OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: RICHARD F. TREST, Petitioner v. BURL CAIN, WARDEN

CASE NO: 96-7901

PLACE: Washington, D.C.

DATE: Monday, November 10, 1997

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IN THE SUPREME COURT OF THE UNITED STATES

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RICHARD F. TREST, :

Petitioner :

v. : No. 96-7901

BURL CAIN, WARDEN :

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Washington, D.C.

Monday, November 10, 1997

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:04 a.m.

APPEARANCES:

REBECCA L. HUDSMITH, ESQ., Lafayette, Louisiana; on behalf of the Petitioner.

KATHLEEN E. PETERSEN, ESQ., Assistant Attorney General of Louisiana, Baton Rouge, Louisiana; on behalf of the Respondent.

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PROCEEDINGS

(11:04 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 96-7901, Richard F. Trest v. Burl Cain.

Ms. Hudsmith.

ORAL ARGUMENT OF REBECCA L. HUDSMITH

ON BEHALF OF THE PETITIONER

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

A Federal court as a general proposition is not and ought not be obligated to raise a nonjurisdictional defense such as procedural default when the party to the proceeding has failed to raise that defense itself.

In this case, in the opinion below the United States Court of Appeals for the Fifth Circuit evidences a belief that it must have raised, had to raise, was obligated to raise what it perceived to be a defense of procedural default and deny the merits of the petitioner's claim on that basis.

QUESTION: Ms. Hudsmith, you're not asserting here that the court could not have raised it on its own. You're just asserting that it had no obligation to. Is that the limit of your argument here?

MS. HUDSMITH: That is the cert question presented.

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QUESTION: Right.

MS. HUDSMITH: I actually think we can and ought to go a little further, Your Honor, and I would say, Justice Scalia, that the Federal court --

QUESTION: Well, you presented --

MS. HUDSMITH: -- can.

QUESTION: Yes.

MS. HUDSMITH: It has the power to raise a waived defense that is nonjurisdictional, but it ought not to without first giving the parties an opportunity to be heard, and it -- and in this context of procedural default it ought to do so only rarely.

QUESTION: So what you're asking for us, from us is a remand --

MS. HUDSMITH: Yes, Your Honor.

QUESTION: -- to let the court of appeals decide whether it wants to exercise its discretion to raise this issue or not?

MS. HUDSMITH: That is the most obvious remedy that we would ask for and hope this Court would grant.

QUESTION: That's an extremely narrow point, perhaps narrower than I thought the question presented.

You agree that the court of appeals could, under Granberry v. Greer, perhaps, have raised this point but it wasn't obligated to. You read its opinion to say it

thought it was obligated to, so then we would remand it and tell the court of appeals you may do it but it's a matter of discretion.

MS. HUDSMITH: No, Your Honor. I agree that when a case gets this far and is before this Court and, given the different opinions that are available to be read in the courts of appeals on this issue, that is when the Court should raise procedural defaults sua sponte.

I think this Court should give the courts of appeal, then the court of appeal below, more guidance than that, and I'm prepared to offer what guidance I can to the Court in that regard.

QUESTION: I wasn't certain, in reading the Fifth Circuit opinion, that it thought it was obligated to do this. It wasn't all that clear to me.

MS. HUDSMITH: I will acknowledge, Justice O'Connor, that, unlike the court of appeals' opinion in Granberry, where the court of appeals apparently concluded that it could not ignore a waiver, the Fifth Circuit in the opinion below did not say that.

However, the court must have known, because the dissent, in the form of the Hon. Richard Parker, made reference to the fact that the State had never raised the defense of procedural default and ought to be barred as a result.

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And I would suggest that it is a fair reading of the opinion, despite the lack of information from the court on the significance of that, that its failure, that the panel majority's failure to even discuss that, in effect, if you will, State procedural default, means that it felt obligated, no matter, to do what it did, and that is to decide the claim against the petitioner on the basis of what it perceived to be a procedural default, and the opinion does --

QUESTION: Ms. Hudsmith --

MS. HUDSMITH: Yes, sir.

QUESTION: -- did the State in its opposition to the petition for certiorari, did the State contest whether the opinion below, whether the court below felt obligated?

MS. HUDSMITH: They didn't address the issue, that I'm aware of, that --

QUESTION: Well, if they didn't address the issue, and if the question presented clearly only asks whether the court of appeals is required to raise the defense sua sponte, how do we get into this other point?

I thought the case was taken on the assumption that the court below was -- felt itself obliged to raise the defense sua sponte. Isn't that what the question presented states?

MS. HUDSMITH: That is, and that certainly --

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QUESTION: And the State did not object that the question presented does not --

MS. HUDSMITH: Well --

QUESTION: -- conform to the true state of facts?

MS. HUDSMITH: The State -- and I know they can speak better to this than I, but the State does take the position that the opinion can be read more broadly.

QUESTION: Too late now. I asked whether they did it in opposition to the petition for certiorari.

MS. HUDSMITH: I am not aware of that, Your Honor.

QUESTION: I don't like getting a case here and then finding that it involves a totally different issue from the one that we granted, and that's what you're essentially saying it does.

MS. HUDSMITH: What I'm saying is that the narrow -- there's a very narrow issue presented to this Court in the question presented.

QUESTION: And that's the issue you framed in your question presented --

MS. HUDSMITH: That is.

QUESTION: -- which we granted as you framed it.

MS. HUDSMITH: Yes, sir.

QUESTION: Okay.

