ORIGINAL

TRANSCRIPT OF PROCEEDINGS

IN THE SUPREME COURT OF THE UNITED STATES

In the Matter of:)
)
R. "ROY" PERALTA,)
)
Appellant,)
)
v.) No. 86-1430
)
HEIGHTS MEDICAL CENTER, INC.,)
d/b/a HEIGHTS HOSPITAL, et al.)
)
)

Pages: 1 through 48

Place: Washington, D.C.

Date: November 30, 1987

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IN THE SUPREME COURT OF THE UNITED STATES

R. "ROY" PERALTA,

Appellant,

v. : No. 86-1430

HEIGHTS MEDICAL CENTER, INC., dba HEIGHTS HOSPITAL, ET AL.

Washington, D.C.

Monday, November 30, 1987

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:59 a.m.

APPEARANCES:

BRUCE IAN SCHIMMEL, ESQ., Houston, Texas; on behalf of the Appellant.

JACK E. URQUHART, ESQ., Houston, Texas; on behalf of the Appellees.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: Mr. Schimmel, you may proceed whenever you are ready.

ORAL ARGUMENT OF BRUCE IAN SCHIMMEL, ESQ.

ON BEHALF OF THE APPELLANT

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

At issue in this case is the constitutionality of Texas Rule of Civil Procedure Number 329(b)(f).

The question presented is whether any state may require a defendant to show a meritorious defense to the underlying issues in order to vacate a default judgment which has been entered without personal jurisdiction or is void as a result of procedural errors that have risen to the level of a denial of due process under the Fourteenth Amendment.

I am here today because my client, Mr. Roy Peralta, has and is continuing to be deprived as the result of a void judgment that was entered in Texas and filed with the Real Property Records of Harris County.

This judgment, I cannot help him overturn, and he cannot be relieved of as a result of the Catch-22 system of procedures in the Texas courts. Mr. Peralta has had $80,000 of his real property sold for $1,720, an execution sale on this void judgment. Additionally, he has an award entered against him for $5,600 on a debt that was previously unliquidated,

$1,867 for attorneys fees that are going to be paid to an attorney who violated his duty to the court by making a motion for entry on a judgment where the service showed on its face that it was void.

QUESTION: Mr. Schimmel, --

MR. SCHIMMEL: Yes, sir.

QUESTION: -- I understand your opponents in this case to contend that Texas does provide relief from this sort of judgment and certainly from execution on it, but that you simply have taken the wrong procedural tact.

MR. SCHIMMEL: Well, to begin with, they are improper in their statement of the law. Believe me, I'm a Board-certified expert on these matters, and if we could have taken a collateral attack, I certainly would have taken it.

However, even if that opportunity were open to us, that would not make Rule 329(b)(f) constitutional. This Court has addressed the issue of post-judgment remedies before in Coe and in the other case that came up from Texas, Manzo v. Armstrong, Armstrong v. Manzo, and has said that the only thing that you can do is to give us a brand-new trial in this matter to put us in the exact same position.

This is what is constitutionally mandated.

QUESTION: Well, again, I had thought that, at least one of your opponents contended, that had you followed the proper Texas procedure, you could have ended up with a new

trial rather than just having to produce a meritorious defense.

MR. SCHIMMEL: No, sir. They would try to confuse this Court on what the status of Texas law is.

This judgment recites in it that it was served, that it was served regularly, and because that recitation is in this void judgment, in Texas courts, if we had taken a collateral attack, as you will see in, for instance, -- well, I'll cite the case to you in a moment, but as you will see in the Texas courts, it clearly states because the judgment recites on its face that service was regularly, you cannot attack it collaterally.

So, they are correct, and besides, that's not a matter of --

QUESTION: To solve that, we don't have to strike down the whole rule. We can just say the rule is no good if you do not allow collateral attack. Would that satisfy you?

MR. SCHIMMEL: No, sir, because --

QUESTION: Because if there is collateral attack, the rule makes a lot of sense to me. Why was the Court's time?

MR. SCHIMMEL: To begin with, there's not collateral attack, and --

QUESTION: I understand, but if there were, would you still say the rule was no good?

MR. SCHIMMEL: Yes, sir, I would, and let me tell you why, sir. Because we would still choose to directly attack it.

If it's void, it's void for all purposes. It should be void in the collateral attack or it should be void in a direct attack, and we would want to take a direct attack to clear the court records.

The collateral attack would not clear this other record out of the judgments, and as long as it's in the judgments, under the Fair Credit Reporting Act, my client's credit would be ruined. It will not clear -- a collateral attack will not clear the original abstracted judgment. A collateral attack may return us our property that has been taken as a result of this, but it will not make the unsatisfied portion of the original judgment, which can be re-executed upon, disappear. It's all still there.

What do we have to do? Wait until they can again attach more of our property under the original judgment and then go and try and get that back again?

QUESTION: Wait until you're harmed, like everybody else.

MR. SCHIMMEL: Well, we're harmed.

QUESTION: Your only immediate harm, as I understand it, is going to be your credit rating. That is --

MR. SCHIMMEL: No, sir, that is not our only immediate harm. Since Pinnoyer v. Neff, it has been this Court's opinion, as I understand it, that the entry of a judgment itself is a taking of a liberty interest from us.

We have a right not to be a judgment debtor.

QUESTION: Mr. Schimmel, doesn't Paul v. Davis suggest there's no liberty interest in reputation alone?

MR. SCHIMMEL: No, ma'am. I believe that Paul v. Davis is really not applicable for several reasons. I think that that case turned on whether or not the tort that occurred was, in fact, a change in status, unlike Wisconsin v. Constantineau, where we actually had a law that allowed a change of status where a person was not able to buy liquor once an official officially made him a "drunkard".

In Paul v. Davis, there was no statute that said a person could not get a job or could not shop once the chief of police has determined that he is a "shop lifter", and I think that's really where Paul v. Davis is distinguishable from the situation here.

