OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-1

TITLE THEODORE KOEHLER, WARDEN, Petitioner v. TILDEN N. ENGLE

PLACE **Washington, D. C.**

DATE February 28, 1984

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IN THE SUPREME COURT OF THE UNITED STATES

THEODORE KOEHLER, WARDEN,

Petitioner,

v. : No. 83-1

TILDEN N. ENGLE

Washington, D.C.

Tuesday, February 28, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:07 o'clock a.m.

APPEARANCES:

LOUIS J. CARUSO, ESQ., Solicitor General, State of Michigan; Lansing, Michigan; on behalf of the Petitioner.

JOHN NUSSBAUMER, ESQ., Assistant State Appellate Defender; Detroit, Michigan; on behalf of the Respondent.

C C N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Solicitor General.

ORAL ARGUMENT OF LOUIS J. CARUSO, SOLICITOR GENERAL, STATE OF MICHIGAN: ON BEHALF OF THE PETITIONER

MR. CARUSO: Mr. Chief Justice, and may it please the Court, this case involves a collateral attack on state courts' proceedings by way of habeas corpus review in Federal District Court.

It concerns a claimed erroneous jury instruction that was given on presumed intent, in connection with a murder trial of Respondent Engle, which culminated in a guilty verdict of first degree murder in July of 1973.

The Federal District Court concluded that the claimed infirm instruction is not constitutionally infirm. The Sixth Circuit Court of Appeals disagreed and reversed.

Collateral attack here is precluded by the failure of Respondent Engle to make timely objection to the claimed infirm instruction.

Michigan has a contemporaneous objection requirement. It is embodied in statute and in court rule. The rule contains, however, an escape provision: "and the Court will review error, without objection," to prevent what it calls a miscarriage of justice.

Respondent, here, mistakenly asserts that there's a broad per se exception to that contemporaneous rule, objection rule, in that it does not apply to the instructions given on elements of crime.

None of the cases cited by Respondent support that proposition. What the Court does in those cases is actually apply the rule and make an assessment as to the likelihood of the potential for miscarriage of justice.

And where the merits have been analyzed by the Court in those cases when the objection has not been made has been because it has been suspected that there is the potential for miscarriage of justice. It is not because the rule is not applied.

QUESTION: Mr. Carusc, didn't the Sixth Circuit disagree with you on that point and say --

MR. CARUSO: Yes. The Sixth Circuit said that the State of Michigan does not apply its contemporaneous objection rule. But it does apply it.

And People v. Wright and People v. Perez, two cases of current vintage, although timely objections were not made in those two cases on presumed intent instructions, the Court took the opportunity in those cases to direct the trial court to stop making those sort of presumed instructions.

But, nevertheless, in those cases, the Court

reaffirmed the existence of the contemporaneous objection rule, and recognized its liability.

In the one case, in People v. Wright, it found harmless error; and, in the other case it found the error was harmless; but, nevertheless, as the Court indicated, quoting the rule, it is still the law in Michigan.

Here, there is no objection made at the trial stage to the claimed infirm instruction. The direct appeal that was taken to the Michigan Court of Appeals as of Wright challenged only the intoxication instruction. The judgment of conviction became final in 1975 when that direct appeal ended.

There was no timely application made for leave to appeal to the Supreme Court. The first time the objection to the intent, presumed intent instruction, came out on three applications for delayed appeal, two to the State Supreme Court, and one application for delayed appeal to the Court of Appeals.

Now, when these applications were filed, the prosecuting attorney raised the absence of compliance by the respondent was a contemporaneous objection rule, as well as making a response to the merits of the claims.

Now, the Court -- all three of these applications for delayed appeal, were denied by the

courts. They were denied on the basis of lack of merits on grounds presented, and the Court is not persuaded that the question presented should be reviewed.

Now, although the Michigan Constitution does require that the Appellate Court, in denying leave to appeal in a matter, should give the grounds for the denial, a denial, the Court says, is not a decision on the merits.

And, thus, in order for Respondent Engle to have had his federal claim decided, it would have been necessary, in each one of those discretionary appeals, to have had the review on the merits by a grant of leave.

So we're taking the position here, insofar as Michigan law is concerned, and we seek the application of the Sykes Rule when there is a denial order -- and Michigan has -- has in Michigan -- they have a contemporaneous objection rule; the defendant has not complied with it, and the prosecutor has argued the rule in response to the application for leave to appeal, and there is no decision on the merits because the Court has repeatedly said this to the bar in Michigan: then, a habeas court must assume that the state followed its contemporaneous objection rule.

This would be consistent with the general rule that, in habeas cases, the state court decision is

presumed correct, absent a contrary showing, overwhelming contrary showing by the prisoner.

QUESTION: Solicitor general, may I ask a question, because maybe I missed something you said.

But the Court of Appeals said that, in People against Wright, the Michigan Supreme Court held that the contemporaneous objection rule does not apply to Sandstrom instructions, as I read it.

I haven't read the Wright case myself.

MR. CARUSO: In the Wright case, the Court applied the contemporaneous objection rule and made a decision that it should review this sort of an error, claimed error, simply because there's the likelihood of miscarriage of justice.