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MS. HUDSMITH: And I'm prepared to speak to that, but I'm also prepared to speak more broadly if the Court so desires to whether, beyond a remand, the Court, this Court should provide guidance to the court of appeals in the exercise of its discretion.

QUESTION: I understand. I mean, you understand our --

MS. HUDSMITH: Absolutely.

QUESTION: I would not have voted to take this case if I thought what it was going to come down to is a parsing of the opinion of this court of appeals to decide the cosmic question of whether this one opinion by this court of appeals in fact displays a belief that the court is obliged to sua sponte raise the issue, or does not -- I mean, this is not something that we should be spending our time on.

MS. HUDSMITH: I agree. I believe, however, Your Honor, that a reading of the opinion is -- and it is fairly read to reach the conclusion that the court did feel obliged. It uses the language, precluded, that it is precluded --

QUESTION: We assumed that when we granted the case.

MS. HUDSMITH: And I would maintain that position, and I think that that is supported by a fair

reading of the opinion itself.

QUESTION: Does the answer -- does it make any difference, in answering the question that you raise, that here we have some convictions from another State, a State other than Louisiana --

MS. HUDSMITH: Well --

QUESTION: -- that are being challenged? Does that matter?

MS. HUDSMITH: The way the question's framed, it doesn't matter, but I'm certainly aware of the context in which this case comes to this Court, and it is one in which my client, who is in custody at Angola, at Louisiana State Penitentiary at Angola, and is challenging a Louisiana enhanced sentence, does so, among many reasons, because he believes the underlying Mississippi convictions were constitutionally invalid and should not be used to enhance.

And in the State's brief in response -- and I might add that, given we were not given notice and an opportunity to be heard, and only knew of the court's stance on the case with the opinion being issued, the brief was really the first time I had and the first time the State really had to really join issue, if you will, on this very complex topic, I think, but --

QUESTION: Well, our cases previously, cases

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like Granberry v. Greer and others, have talked about a procedural default in the sense of failing to raise something in Louisiana, where the -- where your client hypothet -- or not hypothetically, actually is held in custody.

But what the court of appeals focused on was a failure -- the fact that you could not now go back and raise something in Mississippi.

MS. HUDSMITH: That's correct and, of course, if we had given an opportunity to speak to the issue, the petitioner would have argued that that was no procedural default at all.

Getting back really to the question Justice O'Connor posed and you've added to, Mr. Chief Justice, the question becomes, what is the significance of the fact that we're dealing with an underlying Mississippi conviction?

In fact, the Louisiana judgment for which the petitioner stands in custody is not based in any way, shape, or form on his having defaulted procedurally by failing to first go to Mississippi and attack those convictions.

So in a very real sense, in fact in every sense that I can think of, there is no adequate and independent State law ground from Mississippi supporting this

judgment.

QUESTION: But there might be one from Louisiana. I mean, as I understood it, when I'd gotten through this, it's quite -- I don't know where to begin in this, and I'm reluctant to hold them to an answer they had to give to a question that had four parts, and it was an IFP petition, and there were -- I mean, I don't know how much I should hold them to what they've written in three pages there.

But the Federal constitutional question, as I'd understood it, would be whether the State of Louisiana can increase an offender's sentence on the basis of convictions in a different State, which convictions either resulted from a guilty plea where he was not told about his right to appeal, or resulted from a guilty plea that was involuntary, or both, and they're collaterally estopped from attacking it, they can't attack it in Mississippi. That's the Federal constitutional question, isn't it?

MS. HUDSMITH: I agree with that.

QUESTION: Fine. If that's the Federal constitutional question, I can't find it raised anywhere, ever, in the State of Louisiana. Of course they didn't answer it, because it's never been raised.

The closest you could come is something like the

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appeal part of it, where in fact what's cited is a Louisiana case, and then a reference to this case of Griffin, so I would think that that wasn't exhausted.

I don't -- I don't -- it's never been raised, and there could well be an independent ground that you can't, you know, go through five proceedings in Louisiana and never raise this issue.

MS. HUDSMITH: Well, certainly the State in its brief in response has -- has for the first time, Justice Breyer, I might add, suggested that the claim, as you've just described it, was not fairly presented to the State courts in the petitioner's --

QUESTION: I don't see it presented at all, and if I'm right about that, what are we supposed to do now?

MS. HUDSMITH: Well, I would have two responses to that question. One is, and I think it's the very first and most important one, and it gets back to a point that Justice Scalia made about this Court knowing what it has before it on the table when it decides to exercise its scarce judicial resources and grant a cert petition, that the State at least as late as the opposition to the cert petition, should have raised the issue of exhaustion and did not, and therefore this Court ought to consider that defense waived by the State of Louisiana. That would be my first and foremost posture.

Secondly, I'm not prepared to concede, based upon this record, Your Honor, that in fact the claim was not fairly presented in some form to the State courts in the petition filed in 1990 by the petitioner.

QUESTION: Petitioner himself recognized that the -- that it was obscure -- I forgot what the words were, that --

MS. HUDSMITH: He did --

QUESTION: Obscurely presented, or inarticulate, or something.

MS. HUDSMITH: He said that it was obscurely framed and that the claim, something to the effect was floating in muddy waters, and even the Fifth Circuit acknowledged that he had to elucidate more on the claim and did so in his objections to the magistrate's report which were filed in 1994.