Here, when the Court says it is --

QUESTION: Mr. Schimmel, let me ask you something else. Could you bring in Texas a declaratory judgment to establish whether or not the judgment against your client was void?

MR. SCHIMMEL: No, ma'am, and the reason is quite clear. Anything other than a bill of review is an indirect attack and because the judgment itself cites on it that service was regular, even though constitutionally it would seem to me that if it's void, even the recitation of regular service

should also not stand up, that's not the law in Texas.

Crawford v. McDonald and the other cases say that if it says on its face that the judgment is void, that will be preclusive. It would seem to me that even this preclusive effect is unconstitutional, but that's not really the issue in front of us.

QUESTION: Well, let me ask you this. Does Texas law allow you to prevent all efforts to enforce the judgment in this case by collateral means?

MR. SCHIMMEL: In actuality, it would not, and the reason would be because although we would be able to get a temporary injunction during the pendency of the collateral attack, because the collateral attack would have to fail as a result of the recitation of the judgment, at the end of that pendency, the injunction would be vacated, and then they would be open to taking our property again and doing all these other things to us.

So, the answer to that question would be no, ma'am.

QUESTION: Well, aren't you -- don't you have some proceedings going on right now?

MR. SCHIMMEL: Yes, sir. The proceedings that we have --

QUESTION: Well, you aren't taking them just for exercise, are you?

MR. SCHIMMEL: No, sir, we are not, and I think that

it needs to be made clear to the Court why we are taking these other proceedings.

During the discovery on this case, we have found that, in fact, the purchasers who purchased at this execution sale have also gone back and gone to the lender that Mr. Peralta was making his payments to, unknown to him, and gotten a second deed for a -- we feel it's a fraudulent deed for closure of the lender's lien against my client. My client didn't find out about this until not only after he had paid off the loan entirely --

QUESTION: So, what are you -- what proceedings do you have going on?

MR. SCHIMMEL: Well, that is what we call trespass to try title in order to get --

QUESTION: What if you win that?

MR. SCHIMMEL: If we win that, that will not -- well, first of all, we can't win that with this judgment.

QUESTION: Well, why did you bring it?

MR. SCHIMMEL: Because we want to toll the statute of limitations on the second deed, not the one that issued out of the constable on this execution sale. The one that issued that out of the lender on the foreclosure of the --

QUESTION: Trespass to try title. So, you're going to lose that case, is that it?

MR. SCHIMMEL: If we do not win here, we

automatically lose that case because in trespass to try title, you must prove -- you have a burden placed upon you to prove your ownership good as against the entitled world. You cannot rely on the infirmity of the defendant's ownership. You must prove it good as against the entitled world and as a result of that, this judgment execution, even if it hadn't been to the Chinns, I might add, who were the purchasers at the foreclosure sale on the trustee's fees, even if it hadn't been to them, would make the Chinns victorious in their suit in the second case.

QUESTION: But, Mr. Schimmel, if your real problem, if your real complaint is the inability to make a collateral attack, which is what you're now discussing, surely the way to remedy that is to appeal from the decision that does not allow you to make a collateral attack, rather than to say that this rule, Rule 19, is bad.

Rule 19 may be perfectly -- assuming Rule 19 is okay, if collateral attack is allowed, it seems to me a very strange way to complain about the inability to make collateral attack to come in saying Rule 19 is no good.

MR. SCHIMMEL: Mr. Justice, when I sat down with this case the first time and researched the law on it, the courts of the State of Texas told me it was mandated for me to bring a bill of review proceeding. I followed the law of the courts of the State of Texas and brought the bill of review proceeding as

a result of that.

If I do not prevail on this, it will be used as res judicata in the collateral attack under theories that this Court addressed in Joiner v. Vasquez from the State of Texas.

QUESTION: If that happens, come and appeal the collateral attack. I think you would well have a good case there.

MR. SCHIMMEL: It's my understanding that if the theories in Pinnoyer v. Neff and Coe v. Armstrong are still good law today, that we should be able to directly attack this. If it's void, it's void on direct attack. If it's void, it's void on collateral attack.

Why should we be precluded from a default judgment which was entered without jurisdiction? Why should that make me choose a way to attack something for my client? Isn't that a preclusive effect from the default -- from the void judgment? Isn't that a shifting of burden that was addressed in Armstrong v. Manzo where it says that to shift these burdens is unconstitutional? That is the way we feel about it.

We should be at liberty to bring either one of those attacks.

QUESTION: Exactly what section of the Constitution do you rely on?

MR. SCHIMMEL: The due process clause of the Fourteenth Amendment, sir.

QUESTION: Would you explain how you get under that?

MR. SCHIMMEL: Well, the law of the State of Texas says that force and effect can be given where personal jurisdiction has not been had over us. Pinnoyer v. Neff says you must have personal jurisdiction, otherwise it's void.

This case is very similar.

QUESTION: Was that point raised?

MR. SCHIMMEL: Yes, sir, it was raised.

QUESTION: Was it raised here?

MR. SCHIMMEL: Yes, sir, it was raised here. It was raised --

QUESTION: I thought all you were raising here is the rule was wrong.

MR. SCHIMMEL: Sir?

QUESTION: The Texas rule is wrong. Not that your case was wrong.

MR. SCHIMMEL: Case law is part of the rule. It has been ruled on many times that the determination --

QUESTION: Am I correct that you all you are objecting to is the rule?

MR. SCHIMMEL: The rule and the cases that go with it has been objected to. It is the case law that says you must have meritorious defense under this rule, and that has become part and parcel of the rule itself in the State of Texas.

QUESTION: You think so.

MR. SCHIMMEL: Well, not only that, --

QUESTION: And, then, in order to rule with you, we have to think that way.

MR. SCHIMMEL: I hope you agree with me, sir.

QUESTION: You do?

MR. SCHIMMEL: Yes, sir.