But the thing of it is, the Court also has supervisory authority over all litigation in state courts in Michigan. And they made it very clear; the reason that they took these cases was to seize upon the opportunity, in these two consolidated cases, to announce the prophylactic rule of Sandstrom, and directed the lower courts to stop using those kinds of instructions.

QUESTION: But did they say that they would review Sandstrom error, even if there was no contemporaneous objection?

MR. CARUSO: I don't recall their saying that conclusively; no.

QUESTION: But that's, apparently, what the Sixth Circuit thought they said?

MR. CARUSO: The Sixth Circuit apparently thought that; yes.

This position, I would say, promotes comedy. And, as in the showing by the respondent/appellant -- and there certainly has been no showing of cause and actual prejudice, actual prejudice at the level shown in U.S. v. Frady, for example.

Here, the claimed instructional error does not contravene the decision of Sandstrom.

QUESTION: Mr. Caruso, normally we don't reexamine the holding of the Court of Appeals on what the state law is.

Do you plan to discuss the other arguments in this case?

MR. CARUSO: Yes.

But, insofar as the state law is concerned, I say that it has -- the State of Michigan does have the contemporaneous objection requirement, and it is an independent state ground.

And this is what was held in Wainwright v. Sykes; it's what was held in several other cases.

QUESTION: Well, if the State Supreme Court makes what we consider an erroneous instruction of its own law or statute that doesn't involve the Constitution, we certainly don't review it.

If the Court of Appeals makes what, in our view, is an error in construing a State Supreme Court opinion, that's open to review here, is it not?

MR. CARUSO: I would say so, yes, Chief Justice.

And I think that if that is the conclusion that they came to -- and it is -- that the State of Michigan does not apply contemporaneous objection rule, that that is erroneous, and that's contrary.

But the Federal District Court agreed that the error that is claimed for by respondent/applellant did not violate the Sanstrom rule, and they didn't even bother to make a harmless error analysis.

Engle was convicted of first degree murder in July of 1973, convicted of first degree murder of his foreman at the Chrysler Auto Plant in Detroit.

Believing him to have been responsible for having been laid off December 4, 1972, December 7, 1972, at 9:00 p.m., Engle entered the auto plant, told his nephew he was going to kill a guy. Engle entered the Foreman Lantzy's office, encountered a clerk, and asked

him as to where the -- the whereabouts of Foreman Lantzy..

He said he was temporarily out, and offered to go find him. Engle said that, never mind, that he would go find him. At 9:45 p.m., two employees saw Engle talking to Lantzy and then saw him shoot Lantzy, who ran. He was shot twice more, and he fell. He stood over him, and then walked away and returned to the office of Lantzy and told the clerk that he had shot and killed Lantzy.

When the security guard arrived, he gave the gun to his security guard, and said that he had killed Lantzy.

The police arrived, and Engle described the shooting in detail, and said that he had ceased firing because he didn't want to hurt anyone else. The next day, he gave the same version to the police officers in writing.

Now, the respondent --

QUESTION: Mr. Carusc, what are these -- which of the points you want to raise are these facts being urged in support of?

MR. CARUSO: These facts are being urged in support of the fact that if this is error, it's harmless error, beyond a reasonable doubt.

The respondent at trial testified that he did not remember the incident. What he did do was interpose a defense of insanity, the irresistible impulse prong of the Michigan insanity defense.

Now, in Sandstrom, the Court instructed, the law presumes that a person intends the natural consequences of his voluntary acts. That instruction was given, and the Court said a juror may have interpreted these words as a conclusive presumption, one overriding the presumption of innocence, and shifting the burden of proof to defendant.

Now, here, in the Engle case, the subject instruction is not couched in mandatory terms; it is not a mandated presumption that would in any way shift the burden of proof. What is does suggest is a reasoning process to the jury commenting on the relevant evidence.

And you'll see, at page 13a of the Joint Appendix, the wording that was used by the judge in instructing the jury: We, of course, do not have the power to look into a person's mind to tell what the person is thinking of at any particular time, but the law gives a rule of thumb that a person is presumed to intend the natural consequences of his acts.

Then it goes on to say: Therefore, in determining whether there was an intent to kill, you may

properly consider that a gun was used. You may properly consider the wounds, where the gun was held in relation to the body, and I think it is proper that you may consider all these things in determining whether or not there was an intent to kill.

However, the Court did admonish the jury --

QUESTION: Mr. Solicitor General, could I interpret you for a rather important problem that bothers me, if I may?

There are three questions in this case. You've argued the Wainwright against Sykes, and now you're arguing whether there was an Sandstrom error.

But your first question that you presented and discussed in your opening brief was whether Sandstrom was retroactive.

MR. CARUSO: Yes.

QUESTION: And your opponents say, in their -- page 7 of their brief -- that you did not argue that question in either the District Court or the Court of Appeals.

And I don't find that you filed a reply brief.

Are you agreeing you did not raise that question?

MR. CARUSO: That is correct. We did not raise that question.

QUESTION: So that's why you're not arguing the retroactivity clause.

MR. CARUSO: Yes. We did not.

