REVISED

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. ~~86~~ 85-1656

TITLE JAMES A. LYNAUGH, INTERIM DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, Petitioner V. GREGORY ALLEN PETTY

PLACE Washington, D. C.

DATE March 3, 1987

PAGES 1 thru 37

ALDERSON REPORTING

(202) 628-9300
20 F STREET, N.W.

IN THE SUPREME COURT OF THE UNITED STATES

- -x

JAMES A. LYNAUGH, INTERIM DIRECTOR, :
TEXAS DEPARTMENT OF CORRECTIONS, :
Petitioner, :
v. : No. 86-1656
GREGORY ALLEN PETTY :

- -x

Washington, D.C.

Tuesday, March 3, 1987

The above-entitled argument came on for oral argument before the Supreme Court of the United States at 11:10 o'clock a.m.

APPEARANCES:

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

JOHN R. BREIHAN, ESQ., Austin, Texas; on behalf of the respondent, appointed by this Court.

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

CONTENTS

P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: We will hear argument next in No. 85-1656, James A. Lynaugh, Interim Director, Texas Department of Corrections, versus Gregory Allen Petty.

You may proceed whenever you are ready, Mr. Palmer.

ORAL ARGUMENT OF CHARLES A. PALMER, ESQ.,

ON BEHALF OF THE PETITIONER

MR. PALMER: Mr. Chief Justice, and may it please the Court, this is a statutory habeas corpus case brought by a Texas prisoner serving a 50-year sentence for aggravated robbery. The first question presented is whether the petitioner was required to plead prejudice in order to avoid dismissal of the Sixth Amendment claim by the District Court.

I believe it is clear under Strickland versus Washington and Hill versus Lockhart that he was required to do so, and I do not intend to dwell on this point. I believe the important question for the Court's decision is the propriety of the Fifth Circuit's disposition of the new issues which Petty raised on appeal.

Petty was tried on his plea of not guilty and convicted in state court in 1979, and his conviction was affirmed by the state appellate court. He then filed a

state application for collateral relief, raising two grounds, one of which was that his counsel's representation had been constitutionally inadequate. The convicting court found that Petty had not pled facts which would entitle him to relief and recommended that the writ be denied. The state appellate court denied the writ on this basis.

Petty then filed a habeas petition in Federal District Court in which he raised six claims, including ineffective assistance of counsel. Petty's federal claim was couched in the same conclusory terms as had been his state claims. Accordingly, the state's answer pointed out that Petty had not alleged facts which if true would entitle him to habeas relief.

The magistrate to whom the case was referred agreed and recommended denial of the writ because Petty's pleadings were insufficient under existing Fifth Circuit law. Petty did not object to the magistrate's recommendation, and it was adopted by the District Court, which denied the writ.

On appeal to the Fifth Circuit Petty raised for the first time in any court specific factual allegations as to his counsel's performance and how it allegedly affected the outcome of his trial. The Fifth Circuit reversed and remanded, holding that Petty should

be allowed the opportunity to amend his petition in the court below to include the allegation that counsel should have investigated a possible defense of insanity.

The Court of Appeals recognized the general rule that issues raised for the first time on appeal ordinarily are not considered, but ignored the rule because in its words, the fact that Petty has now made these allegations indicates that he would make them in the District Court if he were given the opportunity to do so.

The problem with this standard is that it is no standard at all. There will never be a case where new issues are raised on appeal that will not come within this rule. Under the reasoning of the Court of Appeals, habeas petitioners are entitled to a remand as a matter of right whenever they bring forth new issues on appeal.

We believe the Court of Appeals approach is contrary to the admonitions of this Court as expressed, for example, in Rose V. Lundy, that habeas petitioners should marshall all their claims in a single petition and make but one trip to the state and federal courts in seeking relief.

What is worse, under the reasoning of the

Court of Appeals there is absolutely nothing to prevent Petty from bringing forth additional new issues on a subsequent appeal and obtaining yet another remand with directions to allow him to amend. The end result is that there will be absolutely no semblance of finality in criminal cases.

QUESTION: General Palmer, what it really boils down to, isn't it, that you want to be able to argue effectively that there is an abuse of the writ because even if they had just not taken this disposition, he could still have filed a second habeas petition, but you would have claimed it would be an abuse of the writ if he had?