But again, it gets back to the point that I made earlier in response to Justice Breyer's point, and that is that the State then certainly, before the district court ruled on the case, could have responded and, I might add, quite simply, particularly with the petitioner making note of the fact that the claim wasn't -- wasn't well-articulated before, they could have filed a one-page statement saying, this claim has not been exhausted in the State courts.

QUESTION: Did I --

QUESTION: They didn't -- I'm sorry.

QUESTION: Did I understand you to say at the outset that this really is very narrow because you're not objecting to the authority of the court of appeals to raise the procedural default sua sponte. The only thing you're objecting to is the notion that they must do so. Is that true?

MS. HUDSMITH: The question that I framed is very narrow, I will admit, but --

QUESTION: So do you -- you're not saying that they couldn't do the same thing here as in Granberry. That is to say, exhaustion and procedural default, they're very much alike, so it's something that the court can bring up on its own.

MS. HUDSMITH: Beyond the answer to the narrow question, what I am saying, and I want to be heard very clearly as saying, just in case it's not clear enough in the brief, that once we go beyond that very narrow question, it is the petitioner's position that to the extent that a Federal court can raise a waived or forfeited nonjurisdictional defense, it should only do so in very rare circumstances, and in the context of a procedural default defense it should do so even in more rare circumstances than those presented in Granberry v.

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Greer.

Because Granberry v. Greer, which is a very instructive case but not controlling, of course, on this issue, concerned the defense of exhaustion, and in very many important respects exhaustion is a different -- it is a different defense, it serves different purposes, and its consequences are much graver.

And so I want to be clear that -- and I want to be heard to say that the Fifth Circuit not only was not obligated to raise the procedural default defense that it believed existed, but it ought not to have done so under the circumstances of this case, and I think appropriately the Federal courts in general ought not to raise such a defense except in very rare circumstances where, maybe because of comity, and maybe because of concerns of finality, it is indeed appropriate for a Federal court to save the State from itself.

QUESTION: But that's a matter -- I'm sorry.

That's a matter on which you've never been heard, as I understand it.

MS. HUDSMITH: Absolutely not. The first court to hear the parties on this issue is this Court.

QUESTION: Is right here, yes.

MS. HUDSMITH: Yes, sir. It was not an issue ever even mentioned in the oral argument in the case,

and --

QUESTION: Is it clear that Louisiana could not have -- the Louisiana courts could not have examined this question, and the validity of and the existence of the alleged bar in Mississippi? The Louisiana courts never even looked at that, did they?

MS. HUDSMITH: The Louisiana courts were certainly put on notice with the petition filed by the petitioner in 1990 in the State court that he was attacking the constitutional validity of his Mississippi conviction to be used for the collateral consequence of enhancing his Louisiana conviction, and at -- of enhancing his Louisiana sentence, and undoubtedly at that point a Louisiana court could have and, if it wanted to, was put on notice that it could say no, Mr. Trest, you must first go to Mississippi.

But in fact, Louisiana is more generous than Mississippi and more generous in -- than the Federal court in the Custis case in allowing in the first instance in a habitual offender proceeding an attack by the defendant on the voluntary and intelligent nature of the guilty plea that forms a basis for prior conviction and, likewise, in post conviction proceedings.

And I might add that even a failure on the part of the petitioner which he must acknowledge to have

objected on this basis at the habitual offender proceeding does not prohibit under Louisiana law his raising this issue in post conviction proceedings.

So what I'm saying, I hope in answer to your question, Justice Kennedy, is that the Louisiana court was certainly put on notice it could have raised the issue of a "procedural bar." It did not, and there is none, then, to support this State court judgment such that a procedural default should be found or is in order.

And I would suggest, and this really sort of gets back to Justice O'Connor's initial question, that the fact that Mississippi may have some vague, or attenuated, or some interest in its judgment, it is not so great to create a procedural bar.

There must first be -- the judgment that we must focus on is the Louisiana judgment, and it's not supported by a Mississippi bar, and so we've got interest in the air, if you will, and that's hardly a basis for a Federal court to refuse to exercise its power.

QUESTION: Well, I would think either from the standpoint of discretion or the mandatory rule when a third State, or a second State's interest is involved here, Mississippi, and they're not before it, but that is a compelling case for not allowing the question to be presented.

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MS. HUDSMITH: I would think that is.

QUESTION: If it's late.

QUESTION: But Ms. Hudsmith, if I understood your argument properly, weren't you saying that really Mississippi has no interest because there's nothing in this proceeding that's going to set aside the Mississippi judgment? The only question is whether the Louisiana court, in imposing a sentence, may rely on those judgments even if they're entirely valid.

MS. HUDSMITH: Yes, Justice Stevens. That is a very critical point, and that is that the Mississippi conviction that was imposed back in 1976 is final, and the petitioner has served his time.

QUESTION: Well, but --

MS. HUDSMITH: He's not revisiting that issue.

QUESTION: So supposing that the petitioner succeeds in his present action, and then he commits another offense in Mississippi, and Mississippi says we're going to commit you on the basis of our habitual offender statute, and your client says no, you can't do that, because in the Federal proceedings in Louisiana it was held that these -- this conviction was invalid. Certainly Mississippi would have --

MS. HUDSMITH: Yes.

QUESTION: -- perhaps not a very direct

interest, but you can't say it has no interest.

MS. HUDSMITH: And I haven't, I don't think, been heard to say that Mississippi has no interest. I acknowledge that it has some interest in general in terms of the finality of its judgment.

QUESTION: But that interest would only arise if he were subsequently prosecuted in Mississippi.