Therefore, the Court then went on to admonish the jury that they had to be satisfied with the proof beyond a reasonable doubt.

In addition to that presumed intent instruction, the Court did tell the jury and instruct the jury on the six elements of homocide. And in instructing the jury on the six elements of homocide, it told the jury that the prosecution had to prove each one of these elements beyond a reasonable doubt, and then had to also prove malice.

Now, instructions are only a component part of the entire trial. It is given, usually, in the main, at the conclusion of the testimony and presentation of exhibits. But for that reason, it's necessary to review the instruction in light of the entire record, to determine the impact that a particular instruction does have on the outcome.

And it's our contention that this presumed instruction that is claimed to be infirm did not have any adverse impact on the outcome here, although intent was technically in dispute during the course of the trial. It was actually subsidiary to the claim of

insanity, which was the focal point of the trial. The proofs took up entirely, almost entirely, the time of the jury with proofs on insanity.

They did not dispute the general intent. As a matter of fact, during the course of the trial, in response to a question from the prosecuting attorney on cross examination of the defendant Engle, at the transcript at Volume III, page 314: "You don't know -- you're telling this jury that you don't know who killed Regis Iantzy? Is that correct?

"No, that's too much. Too many witnesses said that I did it. I'm not denying doing it. I'm not even trying to justify doing it. I'm just telling you I didn't know what I was doing it when I did it. I don't remember doing it. I'm not trying to justify me. There isn't any justification for the taking another man's life, unless it's in self defense."

Now, this is the tone that the evidence took in this entire trial.

Now, with respect to the insanity defense, the insanity instruction, that left no doubt that the jury was fully apprised as to its fact-finding function and the prosecution's burden.

In that particular instruction, the Court said the presumption of insanity is a legal presumption

merely. It lasts only until some evidence is introduced.

That merely states the Michigan law that insanity is an affirmative defense. You have to raise it, but you don't have to put any great body of proofs. It's simply, merely a burden of production. And once that is put in, then the prosecutor has the burden of proving sanity. And the Court actually did instruct the jury, in the words that the state has the burden of proving sanity beyond a reasonable doubt.

And that statement is contained in the insanity instruction. Accordingly, there was no doubt as to the jury's duty in the fact-finding function, and also in view of that language, it cannot be argued, it cannot be said that the jury was misled by thse instructions in believing that the instruction given was -- had the effect of shifting the burden of proof from the prosecutor to the defendant. And that simply did not happen.

QUESTION: Mr. Caruso, the conviction here was first degree murder, wasn't it?

MR. CARUSO: Yes.

QUESTION: What were the instructions on first degree murder?

MR. CARUSO: On first degree murder, the instructions read that there had to be a proof of

specific intent to kill, and premeditation. And that instruction was given.

QUESTION: Then how does a good bit of the argument in this case from both sides really bear on that, when the jury came in with a verdict of guilty and first degree murder?

It would bear on second degree and the other lesser defenses, would it not? But does it bear on first degree murder?

MR. CARUSO: The instruction bear -- the verdict? I don't -- I didn't follow that. I'm sorry.

QUESTION: Well, you don't make the argument, and I wonder why you don't -- it seems to me that the instructions on first degree murder were very specific as to premeditation and intent.

MR. CARUSO: Yes.

QUESTION: And that Sandstrom error, when existent, hardly bears on the instructions on first degree murder and the resulting conviction on first degree murder.

MR. CARUSO: That is right.

And the instruction was given; it was very clearly given. And the instructions that were given with respect to malice and the various components of second degree murder was also very clearly given, and --

QUESTION: Let me read from the instructions o first degree murder: "It must appear that the killing was willful and premeditated."

MR. CARUSO: Yes; that is correct.

QUESTION: And the jury bought that.

MR. CARUSO: The jury was convinced that it was.

QUESTION: Then I wonder why we're so concerned about Sandstrom error.

MR. CARUSO: I don't believe we should be concerned about Sandstrom error, because in this case, as I say, the instruction that was given does not -- would not, in any way, indicate to the jury that the burden of proof with respect to the elements of first degree murder -- premeditation, intent to kill, malice -- was in any way led to believe that the prosecutor did not have that burden of proof. He very clear had the burden.

QUESTION: You referred earlier to some of his statements, that he had stopped shooting because he didn't want to kill anybody except this one man.

MR. CARUSO: Yes.

QUESTION: Now, that was before -- those were pretrial statements.

MR. CARUSO: Yes.

QUESTION: They were before the jury, when they received the instruction that Justice Blackmun just referred to.

MR. CARUSO: Yes. That testimony was given to the jury in the form of testimony from the police officers and from -- yes, the police officer gave that testimony.

QUESTION: Let me just summarize what I've said.

It seems to me that the verdict itself is proof beyond a reasonable doubt that the intent instruction did not affect the outcome of the trial.

Do you agree with that?

MR. CARUSO: The intent instruction given did not affect the outcome of the trial?

QUESTION: Could not. With a first degree murder verdict.