MR. PALMER: That is correct, Your Honor.

QUESTION: But why can't you still argue on remand to the District Court that there is an abuse of the writ here because he should have raised these things the first time around?

MR. PALMER: We could argue that. I believe it would be futile. I can't imagine the District Court granting our motion when the remand with directions to allow an amendment was expressly ordered by a higher court. If the Court of Appeals had followed the normal procedure and simply affirmed the District Court without reaching this issue, Petty would have had to initiate a

new lawsuit in order to raise this claim.

QUESTION: Then should we really construe what the Court of Appeals has done as in effect holding that given the particular history of this case we don't think it would be an abuse of the writ for him now to raise these issues so let's just have him raise them in this case instead of filing a new proceeding?

MR. PALMER: No, Your Honor, the abuse issue was never raised by either party. It was not briefed. Whether or not a petitioner has abused the writ is a factual issue. The burden is on the state to plead abuse of the writ. Once the state has done so the burden then shifts to the petitioner to show that he was unaware of a particular claim or claims. None of this has been developed in the District Court or in the Court of Appeals. What the District Court did was simply give Petty an end run around the abuse doctrine and it spells it out quite clearly in its opinion.

It says once the case is remanded to the District Court the state will be allowed to plead failure to exhaust state remedies because it is clear Petty has not exhausted his state remedies as to these claims. If the state does so the District Court will have to dismiss on that ground. Its dismissal will be without prejudice, and then Petty will be free to

initiate a new lawsuit.

I think the only fair reading of what the Court of Appeals did is to relieve Petty of his burden of justifying not bringing this claim earlier.

QUESTION: Why couldn't you argue in the Court of Appeals that allowing this amendment would be an abuse of the writ? And also you could argue if there hasn't been any exhaustion of this particular issue, you could argue there was no exhaustion.

MR. PALMER: Well, the Court of Appeals recognized that there had been no exhaustion. In remanding to the District Court it opined that perhaps the state would wish to waive the exhaustion defense.

QUESTION: How about abuse? Did you argue abuse?

MR. PALMER: No, Your Honor, because abuse is a factual matter, and the Court of Appeals is not the proper forum to develop a factual issue such as abuse.

QUESTION: I know, but they might have remanded and said we have to consider abuse of the writ before the amendment.

MR. PALMER: They might have done that, Your Honor, but that is not the case before the Court.

QUESTION: Well, you didn't ask them to.

MR. PALMER: No, that is true. We didn't.

QUESTION: I don't understand. What would the abuse of the writ have consisted of? Not --

MR. PALMER: The fact that Petty --

QUESTION: Not saying something? I wouldn't have seen any basis for arguing an abuse of the writ.

MR. PALMER: The abuse doctrine goes to whether the petitioner was aware of the claim at the time he filed his federal application and failed to raise that claim, and then in the second federal petition raised the claim --

QUESTION: He has to have raised the claim. It is the second time around when he raises the claim that the writ is abused. He never raised the claim.

MR. PALMER: That is correct.

QUESTION: How could there have been an abuse of the writ? Maybe you could say it was an abuse of the appellate process to raise the claim on appeal when he hadn't raised it below, but I don't know how that could be considered abuse of the writ. Do you?

MR. PALMER: Your Honor, we are not here arguing --

QUESTION: I am trying to help you, General.

MR. PALMER: We are not arguing that this is or is not an abuse of the writ. As we stated in our brief --

QUESTION: Is there any basis on which it could have been an abuse of the writ?

MR. PALMER: Well, we cited the Court to Woodard v. Hutchins, in which the Court opined or stated that a claim like this, an insanity claim surely was known to the petitioner, and failure to bring it would obviously constitute an abuse of the writ.

What is important to keep in mind, I believe, is not whether or not Petty abused the writ. He may or he may not. Once the state is allowed the opportunity to plead abuse of the writ, Petty will be allowed an opportunity to respond to that, and depending on Petty's justification for withholding the claim, it may or may not constitute an abuse of the writ.

What is at stake here is, the state is not allowed the opportunity to plead it. Petty is sent back to the District Court and allowed to amend. It is all the same case. It is not a new case, and the abuse doctrine simply does not apply.