QUESTION: I just don't see any federal question in the case. You're unhappy. That's all.

MR. SCHIMMEL: Sir, there is a federal question whenever eighty acres is taken away on a void default judgment without personal service of process over the defendant. This Court has ruled that over and over again.

There is a federal question when a person is impinged in his liberty to mortgage the property he already owns because there is a judgment on the records, the real property records of Harris County, Texas.

Mr. Peralta cannot go out and even mortgage the land he already owns because no title insurance company will allow him to do that. There is a deprivation of property that has already occurred.

QUESTION: Are you trying to use this case to decide that other one?

MR. SCHIMMEL: Which other one, sir?

QUESTION: The one you have pending right now.

MR. SCHIMMEL: This case, if we do not win this case,

will automatically decide the other one against us.

QUESTION: Do you agree that we can't decide that case now?

MR. SCHIMMEL: Oh, I certainly agree that you cannot decide that case now.

QUESTION: Then, why do you keep arguing that?

MR. SCHIMMEL: Sir?

QUESTION: Why do you keep arguing it? Why do you keep bringing it up?

MR. SCHIMMEL: I'm sorry, sir. It was brought up by the Court, not by me.

QUESTION: Just then you brought it up. Do you need that case to win this one?

MR. SCHIMMEL: Oh, no, sir, I do not need to win in that case in order to win this case, sir. But I certainly need to win this case in order to win that one.

QUESTION: But what do you need -- you need to show how the state denied you due process.

MR. SCHIMMEL: Yes, sir.

QUESTION: And the only thing you say is the rule is a bad rule.

MR. SCHIMMEL: The rule requires us to show meritorious defense to overturn a judgment which was entered without due process of law. That is the exact same situation that this Court had before it in Armstrong v. Manzo where the

State of Texas required a father to go in after judgment, although service of process had not been made upon him, and shifted the burden of proof upon him to prove that, in fact, he --

QUESTION: Were you in the Armstrong case?

MR. SCHIMMEL: Sir?

QUESTION: Were you in the Armstrong case?

MR. SCHIMMEL: No, sir, I was not. I don't believe that I was out of elementary school at the time, sir.

QUESTION: I was just wondering.

MR. SCHIMMEL: I'm sorry, sir?

QUESTION: I said I was just wondering.

MR. SCHIMMEL: Oh. No, sir. No, sir. The case was decided in the early sixties, sir.

QUESTION: I'm just at a loss as to what the federal question is.

MR. SCHIMMEL: The federal question is may any court put a procedural burden of proving meritorious defense in order to overturn a void judgment on a direct attack. That, I would think, is a very clear federal question.

QUESTION: But you didn't try it.

MR. SCHIMMEL: Yes, we did try it, sir. That was --

QUESTION: You tried it one way. You didn't try it the other way.

MR. SCHIMMEL: Sir, we cannot try it in the State of

Texas the other way. The cases in the State of Texas say that if we go in on that collateral attack and say that this judgment that is before you all today is void, they will say this is a collateral attack like they did in the Austin School District case. This is a collateral attack. The case recites on its face the service of process. Therefore, you cannot collateral it and you must bring a bill of review proceeding.

So, we have done that. That is the law in the State of Texas at this point. So, we have followed the law and because we have been forced into this, -- you see, it's a Catch-22. Are we not to be able to object on this end of the Catch-22 and may we only object on that end of the Catch-22?

If we're caught in what the computer people call a "du loop", I think we should be able to cut it off at either end. If the procedure in bill of review says unless you show a meritorious defense, and this Court has ruled on several occasions, in Coe v. Armour Fertilizer Works as well as Armstrong v. Manzo, that we do not have to show a meritorious defense, then this procedure is defective and must be ruled unconstitutional by the Court.

If the Court then -- since it is to the other area, if the Court -- if we then go not on collateral attack but in just our other issues, we don't have to bring collateral attack.

See, if we win here, there is no necessity to bring a

collateral attack. My other case is not a collateral attack on this issue. This other case has to deal with a second deed from the same person, from the lender to the same person, and this Court should distinguish those two cases.

It just so happens to be that because of the status of the law in trespass to try title, that I will automatically be defeated on that because I will have to prove on behalf of my client that not only was the deed from the trustee to -- from the trustee in the lender's situation to the Chinns, not only was that void, but also every other impediment on our title, whether it's this or any other judgment that an execution is issued on, is also against us.

We must remove that from the record in order for us to succeed on this other case, and that's why the other case was brought.

QUESTION: So, the other case does then, if you say that's an essential part of it, it does involve a collateral attack upon this case.

MR. SCHIMMEL: No, sir, it does not. It does not involve a collateral attack. The cases that we have cited to you in our brief, if you'll look at them, sir, are almost every one of them trespass to try title cases, where the courts in the State of Texas have said you have another judgment, you cannot collaterally attack that on this trespass to try title.

Crawford v. McDonald went to the Supreme Court of the

State of Texas. You cannot --

QUESTION: It's a collateral attack case if it has any chance of succeeding. Let me rephrase it.

It's either a collateral attack case or you're a fool to bring it. Is that what you're telling us.

MR. SCHIMMEL: We have two mars on our title, sir. We have not only this execution sale, which we are attacking directly, but we have a trustee's deed which we also had to attack that has nothing to do with Heights Medical Center, and that is what the second case is about. Removing that.

QUESTION: Can you win --

MR. SCHIMMEL: Oh, yes, sir.

QUESTION: Can you win by -- in attacking the trustee's deed without demonstrating that this judgment was invalid?

MR. SCHIMMEL: No, sir.

QUESTION: Then, the suit represents a collateral attack.

MR. SCHIMMEL: We also, in that suit, would not be able to prove that this execution sale was invalid because the court in Texas will look at it and say there is a recitation on the face of the judgment that service was regular. You must directly attack it. That is the position that we're in.