MR. CARUSO: The intent instruction, the presumed intent instruction. The fact is that the claimed error did not have any impact on the decision of the jury in first degree murder. They were satisfied that the evidence was sufficient, apparently, to come to -- to render a verdict of first degree murder.

QUESTION: May I ask you, on that question -- the instructions that are quoted in the Sixth Circuit's

opinion at 17a, the long instruction, are those instructions on the first degree murder charge?

MR. CARUSO: I didn't hear you. I'm sorry.

QUESTION: There's a long quotation, in the Court of Appeals' opinion, from the instructions of the trial judge.

Do I correctly understand that those instructions concern the first degree murder charge? One, he's describing malice in a technical sense, and it says: "Malice is implied from any deliberate and cruel act against another person, however sudden."

And, later on: The law gives us a rule of thumb that a person is presumed to intend the natural consequences of his act."

Did that pertain to the first degree murder charge?

MR. CARUSO: That pertained to the first degree murder charge, as well as to the second degree murder charge.

QUESTION: And how can you be so confident that these instructions had no impact on the jury's deliberations on the first degree murder charge?

MR. CARUSO: The description that was given in defining malice, and the -- certainly, the instruction that was given on malice is defined in another way as

the intentional killing of another person. That's specific intent to kill.

Yes; that definitely had an impact on the decision of the jury.

What I'm saying is, that that one statement in the instruction, that "the law gives us a rule of thumb that a person is presumed to intend the natural consequences of his acts" did not influence the jury. In other words, the jury was not led by this statement in this instruction as calling for a presumption of guilt, a finding of intent; nor did it shift the burden of proof from the prosecutor to the defendant.

This is what I'm arguing. This is the instruction I say did not impact or affect the ultimate decision of the jury.

But the rest of these instructions --

QUESTION: But the other instructions did affect their deliberations.

MR. CARUSO: Did affect -- yes. Yes.

My reference is to the part of the instruction that did not affect the outcome of the decision -- is the instruction on presumed intent, the natural consequences of his act. And that's what Sandstrom says is in infirm. But, at the same time, there's a host of cases that say you consider these instructions in

relation to all of the other instructions contextually.

And not only the words do you consider and the instruction in context of the others, you must consider that instruction in light of the evidence and the proofs at trial to determine if that claimed erroneous instruction had an impact on the outcome of the trial.

QUESTION: That's the basis of the Harmless Error Rule, is it not?

MR. CARUSO: That's right. And the very issue, the issue that is being made here, is in that particular instruction about presumed intent.

And what I'm saying is that that language in that presumed intent instruction did not have any bearing, any outcome, on the decision, on the finding of guilt by the jury, because there was enough contained in the rest of the instructions to indicate the prosecutor had to prove all of the elements of the crime; had to prove specific intent, had to prove malice, had to prove premeditation.

And all of these proofs of the element of crime were not disputed by the defendant here. The defendant admitted having shot the person, in a sense. He does not admit that he intended -- he merely says "I don't remember having done it."

The testimony of witnesses saw him come in,

saw him shoot Regis Lantzy. But these are all proofs that go to the intent. None of these were disputed by the defendant in this case.

So, considering the words that we find in this particular instruction that is claimed to be infirm, related against the whole body of the proofs in this case, I would say it just pales to insignificance.

QUESTION: Did he dispute the statement that he made to the policeman that came into the record through the policeman's testimony, about having stopped shooting because he wanted to be sure not to hit anybody else except the man he was trying to kill?

MR. CARUSO: I don't believe that was disputed. The only they say, that he just doesn't remember what he did. And the arguments made by counsel, by the defendant during the course of the trial itself, the counsel argued and admitted that what Engle represented -- that Lantzy represented to Engle some terrible thing that happened in his life, and he wanted to do away with him; in other words, the irresistible impulse defense.

And that's what the whole defense was on -- the irresistible impulse and insanity plea. And they did not really attack the proofs, and they were not challenged specifically.

CHIEF JUSTICE BURGER: Mr. Nussbaumer.

ORAL ARGUMENT OF JOHN NUSSBAUMER,
ASSISTANT STATE APELLATE DEFENDER, STATE OF MICHIGAN;
ON BEHALF OF RESPONDENT

MR. NUSSBAUMER: Mr. Chief Justice, may it please the Court, I'm going to skip directly to the procedural default issue, since the state has not argued the retroactivity issue.

This procedural default argument should not detain you long. Before the Sandstrom case, the Michigan Supreme Court specifically held that it would not enforce its procedural default rules for cases involving a conclusive presumption of intent or an instruction shifting the burden of proof to the defense.

After Sandstrom, the Michigan Supreme Court specifically held that it was exempting Sandstrom errors from the state's procedural default rules.

QUESTION: Is that the Wright case?

MR. NUSSBAUMER: That's right, Your Honor.

After the Wright case, the Michigan Supreme Court and the Michigan Court of Appeals have addressed the exact situation you have before you today: a delayed appeal in which the issue was not objected to a trial and not raised on the appeal as of Wright to the Michigan Court of Appeals.

And in those cases, they have said we will not enforce our procedural default rules. There's no basis at all for a conclusion that the state enforces its rules for Sandstrom errors.