QUESTION: Abuse of the writ does not consist in withholding a claim, does it? I can file a writ without making a claim. I am not abusing the writ. If I choose not to make a claim, I don't have to. Abuse of the writ consists in filing a writ that makes a claim that could have been made previously.

MR. PALMER: Exactly, Your Honor.

QUESTION: Isn't that what abuse of the writ consists of? And there is no possible way he could have been guilty of that here, because he never made the claim in a writ.

MR. PALMER: He never made the claim when he filed his writ in the District Court.

QUESTION: And simply failing to make a claim when you file a writ is not conceivably abuse of a writ.

MR. PALMER: I agree with that. But the point is, if the Court of Appeals had followed what I understand to be normal appellate procedure it would not have considered this matter whatsoever. It simply would have said this was a claim that was not raised in the court below. We are not entitled to consider it. It would have reviewed the claims Petty raised and affirmed on that basis.

QUESTION: And then if he had raised -- filed another petition making the claim which the Court of Appeals actually considered on this one, then you could have argued abuse of the writ.

MR. PALMER: Precisely, Your Honor. Now, Justice White has suggested that perhaps once Petty was allowed to amend, we could have pleaded abuse at that

point, and perhaps we could, but once the Fifth Circuit had sanctioned the amendment it is very difficult to conceive that the District Court would sustain the state's abuse argument.

Petty makes several arguments in this Court to uphold the propriety of the Fifth Circuit's disposition, the first of which is that the District Court's dismissal was due to a defect in pleadings and therefore was not on the merits. We do not believe that is an accurate statement of how habeas cases are disposed of. In a habeas case such as this, when the District Court considers the pleadings and the state court record, its decision to deny relief necessarily goes to the merits of the petitioner's claim, and the dismissal then is with prejudice.

The dismissal with prejudice on this record in no sense is unfair to habeas petitioners, however, because unlike ordinary civil suits there is no principle of res judicata. Habeas petitioners are free to re-litigate the consitutionality of their convictions again and again subject only to the abuse of the writ doctrine.

Petty also argues that the District Court abused its discretion in not ordering discovery under Rule 6 or expansion of the record under Rule 7. Of

course, the District Court was under no duty to do so, and given the vague and conclusory nature of Petty's allegations there was simply nothing to suggest to it that utilization of those rules would be appropriate in this case.

Finally, Petty argues that he was not put on sufficient notice of the inadequacy of his pleadings. Petty filed his federal petition on March the 7th, 1984. More than seven months previously when the state convicting court filed its findings, it noted that he had not pled sufficient facts to justify relief on a Sixth Amendment claim.

The forum which Petty used to file his federal writ instructed him that it was necessary to raise all the facts in support of each of the claims, and even advised him that it is permissible to attach additional pages to include the facts if necessary. Both the state's answer and the magistrate's report pointed out to Petty that he had not pled sufficient facts to justify relief.

Given this record, it is at best disingenuous to suggest that Petty was not afforded an opportunity to plead his case in the District Court.

QUESTION: May I go back to the facts for just a second. In this case the initial pleading alleged

ineffective assistance of counsel and recited a lot of facts that did not establish it, according to the magistrate. It did not allege the theory that the counsel failed to investigate the possible insanity of the defendant. Is that correct?

MR. PALMER: that is correct.

QUESTION: And on appeal the counsel became aware of this alleged shortcoming of counsel. What, in your view, should counsel who has just been appointed, what should the counsel have done at that point?

MR. PALMER: Well, Your Honor, it was not appointed counsel for Petty on appeal who raised this. It was Petty himself in his pro se brief. It was only after Petty raised this matter in his pro se brief in the Fifth Circuit that counsel was appointed to represent him.

QUESTION: Oh, I see, so that Petty himself raised the failure to investigate the insanity. I was thinking the lawyer did that.

MR. PALMER: No, Your Honor.

QUESTION: I see.

MR. PALMER: Now, of course, the matter was also included in the brief filed by counsel in the Court of Appeals.

QUESTION: So what your view is that they

should have just affirmed and then let him take his chances on filing a second habeas petition making these allegations.

