your Honor, I think that point that you make go to other perhaps due process concerns or other provisions of other constitutional provisions that -- as Collins made clear, that's not what the Ex Post Facto Clause was about. And in fact, in overruling Thompson v. Utah, the Court was quite clear to say there may still be some Sixth Amendment problem, although because of development of Sixth Amendment law in jury trials, that's probably not. But there could be some other constitutional issue, but it's not an ex post facto problem.

And Your Honor brings up treason. I just wanted to address that since there were several questions earlier also. There's a opinion by the Court in 1945, the Kramer case, that I think is the most useful place to look for the treason law under the constitutional provision. And it makes quite clear there that there are three elements for that offense, but the two-witness rule is a procedural means. It talks about how the drafters of the Constitution were concerned about making it difficult to establish treason for obvious reasons.

And one way they did it was by increasing the

elements from the common law. They included not just an overt act requirement but also -- they added an overt act requirement in addition to the elements of aid and comfort to the enemy and adherence to the enemy.

In addition, they established a procedural rule of two-witness. But the Ex Post Facto Clause would only be violated if the criminal prohibition was later expanded; that is, the elements of the offense were expanded or the punishment was increased. That's what the core concerns of the Ex Post Facto Clause were and we don't believe that they would be violated in that --

QUESTION: Isn't the --

QUESTION: Ms. Brinkmann, do you think there's anything left of the fourth category at all?

MS. BRINKMANN: Yes, Your Honor. We believe that looking in historical context, it appears to have been aimed at the situation of a bill of attainder, and some bill of attainders are Ex Post Facto Clauses -- may have an ex post facto effect. In Sir John Fenwick's case, that bill of attainder also had an ex post facto effect to the extent that it did not apply the evidentiary rule then in effect at the time of the bill.

QUESTION: Well, are you saying then it's an unnecessary category? It's just -- it's just overlap?

MS. BRINKMANN: I think there's an overlap

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between bill of --

QUESTION: I mean, if it's a bill of attainder, why do we need it?

MS. BRINKMANN: Because not all bill of attainders are ex post facto. You can have a bill of attainder --

QUESTION: I understand that, but you -- this is a definition of ex post facto, not bill of attainder.

MS. BRINKMANN: Yes.

QUESTION: So, that doesn't work.

MS. BRINKMANN: And if you look at the structure of Justice Chase's opinion -- his sole opinion, it should be pointed out -- he was talking about what the term of ex post facto could mean and talked about how broad it could be and then was trying to narrow it down to give it content. And when he listed the categories of laws it would include in that, it would include bill of attainders that were ex post facto.

QUESTION: I'm saying that you don't need that because we know that bill of attainders are -- are unlawful.

MS. BRINKMANN: But I think that wasn't what Justice Chase was doing. He wasn't delineating the distinction between the two. He was trying to give content to the ex post facto provision in acknowledging

that that was a type of ex post facto law.

QUESTION: Ms. Brinkmann, one of the problems that I have with the argument that you are making from the -- the concept of the core objectives of the clause is in finding a -- a clear distinction between an element of an offense, which you -- we all agree cannot be changed, and a kind of -- let's call it -- a corroborative requirement because when there is a corroborative requirement there, in effect what the law says is you've got to prove something extra. You've got to prove that there is a corroborative witness, and you do that by having the witness come in and say, yes, I saw it or I saw evidence or whatnot of it. I'm not sure that there is a clear analytical basis for -- for distinguishing between an independent corroboration requirement and an element. Am I missing something?

MS. BRINKMANN: Your Honor, may I answer?

QUESTION: Yes.

MS. BRINKMANN: Under Texas law, as the Attorney General pointed out, the corroborating evidence is not to the elements of the offense. It only has to be some evidence --

QUESTION: Well, that's -- that's right, but I don't know that that goes to my question. Whatever the corroboration requirement may be, it seems to function

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with the same demand that an independently stated element would have.

MS. BRINKMANN: We believe it really goes to credibility of the witness, and the structure of the Texas law really reinforces that, particularly with the outcry requirement. It's going to the credibility of that witness testimony that is being --

QUESTION: Thank you, Ms. Brinkmann.

MS. BRINKMANN: Thank you, Your Honor.

QUESTION: Mr. Bernstein, you have 3 minutes remaining.

REBUTTAL ARGUMENT OF RICHARD D. BERNSTEIN

ON BEHALF OF THE PETITIONER

MR. BERNSTEIN: Justice Souter, the point you were making is exactly the point that Fenwick's defenders made in the lodging that we filed yesterday. And they made exactly the point that they viewed changing the minimum evidence as akin to changing the crime itself, as akin to changing the elements.

Justice Stevens, I think you're correct that this rule could be limited to crime-specific minimum standards of evidence. Fenwick itself was a crime-specific treason minimum standard of evidence, and in the -- in the Restatement Second, Conflicts of Law, minimum sufficiency of the evidence in the civil area -- that's

for a particular class of cases -- is described as the clearest case where it's substantive, where -- where it would be a more generalized rule in the civil context like, you know, a variation of how to say preponderance. That would not necessarily be substantive in that context.

Justice Kennedy, the citations for requiring acquittal under Texas law are at page 19, note 10 of our reply brief, although I think the same would be required under the Lockhart case which is a Federal case, 488 U.S. 3340 to 42.

Also, Collins itself makes clear that whether a rule is substantive or procedural for purposes of the Ex Post Facto Clause is a Federal question. That's at page 45 of Collins.

Justice Scalia and Chief Justice Rehnquist, on this 20 years versus 1 year on category three, go back to Miller. Miller was a case where the defendant could have gotten the exact, same sentence, and the change in the standard by which you decided what sentence to give was considered an ex post facto change. This is a change in the standard by which you decide whether the defendant is guilty and I think would even more clearly fit within the Ex Post Facto Clause.

Justice Ginsburg, I think Beazell is even stronger for us than the quotation you read. Beazell also

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describes, as in law, different than the joint trial rule in Beazell, a law that would violate the Ex Post Facto Clause would be a change in a law concerning, quote, the quantum and kind of proof required to establish guilt and all questions which may be considered by the court and jury in determining guilt or innocence. And that's quoted at pages 9 and 10 of our reply brief.

If there are no further questions --

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Bernstein.

The case is submitted.

(Whereupon, at 12:08 p.m., the case in the above-entitled matter was submitted.)

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BY: Ilona M. May
(REPORTER)