In the

ORIGINAL

Supreme Court of the United States

TED ENGLE, SUPERINTENDENT, CHILLICOTHE CORRECTIONAL INSTITUTE, Petitioner	:	No. 80-1430
v.	:	
LINCOLN ISAAC	:	

Washington, D. C.

December 8, 1981

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ALDERSON REPORTING

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TED ENGLE, SUPERINTENDENT, CHILLICOTHE CORRECTIONAL INSTITUTE,

Petitioner

v. No. 80-1430

LINCOLN ISAAC

Washington, D.C.
Tuesday, December 8, 1981

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:55 o'clock a.m.

APPEARANCES:

SIMON B. KARAS, ESQ., Assistant Attorney General of Ohio, 30 East Broad Street, 26th Floor, Columbus, Ohio 43215; on behalf of the Petitioner.

JAMES R. KINGSLEY, ESQ., Court-appointed, 157 West Main Street, Circleville, Ohio 43113; on behalf of the Respondent Isaac.

RICHARD L. AYNES, ESQ., School of Law, Appellatte Review Office, University of Akron, Akron, Ohio 44325; on behalf of Respondents Bell and Hughes.

C O N T E N T S

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will now hear arguments in Docket Number 80-1430, Ted Engle against Lincoln Isaac. Mr. Karas, I think you may proceed when you are ready.

ORAL ARGUMENT OF SIMON B. KARAS, ESQ.

ON BEHALF OF THE PETITIONER

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

In the three cases before this Court for decision, the state of Ohio is attempting to give meaning and content to the decision in Wainwright v. Sykes. The Court is well aware of the deviceiveness and divergence of opinions in the court below, but I think that there is one word that is missing from all of those opinions that acts as a common defect, and that is the absence of the word "federalism."

The state sees this issue as federalism, pure and simple. In a single decision, the court below has avoided Ohio's construction of its contemporaneous objection rule and has also overturned a state's construction of its own substantive law.

If Wainwright v. Sykes is to have any meaning, it must be grounded in the concept that federalism allows a state certain latitudes in the administration of justice.

The facts in our case are relatively simple. Prior to 1974, Ohio filed the common law rule that the

defendant bore the burden of persuasion by a preponderance of the evidence on the affirmative defense of self-defense, insanity and duress.

On January 1, 1974, the legislature enacted Ohio revised Code 2901.05(A) which provided that the defendant has the burden of going forward with evidence of the affirmative defense.

QUESTION: Was this special legislation or was it part of a general --

MR. KARAS: It was part of a code revision. There was a complete revision of the definitions of Ohio substantive crimes; there was also a revision of the procedure. Ohio adopted criminal rules of procedure at that time contemporaneously. There was a little bit of divergence in the time when they took place. The rule started in 1973 and some of the subtantive sections in 1974.

Now, on July 21, 1976, the Ohio Supreme Court decided the case of State v. Robinson. In that case the court held that the defendant no longer bore the burden of persuasion by a preponderance of the evidence, though he did retain a burden of production on the affirmative defense.

The three cases before the Court all occurred prior to the Robinson decision. Mr. Hughes' case occurred in January of 1975, Mr. Bell's in April of 1975, Mr. Isaac's in I believe it was September of 1975.

The decision in State v. Robinson was subsequently held retroactive to all cases that had been tried after January 1, 1974, which was the date that the statute took place. At none of the trials did the defendants object to the traditional instruction that the defendant bore the burden of proof by preponderance of the evidence, but if he failed to prove that defense by that burden, the state still bore the burden of proof as to all the elements of the crime beyond a reasonable doubt.

CHIEF JUSTICE BURGER: We will resume there at 1:00 o'clock, counsel.

(Whereupon, at 12:00 p.m. the oral argument in the above-entitled matter recessed for lunch, to reconvene at 1:00 p.m. the same day.)

AFTERNOON SESSION

(1:00 p.m.)

CHIEF JUSTICE BURGER: Counsel, you may resume.

MR. KARAS: Thank you. I will pick up with the facts because I believe it's very important how these cases developed. I had just pointed out that there had been no objection to the traditional instruction.

On appeal, only one of the three defendants raised the issue. That was Mr. Isaac. It's not quite clear whether he was raising it on the basis that the state court should apply the Robinson decision as to him, or whether there was a simultaneous challenge to the validity of the traditional instruction as well.

On federal habeas corpus, the various district courts decided the case alternatively on a lack of showing of cause, and also a lack of showing of prejudice. On rehearing en banc, the court was quite split. There were six separate opinions. The plurality opinion found that cause was shown by the apparent futility of raising the question prior to Robinson.

As to the cause question, and despite the fact that State v. Robinson was a state statutory interpretation, the court found that Ohio had created an additional element of the crime of absence of the affirmative defense.

Now, our petition has challenged both the cause

and prejudice rulings by the court below. I think for purposes of analysis it would be easier to start with the cause question.

I start, as I think I must, with the decision in Hankerson v. North Carolina, footnote 8. In Hankerson, the court was concerned with the impact of applying Mullaney v. Wilbur retroactive to the states.

I think it ties in with the question of Wainwright because Hankerson was decided six days prior to the opinion in Wainwright v. Sykes. Now, in Hankerson, in response to the state's concern that Mullaney would dictate over 700 rehearsals of homicide convictions, the court in the footnote posited that the fears of the state were not as great as might be imagined because the states, if they wish, may be able to insulate prior convictions by enforcing the normal contemporaneous objection rule.

In these cases, that's exactly what Ohio did. In State v. Williams and State v. Humphries they found that the failure to have objected was a waiver of the question. In State v. Long, they further indicated that they would not hold a State v. Robinson error to be plain error just merely by citation to the case, but that you actually had to look at the facts and circumstances of the individual case.

QUESTION: What's your response, counsel, to the argument that up until the Ohio Supreme Court decision in

Robinson it had been set a law in Ohio that this instruction would not be given?

MR. KARAS: Your Honor, I believe that Hankerson shows the correct analysis for a question of this type. I don't see Hankerson as being a novel question at all. I think it's a recognition of a longstanding doctrine that a reviewing court need not reach an issue which a party complaining of the error could have brought to the attention of the court but did not, at a time when the court could have corrected it or the error could have been avoided.