QUESTION: Now, the actual question here, I suppose is, whether in those three petitions for delayed appeal, the Michigan Appellant Court, in this particular respondent's case, did or did not enforce a default rule.

MR. NUSSBAUMER: That is the question, Justice Rehnquist.

What I'm saying is, before Sandstrom, the Michigan Supreme Court specifically said we're not going to enforce our procedural default rules for conclusive presumption instructions.

That's People v. Guillet. These are all cited in the briefs.

And they held that, where no objection had been made to a burden-shifting instruction, they would not enforce the rules. That happened prior to this appeal.

Then, afterwards, when they got to Sandstrom, they said we're not going to enforce our rules for these kinds of errors.

QUESTION: What happened on these appeals?

MR. NUSSBAUMER: The courts issue standard,

one-line orders denying leave to appeal. They did not specifically address the question of the procedural default.

My argument is that, given that before Sandstrom they didn't enforce these rules, and that after Sandstrom they said we're not going to enforce these rules, and that they have addressed cases just like this one and have not enforced the rules, there's no basis for inferring that they did enforce the rule in this case.

I want to proceed now to the harmless error argument. I think that's really what this case is all about.

I want to respond, first, Justice Blackmun, to your question about didn't the jury's verdict, that this was premeditated murder, render the error harmless?

QUESTION: Could I just interrupt you?

Do you concede, then, that Sandstrom error is subject to the Harmless Error Rule?

MR. NUSSBAUMER: I concede that this was not a conclusive presumption instruction, and I therefore do concede that this kind of instruction, a burden --

QUESTION: So the error in this case, you agree, was subject to the Harmless Error Rule?

MR. NUSSBAUMER: Because it was a

burden-shifting instruction.

QUESTION: Well, anyway, whatever it was, you agree it was --

MR. NUSSBAUMER: But I only agree to a point of where I think Your Honor is going.

I think the limit of how much you should look at the evidence is whether there was conflicting evidence on the element of the crime to which the instruction related.

QUESTION: The intent. Intent.

MR. NUSSBAUMER: Intent. That's right.

QUESTION: And the Court of Appeals below held intent was in issue here.

MR. NUSSBAUMER: That's correct.

QUESTION: And, therefore, it was not harmless error.

MR. NUSSBAUMER: That's correct.

And that's -- I think, basically, that's the approach, legally, that you should follow with a burden-shifting instruction. Where intent is disputed and there is conflicting evidence on that point, it should be reversible error.

QUESTION: Do you agree with counsel for the state, that he did not dispute the statements made at the time that he stopped shooting, because he wanted to

be sure not to hit anyone else except this particular man?

MR. NUSSBAUMER: He testified that he did not recall making any statements to the police at the scene. And there was an explanation.

QUESTION: There was evidence that he did stop shooting for a period that was consistent to the statement attributed to him, was there not?

MR. NUSSBAUMER: The evidence of the shooting was that he fired one shoot at very close range. The deceased turned and ran. And he then fired three more shots in the space of a very short period of time.

QUESTION: Mr. Nussbaumer, you doubtless recall that Sandstrom against Montana and Connecticut against Johnson were cases here on direct review, involving the kind of instructions that are being contested here.

This case appears, of course, on federal habeas. Now, do you think that a federal habeas court is as free as this Court would be on direct review of a state conviction, where the same challenge is made, to pick out a couple sentences in instructions that here seem to have taken about 16 pages, and say there was an impermissible instruction, so a conviction that's 13 years is -- or 11 years old -- can be set aside?

I ask that because of our decision in Cupp against Naughten.

MR. NUSSBAUMER: Let me make sure you're clear on what these instructions did.

The Court began by telling the jury that malice, a term which the Court used interchangeably with intent to kill, was to be implied from any deliberate or cruel act, however sudden.

The Court then gave the instruction that, because we can't look into a person's mind and determine what they were thinking, the law provides a rule of thumb that a person is presumed to intend the natural consequences of his acts.

The Court then reinforced the idea that intent was to be determined from the nature of Mr. Engle's acts, by explaining that legal presumption as like the old saying that "actions speak louder than words."

The Court then specifically directed the jury's attention to three undisputed facts from the prosecutor's case, the natural consequence of which was death: the use of a deadly weapon, evidence of close-range firing, and the number and location of the wounds, any one of which would have been sufficient to trigger the presumption of intent the Court had just given them.

Now, the State goes on and argues that, well, the rest of the instructions cure this error.

I really encourage you to read the rest of these instructions closely.

QUESTION: Are you going to answer my question about the standard of review on habeas?

MR. NUSSBAUMER: I am answering it by saying that this was not a case where the Court of Appeals picked out a few isolated instructions. This was a case in which the burden-shifting instructions permeated this charge to the jury from beginning to end.

And I think the Court of Appeals did exactly what you said should do in Cupp. It read these as a whole.

It went on to look at the instructions with regard to the defenses presented. With regard to insanity, the judge instructed the jury that the prosecution was entitled to a presumption that the defendant was sane and responsible for his acts, and then defined the quantum of evidence necessary to overcome that presumption as evidence raising a reasonable doubt of insanity.