QUESTION: Can you win that suit without demonstrating the invalidity of this judgment?

MR. SCHIMMEL: No, sir, we cannot win that suit without demonstrating that.

QUESTION: That, to me, means that that suit is a collateral attack. I don't know any other definition of a collateral attack.

MR. SCHIMMEL: Well, if we were allowed to question that, then it would be a collateral attack. We are not going to be allowed in the State of Texas to question that.

QUESTION: That just means that you're going to lose.

MR. SCHIMMEL: No, sir. That means that there is an unconstitutional preclusive effect of a void default judgment. It means that the default judgment entered in this case will be given light and imbued with some power, although we didn't service, we didn't appear, and we didn't find out about it until years later.

That is fundamentally repugnant to the Constitution of the United States. How can it have any life in a collateral or direct attack? We can remove -- if we remove this other deed, then here we are again, yet we will not be able to remove this deed in that other proceeding. It will not be allowed in the State of Texas because, among other things, we have chosen to directly attack it.

You know, one of the pleadings, it was the attorney for the respondents in the cause of action who put the pleadings in this other case into evidence here, if you will

read their answer, their answer to the pleadings that we filed in this other case, they claim res judicata, and I would fear that under Joiner v. Vasquez, where it says if you don't appeal from a denial of the bill of review, that it is res judicata, that they will prevail on that because that is why we have appealed this all the way up.

We're not free to collaterally attack it, if we have taken the bill of review proceeding. Once the die is cast, we have to go all the way through with it. How can a void judgment be given res judicata effect? How can a recitation in a void judgment be given any life? The courts of Texas say we have to directly attack it. That is what we have done here.

As I believe it was cited in one of the cases that we cited to you, I know of no case that you can collaterally attack that you cannot directly attack. Why are we precluded from bringing a direct attack? If it's void, it should be void for all purposes. On direct attack and collateral.

We will reserve the balance of our time for rebuttal, sir.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Schimmel.

We'll hear now from you, Mr. Urquhart.

ORAL ARGUMENT OF JACK E. URQUHART, ESQ.

ON BEHALF OF THE APPELLEES

MR. URQUHART: Thank you, Mr. Chief Justice, and may it please the Court:

A default judgment that is entered by a court that does not have personal jurisdiction is void under Texas law. It is a nullity. It has absolutely no legal effect. It can be collaterally attacked at any time by anyone. An attempt to execute --

QUESTION: Mr. Urquhart, could I interrupt you?

MR. URQUHART: Yes.

QUESTION: The State of Texas has filed an amicus curiae brief.

MR. URQUHART: Yes, sir.

QUESTION: In which they say that once the time for all of the prior proceedings, which they describe, have elapsed, the only remaining way to directly attack the voidable default judgment is through a bill of review.

Do you disagree with that statement?

MR. URQUHART: I agree with the statement, underlining that the only way to directly attack a void judgment is through the bill of review mechanism.

QUESTION: But, then, they go on and describe injunctive relief, but they say that in the other reliefs, you also must plead a meritorious defense.

MR. URQUHART: Your Honor, what the Attorney General's brief was doing was reciting methods of direct attack. They were not raising the issue of collateral attack under Texas law.

The distinction between a direct attack and a collateral attack is that the relief granted by direct attack is a change in the attack judgment. In other words, you only bring a direct attack if you have at least an arguable defense.

QUESTION: Yes, but the consequence of bringing it is that if you make such an allegation and have an arguable defense, they set aside the judgment, don't they?

MR. URQUHART: Only to immediately reinstate it, Your Honor.

QUESTION: Only to immediately reinstate it?

MR. URQUHART: Right. You see, a direct attack like the bill of review procedure that is here, the direct appeal, the writ of error, all of which are mentioned in the Attorney General's brief, the result of those procedures is the granting of a new trial. That's the reason that you seek those procedures, and if you have no meritorious defense, then you're wrong ever to pursue a direct attack under Texas law because you're engaging in a waste of time.

QUESTION: Why is it a waste of time? It would have made a great deal of difference in this case if they had granted relief by way of the bill of review because then you couldn't have executed the -- the execution would then fall right away.

MR. URQUHART: No. Your Honor, if I can try to directly respond to your question by explaining the bill of

review procedure. I'm not trying to evade the question at all.

The bill of review procedure, understand, is an equitable procedure that is available to people after everything else has run out in terms of direct attack. It's really designed not where there is a jurisdictional question involved but where somebody has a good defense.

QUESTION: I understand.

MR. URQUHART: And a court had jurisdiction.

QUESTION: But if you did have a good -- say you set aside the judgment, said okay we'll now try the case, you try the case, you enter a new judgment, that would mean that the earlier execution on the void judgment would no longer stand.

MR. URQUHART: But the bill of review procedure, Your Honor, works like this. It's a bang-bang procedure. You -- the bill of review --

QUESTION: Yes, but you have to enter a new judgment, wouldn't you? If you granted relief and then found that there was no merit to the pleaded defense, you'd have to enter a new judgment, wouldn't you?

MR. URQUHART: Right, and this --

QUESTION: And, therefore, would that not vacate the prior proceedings taken in execution of the original judgment?

MR. URQUHART: It would, in fact, Your Honor.

QUESTION: And would you -- do you concede that if his allegations are true, that this is a void judgment?

MR. URQUHART: I think I'd go further than that, Your Honor. In this case, we have to, I think, all of us, accept that his allegations are correct and that it is, therefore, a void judgment because of the posture that this case is in.

QUESTION: Well, then, what's your objection to opening the judgment?

MR. URQUHART: Your Honor, my objection is simply this, that what is being attacked in this case is a specific procedure, and the specific procedure is a salutary procedure. It enables people to recover who otherwise would not recover and it is designed specifically for people who have defenses.

My objection is -- my opposition has a whole panoply of remedies that they could pursue that would enable them to achieve exactly the purpose that they want to achieve.

