IN THE SUPREME COURT OF THE UNITED STATES

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DOUG DRETKE, DIRECTOR :

TEXAS DEPARTMENT OF CRIMINAL :

JUSTICE, CORRECTIONAL :

INSTITUTIONS DIVISION, :

Petitioner :

v. : No. 02-1824

MICHAEL WAYNE HALEY :

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Washington, D.C.

Tuesday, March 2, 2004

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

APPEARANCES:

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

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

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

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P R O C E E D I N G S

(10:10 a.m.)

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

Mr. Cruz.

ORAL ARGUMENT OF R. TED CRUZ

ON BEHALF OF THE PETITIONER

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

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

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

MR. CRUZ: Yes, Justice Kennedy.

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

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

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

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

MR. CRUZ: Implicit in the procedural default --

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

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

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

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

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

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

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

QUESTION: But is it --

QUESTION: Well --

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

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

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

MR. CRUZ: Two years would be the max.

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

MR. CRUZ: Yes, Justice Stevens.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

argue a waiver if it's sent back?

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

QUESTION: And not raise any procedural impediment to --

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

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

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

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

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

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

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

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

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

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

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

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

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

QUESTION: So you come back and fight another day?

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

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

MR. CRUZ: Yes, Justice --

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

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

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

MR. CRUZ: And --

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

should say so.

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

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

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

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

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

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

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

QUESTION: Well, give me an example.

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

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

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

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

MR. CRUZ: If he had raised his objection.

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

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

QUESTION: Well --

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

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

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

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

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

QUESTION: Yeah.

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

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

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

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

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

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

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

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

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

MR. CRUZ: The difficult --

QUESTION: There aren't many cases like this.

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

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

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

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

outcome in the trial?

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

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

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

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

MR. CRUZ: Only in the sense --

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

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

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

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

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

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

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

(Laughter.)

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

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

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

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

QUESTION: Very well, Mr. Cruz.

Mr. Roberts, we'll hear from you.

ORAL ARGUMENT OF MATTHEW D. ROBERTS

ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

SUPPORTING THE PETITIONER

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

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

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

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

QUESTION: On the inadequate assistance claim?

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

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

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

Your Honor.

QUESTION: Thank you.

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

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

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

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

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

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

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

QUESTION: All right. But is the answer then not

to deal with it when it's clear?

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

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

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

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

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

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

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

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

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

(Laughter.)

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

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

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

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

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

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

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

MR. ROBERTS: I -- I --

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

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

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

MR. ROBERTS: Right.

QUESTION: -- argument.

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

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

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

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

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

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

offense which has a special constitutional status.

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

MR. ROBERTS: Well, well, the --

QUESTION: -- justification for this --

MR. ROBERTS: -- these rules are --

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

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

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

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

QUESTION: Yeah.

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

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

QUESTION: Mr. Roberts, why is it --

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

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

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

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

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

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

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

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

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

QUESTION: Doesn't scare me.

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

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

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

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

QUESTION: The manifest injustice --

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

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

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

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

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

Your Honor.

QUESTION: Thank you, Mr. Roberts.

Mr. Albritton.

ORAL ARGUMENT OF ERIC M. ALBRITTON

ON BEHALF OF THE RESPONDENT

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

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

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

MR. ALBRITTON: That is correct, Your Honor. However --

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

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

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

In this case, Your Honor, the petitioner --

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

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

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

MR. ALBRITTON: You could, Your Honor.

QUESTION: Yes.

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

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

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

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

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

QUESTION: Doesn't sound like it.

(Laughter.)

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

MR. ALBRITTON: Absolutely, Your Honor.

QUESTION: That seems reasonable.

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

the danger of this clearly --

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

MR. ALBRITTON: Yes, Your Honor.

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

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

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

allowed it.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

sentence for which he or she is statutorily ineligible.

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

MR. ALBRITTON: That is correct, Your Honor.

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

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

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

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

QUESTION: Oh no.

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

MR. ALBRITTON: Yes, sir.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

QUESTION: But do you know on what basis?

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

QUESTION: Okay.

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

QUESTION: Okay.

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

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

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

QUESTION: I -- I --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

QUESTION: Thank you, Mr. Albritton.

Mr. Cruz, you have three minutes remaining.

REBUTTAL ARGUMENT OF R. TED CRUZ

ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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