MS. HUDSMITH: Absolutely.

QUESTION: Yes.

MS. HUDSMITH: Absolutely.

QUESTION: Do you claim that Mississippi would be estopped in that case, that there would be any preclusion running against Mississippi in that case?

MS. HUDSMITH: My initial reaction is that no, there wouldn't be, that whether it be in the context of a Mississippi attempt to enhance a sentence because of a Mississippi conviction or otherwise, that Mississippi, because it wasn't a party to this action, ought not be precluded from defending its -- both its conviction and asserting its procedural laws that the petitioner failed to comply with vis-a-vis Mississippi.

QUESTION: I suppose a State has a certain interest -- whether or not he's prosecuted later in Mississippi, I think a State has a certain interest in not having the solemn judgments of its courts impugned

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elsewhere.

MS. HUDSMITH: Sure, but --

QUESTION: At least where the Constitution does not permit that to happen. Don't you think they have a -- if they assert that that's the case?

MS. HUDSMITH: But that's the nature of the beast when it comes to enhanced punishments. That is happening all the time, certainly in Louisiana, where, in the habitual offender proceeding itself, a defendant can call into question the validity of a guilty plea.

So it's happening, and surely we're not going to stop that and not allow -- again, I feel like I'm speaking up for Louisiana here, because Louisiana has its own rules and its own procedures, and they say we can look beyond this judgment if it's presented to us in the right way and it's compelling.

QUESTION: But if Mississippi feels otherwise, and wants to have its judgments final and not looked into later --

MS. HUDSMITH: I think that that -- that's the way it is, and Mississippi could do the same with Louisiana's judgments.

QUESTION: Well, I thought you had to give judgments the effect they had in the State where they were rendered.

MS. HUDSMITH: This -- I don't think that when we're dealing with --

QUESTION: It's the Constitution is an impediment to that, but that's a separate issue.

MS. HUDSMITH: I don't think -- I don't think what we're talking about here, that is, Louisiana or any other State determining whether it wants to impose collateral consequences in its State on its sentence with respect to another State's judgment raises an issue of full faith and credit.

Again, and I think --

QUESTION: Well, it doesn't have to have --

QUESTION: Well, you say that --

QUESTION: -- an habitual offender statute, so the Mississippi judgment had no effect by its own force. Louisiana doesn't have to have --

MS. HUDSMITH: Absolutely, Louisiana doesn't even have to have a habitual --

QUESTION: But when you stand back from all of this, and what you're left with is a very old Mississippi -- finally he served his time, and it's been years ago, and he doesn't raise this till very late, and you tell us, ah, but the State defaulted because it didn't object on that basis, isn't there something unseemly about allowing a defendant so many years after to raise this

issue and say, he can get by because the State out of carelessness, which seems to be what happens here, didn't object?

MS. HUDSMITH: Your Honor, my response to that would be that first of all the -- Louisiana, like Mississippi, now has a prescriptive period, if you will, that's what we call it in Louisiana, for when a petitioner who is in prison in Louisiana can bring a post conviction proceeding, so the oldness of these claims is, I think, going to lessen as more and more States like Louisiana and Mississippi adopt these bars, these time bars to these claims.

But I think it's even more unseemly for us to allow a Federal court, or to give a Federal court the authority, or even require a Federal court to ignore a State's procedural default because of negligence or inadvertence or whatever, when at the same time this Court's jurisprudence clearly holds that the petitioner's inadvertence or negligence does not save him from his procedural default and, as we know, there are petitioners in those circumstances who have been executed because of that inadvertence or negligence.

So yes, it has been a long time, and I think these cases will be less and less so because of these time limitations imposed now by the State systems, but I think

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it's an appropriate response and more unseemly to allow the State to be forgiven its procedural bar or default.

If there are no other questions, I --

QUESTION: Just your bottom line is, facing your narrow question, what are you asking this Court to do?

MS. HUDSMITH: The bottom line very narrow question is reverse the U.S. Fifth Circuit and remand it for further proceedings, but I think those further proceedings ought to include a caution or instruction, if you will, that the Court ought to give the parties notice and an opportunity to be heard on the issue, first of all, and secondarily that the Court ought not freely forgive a State procedural default, but ought to do it only in a rare circumstance, which we contend, the petitioner contends does not exist here.

QUESTION: Thank you, Ms. Hudsmith.

Ms. Petersen, we'll hear from you.

ORAL ARGUMENT OF KATHLEEN E. PETERSEN

ON BEHALF OF THE RESPONDENT

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

As the argument has pointed out to this point, the petitioner and the respondent are in agreement on the issue stated, and that is whether or not a Federal court of appeal may, on its own motion, invoke procedural

default, and thereby find it is precluded from the merits of the habeas claims.

QUESTION: Well, I --

QUESTION: Well, I didn't think that was what the petitioner had raised. I thought we had spent a lot of time already this morning establishing that the narrow question presented is whether the court of appeals is required on its own motion to consider this matter.

MS. PETERSEN: Well, Justice O'Connor --

QUESTION: This procedural bar.

MS. PETERSEN: Justice O'Connor, if you read the Trest opinion, and as we pointed out in the brief, the petitioner's -- I mean, the brief on the merits as respondent, we do not read Judge -- the judge's opinion, Edith Jones, to have required the sua sponte invocation --

QUESTION: Did you tell us that in response to the cert petition?