Now, notice that I say the word could have rather than would have, because I think that there's a distinction to be drawn between the two words, and also, that that distinction is the difference between our position and the position of the plurality.

When I use the words could have been raised, I don't mean it in some metaphysical sense that you could always raise a question; that counsel should anticipate a 35th amendment to the Constitution that has not yet been enacted. I'm also not indulging in the legal fiction that once a court declares the law, that it is deemed always to have been the law and therefore, a failure to object is a waiver of it.

I think it's a recognition of the fact that when the tools are available to construct the argument, that you

can charge counsel with the obligation of raising that argument; otherwise, a failure to raise it will be deemed binding on the client.

The argument of the court of appeals about a apparent futility --

QUESTION: Do you think you could say counsel was incompetent, constitutionally incompetent, if he didn't raise it?

MR. KARAS: Well, Mr. Justice White, I think that is somewhat of the extension that the respondents are trying to make. They are going one step farther and are using the words "should have raised" the question.

Our concern about Wainwright v. Sykes is that if you don't identify any middle ground in which the actions of counsel can be deemed binding on the client --

QUESTION: And not incompetent.

MR. KARAS: And not incompetent, that you effectively destroy the decision. If the objection is well known, then the failure of counsel to raise it will be deemed ineffectiveness of counsel. If the objection is not well known, then under the court of appeals decision it is deemed inadvertence or apparent futility, and is found to be cause, and there's no middle ground between the two.

I think we're giving recognition of the fact that there's a whole range of decisions that counsel are

entrusted to make, and sometimes, the power to make a decision includes the power to err or the power not to see a question that should have been raised.

Take, for example, the argument of a apparent futility. Assume that counsel actually saw the argument and failed to raise it because of the nature of the prior Ohio law. That is as strategic as any other decision that counsel is supposed to make.

Now, the fact that he does not raise it when he sees the argument and fails to raise it in light of the prior law, is, in the words of Mr. Justice Powell, I believe, an inexcusable procedural default of a known right. On the other hand, if the objection is not perceived but could have been perceived --

QUESTION: Like the fellow perceived it who finally raised it and had a decision on it.

MR. KARAS: Obviously, the question was raised, and any time you have an overruling of a prior precedent or a new development in the law, somebody has to make the first step.

But I think that argument can be shown by a distinction between the cases of O'Connor v. Ohio and Lee v. Missouri. In Lee v. Missouri, this Court held that Duran v. Missouri was retroactive as to the date of Taylor v. Louisiana; but indicated that the failure to have objected

might be deemed a waiver of that.

I think what the Court was saying is that as of the date of Taylor v. Louisiana, the objection could have been raised even if it was not raised in a particular case.

Now, in the case of O'Connor v. Ohio -- and I'd like to state right at the beginning that I don't believe that our position requires the overruling of O'Connor v. Ohio. I think it requires a different look at the case.

But in O'Connor v. Ohio, the trial took place five and a half months before Malloy v. Hogan, and I think that it can fairly be said that the tools were not even available for counsel to have constructed the argument. It might be a different case once Malloy v. Hogan had been decided. The court didn't have to deal with those types of questions and split the difference between could have raised it or would have raised it or should have raised it, when you're operating under the deliberate bypass test. But once you go to the notion that the actions of counsel can bind a client, then I think you have to look at it in a different light.

The decision in O'Connor v. Ohio, of course, was the decision that was cited by the appellate court as to why the result was dictated that counsel should not anticipate a future development of the law. But I think if you look at Ohio law in a real sense, the question could have been raised. I'm not going to deny that it was difficult; I

merely say that the grounds were there that counsel could have raised the question.

First of all, In Re Winship had been decided five years prior to the development in these cases. Mullaney v. Wilbur had been decided three months prior to the trial in Mr. Isaac's case. There was discussion of this issue. The first appellate court decision in Ohio that held the Robinson way was December 24, 1974, which was well prior to the trials in these cases.

If you look at the State v. Robinson opinion itself, it makes reference to the 1979 Technical Committee Report on the proposed criminal reform. There's also reference to a Law Journal article, "Affirmative Defenses in Ohio", after Mullaney v. Wilbur. And the curious thing about that is that the Law Review article starts out with the proposition that the legislature did not intend to change the law, but then concludes arguing that Mullaney v. Wilbur should have dictated the result.

I would invite the Court to look at that Law Review article and see whether or not an Ohio counsel could have raised the question in this time period.

There's one other thing that I'd like to note with respect to the question of "could have raised it." That is the argument that has been made on behalf of the respondent Bell that self defense inherently requires the state to

disprove that defense.

That argument, which I will submit is not correct either based on Ohio law or on this Court's decisions in Patterson v. New York or Rivera v. Delaware, doesn't depend at all on the change in the law. The argument, could it be constructed accurately according to Ohio law now, could have been constructed according to Ohio law then. Robinson didn't change that at all.

Our concern is that a limitation of Wainwright to the strategic decision relieves counsel of the traditional responsibility to not only his client, but to the court. I think the Supreme Court of Ohio in State v. Humphries summed it up very succinctly when they said that there is a traditional relationship between court and counsel which enjoins upon counsel the duty to raise an issue before the court rather than to, by its silence, lead it into commission of error.

I'd also point out that our argument does not depend upon the ultimate success or lack of success in raising the issue. The phrasing in Wainwright v. Sykes is that if a person thinks that the actions of the trial court are about to deprive it of constitutional error, then he has a duty to object. Not that he knows that the actions of the trial court are about to deprive him of a constitutional right.

I would refer the court to Judge Poole's dissenting opinion in Myers v. State of Washington which is cited in our reply brief, because I think he very succinctly points out our position. He refers to the question of whether or not counsel would have raised the question as a murky epistemology.

Who is to say what factor will set off the creative light bulb that will lead to new development in the law? It could be the creation of a new statute, it could be a development in another state, it could be the pendancy of a case in this Court.

It could be any one of numerous factors, and I think that if you apply a "would have raised" you're merely stating a result and not a test. It's obvious here that the attorneys did not object. There's no explanation offered as to why, and there's no argument made that they could not have raised it.