QUESTION: Well, Mr. Urquhart, your opposing counsel vehemently disputes that there is any other procedure which would give him relief.

Now, how are we to evaluate that? We're not in a very good position here to know that.

MR. URQUHART: Justice O'Connor, I think that is accurate. If I can explain my answer. This case was brought as a bill of review. Our position is that was the inappropriate remedy. The remedy that they should have pursued would have been any of a variety of collateral attacks, Your Honor.

QUESTION: Such as what?

MR. URQUHART: Declaratory judgment. As a matter of fact, if Your Honor --

QUESTION: He said that's absolutely unavailable where the judgment on its face recites service was proper.

MR. URQUHART: All right. First, Your Honor, that question has not been presented properly to this Court because the state court in Texas has not had an opportunity to say after they have pursued the correct appeal that there is no avenue of collateral attack.

There is law in Texas, so that all of the Justices of the Court understand this, and I'm not misleading the Court, there is law in Texas to the effect that a recitation in the judgment controls. There is also a law in Texas to the effect that the record controls. There is also a law in Texas, however, that if a recitation of judgment conflicts with the record, specifically in this case, the record in this case shows according to what we must accept true a defective service, there is law in Texas which says that the Court can consider that.

QUESTION: So, in other words, it's an open question whether if this Petitioner follows some other procedure in Texas, whether relief can be obtained?

MR. URQUHART: Certainly, Justice O'Connor, and I would think that the Texas courts should be given the

opportunity. The Commander v. Bryan case is a very old case. It's a 1938 case that's referred to in our brief and a bit difficult to get through, but, basically, what the Commander v. Bryan case does is take on the problem that is addressed and then says that this presents possibly a due process question.

The Commander v. Bryan case has never been overruled. It's never been strongly followed. So far as our research indicates, there is no case, surprisingly, by our High Court or even our intermediate courts where the constitutional due process challenge to a collateral attack has ever been overturned.

QUESTION: But, Mr. Urquhart, the Texas court in its opinion didn't make reference to any other remedy. Its answer to the due process challenge was that as long as you have the right to assert a meritorious defense, that's all you have to do, but if you can't do that, you get no relief. That's basically what that opinion says.

Would you defend that theory?

MR. URQUHART: I defend the opinion.

QUESTION: You do defend the opinion?

MR. URQUHART: Yes, sir. I do.

QUESTION: Supposing it also said there is no other relief except the bill of review and you may not have any relief unless you can assert a meritorious defense, would you say that would be constitutional?

MR. URQUHART: No, sir, and I don't believe that the Justice Evans would have said that either when he wrote the opinion.

QUESTION: But if he's really saying your -- the response to the constitutional argument is you pursued the wrong remedy, he didn't say that.

MR. URQUHART: Nor do I think he had --

QUESTION: Neither does the Texas Attorney General identify any other remedy in which you do not have to prove a meritorious defense. Am I right on that?

MR. URQUHART: No, sir. Respectfully.

QUESTION: Where does the Texas Attorney General call our attention to the remedy you described?

MR. URQUHART: In his first argument, where he says that there is a collateral attack that is available. All right.

There is no specific rule or procedure that provides for collateral attack, but there is a massive body of case law in Texas that provides for collateral attack stemming from the premise in Austin Independent School District v. The Sierra Club and others that says that a judgment without jurisdiction is void and can be attacked, and I believe what the Attorney General -- excuse me, Your Honor.

I believe what the Attorney General was saying was that the collateral attack is available and then he goes on, I

think principally for the help of the Court, to explain what the direct attack remedies are and maybe there is a lack of clarity in the brief. But his point, and I think it is an accurate point, is that this judgment can be and should have been, if there is any merit at all in what they're doing, presented as a collateral attack.

QUESTION: But is it not true that while the collateral attack is pending, it takes time, I take it, to litigate the collateral attack, the judgment remains on the books and remains an impediment and a cloud on the title to the assets of this litigant?

MR. URQUHART: Under Texas law, --

QUESTION: And what is the justification for that burden?

MR. URQUHART: All right. not to be splitting hairs, Your Honor, but a void judgment is that. It's not a cloud on anything. It's a void judgment. It's a legal nullity.

QUESTION: But if it's nothing, it was the foundation for your execution and apparently a sheriff's sale and a lot of other things that happened that caused the transfer of ownership interest in property, all based on this judgment, if we take the facts as pleaded.

MR. URQUHART: Well, Justice Stevens, if I could make a comment, none of this execution aspect of the case was in the record. All of that is a result of the briefing. My

understanding of the --

QUESTION: But can not we presume that if there's a judgment on the books, that they would go ahead and execute it? They could have done so consistently with your theory. Whether they really did or not, it was subject to being executed. The property could have been sold.

MR. URQUHART: Your Honor, if there was a judgment on the books, it could have been --

QUESTION: And if they didn't know about it, so they couldn't bring a collateral attack until after the sale took place, how could they protect themselves?

MR. URQUHART: Well, the point is, Your Honor, immediately upon receipt of any notification that any attempt was made to execute on the judgment, they could have done a wide variety of things, which, to this point, they still have not done.

There is no suit on file at all attacking the execution because, in point of fact, Your Honor, they did not own the property when the alleged execution sale took place. This deed that's the subject of the attack that's going on right now was actually granted before the execution sale.

QUESTION: Well, that may be. I can't get into the facts. Hypothetically, at least, this procedure would permit this kind of transaction to take place. The judgment gets on the books that the defendant knows nothing about and a sale of

property could take place without his knowing about it.

MR. URQUHART: But, Your Honor, isn't the -- assuming --

QUESTION: And I don't understand the state's interest in having that scenario be a possible way to dispose of this kind of litigation.

MR. URQUHART: Well, I'm apparently not explaining myself well, Your Honor. It's clear to me, but I will try again.