MS. PETERSEN: The cert petition was filed by the District Attorney in this matter, and the Attorney General's Office --

QUESTION: Just answer the question. Were we told that in response to the cert petition?

MS. PETERSEN: No, Justice O'Connor.

QUESTION: Well then, are you going to argue on the narrow question, as framed in the cert petition, was

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the Fifth Circuit required --

MS. PETERSEN: No.

QUESTION: -- to raise it sua sponte? What do you say in answer to that? Was it required to?

MS. PETERSEN: No, Justice O'Connor.

QUESTION: So you agree with the petitioner.

MS. PETERSEN: Yes, Justice O'Connor. We agree, and we feel that the record that is before the Court shows that that opinion, Trest v. Whitley, was not abuse of discretion and that the petitioner has not established it was an abuse of discretion, therefore we urge this Court to affirm the judgment.

QUESTION: Then how does the -- is -- you're saying they're not required, but they're permitted to assert an independent State ground.

MS. PETERSEN: Yes.

QUESTION: And even if that State ground doesn't exist? I'm curious to know what is the independent State ground that Louisiana could have affirmed this conviction on.

MS. PETERSEN: The --

QUESTION: I mean, that he filed the habeas -- he filed the collateral -- petition for collateral relief in State court. It was denied, and what is the independent State ground on which Louisiana could have

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denied that?

MS. PETERSEN: At this point the independent State ground is under both Louisiana procedural post conviction law and the Mississippi procedural --

QUESTION: What is that it states that would provide an independent State ground for affirming the conviction?

MS. PETERSEN: It would be Louisiana Code of Criminal Procedure --

QUESTION: I don't want the citation. I want the proposition of law.

MS. PETERSEN: That it was a successive petition, that it was not properly presented -- in our brief --

QUESTION: Right, it's successive -- my impression, and here you can correct me, because I -- I thought that he initially pleaded guilty at his trial and was sentenced and didn't appeal, and that's sometime around 1980, and then he brought this petition in about 1990-something.

MS. PETERSEN: He was found guilty in 1979.

QUESTION: Yeah. I mean, I'm not saying -- isn't that basically what happened?

MS. PETERSEN: The first time it was raised in State court was in his third application for State post

conviction relief, and it was in 1980.

QUESTION: In 19 --

MS. PETERSEN: 1980.

QUESTION: His third application for post conviction relief was in 1980?

MS. PETERSEN: Yes -- I'm -- excuse me, 1990. I'm --

QUESTION: And when was the first?

MS. PETERSEN: The first one was in 1981.

QUESTION: And when was the second?

MS. PETERSEN: 1983.

QUESTION: All right. So I assume he'll argue that this third one, he didn't really know that he had a Federal claim until the Louisiana courts decided Robisher and he had a chance to digest it, and because Robisher was the first time that anybody had suggested under Louisiana law, in reference to Federal law, that there could be some kind of claim here.

I suppose that will be the argument, as -- and -- whether he had a chance to do it before or not. Is it clear how that argument will come out?

MS. PETERSEN: No, Your Honor, because it has not been presented to the State court, and Robisher dealt with the right to appeal.

QUESTION: Right. So then you're saying whether

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or not there is an adequate State ground has not yet been presented to the Louisiana court, and therefore that hasn't been exhausted, and therefore, what? Therefore this is a case that, although you conceded exhaustion, it wasn't exhausted?

MS. PETERSEN: It was exhausted by the fact of the technical exhaustion in that it was procedurally barred at the point it was raised.

In 1990, when the petitioner put the claim in the petition it was not in the nine claims for relief. It was attached in a memorandum of law and no one addressed the claim. We have termed it the needle in the paper haystack.

The trial judge in Louisiana read claim number 7 as being the evidence used by the State of Louisiana was illegal, and in his written opinion, which is in the joint appendix, he addressed the technical aspects, whether or not they were certified documents.

There was no discussion in that opinion at all on the 7(b) claim, which we have termed it in our brief.

QUESTION: Let me be straightforward with you. The reason I'm asking these questions is in my mind is the tentative idea -- I'm certainly not wedded to it -- that the correct result here is to say, of course they're not required to assert this on their own, but was it an abuse

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of discretion here to do so?

Yes, because this is a case where there was no exhaustion. Indeed, there is a big question as to whether or not there is an adequate State ground, so it is a case, under Granberry, where, despite the State's concession, it should be remanded to the State courts to give people an opportunity to decide whether there is or is not some State ground that would bar it.

Now, I have no -- that's quite tentative. I mean, I'm not advocating that. I'm trying to -- what's your reaction to that?

MS. PETERSEN: Justice Breyer, a remand would do no good at this point. Mr. Trest is procedurally barred in Louisiana and as we read the post conviction articles he couldn't present the claim again in Louisiana. In 1990, when he presented the claim to Louisiana, he was procedurally barred in Mississippi. He was barred in 1987 in Mississippi.

QUESTION: Did the Louisiana courts ever say that he was procedurally barred in Louisiana from raising his claims against the Mississippi judgment?

MS. PETERSEN: No Louisiana court ever addressed that claim.

QUESTION: Because what, he had never raised it? He says he raised it, I think.

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MS. PETERSEN: Well, he raised it but it's not fairly presented. It's in a memorandum attached. The District Attorney, under the State law, was not ordered by the trial judge, and our law did not require the trial judge to order the District Attorney to respond, so therefore the trial judge was without benefit of a response by the District Attorney in 1990.