I think our distinction flows directly from Wainwright v. Sykes. I think them major premise of that decision is that once counsel is either retained or appointed for a criminal defendant, that the whole range of strategic and tactical decisions is entrusted to that counsel.

I also think that the result is fully justified by the state's interest in finality. There comes a point in

time when society and the individual's interest in finality far outweigh any possibility of enhanced reliability on another trial.

QUESTION: Counsel, you're suggesting then that you almost need to have a spectrum of cases in order to make an assessment of cause and prejudice. Like Taylor against Louisiana, Duren against Missouri and Lee against Missouri, one of which foreshadows a development or at least suggests that there's a possibility of getting the argument accepted by a court.

The second of which represents the acceptance by the court, and the last of which says we aren't just going to open the jail doors for people who were convicted for 40 years.

MR. KARAS: Well, I think there could be a whole range of circumstances which could give rise to the conclusion that somebody could have raised a particular question. I don't particularly want to limit it to a clear foreshadowing by a prior case, though that certainly fits within the category of cases that I would consider to give rise to a situation where counsel could have raised it. It might be a combination of cases, as opposed to one particular case.

QUESTION: Your position is that even if a state supreme court has said the instruction should never be given

just the day before a trial, the counsel should have raised it the next day in another case.

MR. KARAS: If it were a situation in which counsel could have raised it, yes.

QUESTION: Well yes, he could have raised it, and he could always ask the court to overrule its decision.

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

QUESTION: That's your position.

MR. KARAS: Our position is that you have to look to the law to see if at the time that the case was tried, whether or not a competent counsel could have raised the question.

I would specifically, Mr. Justice White, I would refer to Brady v. the United States. I think there is a cogent quote there to the extent that a voluntary plea of guilty intelligently entered, in light of the law in existence at the time, does not become vulnerable simply because a later decision makes the initial premise seem faulty.

Now, that was the case in which the waiver was of the person's individual rights, but it was done at the advice of counsel. The premise of Wainwright is that with respect to trial type decisions, those things are entrusted to counsel, and I don't see why there should be a distinction in the question of waiver between the guilty

plea situation and the situation at trial.

QUESTION: General Karas, do you concede there was a constitutional violation?

MR. KARAS: No, I do not, Mr. Justice Stevens. I think an example might help to illustrate our position in this case. Assume that subsequent to Leland v. Oregon, the state of Oregon had enacted a new statute which was later interpreted in a state case to change the burden of proof on the affirmative defense of insanity to a preponderance of the evidence. And that the change was not initially seen by many of counsel in the state of Oregon -- you had a somewhat similar situation to what happened here in Ohio.

You might say with respect to the instruction that was given, that it was an error of sate law. But I don't see how you can say that it's an error of fundamental justice when it's the same instruction which, in Leland v. Oregon, was held to not violate fundamental fairness.

I think there's a distinction to be drawn between a decision which overcomes a defect in the factfinding process as opposed to one which creates an enhancement of the factfinding process, and I refer the court to Gosa v. Mayden in which the court refused to hold O'Callahan v. Parker retroactive.

The state --

QUESTION: What you're saying is there's no

constitutional right to have laws retroactively applied. Changes in the law retroactively applied.

MR. KARAS: The difficulty that the state has with the argument that if the state creates a law in a certain fashion that it must apply it is that I don't see where you draw a distinction --

QUESTION: Let me ask you the question a little differently. What do you understand their constitutional claim to be?

MR. KARAS: Well, I understand the argument from the appellate court to have been that once Ohio passed 2901.05 that they created an element of the crime of the absence of the affirmative defense. I don't think that that is justified by looking at Ohio law.

In State v. Poole, the Supreme Court of Ohio specifically said that an affirmative defense is an excuse or justification usually provable for the most part through the plea of not guilty, which is collateral to the elements of the crime. And it then specifically said that the affirmative defenses in Ohio are insanity, self defense and duress.

Your Honors, I'd like to reserve some time if I may.

QUESTION: But your point is that if it were an element of the crime, the state would have to prove it.

MR. KARAS: If it were an element of the crime, yes. But I think that under Patterson v. New York, the state may make the absence of self-defense not an element of the crime.

QUESTION: But the Ohio court said it was an element of the crime.

MR. KARAS: The Ohio court has specifically held that it is a true affirmative defense which has no necessary relationship to the elements of the crime, and that is the State v. Poole opinion, which is not even cited by the respondents.

QUESTION: I see, thank you.

CHIEF JUSTICE BURGER: Mr. Kingsley.

ORAL ARGUMENT OF JAMES R. KINGSLEY, ESQ.

ON BEHALF OF RESPONDENT ISAAC

MR. KINGSLEY: Mr. Chief Justice, members of this high Court:

Ohio unexpectedly change a traditional rule that the defendant had to prove self-defense. It consciously declared that change be retroactive. In my opinion, that therefore as a necessary result change the law of the case of respondent Lincoln Isaac.

The state now attempts to deny Lincoln Isaac a new trial because he failed to object to this change which occurred some ten months after his trial. Because Criminal

Rule 30 is not rationally related to the principle of retroactivity, it appears that imposition of this contemporaneous objection rule results in an arbitrary and selected denial of retroactive benefits to some, in contravention of the equal protection clause of the United States Constitution.

In all cases after January 1, 1974, all judges and all juries were misinformed as to who had to prove self-defense. Defendants, who were found guilty by misinformed judges were permitted new trials under the case of State v. Myers. That judge was permitted to apply the same facts of the case to the changed law with the possibility of a changed verdict.

However -- and that is despite counsel's failure to object. However, those defendants who were found guilty by misinformed juries were not granted new trials. They were not permitted the opportunity to apply the same facts to the changed law with the possible result of a changed verdict.

QUESTION: Well, isn't that because in a bench trial, a judge doesn't ordinarily charge himself?

MR. KINGSLEY: There is no corresponding Criminal Rule 30 to court trials. But can we assume that the judge was informed of the proper law? He instructed the jury wrong. Obviously, he was misinformed in both cases. He

thought the defendant had to prove self-defense. Why is there not a corresponding duty on counsel to tell the court, as a trier of fact --

QUESTION: Indeed, it may be that the judge might really bound by appellate decisions, and juries may not even feel that way.