The direct attack procedure is set up for people who have defenses. All right. So that they can assert their defenses. A direct attack permits you to change the judgment. A collateral attack is available for people who have no defenses but who have a technical thing that they can use. All right.

The technical thing in this case is that, according to them, the judgment is void, and I'm not meaning to trivialize technical, but what I am saying is that they don't have a defense to this action. They admit they don't have a defense to this action.

So, the point is that is the remedy adequate, and our position is since they have a collateral attack remedy, which means that the moment they find out about this void judgment, they can avoid the consequences of that judgment, that this remedy meets the due process requirements.

QUESTION: Mr. Urquhart, as I understand your theory, it's that there's no deprivation of property by the mere existence on the books of this judgment which is void, right?

MR. URQUHART: Yes, sir.

QUESTION: If that is so, how is it that we will entertain an appeal to this Court on the basis of the due process clause from the entry by a state supreme court of a judgment in a matter in which it has no jurisdiction? I mean, it happens all the time. A person comes here and says we've been deprived of property without due process of law, not because this judgment has been executed upon yet, but merely because this Court is about to enter this judgment or has entered this judgment.

We entertain those suits. That must mean that the mere existence of the judgment is a deprivation of property, mustn't it?

MR. URQUHART: Justice Scalia, my response to that is, and I start to understand, sir, from the premise that if, as we must accept, the judgment that we're dealing with is a void judgment, all right, then that particular type of judgment, one that is void as a matter of the law of our jurisdiction, all right, cannot be a taking under the due process clause.

QUESTION: You may be right. It may well be a void judgment because, if executed upon, it would deprive you of

property without due process, but until it's executed upon, there's no harm done. It is, after all, a void judgment. So, there's no federal violation.

Why wouldn't we have said that in all those cases? The fact is we do entertain attacks on the basis that the state had no jurisdiction on this matter. We entertain those attacks in the original suit. We don't wait until the suit is executed upon, and I don't know why that doesn't mean that the Petitioner here has a right to have some method of eliminating the mere existence of that judgment.

MR. URQUHART: Your Honor, while that, in the abstract and in the important abstract, may be true, my belief is that what we are dealing with in this Court and the only thing that the record in this Court enables the United States Supreme Court to deal with is the constitutionality of a very specific procedure, which is designed for a very specific purpose, not this purpose. It's designed for those people who, through no fault of their own, have been wrongfully deprived of the opportunity to present their defense, and if they meet the specific aspects of the bill of review procedure, then they're entitled to bill of review relief.

What happened in this case, I suggest, is that the avenues that Texas does provide for dealing with a void judgment, such as, for example, the declaratory judgment, simply were not pursued.

QUESTION: Then, Mr. Urquhart, certainly, it seems, I guess, apparent to some my colleagues and perhaps to the counsel that if this were the only provision of Texas law under which one could attack a default judgment entered against him, it might well lack something in the way of procedural due process.

You say it's not the only process, that Mr. Peralta, as he is situated, could have brought an action for a declaratory judgment where, in the state trial court?

MR. URQUHART: It's my position, Your Honor, (1) that he could, (2) that in all honesty that issue is not before this Court and is not briefed and I really cannot presume to speak for the State of Texas.

QUESTION: I think it's briefed in a sense that Peralta's contention is that I brought a bill of review because I claimed the judgment was improperly served on my client -- on me. I was told by the Texas Court of Civil Appeals that you have to have a meritorious defense in order to set aside a judgment under a bill of review.

That is not constitutional, Peralta says, because I shouldn't have to prove a meritorious defense before I can set aside a void judgment that was never properly served. So, I think that is before us.

MR. URQUHART: Your Honor, --

QUESTION: I don't know how you escape your

concession that if there were no other way to attack that this provision would be unconstitutional. I think you agree with that. If there were no other way of attacking this void judgment, this meritorious defense provision would be unconstitutional.

MR. URQUHART: Your Honor, --

QUESTION: I thought you agreed to that.

MR. URQUHART: -- I don't think I did that because, first of all, I have not really agreed that this is a way to attack a void judgment when you have no defense. I thought, in fact, I know that my intended point is that this is not even a way to attack a void judgment unless you have a meritorious defense.

I thought my other point, however, Your Honor, was that there are many ways under Texas law that a void default judgment can be attacked.

QUESTION: That's not what you say in your brief. You say in your brief after they say there's no other way to attack the void judgment, you say, "Although this may be technically correct, the implication that Appellant cannot attack the enforcement of this judgment is wrong", and then in your brief, you argue that his remedy was to enjoin the enforcement of the judgment or to have it declared void.

That's quite different from saying there's another way to attack a void judgment and have it wiped off the books

and you do not identify any rule or statute that specifies a collateral attack procedure which would result in vacating the judgment.

MR. URQUHART: All right. Your Honor will note that the Attorney General in its brief said that the judgment can be attacked collaterally, that judgment can be attacked collaterally as opposed to the enforcement.

QUESTION: You didn't say that in your brief.

MR. URQUHART: That's true, Your Honor, but I think that --

QUESTION: The Texas Court of Appeals didn't say that either.

MR. URQUHART: I think, though, that at least from my point of argument, that is a distinction without a difference. The point is that so long as the deprivation, the contended deprivation, the taking of liberty or the taking of property can be addressed, then there is no due process problem.

QUESTION: Well, would you say that supposing the judgment was entered, the defendant didn't even know about it, and the plaintiff just let it sit there for, say, three years, they just -- and then three years later they found out about it and brought a proceeding to set it aside, would you say there had been no impact on -- no deprivation of property during that three year period?

MR. URQUHART: None caused by the inadequacies of the

remedy, particularly the inadequacies --

QUESTION: Well, I'm not saying whether it's without due process. The question is would there be a deprivation of property merely by virtue of the entry of a judgment which remains on the official records of the county for three years? Does that deprive anybody of property?

MR. URQUHART: Not a void judgment, Your Honor. No, sir.