QUESTION: Well, but if the claim was raised, but the District Attorney didn't respond to it, you would think that that was at least preserved.

MS. PETERSEN: Well, I may agree with that, Chief Justice Rehnquist, but if you look at what the petitioner did after his claim was presumptively ignored by the trial judge, he went to Federal court and filed the exact same petition.

And that leads us to the point that we did file a motion to enlarge the record based on Gray v. Netherland, and the petitioner has consented, and we put into the record all the briefs, and if you examine all the briefs you will plainly see that the petitioner had no problem with the 7(b) claim being ignored, or else he would have brought it to the Federal court's attention.

The magistrate didn't look at it. The district court adopted the magistrate's report. It wasn't until February of 1994 that the petitioner came forward with the

transcript. Back in 1990 --

QUESTION: The transcript of the Mississippi proceedings, or the Louisiana proceedings?

MS. PETERSEN: The Mississippi proceedings.

QUESTION: Ms. Petersen, I -- correct me if I'm wrong, but I thought the other side in this case said that in an objection to the magistrate's report they did make this claim more explicit, that's the point at which it blossomed, that the district court made no response to that objection to the magistrate's report either by committing it to the magistrate again for further proceedings or by ruling on the merits and, that, in fact, the first time it -- and that the State once again said nothing about it in the circuit itself, and that the first time it came up on the merits was when the circuit brought it up.

Is my recollection of what they said correct and, if so, are they wrong?

MS. PETERSEN: Justice Souter, that is correct. The first time that this claim was ever brought to the attention of any forum in this form was when the petitioner filed the objections. The District Attorney did not respond to those objections. The district court did not address the objections.

It went on to the Fifth Circuit. The Fifth

Circuit granted the certificate of probable cause which the district court had denied, and you would think that if the petitioner really had a problem that his Boykin claim was not addressed, and further had a problem that the 7(b) claim, which is the right to appeal, right to counsel, and maximum sentence, he would have been screaming in the Fifth Circuit that these courts have ignored me, and if you look at his brief in the Fifth Circuit, it's the exact same brief.

The exact same brief has been moving through the system, and nobody has asked, was this claim ever presented to the State court, and the answer is no.

QUESTION: Ms. Petersen, could -- you are asking us to affirm because although you agree that the lower court did not have to take this procedural bar into effect, you believe that it could, in its discretion, do so.

Well, I don't see how you get there from here. The fact that it could in its discretion do so does not establish that it was exercising its discretion. Don't we have to give it a chance to exercise its discretion rather than our exercising it on the Fifth Circuit's behalf?

MS. PETERSEN: Your Honor --

QUESTION: Unless -- unless the argument you're making is that it had no discretion, that, given the facts

of this case, it would have been an abuse of discretion not -- not to raise the issue sua sponte.

MS. PETERSEN: The Fifth Circuit --

QUESTION: Is that your argument here, that it would have been an abuse of discretion to come out the other way?

MS. PETERSEN: I believe that the Fifth Circuit had no fact-finding whatsoever on this claim. The Fifth Circuit was faced with the objections that Trest had filed in the district court. They were aware of Custis v. United States, and they appointed Rebecca Hudsmith as counsel and ordered the parties to brief Custis.

The District Attorney, who is representing the State of Louisiana, briefed Custis. They argued custody, and secondly they argued whether or not this would be a claim that would be cognizable in habeas.

QUESTION: Let's go to -- I'm trying to figure out what to do with this, in my -- what I think we should do here. Suppose we said -- all right, suppose you answer the question, required, of course they're not required.

All right. The next step would be we remand, and I take it one possible thing to do would be to explain when a court has the power, or when it lacks the power under the law to, sua sponte, or in the face of a refusal by the State to raise the issue, assert a claim of an

independent State ground.

Now, if you were trying to write that paragraph of when it does and when it doesn't, what does it say?

MS. PETERSEN: I think that's where Granberry v. Greer comes in.

QUESTION: Exhaustion is the same as independent State ground? I'm not sure.

MS. PETERSEN: I think it is different.

QUESTION: Yeah.

MS. PETERSEN: Because it closes the Federal door to the petitioner.

The exhaustion allows him to go back and let the States decide it in the first instance. We don't have that here because of the procedural default, and the procedural default is in both Mississippi and in Louisiana.

QUESTION: Can we go back --

QUESTION: All right, so what you're suggest --

QUESTION: -- one step, because there's a large concern here, I think, with a Court raising a nonjurisdictional question on its own, and if you think of the two models of procedure, there's the adversary system that we follow, and the inquisitorial one that we don't follow, and the ordinary rule is that judges are obliged to bring up jurisdictional issues on their own, but for

the rest, we follow the principle of party presentation, and if a party doesn't bring it up then it's forfeited, or waived.

So why is this so special that it would be ranked kind of like jurisdiction, that we would let a court deviate from the normal party presentation rule to bring it up on its own, even though the State didn't raise it?

MS. PETERSEN: Because the record in this case was clear in the Fifth Circuit. The District Attorney did not object when the objections were filed by the petitioner. The Fifth Circuit granted the appeal and looked at the record. Obviously, the petitioner had conceded. He did not object in Louisiana back in 1979 when the prosecutor admitted --

QUESTION: You seem to be making all kinds of arguments that would have strengthened the State's plea if it had made it, but it didn't make it, and that's -- you're saying there was a terrific defense that the State had here, and because it was so good, the court of appeals can make it for them. That's what I've heard you say so far.