MR. KINGSLEY: I would trust that's not a precept of our system, but that may be a reality.

(Laughter.)

In any event, I feel there is no basis to distinguish --

QUESTION: Let me ask you, though, Mr. Kingsley, would you make the same constitutional claim if in the -- whatever decision it was in which the Ohio Supreme Court imposed the new rule -- if they had expressly said this rule should be prospective only? Or do you rely entirely on the equal protection concept?

MR. KINGSLEY: No, I rely upon the fact that if the state of Ohio wants to overrule Ivan v. New York and Hankerson, they wouldn't have --

QUESTION: They construed the 1974 statute and said well, it's not entirely clear in the statute itself, but we say now the burden is on the prosecutor to negate the defense of self-defense.

Say they had done that in 1976 and said this

construction, however, will only apply to future trials. Would that have been an unconstitutional action of the state of Ohio?

MR. KINGSLEY: And without the cases of Hankerson and Ivan v. New York, my personal opinion is no. The state has the right to declare prospective only. The major premise of my argument is that once they make the conscious decision, it must be applied even-handedly to all defendants down below.

Because in this particular case, the only difference between Mrs. Myers and Mr. Isacc is Mr. Isaac exercised his constitutional right to a jury trial that was prejudiced. Now, how can you have a constitutional distinction and the only difference in the case is on what the jury trial -- that's my constitutional right. Do I have to waive my constitutional right in order to protect myself and stop going -- go to the judge as opposed to the jury? I don't think so. I don't think that is the case.

QUESTION: Suppose the Ohio court says the prosecution hereafter is going to have to prove the absence of self-defense, but that we're not suggesting for a moment that this is an element of the crime? But it's just a state rule allocating the burden of proof on --

MR. KINGSLEY: Subsequent to my man's trial?

QUESTION: Yes.

MR. KINGSLEY: Would it be retroactive? Is that the question to me?

QUESTION: Well, my question to you is what constitutional violation could there be in their refusing to give you a new trial?

MR. KINGSLEY: Under the theory of Ivan v. New York, if in fact that change so affected the entire factfinding process, you're entitled to a new trial. Indeed, the question would be, did that change so affect the entire trial process that the jury was misled as to who had prove what. If they were --

QUESTION: But in my case, I'm suggesting that the state could do it either way. Insofar as any constitutional rule is concerned, they could do it either way. They could either put the burden on the state or on the defendant with respect to self-defense.

MR. KINGSLEY: I don't disagree with you. My premise is -- we're starting at a different starting point. The state of Ohio found it necessary under state principles to make it retroactive. Not constitutional principles.

QUESTION: Well, you think if the state says that the burden hereafter -- the burden under the Ohio law is on the prosecution, although it's not an element of the crime -- the burden is on the prosecution to prove the absence of self-defense, that they have to make it retroactive?

MR. KINGSLEY: No, they do not.

QUESTION: But if they do --

MR. KINGSLEY: If they do, they must apply it even-handedly. You cannot create it retroactively and treat some defendants differently to others when they are in the same factual situation.

QUESTION: But the distinction you're talking about is those who have bench trials and those who have jury trials.

MR. KINGSLEY: Correct.

QUESTION: And the distinction follows not from the fact that they have selected out bench trials for separate treatment, but because you simply don't have charges to the judge in a bench trial.

MR. KINGSLEY: The distinction is that they relied upon Criminal Rule 30 saying counsel did not object. The classes -- there is only one class. Counsel has failed to object, and they treated all those people in that class of failure to object differently. This counsel didn't object, she got a new trial. This counsel didn't object, he was refused a new trial.

The class is counsel had failed to object --

QUESTION: So if there are two parties in a case like this; one had a bench trial and one had a jury trial, you would say that at least in my example one would get

relief and the other would not.

MR. KINGSLEY: That's exactly what happened in Ohio. And I say there's no distinction, except that I demanded my constitutional right to a jury trial.

QUESTION: I know, but the person on the bench trial wouldn't get a new trial.

MR. KINGSLEY: The person in Ohio -- the person that went to the court, the bench trial, did get a new trial under State v. Myers. Mrs. Myers had a brand new trial because had an insanity defense. And Mr. Humphries didn't.

There are additional reasons that go to due process why Criminal Rule 30 is not related to retroactivity. Number one, the purpose of retroactivity is emasculated. If the state of Ohio found to be retroactive, that necessarily was admitting that the factfinding process was faulty, and the accuracy of the verdict was questioned. We can't let defendants remain in jail if we're going to tell them that their verdict may be in error.

Secondly, it requires me as trial counsel to object to everything, to all the parts of jury instruction regardless of legal merit. Under the contemporaneous objection to rules of evidence, I must object to --

QUESTION: Well, you'd only have to object to those rules you thought maybe some day somebody would think the instruction was unconstitutional.

MR. KINGSLEY: Which may be every part of it.

QUESTION: Well, if that's true, then we have pretty broad collateral attack. Because you can't really suggest that everything the judge instructs is potentially an unconstitutional instruction.

MR. KINGSLEY: I must assume that as trial counsel to protect my client. I have no way to reserve that.

I didn't think in this trial that they were going to change burden of proof. I thought that was a cornerstone of Ohio law to try --

QUESTION: But then you're saying you didn't think there was anything unfair about the rule in existence at the time you tried the case.

MR. KINGSLEY: No question about that. It was not unfair.

QUESTION: Defense counsel usually are sensitive to aspects of the charge that tend to be prejudicial to their clients. They concentrate on those things and object to those things. You don't have to object to everything.

MR. KINGSLEY: Well basically, I saw the change in the burden of proof as being a frivolous legal issue because it was solidly decided by the Supreme Court of Ohio.

And do I object and tell them -- do I come back -- I relied upon State v. Rogers which was decided one month after Mullaney and three months before my trial. And in

fact, what happened in State v. Rogers was they construed the new 2905 statute and they said that self-defense is on the defendant. Must I go back three months later and tell the supreme court that they're wrong? Or can I rely upon -- I see it this way. When E.F. Hutton speaks, people listen. When the Supreme Court of Ohio speaks, I listen. I'm taught that in law school.