MR. PALMER: Absolutely, Your Honor, and I am aware of no authority which allows for the disposition made by the Court of Appeals. It is an anomaly, and it is one that is unfair to the states and burdensome to the courts.

QUESTION: Well, I suppose, though, if he had just -- if they just affirmed and he filed the second petition the District Court would have had to dismiss it because it hadn't been exhausted. Isn't that right?

MR. PALMER: Well, if it had been affirmed he would have had to go back to state court and exhaust his remedies before he would be entitled to file a second petition. Yes.

QUESTION: But they are going to dismiss this one anyway, and he has to go back to state court. I am just not quite clear on how much difference it all makes.

MR. PALMER: Well, the big difference, the significant difference is, given the way the Fifth Circuit handled the case, Petty is allowed to amend to raise this claim. This claim is unexhausted.

QUESTION: Right.

MR. PALMER: Therefore the amended petition

will be dismissed for failure to exhaust.

QUESTION: Right.

MR. PALMER: That dismissal will be without prejudice. A dismissal without prejudice does not trigger the abuse of the writ doctrine. When Petty comes back into state court -- into federal court after exhausting the state remedies, the state will have no opportunity whatsoever to plead abuse because there has been no adjudication on the merits. If the Fifth Circuit had followed normal procedure --

QUESTION: Well, there would be no adjudication on the merits of the defective assistance of counsel based on the failure to investigate insanity then.

MR. PALMER: There would have been no adjudication on the merits of any of the claims. The District Court denied relief on the merits. The Fifth Circuit failed to affirm, sent the case back.

QUESTION: Oh, I see.

MR. PALMER: And once the exhaustion issue is raised after the remand, the dismissal for failure to exhaust will not be on the merits, it will be without prejudice. There will never have been a final adjudication of Petty's first petition on the merits. On the other hand, what the state is arguing for and

what we understand to be the normal procedure is simply to affirm without considering this matter.

Then there is finality to the District Court's determination that Petty's first petition was without merit. There is a dismissal with prejudice which has been affirmed. The only way Petty can raise this claim then is by initiating a brand new lawsuit in the federal court in which he raises the matter because there will have been a disposition on the merits. The state then is entitled to raise its 9B defense.

In conclusion, we ask the Court to hold that the Court of Appeals abused its discretion in its disposition of Petty's appeal. The Courts of Appeals would thereby be put on notice that their discretion in this area is not unlimited, that it may not be exercised in such a way as to deprive the state of its opportunity to plead abuse of the writ. The result we ask for is consistent with the equitable nature of habeas corpus in that it upholds society's valid interest in finality and in the orderly administration of justice, and it in no way impinges on the rights of habeas petitioners to raise these new claims.

In this case as in any other similar to this a petitioner always can justify raising this new claim if he can show that he was unaware of it or that he did not

abuse the writ.

For these reasons, we ask that the judgment of the court below be reversed.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Palmer.

We will hear now from you, Mr. Breihan.

ORAL ARGUMENT OF JOHN R. BREIHAN, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. BREIHAN: Mr. Chief Justice, and may it please the Court, from Petty's perspective what this case is really about is the ability of the Circuit Judges to administer their dockets with flexibility and common sense. In other words, we are of the view that the Circuit Courts have the power to do what they consider is just under the circumstances. This case in federal court arose in 1984 when Mr. Petty filed his first and only habeas action.

In that action he raised the issue of ineffective assistance of counsel by pleading that his counsel had not conducted a pretrial investigation and had not rendered any advice as to the charges against him and the issues raised at trial. The District Court dismissed this petition after first finding that his pleadings were insufficient.

It is in this context that after that the --

in his pro se brief to the Fifth Circuit Mr. Petty expanded upon his claim that his counsel had not conducted the pretrial investigation by then alleging that the pretrial investigation would have revealed facts that supported the insanity defense at the time of trial.

QUESTION: Was it agreed -- did the Fifth Circuit opine on the question of whether that claim had been exhausted?

MR. BREIHAN: The Fifth Circuit stated in its opinion that that claim probably had not been exhausted, and that is why instead of reversing for an evidentiary hearing it reversed for amendment so that the state could respond and pursue its exhaustion defense if it chose to.