QUESTION: Although it's appealable here on the basis that there has been a deprivation of property?

MR. URQUHART: Your Honor, I will accept the Court's statement on that. I did not respond well to the Court's earlier question as to why the Court has done that in other cases, but I just cannot see the deprivation, perhaps because I am, from my side of the table, blind to it.

QUESTION: I started off agreeing with you on that, but I just can't explain why we entertain these suits then, unless we are of the view that the mere entry of a void judgment is a deprivation of property.

QUESTION: Mr. Urquhart, just so I can be sure I understand what you're saying in response to all these questions, if we assume that there is no other procedure at all in Texas, other than the bill of review procedure, whereby the judgment itself could be stricken as opposed to simply preventing its enforcement, do you think there is a due process

violation or would be?

MR. URQUHART: Not in this case, Your Honor, because the judgment by --

QUESTION: Forget this case. If there is no other procedure under Texas law except the bill of review, for setting aside a void judgment, without establishing a meritorious defense, is there a due process problem violation?

MR. URQUHART: My answer to that, Your Honor, is no, because a void judgment does not constitute a taking of property.

QUESTION: But, then, you're saying, in effect, that this judgment, which recites on its face that it was properly served and is presumably on file and, you know, a title company looking at that judgment isn't going to go back and interview the people about whether the facts conform to what the record shows, it seems to me that would really be a cloud on the title.

MR. URQUHART: But, Your Honor, isn't this really a Paul v. Davis situation, where the most that can be said of a void judgment is that it has an effect on the reputation alone? It does not change the legal status.

QUESTION: If you believe Shakespeare that he who steals my purse steals trash, perhaps reputation is more important than money, but I should think this would be a real impairment of one's property right. I don't know what the

Texas law is, but in Arizona, a recorded judgment was a lien upon all of your real property.

MR. URQUHART: Your Honor, a couple of responses to that is that the liberty issue, which I think the -- at least in my respect, the Court is addressing here, we have asserted in our brief was not properly raised below.

QUESTION: That may be right, but how about the property?

MR. URQUHART: Your Honor, a void judgment, and here I know that I'm being obnoxiously repetitive, but a void judgment that has no legal effect under Texas law cannot constitute a taking of property except for a pure reputational interest, which, as I understand the Paul v. Davis case, states is not a taking of liberty so as to invoke the due process.

QUESTION: But how does anybody know it's void?

MR. URQUHART: Well, --

QUESTION: If you look at the face of the judgment.

MR. URQUHART: -- Your Honor, since my brief has been properly thrown at me, on page 6 of my opponent's brief, they say that this judgment is -- pardon me. The citation is void on its face. If that is true, as the Attorney General says, --

QUESTION: Void on its face, but you have to accept the allegation that he was never served.

MR. URQUHART: Which I think --

QUESTION: I know, but you certainly have to go

outside the judgment that's on record to find out whether there was -- whether it's void or not, whether there was service or not.

MR. URQUHART: But you can't do anything with it. From our point of -- from our side of the table, Your Honor, I understand that side of the table's argument, but from our side of the table, if we accept what they say could be true as we must, then we have a void judgment that is not worth anything to us.

QUESTION: Well, that may be so, but was this property sold?

MR. URQUHART: Not -- Your Honor, the property was sold.

QUESTION: Was it foreclosed on?

MR. URQUHART: To clear title, it was, yes, sir.

QUESTION: And was --

MR. URQUHART: It was foreclosed on by someone else first.

QUESTION: All right. Was it transferred?

MR. URQUHART: The deed record was transferred.

QUESTION: What about the lawyer who represented the buyer? Don't you suppose he relied on that judgment? If you had been a lawyer for the buyer, wouldn't you have looked at that judgment and wondered if it was good and you probably would have relied on it?

MR. URQUHART: I hope I would have done something before we reached this point, Your Honor, in to looking into whether the judgment was valid or not.

Justice White, --

QUESTION: I suppose he must have charged the client something for getting the judgment.

MR. URQUHART: I wasn't representing him then, Your Honor.

QUESTION: Whoever represented -- got that judgment didn't think he was doing something for nothing or that the judgment was utterly useless.

MR. URQUHART: That is certainly true, Your Honor, and we still contend the judgment is not useless, but for the purpose of this argument, we are assuming that it's void.

Justice White, in your dissenting opinion in the Gertz case, you stated that our constitutional, or words to this effect, that our constitutional scheme demands a proper respect for the roles of the state in discharging their obligation to obey the Constitution.

I think that the State of Texas is entitled to that respect in this case. The only thing that the Court of Appeals and the Supreme Court did was to rule on the specific procedure under which the Appellates tried to make a claim in this case, a procedure that, Your Honor, expands the rights of victims of default judgments rather than attempts to limit it in some form

or fashion.

This is a procedure that has been on the books of Texas for a long time, and I think it's entitled to deference in this case, particularly in light of the Mathews v. Eldridge balancing test.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Urquhart.

Mr. Schimmel, you have nine minutes remaining.

ORAL ARGUMENT OF BRUCE IAN SCHIMMEL

ON BEHALF OF THE APPELLATES - REBUTTAL

MR. SCHIMMEL: Thank you, sir.

This Court looked at an extremely similar procedure in Armstrong v. Manzo. At that time, this Court did not say, well, why didn't Mr. Armstrong go in and collaterally attack this judgment denying his children's rights. Because we should be able to bring the direct attack.

The counsel for the people over at Heights Medical Center waited until after all time limits had ran before we could take an appeal, before any action was taken on this. It needs to be emphasized to this Court that even after the supposed execution sale and the supposed trustee's deed, the people who bought this property waited for months and even years before even attempting to contact my client to say that they owned the property -- that they no longer owned the property and waited until after we had paid off the first

mortgage before making any attempts to do that.