With regard to the particular mental illness defense presented of dissociative reaction, the judge said where this can be proved, it would constitute a

defense.

What I'm saying tc ycu is that these instruction, from top to bottom, shifted the burden cf prccf. It wasn't a case of isolating one single line out of the instructions.

QUESTION: Well, is there something unccnstitutional abcut requiring a defendant to bear the burden of going forward with evidence about insanity?

MR. NUSSBAUMER: There's nothing unccnstitutional about that, unless the State does not require the defendant tc carry any burden.

QUESTION: Well, isn't the best evidence of what the State requires, the charge by a Michigan judge in this particular case, affirmed by the Michigan Ccurt cf Appeals?

MR. NUSSBAUMER: That charge was not affirmed. This issue was nct raised in the case that the Michigan Court cf Appeals addressed.

QUESTION: Well, we at least have the view of the Michigan trial judge that this was Michigan law.

MR. NUSSBAUMER: If ycu look at People v. Kruggman, that is a Michigan Supreme Ccurt decision fcund at 377 Michigan 559, page 563, you will see that the judge's instruction on the burden cf prcof in this case with regard to insanity was clearly wrong.

In fact, we raised that issue on state law grounds in the state court.

QUESTION: Well, and does it amount to much more than state law grounds here?

MR. NUSSBAUMER: All I am saying is that the State has pointed to this instruction, this particular instruction, the insanity instruction, and said this cured any burden-shifting effect.

In fact, the judge told the jury that only where the defendant's defense could be proven would it constitute a defense. That's the kind of instruction which clearly tells the jury the defendant has to prove his defense. And that's not Michigan law.

Intent was -- I started to say at the beginning, I was going to reply to your question, Justice Blackum. I'll get to that now.

This instruction, particularly the instruction that the law gives us a rule of thumb that a person is presume to intend the consequences of his acts, did affect the first degree premeditated murder finding.

The jury in this case, for example, could have found, from Mr. Engle's act of bringing a gun to the auto plant with him, driving to the plant with a gun, from that act, together with the presumption of law the Court had just given them, they could infer the

necessary element of premeditation.

These instructions were not carefully separated cut. The judge didn't say, all right, here's first, here's second. They were all combined. The issue of intent and malice were all balled up into a whole series of instructions.

So these instructions very well could have led the jury to presume the existence of the necessary mens rea, unless Mr. Engle proved otherwise.

One of the State's main points in this case is that only irresistible impulse was challenged. That's not correct. The defense counsel, in closing, argued first that Mr. Engle had not planned or intended to kill the deceased. He argued, second, that Mr. Engle was not mentally there at the time this happened. He argued, third, that Mr. Engle did not know right from wrong at the time; and, lastly, he argued irresistible impulse.

The trial prosecutor himself recognized that intent was a hotly-disputed issue in this case, because he specifically responded to each one of those claims in his closing argument.

The trial judge also recognized that everything about intent was in dispute in this case; in fact, instructing the jury that Mr. Engle's claim was that he had not known what he was doing, and that the

jury had to decide whether he was capable of forming a premeditated intent to kill.

The State itself, in the very first appellate pleadings filed in this case, argue that intent was the crucial issue in the case. On page 14 of the prosecution's brief on appeal, in Michigan Court of Appeals case No. 18951, the prosecution characterized the defense presented in the following language, and I quote:

"The defense in this case was that the intent to kill was not there, as the defendant was temporarily insane or was so under the influence of intoxicating beverages as to not have the intent to kill."

That's the State talking.

And the Michigan Court of Appeals, in its published decision, reviewing the same record you have before you today, characterized the defense presented as follows: "The defense was that defendant was so under the influence of librium, beer, and whiskey, that he could not have formed the specific intent to commit the crime of first degree murder.

Everyone who has looked at this case before you has come to the conclusion that state -- that intent was the crucial issue in this case. And all of these series of instructions related to the issue of intent

and raised a presumption of intent for the jury to follow.

The evidence presented on this point was conflicting. Mr. Engle himself testified that he consumed an enormous amount of alcohol during the three days preceding the shooting, as well as ingesting four librium tablets on the last day. And he flatly denied ever intending to kill the deceased.

He testified, he conceded that he did the act of shooting, but he maintained that he had not known what he was doing.

Dr. Mary Ainsley, a qualified psychiatrist, supported this testimony. She testified that, as a result of a whole series of personal tragedies culminating in the loss of his job --

QUESTION: Now, these matters were all before the jury, were they not?

MR. NUSSBAUMER: They were. An improper --

QUESTION: They've been resolved by the jury.

MR. NUSSBAUMER: Yes; they were, Your Honor.

QUESTION: In what year was this killing committed?

MR. NUSSBAUMER: '72, December.

QUESTION: '72?

MR. NUSSBAUMER: Yes. Trial was in July of

'73.

Yes; all these facts were before an improperly instructed jury.

Dr. Ainsley testified that Mr. Engle suffered a dissociative reaction, mental breakdown, on the night of this shooting. She testified that such breakdowns are accompanied by impaired perception, judgment, and consciousness, and that, in her judgment, the combination of the intoxicants and the mental stresses this man had been under were sufficient to have blocked his consciousness to the point where he would not have been fully aware of what he was doing.