QUESTION: But you're not taught that the Ohio Supreme Court is the last word on federal issues.

MR. KINGSLEY: No. And I raised --

QUESTION: The objection in Griffin against California never would have been made.

MR. KINGSLEY: That's correct.

QUESTION: And sometimes lawyers do sense things that lead to changes in the law.

MR. KINGSLEY: And sometimes it incorporates it. Notice this is very interesting how this came up, because no one raised this issue in Ohio. The courts found it.

The position of the state seems to be that the purpose of Criminal Rule 30 is not to inform the trier of fact. The purpose of Criminal Rule 30, the paramount interest, is to limit the defendant to one day in court.

Counsel is required to foresee a change in the law forged at a trial or forever be barred. Now, this is fair, the state says, because all counsel are not created equal.

Those that are able will raise the issue and will receive the benefit. The poor counsel will not raise it and their counsel will be barred.

In this particular case, the counsel that raised Robinson, Mr. Tyack, had the benefit of State v. Matthews, an unreported decision which is in conflict with the Robinson decision. He didn't raise the first one in Ohio. Obviously, Mr. Matthews was the only one benefiting. But Mr. Robinson's counsel got that decision.

In the State v. Matthews, defense counsel did not say it's unconstitutional. Defense counsel said -- the state raised the issue. Defense counsel said if you raise it, you prove it. The court of appeals decision came back on a different ground saying no, the burden has been shifted.

So here, no counsel raised the issue, the court sua sponte raised the issue, and Mr. Robinson got the benefit.

Now obviously, Mr. Robinson and Mr. Humphries seem to have equal counsel. Mrs. Myers and Mrs. Humphries had equal counsel, because neither objected. But Mrs. Myers' counsel's default did not bind her; she got a new trial. But the default of Mr. Humphries' counsel's failure to object bound him, did not get a new trial.

QUESTION: Let me go back to one of your responses to I think Justice Stevens' question. You said as trial

counsel when this situation arose, you did not have any judgment or view that there was anything inherently unfair about what was taking place.

MR. KINGSLEY: I was aware of the fact that some other jurisdictions -- for instance, the military required the military to disprove these elements, but I saw an Ohio state decision that told me that any objection I was going to make would be futile in this particular case, unless I was going to change the law --

QUESTION: Even though there were decisions which would have supported such an objection.

MR. KINGSLEY: In the military law.

QUESTION: Well, whatever. There may be some in other places, too.

MR. KINGSLEY: I do not disagree with that. I could have objected. However, they're not treating counsel equally, either. The only reason I should object is there is a case down there I should have seen in the Ohio law. There was no case in the Ohio law and the major treatises in the decisions anywhere. As a matter of fact, I was certified as an instructor and I was training counsel to talk to our officers on this case, and the course material that was put together by the leading scholars in Ohio didn't say this.

As a matter of fact, what was referred to by Mr.

Karas here, the notes of the committee, the state of Ohio and the legislative notes said, we are going to change the language specifically and say the defendant has the burden of persuasion. And they struck that from the bill and they left it the same. The only conclusion could be was that they did not intend to change the law by looking at this enactment. And that's exactly what I assume.

QUESTION: Is it possible that this reaching out to make every change in the law retroactive may put a damper on efforts of legislatures and judges where it's within the power of judges to make changes, if this is going to be -- if 200, 500, 600 people are going to have the benefit of some change?

MR. KINGSLEY: I don't think it has to go back that far. My --

QUESTION: Well, it can. It can go back to several thousands.

MR. KINGSLEY: It can, but I don't think the court's or other changes go that far. I raise in my petition that those counsel that foresaw the issue and got into the courts and said yes, I want this relief, will get benefit. Three counsel that I can see so far. Because then you've cut off the rights of retroactivity.

As to the diligence of the defendant -- if he didn't see that change -- and Robinson was changed -- all

the defendants would have run into the courthouse and said that's my case. They didn't do that. Very few ran into the courthouse and said that.

Therefore, it's their fault they're not going to get the relief that they want. Let's not cut it off at factors we can't control; let's cut it off at a factor where the criminal defendant can control it. His own inadvertence at seeing the decision. Then we have a true balance struck. We have relief to those that caught it and asked for it and they're not getting the benefit at the coattails of the clients who did not.

It seems to me that that is a logical way to look at retroactivity on the state level and on the federal level.

QUESTION: Mr. Kingsley, would you agree with the state that after State v. Robinson and under State v. Poole, that the absence of an affirmative defense is not an element of the crime?

MR. KINGSLEY: That is clearly what Ohio ruled in this particular case. However, it did not say that my client still had to prove that. My client is still required to prove something that he did not have to prove.

Now, the crux and the thing that bothers me about this case is that I raised this issue 22 months after this thing was changed, the state went ahead and changed it. I never got a hearing. Thank you.

CHIEF JUSTICE BURGER: Mr. Aynes?

ORAL ARGUMENT OF RICHARD L. AYNES, ESQ.

ON BEHALF OF RESPONDENTS BELL AND HUGHES

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

We believe this case presents two overriding issues. First of all, may the state require an accused to prove his innocence by establishing that he acted in lawful self-defense, and second, should the procedural default rule that this Court last fully addressed in Wainwright v. Sykes, be extended to apply to errors which affect the integrity of the factfinding process and go to the very heart of the guilt/innocence determination process.

I think that on its fact, these may appear to be substantive and procedural issues that you can separate, but I think if you look at them, they are entertwined here. And I say that because I think the nature of the error itself is relevant not only to establishing the error occurred, but more importantly, to establishing that the Skyes principles at least by their own force do not apply to this case, and they're also relevant to determining cause and prejudice.

I'd like to address the Sykes application, but I'd just like to make one respose to some of the points that Mr. Karas made. He, in tracing the history of the case, he may have left the Court with the impression that there was an

exhaustion issue here. I would simply point out that the lowe courts have found no question of exhausting state remedies. I don't believe that that defense was ever asserted in these proceedings.

Also, it was indicated that the record before the court demonstrated there was no objection to these jury instructions. I think that's certainly true of Mr. Isaac's case, it's certainly true of my client, Mr. Hughes. But as we indicated in the brief, there's no transcript before this Court, there's nothing in the record to indicate whether Mr. Bell's counsel did or did not object.