If this Court upholds this rule of civil procedure, what this Court is saying is that in the State of Texas, after six months on the entry of a judgment, you have absolutely no right to a direct appeal or direct attack on the judgment. That is what this Court will be saying because you can only use bill of review if six months has gone by after the entry of the judgment.

Every method that was cited by the Attorney General in their brief, on their long expounding on the different ways that you can attack, are all six months and a day short of what our situation is here, and even this remedy in Texas cannot be brought after four years. So, they've now placed a four-year statute of limitations on attacking default judgments in the State of Texas, even if they're totally void. You cannot directly attack even by bill of review. This is a void act.

QUESTION: Well, do you think it's unconstitutional for a state to say that a paper claim duly recorded after a period of time is taken at its face value?

MR. SCHIMMEL: Yes, sir, I do. I believe that the Constitution of the United States mandates that if the issue is one of lack of jurisdiction, that lack of jurisdiction is void forever and always under all circumstances. That's Pinnoyer v. Neff.

QUESTION: But maybe you don't have to make quite

that sweeping a claim to win this case here.

MR. SCHIMMEL: Well, fortunately, we didn't wait four years. Had we waited four years, then we would have had an additional burden placed in front of us, and all of the injunctive relief which the courts supposedly say that we can have without citing one case, all that injunctive relief -- in an injunctive proceeding, the burden is on us to go in and prove that we have a right, that we will ultimately win.

This is exactly the opposite statement that was made by this Court in Armstrong v. Manzo. It even says, "The shifting of this burden therein often lies who will win and who will lose." That's what this Court said.

QUESTION: What if there had been notice in this case and you had come in and said I have absolutely no defense to this, I haven't paid and --

MR. SCHIMMEL: That's due process of law, sir. We have an opportunity --

QUESTION: Will you just wait a minute until I ask my question?

MR. SCHIMMEL: Sorry.

QUESTION: What would you have done if you were sued, as you were in this case, and you come in and say I have no defense, I suppose the same judgment would have been entered, and then what would you have done?

MR. SCHIMMEL: We would have paid the judgment and

not lost our property. We would have paid the judgment and satisfied it and not lost our good name. That was deprived us. We did not have that opportunity. No demand was ever made on us to pay the unpaid amount or to enter into the Court.

We could have saved our good name. We could have saved our property.

QUESTION: That's really what makes this meritorious defense business unconstitutional in your view, I guess.

MR. URQUHART: Among other things, yes, sir.

This Court, in Carey v. Piphus, has said that it is of no force and effect to say that the same result would happen. Due process of law does not turn on whether or not you have a meritorious defense. It would be like the "Legal Eagles" movie where they said, well, let's give them a fair trial before we hang them. Due process of law requires that you do give us a fair trial before you deprive us of a right or a liberty, even if we're wrong.

That's the purpose. The integrity of the system of justice relies upon us having notice and ample opportunity to be heard, even if it is to say that we're wrong. That is what due process of law is about. It is about the procedures that guarantee the liberties of this country versus France, where you're guilty until you prove yourself innocent, and that is the same situation here.

QUESTION: Mr. Schimmel, can I ask you a question of

Texas procedure?

MR. SCHIMMEL: Yes, sir.

QUESTION: Does Texas have a certification procedure whereby if we were concerned about the question of state law, we could certify the question to the Texas court? Do you know?

MR. SCHIMMEL: I am not familiar with that, sir. I do not know whether or not they do or do not have that procedure. No one has asked me to brief it, sir.

I would also like to close by stating Texas gives great lip service in its cases to say that, in fact, you can bring collateral attacks, yet not one of the collateral attacks that has ever been brought and cited to you in these cases has ever succeeded, except this one case that was improperly decided, Commander v. Bryan, and even that case was not appealed to the Supreme Court of the State of Texas, so it's not stare decisis. It was relied on by the dissent in the case that did go to the Supreme Court of the State of Texas, McEwen v. Harrison, where they said the exact opposite, and ultimately its ultimate judgment shows the poverty of legal thinking in that case because it says that you can attack a case over and over and over again that's void on its face and have no res judicata effect, which is entirely in opposite with Joiner v. Vasquez, which was cert. denied by this Court and which the Supreme Court of Texas said the exact opposite.

Once you do submit to the procedure, you're bound by

it, even if they didn't have jurisdiction over you before. If you make a bill of review and you lose that bill of review, you must appeal it all the way. You cannot bring a separate bill of review proceeding or separate collateral attack. It's res judicata.

So, that case is simply not right. Also, it is a subject matter jurisdiction case and not a personal jurisdiction case, and the judgment in that case shows on its face that the Court had subject matter jurisdiction -- it did not have subject matter jurisdiction.

The Attorney General of the State of Texas starts his brief from a wrong point. He states that the face of this judgment is void when, in fact, the face of the judgment is not void. The face of this judgment shows the exact opposite and recites that service was properly made.

So, anything that is stated by the State of Texas beyond that point, based upon that premise, cannot be correct, and the cases that they cite to you, I would hold, simply are not the law in the State of Texas, and the portion of their case where they say you can bring a collateral attack has not one case cited, has not one case cited, and this whole procedure that we've gone through here, nobody on the opposition or amicus has cited to this case where there has been a collateral attack where the judgment comes from inside the State of Texas, not from outside the State of Texas, where

the issue was did you serve the defendant and the answer was no, and they said you can collaterally attack this, not where there is a recitation.

They cannot do it. It does not exist. This is our only method of attack and for that reason, we respectfully ask the Court to rule in our favor.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Schimmel.

The case is submitted.

(Whereupon, at 11:49 o'clock a.m., the case in the above-entitled matter was submitted.)

REPORTER'S CERTIFICATE

DOCKET NUMBER: 86-1430

CASE TITLE: R. Roy Peralta v. Heights Medical Center, Inc

HEARING DATE: November 30, 1987

LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Supreme Court of the United States, and that this is a true and accurate transcript of the case.

Date: November 30, 1987

Margaret Daly

Official Reporter

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