I'd ask Your Honors to note that that appears on pages 359 through 361 of the transcripts, not 360 as I stated in my brief.

Regarding Mr. Engle's apparent ability to function during this period, to walk and talk, even the State's psychiatrist conceded, at page 420 of his testimony, that when a breakdown of this type occurs, somnambulistic behavior similar to sleepwalking and sleeptalking, is possible, in which an individual may say and do things, but not be fully consciously aware of what they are doing.

And, Chief Justice Burger, with regard to your question regarding the statements, Dr. Ainsley

testified that Mr. Engle was able to recall what had happened during this period of time, as you or I might recall a nightmare upon waking. And that was the reason why, even though he was not conscious at the time, he was able to recall these things, like a dream. And that's what defense counsel argued in closing.

QUESTION: The State's psychiatrist did not concede all of what the defense psychiatrist said.

MR. NUSSBAUMER: That's correct.

QUESTION: But merely, that if what she said was true --

MR. NUSSBAUMER: That's correct.

QUESTION: Then he was really just talking about a generalization of psychiatry, was he not?

MR. NUSSBAUMER: He was questioned about that by defense counsel. The questions were to the effect, well, if this did happen, wouldn't you agree that some of the things that are possible are this kind of behavior? And he agreed to that kind of statement.

Now, in addition to this expert testimony, there was lay testimony from each of the witnesses who came in contact with Mr. Engle before this shooting as to his abnormal and unusual behavior.

The same witness who testified that Mr. Engle said he was going to kill a guy when he came into this

plant, testified that when Mr. Engle said this, he was not acting normally. He was crying. He had a nervous pitch to his voice, and the things he was saying did not make much sense.

Two other witnesses who came in contact with Mr. Engle before the shooting independently testified to the same thing. They both testified that they noted a very strange look in his eyes, a look which they described as something they'd never before seen in their lives.

With regard to the fact that Mr. Engle had a gun with him on this night, he himself testified that his best friend had been murdered in a nearby bar a few months before this, and that after that he bought a pistol and carried it with him wherever he went for self-protection.

In Detroit, I'd say that would be very believable testimony.

While there is certainly evidence supporting the State's position that this was a premeditated killing, there was contrary, conflicting evidence regarding Mr. Engle's mental state that presented a genuine factual dispute for the jury to resolve.

QUESTION: Could I ask -- I would suppose you would agree that we are not foreclosed from considering

the retroactivity issue in this case.

This is from a federal court; it may not have been raised below, but we have not infrequently considered issues that aren't raised by -- weren't presented to a court below.

MR. NUSSBAUMER: Justice White, I agree that this is a discretionary matter. It's not jurisdictional.

QUESTION: And what of -- let's just assume that it was as clear as could be that, under our precedents, old or new, that a decision like this should not be retroactive? I suppose we would certainly deal with the retroactivity issue, wouldn't we, even if it weren't raised below?

MR. NUSSBAUMER: I don't think that's correct.

In United States v. Auritz, you faced this same situation, where the Government raised a retroactivity argument that had not been raised below, and you refused to consider it.

QUESTION: That may be. That may be. But was it absolutely clear in that case that the position that was being urged was clear under our cases?

MR. NUSSBAUMER: I don't think --

QUESTION: My only suggestion is, are you going to say anything about retroactivity?

MR. NUSSBAUMER: Since you have asked, I will.

QUESTION: I would appreciate, just in a word, why you think Sandstrom is retroactive in a case like this.

MR. NUSSBAUMER: For three reasons: First of all, Sandstrom was designed to eliminate the use of jury instructions which created a substantial danger that the jury would either conclusively presume or presume, absent proof to the contrary, the element of intent, eliminating the prosecution's burden of proof which you have characterized in past cases as one of the most fundamental safeguards we have against erroneous factual convictions.

QUESTION: So it's a protection against risk of -- against error, is it?

MR. NUSSBAUMER: Yes; against erroneous factual error.

In addition to that, your past decisions clearly forshadowed Sandstrom. In Morissette v. United States, over 30 years ago, you condemned this kind of an instruction.

QUESTION: But that was for federal courts construing the federal statute.

MR. NUSSBAUMER: You're correct.

But then, the reason you said that in Morissette was because such conclusive presumptions or

burden-shifting presumptions violate the presumption of innocence.

In 1970, in In re Winship, you said we have to apply the reasonable doubt standard in order to provide concrete substance to the presumption of innocence.

Together, Winship and Morissette, Winship, of course, was a state case, applying this to the states. Together, those cases gave clear warning that these instructions could not pass constitutional muster.

QUESTION: Well, if you're right on your first argument --

MR. NUSSBAUMER: We don't have to go any further.

QUESTION: If you're right in your first argument, it doesn't make any difference whether the case is here on direct appeal or on collateral attack, I take it?

MR. NUSSBAUMER: That's correct.

The State has not raised the argument that a different standard should apply to collateral attack cases. The said --

QUESTION: Well, under our -- at least, arguably, under our cases, if the new rule is designed sufficiently related to the accuracy of verdicts, it's retroactive in any case.