Turning to the Sykes question, I think if we focus on Sykes, we see that in the line of cases beginning with Davis and going through Sykes, none of those cases dealt with the fundamental integrity of the guilt-determining process. In Sykes, for example, we're talking about a voluntary - not even a voluntary issue -- of a prophylactic rule under Miranda.

In none of those cases did we have the factual basis for the error in the record. I think this Court specifically, in Wainwright v. Sykes and in the course of the oral argument inquired about plain error, and the response was of course no, we didn't have a suppression hearing, so therefore, the factual basis wasn't there; therefore, it couldn't be plain error.

And I think most importantly, both counsel for Wainwright as well as the United States who appeared as an amicus advocated the procedural default rule and in presenting that argument to the Court, they specifically disavowed any intent to apply that to any rule that would make a decision as to guilt or innocence.

That's in marked contrast to this case. In this case, the state of Ohio told its juries if the state does not dis-prove self-defense, at least by the Robinson decision, then this man is innocent. It goes to the very heat of that determination. It made the whole difference here between an acquittal and punishment.

Also, the error is in the record. We don't have to have an evidentiary hearing, we don't have to go back and make reconstructions.

I think it's also important to focus upon the nature of the error to this extent. That in any other situation, a conscientious jury could still come back with a proper verdict. If the prosecutor comments on silence, I can ignore it. If the prosecutor makes an inflammatory comment I can ignore it. Even if an involuntary confession comes in I can ignore it as a juror based upon the very reasons that the trial judge would have excluded it in the first place.

But in this case, a conscientious jury would have

followed this erroneous statute. And that's what makes -- I'm sorry, the erroneous instruction, and that's what makes it so critical to the guilt or innocence determining process.

I think that where we end up at least with that is that Sykes, by its own terms, was not designed to apply here. That we go back and we look to the fundamental nature of the error, and it should suggest that relief is available wthout ever reaching the Sykes question.

With respect to the state law question, I think that we have to go back -- and perhaps I could clarify just a couple of points. The Poole case that my friend Mr. Karas makes reference to, is a 1973 Ohio Supreme Court case. We did not cite it in our brief; he does cite it in his brief, and he quotes sections from it. And part of the language he is relying on is the Ohio Supreme Court saying some commentators have said this is true.

QUESTION: Counsel, you say where there's fundamental error Sykes ought not to apply. What's the definition of fundamental error?

MR. AYNES: Well, to some extent, Your Honor, I think we can track into an argument that I haven't advanced, but it tracks closely to Mr. Kingsley's retroactivity question. I wouldn't say fundamental error as much as error that affects the accuracy of the factfinding process. And I think that that's a very similar rationale to the test of

retroactivity that this Court has developed, for example, in Hankerson, deciding whether to apply Mullaney v. Wilbur retroactively.

And I think what we have to look at is when we consider the jury, not just is this an error in and of itself, or even is it a constitutional error, but is this the type of error that raises serious questions about the accuracy of the jury in performing its function in making findings of fact and determining guilt or innocence.

I think while we, I suppose, would have to go through a whole continuum of examples, I don't think there's any question that when the burden of proof is shifted, whether that burden of proof is required by state statute or is required by federal constitutional law, that that does impinge upon the varying --

QUESTION: You really are submitting that if the Ohio Supreme Court imposes a rule for the benefit of the defendant under the state constitution and says well, we understand it's not required by the federal constitution, and if that rule would, in your words, seriously affect the accuracy of the factfinding process, that the federal constitution requires its retroactivity? That's what you're suggesting.

QUESTION: I suppose I hesitate, Your Honor, only because --

QUESTION: Well isn't that what your argument is?

MR. AYNES: I stumble over the word retroactivity, Your Honor.

QUESTION: Well, would you get the benefit of it -- must you get the benefit of it under the federal Constitution, even though your case was tried before the new rule was put in?

MR. AYNES: I can answer that yes and say that's true. I'd like to clarify it only from this point. One of the problems we have in the whole Ohio system, I submit to the Court, is confusion over where the source of this right comes from. And that confusion was indicated in the brief, I think. Unfortunately, the Ohio State Supreme Court has not helped to clarify this situation.

In State v. Robinson, the Ohio Supreme Court uses language such as the meaning of the statute is clear. It doesn't admit to substantial doubt. We can't really have -- and this is not a quote; the first two were quotes -- but we can't really have a good faith argument about what this statute means.

The Ohio Supreme Court never uses the term retroactivity in any of its cases. Solicitor General in their amicus brief argues -- and I understand the argument -- they come in and argue that this right stems from the statute. And we don't really have a retroactive problem at

all.

Now of course, the problem with that is I can impeach that position, it seems to me, by the Ohio Supreme Court's own decision in State v. Rogers. If it's as clear as you said it was in 1976 in Robinson, how did you, the Ohio Supreme Court, make that mistake in State v. Rogers in 1975 when you told us it didn't change the burden of proof?

And I think the only satisfactory answer that I have been able to come up with to that is it's perhaps analogous to this optical illusion that folks have --

QUESTION: Well, changing the burden of proof on self-defense didn't result from any federal pressure, did it?

MR. AYNES: Well, as I read the state supreme court's opinion, the federal issue was raised, and they said we have the power to resolve this without addressing the implications of Mullaney, an therefore we're going to do it --

QUESTION: So they did it as a matter of state law.

MR. AYNES: They did it as a matter of state law.

QUESTION: And are you suggesting that the federal Constitution requires that you have the benefit of that ruling?

MR. AYNES: Yes, I am, Your Honor, for this reason.

QUESTION: Even though the change was in state law?

MR. AYNES: Yes, I am, Your Honor, for this

reason. In the subsequent cases, State v. Jones, the state of Ohio Supreme Court said we're not talking about an evidentiary rule here; we're talking about a substantive element. In that case they struck down changing the burden of proof based on ex post facto position.

What they're saying, in effect, is that this goes to the very integrity of the trial process. What I'm suggesting to the Court is, for example, we can even track back to an analogy between this Court's cases, say, in Patterson, that basically says the state has great freedom in defining what the elements are going to be, what the --

QUESTION: But the Ohio Supreme Court has never said the absence of self-defense is an element of the crime, has it?