QUESTION: And you agree that the claim had not been exhausted?

Let me -- do you challenge the Fifth Circuit's --

MR. BREIHAN: At this point I don't challenge that issue. I have not given that a substantial amount of thought, Mr. Chief Justice. That is an issue that will be raised with whichever disposition comes of this case. It is an issue that will be before the District Court, the exhaustion issue.

QUESTION: But what you are defending here is the Fifth Circuit's treatment of this amended claim on appeal.

MR. BREIHAN: What we are defending is the Fifth Circuit's power to handle its docket in the way that it considered appropriate under the circumstances of the case.

QUESTION: Counsel, let's assume for the moment that you prevail up here and you go back and have a trial in the District Court and lose again. What in Judge Reuben's opinion for CA5 would keep you from coming back here, going back through CA5, saying that your client had discovered a new claim that he hadn't thought about raising below? In light of the language of the Court of Appeals' opinion, couldn't you come back a second and a third and a fourth time?

MR. BREIHAN: I don't know that there is anything in the language of the opinion that addresses that issue directly.

QUESTION: But -- well, take a look at F2 in your petition, amended petition for cert. It is a printed document. Well, I don't want to hold you up. Just carry on, counsel. That is all right.

MR. BREIHAN: I am sorry, Your Honor.

QUESTION: I agree with you (inaudible) say

whether or not you can come back repetitively, but I think the rationale of its opinion makes it perfectly clear that the court thinks you can come back whenever a claim is presented at the Fifth Circuit level that had not been presented below.

MR. BREIHAN: I think, though, it is the exercise -- it is the particular circumstances of this claim that caused the Fifth Circuit to exercise its discretion in this case, and I do think that the Fifth Circuit is limited in the exercise of that flexibility and discretion.

QUESTION: So you think it is a a matter of discretion for the Court of Appeals?

MR. BREIHAN: Yes, Your Honor.

QUESTION: Mr. Breihan, why isn't it the case that when a matter rises to significantly enough injustice that it would be a proper exercise of the Court of Appeals' discretion to allow the matter to be raised anew it would not also be significant enough to avoid the contention of abuse of the writ if the matter were raised in the normal fashion?

I mean, this has to be an unusual situation. You can't have the Court of Appeals doing this all the time because it will, as your opponent suggests, string out these habeas proceedings until doomsday, but if the

situation is extraordinary enough for the Court of Appeals to act in this fashion, why wouldn't it automatically be extraordinary enough that when an additional habeas petition were brought you could not be dismissed on the basis of abuse of the writ?

MR. BREIHAN: I am not certain that I understand Your Honor's question.

QUESTION: You agree that the Court of Appeals can't do this sort of thing routinely, that it is --

MR. BREIHAN: I would agree.

QUESTION: To allow the new issue to be raised there has to be some extraordinary circumstance.

MR. BREIHAN: Yes, Your Honor. It is my position that the situation in this case that Petty had alleged at the trial court level that he had -- that his counsel had failed to pursue any pretrial investigation. At the appellate court level after the trial court level -- the trial court had dismissed that claim for insufficiency. At the appellate court level Mr. Petty showed in his pro se brief that he had -- that he had a substantial prejudiced claim, that claim being that had his counsel presented, or had his counsel pursued a pretrial investigation she would have realized that he had facts that supported an insanity defense and brought that issue at the trial court below.

QUESTION: I understand all that. The only point I make -- I don't know how to put it to you more clearly -- is that it seems to me if it is extraordinary enough for the Court of Appeals to step in and allow claims that haven't been made to be made in the Court of Appeals, it would also be extraordinary enough to cause the District Court to entertain a subsequent habeas petition

MR. BREIHAN: Well, I think that -- I think that is true.

QUESTION: So that therefore we really don't have to permit this kind of a procedure, which you acknowledge has its dangers, in order to preserve the rights of defendants to be defended against patent injustice.

MR. BREIHAN: My response, Your Honor, is that the actions of the Fifth Circuit under the extreme circumstances of this case was to expediate the -- expediate justice, to send it back to the District Court for amendment so that the Court could get right to its business of considering this new claim. In that sense, it doesn't seem to me that this is an abuse case or indeed is a Rule 9 case of any kind, because what the Fifth Circuit has done is to limit Mr. Petty to one petition. It has sent the case back for amendment. Mr.