MS. PETERSEN: Well, the court of appeals addressed the Mississippi interests. The opinion is silent as to the Louisiana's interests, other than the

interest you could infer that Louisiana has the right to presume that out-of-State convictions are valid, and unless the petitioner draws that to the attention of the court either at the time of the habitual offender proceedings or at some time seasonably early in the litigation, the court is on its own motion looking for the procedural bar, and they find a procedural bar in Mississippi.

Mississippi has an interest in the finality of its judgments. Whether or not Trest returns to the State of Mississippi is an open question. But they also have an interest in the procedural rules, and they allow Trest 11 years to litigate in Mississippi. The door in Mississippi closed in 1987, and he didn't even file the claim until 1990. He waited 3 years past --

QUESTION: May I ask you just another question about the Fifth Circuit's procedure? They say in their own opinion they are amazed that neither party had cited this Sones case. Is it the practice in that court, or do you happen to know, if, when they want to rely on a brand-new ground that nobody's addressed, do they ever give notice to the parties and ask them for a brief comment on the issue?

MS. PETERSEN: Justice Stevens, I'm sure that happens. In Kubick v. Whitley, a case cited by the

petitioner, the Fifth Circuit would not invoke sua sponte procedural default and proceeded to the merits.

QUESTION: In this case they did ask for -- request briefing on Custis, did they not?

MS. PETERSEN: Yes, Chief Justice.

QUESTION: Is that unusual, that the court would ask for a briefing, the Fifth Circuit would ask for a briefing on a particular issue, or is that -- do they always do that?

MS. PETERSEN: To be honest, Chief Justice Rehnquist, I haven't practiced much in the Fifth Circuit because I'm a State prosecutor, but I don't think that is that unusual.

Obviously, when that happened the District Attorney should have lodged procedural objections, but for whatever reason, which is not in the record, he did not.

The judgment is correct, and this Court sits to review judgments. You can justify it with the Mississippi interest, which is an independent and adequate State bar, and the petitioner has not claimed it was not an adequate and independent State bar until argument today.

QUESTION: Well, but if we decide the narrow question presented, which one certainly hopes we will, it would be possible to conclude that the court of appeals was not bound to raise this but perhaps could have raised

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it in the exercise of its discretion, and you say, I take it, that even if that is so, it would have properly exercised its discretion to prevent the -- to raise this question on its own, but isn't it best left for them to decide that exercising their discretion, as they're now told to do, rather than feeling that they're obligated to do it?

MS. PETERSEN: We don't read the opinion that they felt like they were obligated.

QUESTION: But there I think you're foreclosed by your failure to respond to -- your brief in opposition to certiorari.

MS. PETERSEN: Well, Chief Justice, we do agree that a remand in light of Granberry v. Greer would -- may be proper. However, it is not necessary on the record as it appears before the Court.

I think that if you look at the record, both as it was in the Fifth Circuit and as it is presented to this Court, that there was not an abuse of discretion.

QUESTION: No, but aren't you assuming more than that? Aren't you assuming not merely that there was no abuse, but that there was no discretion to be exercised, because he could only -- the court could only come out one way.

That would -- isn't that the premise upon which

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we would have to affirm for you, because we're not sitting here to exercise discretion. That's not what we do. That's what other courts do. So if we affirm, it's got to be on the grounds that there was really no discretionary choice except the choice that ultimately is reflected in this judgment, and that would be the only basis upon which we could affirm for you. Isn't that the premise of your argument?

MS. PETERSEN: Yes, Your Honor, but the reasonings for judgment are not for review, it's the judgment itself, and if you feel by looking at the record that under Granberry v. Greer there was an adequate Federal interest, remanding it back, certainly we would not oppose that, but I think that at this point the remand would be unnecessary and that the decision --

QUESTION: I don't know what you mean when you say the reasons for judgment are not under review. I thought that's precisely what we're reviewing, whether the belief which the lower court had that it must raise this matter sua sponte, which is the reason for the judgment, whether that was correct. Isn't that what we're reviewing here?

MS. PETERSEN: Well, Justice Scalia, the opinion is solid as far as the propriety of invoking sua sponte default, procedural default. They did, and when we were

writing the brief --

QUESTION: I mean, that's why courts write opinions, so that we can see if the reasons for their judgment are okay, and that's why we reverse when the reasons do not sustain the judgment.

MS. PETERSEN: And we must concede that there is no language in the opinion that addresses their power as a Federal court to invoke --

QUESTION: Yes, that's true, but they do start out saying that the Sones decision precludes us from reviewing the merits, and they end up saying this court is bound to conclude, as we did in Sones. They thought they were compelled to do what they'd done in Sones.

MS. PETERSEN: Well, Justice Stevens, I read that language that they were precluded by Coleman v. Thompson. In the Sones opinion that was a Mississippi prisoner attacking a Mississippi conviction.

QUESTION: Right.

MS. PETERSEN: You had not -- we have a Louisiana prison -- prisoner attacking the use of Mississippi convictions in a Louisiana Federal court, so Sones was not exactly on point.

QUESTION: But they surely thought it was on point. They said so.

MS. PETERSEN: And we believe -- that's why we

built the record. We believe that the judgment was correct to deny relief to this petitioner. We believe that Mississippi had a valid interest. We believe that the reasoning in Sones showing that if you're going to attack a Mississippi conviction, and this is Phillips v. State, you must return to the court in Mississippi that gave you the judgment.