MR. AYNES: They have not -- no, Your Honor.

QUESTION: They just said the state has to prove it.

MR. AYNES: Correct, Your Honor. I think it's fair to say this, though, about what the Ohio Supreme Court has said and what they haven't said. They have never -- you're absolutely correct, they have never said that it negates an element of crime, and they've never said that its absence is an element of crime.

What they have said, though, in the Chas, Abner and Jones cases that we've cited and quoted to this Court,

is that when the jury makes its decision about guilt or innocence, they consider all of the evidence. And as part of all of that evidence, they consider whether or not they acted in self-defense.

Now, I point out this is very distinguishable from Leland. In Leland the insanity case, of course, the statutory scheme was that you considered guilt or innocence; once you decide the person is guilty, you go on to consider insanity as a separate element. The three Ohio Supreme Court cases that post-date this statute all make it very clear Ohio doesn't do that.

QUESTION: But the defense claim -- if defense is the right word -- in Leland against Oregon, was in the nature of confession and avoidance clearly, was it not?

MR. AYNES: Yes, Your Honor, in the Leland case.

QUESTION: Now, in your response to Mr. Justice White two questions back, equal protection was the route by which you get to your position when it's a state law, not a federal question that you're relying on.

MR. AYNES: No, I don't believe so, Your Honor. I think that even under this case --

QUESTION: That's what I want to be sure about. How do you get there other than by equal protection?

MR. AYNES: I think in terms of establishing a substantive constitutional violation, I think we probably

have at least two positions on that. The one is that while the state may be free to allocate burden of proof and to define the elements of the crime, once it makes it allocation, this is so important it can't depart from that without violating due process.

QUESTION: What about Sunburst, where this Court said a state was free to make its decision prospective only or retroactively only.

MR. AYNES: Well, Your Honor, I think -- you're talking about a question of state law, the court is then free to make that decision?

QUESTION: Yes.

MR. AYNES: I think that's true, but I think what is Ohio is back in the position is perhaps Mullaney v. Wilbur, where this court says, in effect, you don't have to have voluntary manslaughter; you could just have murder one, murder two. But if you do choose to have voluntary manslaughter, then there are certain consequences to that which due process mandates.

And I think that's what we're saying here. That you may not have to accept -- you know, quite frankly, we think they do have to accept burden of proof. But even if we were not to reach that point, you may not have to accept the burden of proof, but once the state sets the agenda and says, in effect, to prove a man guilty we must prove these

things; any departure from that is a due process violation.

And, of course, I think we have the second position and that is, unlike insanity, no one has a right to be insane. If you commit an act that would otherwise be a crime, the absence of intent may or may not have bearing upon whether you committed that crime. But under self-defense you do have a right to act in self-defense. The state cannot deprive you of that right.

QUESTION: You mean a state must, under our federal Constitution, provide a defense of self-defense?

MR. AYNES: Yes, Your Honor. I don't believe our case must necessarily stand or fall in that position. But we have taken the position -- and I think I'm prepared to defend that position even though there are no decisions from this Court -- saying that's true, that you have a constitutional right of self-defense.

QUESTION: Well, there certainly are no cases from this Court --

MR. AYNES: No, there are not, Your Honor. But if the state tells me, for example, that to refrain from criminal conduct I must stand here and allow someone to assail me and take my life, it seems to me that that's state action depriving me of life without due process. If it says, in effect, I must let someone commit a crime rather than defend myself, it seems to me that's a violation of

cruel and unusual punishment. And I could go on with right of privacy and other constitutional bases.

I simply point out on the Sykes issue that this Court indicated by citing Henry-Mississippi that in every case you must look to the specific interests that are supposed to be advanced by the contemporaneous objection rule. Those interests generally coalesce into three parts. And two of them don't exist here.

We don't have any need to preserve testimony or to take testimony to make the record here. We also don't have any evidence of sandbagging. My friend Mr. Karas has indicated in his petition before the Sixth Circuit that the counsel could justify we lied here. We've had no indication, no allegation that these counsel deliberately withheld these charges or that they were trying, in effect, to reserve error for a later time.

The only interest the state has here is finality, and we're suggesting to the Court that even finality, while it may be of considerable interest, could never alone outweight the defendant's interest, when we have an error of this magnitude.

I think also there's been some discussion here of futility, and I'd point out particularly in favor of my client Mr. Hughes that we had a binding decision from the Ninth District Court of Appeals which is unreported but

we've reproduced it in the addendum that we lodged with the clerk's office which interpreted the statute prior to Mr. Hughes' trial and said, in effect, the statute didn't change it.

The state's interest here is avoiding retrials, and all I'm suggesting to you is while futility is generally discussed in terms of cause, we would like the Court to focus here on futility in terms of the adequacy of the state grounds. If the judge, in theory, could not have given that instruction, it serves no purpose to raise the objection and it becomes futile. And just as we don't require futile acts under the exhaustion requirement which is comity-based, neither should we require futile acts here.

Of course, as we've also tried to indicate in our briefs, if the Court goes beyond the adequacy of the state grounds, finds it adequate, wants to look to cause and prejudice, we think that we've demonstrated cause and prejudice here.

I'd also point out that we have some -- both of these individuals filed their petitions pro se in the district court. The district court cited those decisions -- I guess I did enter one of those cases after the magistrate's recommendation -- but decided those cases without any type of evidentiary hearing. And the only reason I think that that is relevant here is that this Court

seems to suggest in its recent case in Jenkins v. Anderson that in order to resolve a cause type of question, there may be a necessity for an evidentiary hearing, and none was held in any of these cases.

So I'm suggesting to the Court that I think the record here is clear enough under all these facts that we've demonstrated cause without that hearing, but if the Court were to determine otherwise, then we'd suggest that perhaps one of the proper remedies would be to remand for an evidentiary hearing.

I think it's also important to point out, in terms of assessing what counsel's opportunity was, that the only two opinions that speak directly to these points are from the judges closest to what was happening in the state of Ohio come from the Second District Court of Appeals in Ohio; again, an unreported case, State v. Hamilton and it's in the addendum, where they characterized this that objecting would have been a vain act.