Petty's first and only so far habeas petition has been now sent back --

QUESTION: What was extreme? You say this was an extreme case that provoked this reaction on the part of the Fifth Circuit. What was extreme about it that distinguishes it from any other habeas case?

MR. BREIHAN: First of all, under the circumstances, the petition that Mr. Petty filed had alleged the fact of a lack of a pretrial investigation. He had not gone any further, but the District Court had purported to reach the merits of that claim though the issues raised by the lack of pretrial investigation claim, if you will, arise to a certain extent beyond the record, and a review of the record itself is not entirely sufficient to address that claim.

QUESTION: Well, is that something that almost never happens in other habeas cases?

MR. BREIHAN: I suppose that happens often enough, Your Honor.

QUESTION: So that doesn't make this case extreme.

MR. BREIHAN: What makes this case a special case to the Fifth Circuit is that Mr. Petty came forward with the issue of prejudice on appeal. The Fifth Circuit did not consider that issue. They didn't

consider the truth of that issue. They simply sent the case back for amendment so that that issue could be addressed quickly and efficiently in the District Court.

QUESTION: But do you have reason to think that doesn't happen fairly often in habeas cases? I don't see what it is about that fact that makes this case so extreme so that, as you are saying, really it is a sport that we don't have worry about.

MR. BREIHAN: It is a -- this is -- in the interest of handling pro se litigation I believe it is simply an act of discretion.

QUESTION: But isn't a lot of habeas litigation pro se?

MR. BREIHAN: Certainly. Most of it probably is.

QUESTION: So it seems to me none of the factors that you have mentioned just now tell us that this case is any different from hundreds of others that may be going through the Court of Appeals, so therefore if the Court of Appeals were to follow the Fifth Circuit's decision here this would become a common practice.

MR. BREIHAN: It may become a common practice, but I do not think that that would mean that it would become a -- it would be common for the Fifth Circuit to

handle the case in this way.

QUESTION: Wouldn't it be a logical common practice, especially for a capital defendant who has been condemned to death, to raise his defenses in exactly this way? Not be specific enough in the original habeas. Raise it in the Court of Appeals, causing the Court of Appeals to send it back down. Then when it is finally denied, he can rebring another habeas afterwards, string the process along.

MR. BREIHAN: Well, to me, Your Honor, the key issue is simply the fact that in this case the Fifth Circuit has sent it back -- sent it back so that this can be the one and only petition that Mr. Petty files.

QUESTION: Well, why will it be the one and only?

MR. BREIHAN: Well, because it --

QUESTION: He can file a petition after this one even if the lower court denies this. He can then file another one, can't he?

MR. BREIHAN: He could file another one, but not on these claims, absent being challenged by the abuse of writ doctrine from the state.

QUESTION: The thing that troubles me a little bit about this case is that this -- apparently this really isn't a new claim, the fact that the lawyer

didn't investigate the insanity defense. Those are facts that tend to support the claim that was made. And he did allege a good many facts but just didn't include this particular group of facts.

MR. BREIHAN: Yes, Your Honor. I think that is one of the special circumstances in this case, and that is why I do not consider it an abuse of the writ case. I think it would fall within the first part of Rule 9, which is the part that addresses -- if it falls within Rule 9 at all, it would fall within the first part, that addresses an issue that is not new and different and was considered on the merits below. Even that is in the discretion of the trial court whether or not they are going to rule. That was part of the Poolman decision, I believe, that said when it is an issue that is in the interest of justice goes to the factual innocence the lower court can go ahead and reach the merits of that case and the abuse defense will be waived.

QUESTION: Am I correct that in this case the magistrate did not go into the facts other than those set forth in the habeas petition, and apparently he also knew that the lawyer had represented the same defendant in some other matters, I guess?

MR. BREIHAN: The magistrate addressed -- the

magistrate first concluded that Petty's pleading was insufficient.

QUESTION: Right.

MR. BREIHAN: Then reviewed the record to determine such things as the fact that his counsel had conducted a voir dire examination --

QUESTION: Right.

MR. BREIHAN: -- cross examined witnesses, and conducted a closing argument.