In this case, the petitioner clearly bypassed the State of Mississippi. He was found a habitual offender in June of 1979. He had until 1987 to go back to Mississippi, and he did not.

QUESTION: Ms. Petersen, may I ask a question about your internal procedures not related to the merits of this case?

As you see from the discussion today, some very important issues in the case can be precluded by the response to the petition for certiorari, and as I understand what happened here, I wonder if it's the standard procedure in Louisiana that it is the local prosecutor who responds to the petition for certiorari, and that the Attorney General's Office does not get into the matter until the petition is granted, is that the case?

MS. PETERSEN: That is correct. The District Attorneys in Louisiana have the power and authority for

all cases in their districts. The Attorney General is involved only at their request, and when -- or a conflict of interest as well, but in this case it was a request by the District Attorney to handle the case on July 7, 1997.

That was after the writ was granted, and when we prepared the brief on the merits we were looking forward to the issue of whether Granberry v. Greer should be extended to encompass procedural default.

Quite honestly, I think that the parties here agree that the Fifth Circuit was not required, and therefore there is no dispute on that.

QUESTION: I will have to say that I think there's merit to the petitioner's argument that you should read the Fifth Circuit's opinion that way.

After the passage Justice Stevens quoted the Fifth Circuit says, again, the Supreme Court has explained that procedural default will block all Federal review unless there's cause and prejudice.

MS. PETERSEN: And Justice Kennedy --

QUESTION: That's a pretty straightforward statement from the Fifth Circuit.

MS. PETERSEN: It is, Justice Kennedy, and we read that to believe that they've looked at the record for cause and prejudice, that they felt that the record did not establish it, and therefore denied relief. That is

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the only way you can read that correctly, is that they looked at the record, they felt that the petitioner could have shown cause -- If you look at the objections to the magistrate's report --

QUESTION: But if there was no objection by the State, if this wasn't in the case until the Fifth Circuit put it there, then how could you expect the petitioner to come up with cause and prejudice? He was -- to anticipate a defense that wasn't there and answer it, that's very strange, so it does suggest that at least he should have had an opportunity to address the cause and prejudice issue.

MS. PETERSEN: Well, Justice Ginsburg, we believe that's the next question, and we do not -- in our brief we do not state that it was one that was fairly encompassed in the question presented.

However, I would answer that by saying that the petitioner did have an opportunity when he filed the objections to the magistrate's report, because if you look at his answer, you see that he is admitting new evidence, a transcript, in 1994 from a 1979 conviction which was transcribed in June of 19 -- excuse me, June of 1976. It was a May of 1976 conviction. He brings this new evidence, he cites new case law, and he cites Boykin v. Alabama for the first time for that proposition.

QUESTION: All right. Can I ask you -- are you finished with --

MS. PETERSEN: Well -- no, go ahead if you --

MS. PETERSEN: Yes, Your Honor. So --

QUESTION: All right. Well, can I ask -- I want to ask you this -- try a third minimalist approach.

MS. PETERSEN: Yes, Justice Breyer.

QUESTION: Minimalist. Is there any answer to at least the minimalist? The question before us is whether they were required. There's no objection that that's the question, and clearly they're not required to bring it up.

The State then argues that despite that they have the power to bring it up, and this was not an abuse of discretion.

But one thing that is clear is that it is an abuse of discretion to assert an independent State ground to bar a petitioner's claim when you assert the wrong independent State ground, an independent State ground that has nothing to do with this case, or at least very little, since it had to do with Mississippi and we're interested in Louisiana. At least that's an abuse of discretion.

Now, there are many other issues that have been raised in this very interesting set of briefs, et cetera, and we'll leave those for the court of appeals.

All right. Is there any answer to that, as a minimal approach?

MS. PETERSEN: Yes, Justice Breyer. You would have to find that the Fifth Circuit abused its discretion by invoking Mississippi law.

QUESTION: Well, the reason is because of course, as you've heard, to focus you right on it, that the question is whether the Constitution bars Louisiana from taking this Mississippi conviction into account when it increases a punishment, a matter that perhaps has never even been argued.

Now, go ahead.

MS. PETERSEN: Well, I think you can justify it in that the State of Mississippi was never given any opportunity to pass on these convictions despite the fact that Trest was on notice in June of 1979 in Louisiana that they were being used for enhancement, and he had in the State of Mississippi till 1987.

So therefore you have the State of Mississippi affording this petitioner an opportunity, clearly knowing the State of Louisiana is using these five other prior felonies, and not going to the State of Mississippi.

Meanwhile, you have the interest of the State of Louisiana in presuming that that judgments -- those judgments are valid, and furthermore, he had two options.

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He could have either gone to the State court in Louisiana -- our position is that in 1990 the claim was not fairly presented. He could have gone back to the State of Mississippi up to the year 1987. He didn't even raise the Boykin claim until 1994.

Clearly, the petitioner had options in either State. He's foreclosed in either State. Therefore, there's a procedural bar in either State, and that would support the judgment of the Fifth Circuit.

QUESTION: Thank you, Ms. Petersen.

MS. PETERSEN: Thank you.

QUESTION: Ms. Hudsmith, you have 5 minutes remaining.

MS. HUDSMITH: I would waive the remaining oral argument unless the Court has questions of me.

CHIEF JUSTICE REHNQUIST: Thank you, Ms. Hudsmith.

The case is submitted.

(Whereupon, at 11:57 a.m., the case in the above-entitled matter was submitted.)

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BY Ann Marie Fedigo

(REPORTER)