And also, Judge Peck, senior status on the Sixth Circuit who authored the plurality decision, who was a former Ohio common pleas judge and also former Ohio Supreme Court judge, and he, too, looking at this said in the context of these cases, it would have been vain or it would have been futile to make this objection.

QUESTION: May I ask you to go back to your

constitutional theory for just a second. Your first theory, as I understand it was that if the Ohio Supreme Court changes the burden of proof, it must make the new rule available to everyone who was tried after the statute was passed in 1974. Is that right?

MR. AYNES: Yes, Your Honor, on the theory that the agenda was set by the statute.

QUESTION: All right. Supposing you had no statute at all, and the Ohio Supreme Court just announced a new rule of law that the self-defense burden of proof shall be different henceforth. Would that have had to have been applied retroactively?

MR. AYNES: If I were to abandon my other constitutional claim and admit that that is purely a question of state law then no, I don't believe they're required to apply it retroactively.

QUESTION: Why do they have to apply it retroactively when it's a statutory interpretation and not when it's a non-statutory question?

MR. AYNES: I think you can track that on either due process or almost an ex post facto analysis and say that once you make that determination on the very important issue of who bears the burden of proof on self-defense, the state locks itself into that position. It's very similar to this Court's decision in Hicks v. Oklahoma where the state tried

to argue this is merely a matter of sentencing. And the Cour came back and said no, once you make that determination, any departure from that is going to be a violation of due process. Thank you.

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Karas?

ORAL ARGUMENT OF SIMON B. KARAS, ESQ.

ON BEHALF OF PETITIONER - Rebuttal

MR. KARAS: Four points real quickly. One, I think it's important to emphasize that the Supreme Court of Ohio specifically said in State v. Robinson that they were reaching this decision on the basis of state law. I think the questions from the various Justices point out that if it is a question of state law, then it is for the state to determine how far it is going to apply its retroactivity.

Now, the state here I think had a valid reason as opposed to arbitrary and capricious, as called by the appellate court for not making this applicable to those who had not objected, and that is that the result in this case is absolutely devastating in terms of its impact on the administration of justice.

Certainly, a number of persons are going to obtain new trials as a result of the holding by the court below.

QUESTION: All the people who had bench trials are going to get a new trial.

MR. KARAS: Well, two things on that.

QUESTION: Isn't that what the court said?

MR. KARAS: That is correct. That was a function of the fact that Criminal Rule 30 did not apply to bench trials.

QUESTION: Whatever it's a function of, you're going to have a class of convicted defendants who are going to get a new trial.

MR. KARAS: I don't see anything arbitrary and capricious about drawing a --

QUESTION: I didn't say there was. I just say that that is -- part of the devastating impact is self-imposed.

MR. KARAS: To the extent that those cases are entitled to relief under Ohio law, then those cases --

QUESTION: There is certainly more than one of them, aren't there?

MR. KARAS: I'm sure that's correct, Your Honor.

One aspect of finality that I would like to illustrate, and I think Ohio was lucky in this case because we're dealing with a relatively short time period. In the Frady case, which the Court will hear next, there were 16 years involved between the time of the initial trial and the finding of constitutional error.

QUESTION: Is there any claim here that it goes

back beyond the date of the statute?

MR. KARAS: There is not in this particular case. I would refer the Court to the Carter decision in which a petition for rehearing en banc is still pending in the appellate court, and of course, they relied on the Isaacs case for finding cause in the failure to object in that case, and it could apply backwards.

One thing I would like to point out and that is the fact that Mr. Hughes and Mr. Isaac have actually been released, and I think that illustrates the need for finality in the system. Here we are after they have been released from prison, they have gone back to their jobs or whatever, and we are still litigating the question as to whether or not their convictions were valid. I submit that is a result that should not be allowed under our system of justice.

QUESTION: Even though they were released, they would have to be retried?

MR. KARAS: I'm not saying that the question is technically moot; I'm just saying that --

QUESTION: Will they have to -- can they be retried?

MR. KARAS: As a practical matter, Your Honor, I don't believe the state would retry it, nor would they have the opportunity --

QUESTION: Legally, they could be -- they could be

lawfully retried now.

MR. KARAS: Legally they could be.

QUESTION: The question of whether you can find your witnesses and all that sort of thing has nothing to do with the legal issues.

MR. KARAS: No, that's correct.

QUESTION: What would the habeas corpus court's order be if somebody has been released? Either retry them or release them, or they're already released?

MR. KARAS: I suppose it would be a predicate for an expungement.

QUESTION: Either -- just order expungement, is that it?

MR. KARAS: Probably under the Ohio law if they're a first offender.

QUESTION: You had three other points you were going to make?

MR. KARAS: The second thing is that Mr. Aynes has referred to the nature of the claim. I think that is what gives rise to the court of appeals' argument about presumed prejudice, and the only point that I would make there is a quote from Davis v. United States. "The presumption of prejudice, which supports the existence of the right, is not inconsistent with the holding that actual prejudice must be shown in order to obtain relief from a statutory waiver for

failure to assert it in a timely manner."

The third thing is State v. Abner I would assert actually supports the state's position. The court there held that there need not be a specific instruction on the state's burden to prove the absence of self-defense beyond a reasonable doubt. The argument there would be that if it were an element of the offense, that would constitutionally be required. The only counter-argument that the respondents have made is that the Ohio Supreme Court was acting unconstitutionally there as well.

And the last thing is that the distinction of how you separate the claimed state error here from any other claimed state error. If the state has a speedy trial act that is more restrictive than what would be required by the constitutional claim of speedy trial, can a habeas corpus petitioner raise the failure of Ohio to have abided by the state supreme court act, the state speedy trial act or anything other of the myriad range of decisions by which state courts actually go beyond what is fundamentally required by the constitution.

I just ask the Court to note that the Hughes case provides writ granted on the basis of Isaacs; I expect that if this decision is upheld you will have writ granted Isaacs, writ granted Isaacs, and I have asked the Court to spare the state of Ohio this tragedy.

CHIEF JUSTICE BURGER: Thank you, gentlemen, the case is submitted.

(Whereupon, at 2:00 p.m. the oral argument in the above-entitled matter ceased.)

CERTIFICATION

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BY Suzanne Young