MR. NUSSBAUMER: That's correct.

QUESTION: And I take it, that's your position.

MR. NUSSBAUMER: That's my main position; yes.

QUESTION: So it really depends on -- if there were a rule, for example, that Sandstrom error is never subject to the harmless error analysis, a fortiori, Sandstrom would be retroactive everywhere.

MR. NUSSBAUMER: I would think it would.

But the last point I want to make is that the impact of whatever you decide in this case on retroactivity is not going to be very great.

Five years have passed since Sandstrom was decided. During that time, defendants have been actively litigating this issue on federal habeas corpus relief. And most of those cases have been finally resolved, one way or the other. All we're really dealing with here are the stragglers. This isn't a case --

QUESTION: Well, that might be quite a few, and if Sandstrom isn't retroactive, it seems untoward for us to set aside, based on Sandstrom, a conviction that's 13 years old.

MR. NUSSBAUMER: I don't think it's untoward, given the fact that Morissette and Winship and approximately a half a dozen Circuit Court of Appeals

decisions decided in the '50s and '60s, struck down these kinds of instructions, said they'd shift the burden of proof.

QUESTION: I know, but that's just an argument that Sandstrom should be retroactive.

MR. NUSSBAUMER: That's correct.

QUESTION: And I just assumed that if -- what if it wasn't? What if it isn't?

MR. NUSSBAUMER: I think, even if it isn't, I think you're really only dealing with the stragglers here.

QUESTION: That's too many.

MR. NUSSBAUMER: I wanted to make one final point with regard to the harmless error issue.

If intent was such an inconsequential and peripheral part of this case, and if these instructions were so minor and had no role in the case, why, then, did the trial court go to the lengths it did to inundate this jury with all of these presumptions, all relating to the question of intent?

And, equally important, why did the trial prosecutor repeatedly urge the jury, throughout his closing argument, on no less than three occasions, to rely on Mr. Engle's acts in determining his intent, using language virtually identical to the natural

consequences presumption that the Court would ultimately use in its instructions?

I submit that the answer is that both the trial court and the trial prosecutor knew that the question of intent in this case was a hotly-disputed matter, an issue on which the jury could go either way, and they both wanted to make sure that, in resolving the factual dispute before them, these jurors applied these presumptions.

Even under a traditional Chapman v. California harmless error analysis, I don't think the State can carry its burden that these instructions did not contribute to the verdict obtained. I encourage you to read these instructions. You'll find that they stacked the deck against this defendant to such an extent that there was no way that the jury could fairly or constitutionally consider the evidence, the conflicting evidence of intent that the defense had presented.

Thank you very much.

QUESTION: Do you have anything further, Mr. Solicitor General?

MR. CARUSO: Yes, Mr. Chief Justice.

ORAL ARGUMENT OF LOUIS J. CARUSO,

SOLICITOR GENERAL, STATE OF MICHIGAN;

ON BEHALF OF THE PETITIONER -- REBUTTAL

MR. CARUSO: I would like to advise the Court that, although I didn't comment on the retroactive argument, we have not abandoned that. We simply rely on what's been contained in the brief.

And, suffice it to say that we would agree with counsel that rules of law should be made retroactive if they are sufficiently related to the accuracy of the verdicts.

In this situation with Sandstrom, we characteriz Sandstrom as more or less a prophylactic rule to protect against the possibility of a juror being misled by an instruction.

It cannt be said that, in all cases heretofore, that Sandstrom affected the accuracy of a verdict, because in many of these cases, they were certainly not closed questions.

Now, with respect to the intoxication instructions, the intoxication instruction that was given was valid under Michigan law at the time it was given, and it was a capacity test instruction. In other words, the Court said, if you find that the defendant was so intoxicated that he was unable to form an intent, then you must find him not guilty.

But the fact of it is that it didn't concern a finding of intent as such. The only thing is that they

found, if he was incapacitated to that extent, then he couldn't be guilty of the crime; but, nevertheless, the jury found that he was not intoxicated to the extent that he lacked capacity.

Now, with respect to the insanity testimony, there was testimony, not only from lay witnesses, there was testimony also from state psychiatrist. There was a great deal of testimony; it was in conflict. And the jury finally agreed to believe the testimony of the state witnesses, particularly I call your attention again to that instruction that was given on insanity, and that is, that the Court reminded, in so many terms, that the prosecution, the State, had the burden of proving sanity beyond a reasonable doubt.

And we presume now -- it's quite evident, at least to me, that the jury did believe that the prosecution had proved sanity beyond a reasonable doubt.

And the question, the matter of the defense of insanity itself, does not relate to the elements of the crime that's separate and apart. It doesn't relate to intent. It is almost in the nature of an affirmative defense. You can still have intent to kill and be insane or be suffering from mental disease.

And that does not negate, in and of itself,

the intent.

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

(Whereupon, at 11:58 a.m, the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:
#83-1 - THEODORE KOEHLER, WARDEN, Petitioner v. TILDEN N. ENGLE

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

BY _____

(REPORTER)