(Pause.)

MR. BREIHAN: I think it is important to note that the Fifth Circuit did not consider, if you will, the issues that were raised for the first time on appeal. It did not make any determination about the truthfulness of those issues. It sent those directly back to the District Court for factual findings and preserved the interest of the state and preserved the interest of the judicial system in efficiency, if you will, and to further the quick consideration of this claim.

The key points that I would again repeat are that the Fifth Circuit's handling of this case is in everyone's interest. It has in this particular instance created a situation where these claims can be handled quickly at the District Court level. That is in the

state's interest to limit Petty to a single petition. The Circuit Courts and the Circuit Judges in this case are --

QUESTION: May I ask you one other question? I am just --

MR. BREIHAN: Yes.

QUESTION: In the District Court when the magistrate reached his conclusions and wrote out his report, that, I take it, is sent to the prisoner so he had a copy of that.

MR. BREIHAN: Yes, Your Honor.

QUESTION: So that at least it would have been -- presumably in most cases if the pleading is a little -- doesn't go into the facts enough he at least theoretically could have responded back at the District Court level and said you have overlooked these facts, the ones he calls to the attention of the Court of Appeals, and then it could have been processed in the District Court. That could have been done, couldn't it?

MR. BREIHAN: As a pro se petitioner he is limited in his ability, of course, to understand whatever he has been told by the --

QUESTION: Right, I understand. Maybe he wasn't wise enough in the ways of the law to do that,

but at least had he been fully informed and represented by able counsel at that time I suppose that is what the lawyer would have done.

MR. BREIHAN: I suppose.

QUESTION: And said that you have these additional facts that support the ineffective assistance claim, and I don't think there would have been any -- dismissal with prejudice would have foreclosed that at that time. So the problem is that he didn't do it then, he did it on appeal for the first time.

MR. BREIHAN: Yes, Your Honor.

QUESTION: Mr. Breihan, do you think perhaps some change in the habeas form application in the District Courts might solve this problem?

MR. BREIHAN: Well, I think there is some -- that issue is presented to the extent that Mr. Petty is a pro se petitioner and has followed the form pleading when he stated his case in summary fashion. He alleged facts which from his perspective were factual. He alleged that there was no pretrial investigation. He alleged that there was no advice given from his perspective. That is a factual argument, though, from the court's perspective and lawyers' perspective. Those are conclusions.

It may help, to answer Your Honor's question,

to change the language of the form to the extent of asking the petitioner to explain why it is that an error of counsel affected the outcome of the case. That may have gotten Mr. Petty over the hurdle by bringing his attention to the need to address that issue. One of the circumstances that was involved in this case was that Mr. Petty had filed his petition before this Court's decisions in Strickland and Hill versus Lockhart, so that not necessarily that he would have paid any attention to those decisions, but when the Fifth Circuit considers his petition they are aware that those pleading standards were in flux at the time that Mr. Petty's pleading was being considered.

QUESTION: Is it not also true that the magistrate's disposition is not the traditional ruling on the legal insufficiency of the pleading, because it is kind of a mixture of his having looked at the record and satisfying himself, which would be good practice for the magistrate, that there was -- there appeared to be effective assistance, so his dismissal was kind of a mixture of insufficiency on the face and not a full hearing, but yet enough of a look at the facts to come to that conclusion.

MR. BREIHAN: His dismissal was based on the record that was in front of him, but I repeat that the

record in front of him doesn't include anything that reveals the extent of pretrial investigation other than by inference.

QUESTION: Of course it wouldn't show that, but he did have a transcript of the trial proceeding, I assume.

MR. BREIHAN: Yes, he did.

QUESTION: Because he talked about the voir dire.

MR. BREIHAN: And so to a certain extent issues that were raised, inferential inferences can be raised based on the fact that Mr. Petty -- Mr. Petty's counsel was familiar with some facts, though that does not go to the advice given Mr. Petty during the course of the pretrial preparation.

To sum up, I want to repeat that from our perspective the remand of this case serves the interest of all the parties by expediting the review of this case on the merits. It enables Petty to be heard on his expanded plea of ineffective assistance, and that is a plea that goes to the very guilt or innocence. It protects the state to a certain extent from piecemeal litigation by addressing that issue directly as quickly as possible, and in the interest of the court system it provides an opportunity for Mr. Petty's claim to be

resolved quickly and efficiently.

In these respects remand was a reasonable exercise of the court's power. It considered the circumstances, and it balanced the interest from its perspective in its discretion of those interests.

Whatever this Court does with this case is going to send a signal, of course, to the Circuit Courts about the way that they handle complex problems such as pro se litigation. That signal should not be to tie their hands in a way to prevent them from addressing questions that were raised on appeal if the merits of the case support that.

The message should instead be to let the judges do their job, the Circuit Judges to do their job as best as they see fit.

QUESTION: Well, what if the Court of Appeals has said no amendment, you didn't raise it, no amendment?

MR. BREIHAN: I would say --

QUESTION: Is that an abuse of discretion or error?

MR. BREIHAN: No, I would not think that would be an abuse of discretion.

QUESTION: So it could have said you have to file a new lawsuit or something, new petition.

MR. BREIHAN: It could have.

QUESTION: Yes.

MR. BREIHAN: It could have sent it back for a new petition.

It is for these reasons that I pray that the Court will affirm the Fifth Circuit's ruling.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Breihan. Mr. Palmer, you have 12 minutes remaining.

ORAL ARGUMENT OF CHARLES A. PALMER, ESQ.,

ON BEHALF OF THE PETITIONER - REBUTTAL

MR. PALMER: If the Court has no further questions, I have no further argument. I believe Mr. Justice Scalia has zeroed in on the crux of the case. Anything that would excuse, that would justify the Fifth Circuit's disposition would also excuse Petty if he brought this claim in a new lawsuit, and as Your Honor has pointed out, there is nothing extreme or unusual about this case that justifies that disposition.

QUESTION: May I ask you this before you sit down, General? Had he realized what he was supposed to do in the District Court, say he had gotten a copy of the magistrate's report and say he had then in the District Court said, hey, I should have explained the facts about my prior insanity or whatever it is. What would the magistrate or the District Court have properly

done in response to those allegations in your view?

MR. PALMER: Dismiss for failure to exhaust.

QUESTION: Dismiss just that part of the claim but not the whole --

MR. PALMER: No, the entire petition would have had to be dismissed.

QUESTION: Because there was an unexhausted claim. He did exhaust his -- did he exhaust an ineffective assistance claim before bit just not making these factual allegations?

MR. PALMER: Right, and as is pointed out in the Fifth Circuit's opinion at F5 this new factual allegation is treated as a new claim.

QUESTION: I see, so that had he done this in the District Court he would then have -- there would have been a dismissal for failure to exhaust and -- and that is exactly what is going to happen under the Court of Appeals disposition but you object to that because you cannot now argue abuse of the writ, but could you have argued abuse of the writ if it happened in the District?

MR. PALMER: No, we couldn't. The point is, Petty had his chance. He had more than ample chance. When the state convicting court made its findings it told Petty, you have not pled a case. Seven months

later he came into federal court --

QUESTION: It wasn't quite not pled a case because the magistrate did look at the record. He did go beyond the pleading, didn't he?

MR. PALMER: No, Your Honor. I am talking about what the state convicting court did on Petty's state application.

QUESTION: Oh, pardon me. I see.

MR. PALMER: The state convicting court said you allege only annotations and general statements. It was seven months later that Petty came into federal court with the same conclusory claims, and once he got into federal court the state's answer told him you still haven't stated the claim. The magistrate's report told him, you still haven't stated a claim.

QUESTION: Well, but the magistrate didn't dismiss it without at least looking at the transcript.

MR. PALMER: No, Your Honor, he reviewed the entire transcript in light of what Petty had pled.

QUESTION: Right.

MR. PALMER: It wasn't until the appellate level that Petty raised these matters, but he certainly had ample opportunity to do so.

QUESTION: Thank you.

MR. PALMER: Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Palmer.

The case is submitted.

(Whereupon, at 11:51 o'clock a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

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

#86-1656 - JAMES A. LYNAUGH, INTERIM DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, Petitioner V. GREGORY ALLEN PETTY

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

BY Paul A. Richardson

(REPORTER)