OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-218

TITLE AMOS REED, ETC. AND THE ATTORNEY GENERAL OF NORTH CAROLINA, Petitioners v. DANIEL ROSS

PLACE Washington, D. C.

DATE March 27, 1984

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IN THE SUPREME COURT OF THE UNITED STATES

AMOS REED, ETC. AND THE ATTORNEY GENERAL OF NORTH CARCLINA,

Petitioners

v. : Case No. 83-218

DANIEL ROSS

Washington, D.C.

Tuesday, March 27, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:29 p.m.

APPEARANCES:

RICHARD N. LEAGUE, ESQ., Special Deputy Attorney General of North Carolina, Raleigh, North Carclina; cn behalf of the Petitioners.

EDWIN S. KNEEDLER, ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C.; as amicus curiae.

BARRY NAKELL, ESQ., Boulder, Colorado; on behalf of the Respondent.

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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: Mr. League, I think you may proceed whenever you're ready.

ORAL ARGUMENT OF RICHARD N. LEAGUE, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. LEAGUE: Thank you.

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

This case is presenting the issue of whether or not cause is sufficient grounds to excuse the procedural default in the context of a habeas corpus proceeding. Our position is that in this particular case it isn't.

Briefly, the facts of this case are that Daniel Ross in 1969 was convicted in Wake County, North Carolina of first degree murder in a trial that he put on evidence of self-defense in. The instructions of the trial judge gave the state the benefit of a presumption of unlawfulness and malice because a deadly weapon was used, and also put the burden of proof in one of two contexts on Mr. Ross to negate self-defense.

Mr. Ross appealed his case. He did not assign this error, the instructions in this regard, and that is where we urge that the procedural default comes in, at that time and under present day law as well, although it's now changed in terms of the particular statute.

North Carolina required an issue that could be raised on appeal to be so raised. It could not be raised if it were a matter of record on post-conviction review after the appeal under ordinary circumstances.

We have an initial problem in this case as to whether we do have a forfeiture because of some language in the North Carolina Supreme Court's decision on the matter, and I'll address that first. And the language they used was this: that the burden of proof was properly allocated in the case. That was used, however, not in the context of an issue being raised about this matter, but it was made as a part of a discussion that -- whether or not -- on whether or not it was proper for the court not to have charged on the offense of involuntary manslaughter.

There's a reference in the instructions on down the line that the court -- or pardon me -- in the opinion on down the line that the court was waiving its rule with regard to assignments of error to parts of the charge. However, this, too, was made in the context of referring to the matter, whether or not the instruction on involuntary manslaughter was properly not given. It was not made in connection with the reference to the burden of proof some paragraph and a half, two paragraphs above that.

On thing that's occurred to me with regard to this matter that might provide the Court some assistance in determining whether this rather curscry reference should amount to a waiver of the state's forfeiture rule is something that ccmes out cf exhaustion law. And when an issue is presented in a state court, a fact situation is presented in a state court on the basis of one legal theory, that's not viewed as an exhaustion of a -- cf a separate legal theory.

Therefore, tc the extent this Court may feel that the North Carolina Supreme Court to some extent waived its procedural default rule, I would argue that the most they were looking for -- andit was on their own initiative -- would be somewhat of a plain error approach; that it was nct a complete waiver of the state's forfeiture rule. At most it would be sort of a prc tantc type thing. And the interest in comity that the courts recognized underline the recogition of procedural defaults over in the habeas corpus proceeding ought to apply to the same extent that the state ccurt recognized and followed its own rule, and that would be the large extent in this case.

At the post-conviction level there's an additional problem as well, unfortunately, and that stems from the judge at the Superior Court level saying

in rejecting the man's post-conviction proceeding or petition that no grounds for relief were stated. Then he goes on to say that under the Post-Conviction Relief Act -- and I argue to you that that certainly is most likely construed as a procedural waiver, particularly in the context in which it was said -- after recitation of the man's efforts, including his appeal and his lack of success there. There wasn't any -- any reference to a substance obviation, whether it was right or wrong.

We've suggested to the Court in our brief the Hayes case from Alabama, U.S. District Court case, provides a good basis for approaching this. And the points they make or that are made by the court in that case -- the fact that there's a well-established body of procedural default rule that would -- procedural default law that would apply here; and the fact that it would be correctly applied here as shown by a number of cases we cite on page 12 in the footnote to our brief; the fact that the state pled forfeiture, as it did at its first opportunity -- that would be at the appeal level.

Now, in state post-conviction proceedings in North Carolina, often an answer is not required from the District Attorney's Office, and that was the case here. The adjudication is made just from a survey of the writ itself or the petition itself initially. It's only if

some concern is raised by it to the reviewing court that they will go ahead and call for an answer from the state.

The other consideration noted in the Hayes case -- that the decision on this basis would favor the interest in avoiding constitutional questions -- would also apply here as well. North Carolina has such a preference of avoiding such questions if they can.

Mr. Nakell has argued to you throughout his brief that the perhaps the state ground relied on was inadequate here because of certain cases and the resolution of them. He cites a Hankerson case and a Hancock case as examples where Mullaney-type issues were allowed to be raised on direct appeal despite the fact that no assignment of error was made with regard to them. That is true, but nevertheless, the case was still on direct appeal, and therefore, the State Supreme Court had the opportunity to correct any error at the point in the proceedings that they wanted to do so, that it was most efficient to do so and that they felt it was proper to do so. It's not an after-the-fact thing such as this man's case is.

There's reference to the case Wynn v. Mahoney, but the conduct there --

QUESTION: Could I interrupt to ask you a question --

MR. LEAGUE: Yes, sir.

QUESTION: -- About the case?

As I remember the cert petition, the Respondent had actually been released from custody.

MR. LEAGUE: Yes, sir.

QUESTION: And is it also true that the period -- he would have completely served his sentence now if he hadn't been released when he was? He was on parole, I think, or something at the time.

MR. LEAGUE: No, sir. He was close to parole. He was in a limited custody type of status allowing him substantial home leaves and work release, perhaps study release. I'm not sure. One of the two. He is not completely discharged. He had not been completely discharged from his sentence, nor was he by the fact that we did release him. That was pursuant to -- to the court order.

QUESTION: What will happen if you win?

MR. LEAGUE: If I win, he will return to custody. The time he has been out will not be credited. He will pick up most likely, one would hope, within several weeks of readmission, be back into that minimum custody status, and the expectations would be that parole would be shortly granted.

QUESTION: So the net result would be that by

winning and lose, if you win, he would merely have postponed what would otherwise have been his total release.

MR. LEAGUE: That's right. Yes, sir.

QUESTION: There's really hardly a vital state interest in the case at this point. I guess you do have standing, though, don't you?

MR. LEAGUE: Yes, sir. I presented my views on that in the cert petition and hoped they had been accepted. The interest would be not so much in Mr. Ross' case but in the other applications we might have stemming from a definitive decision by this Court, a win here, and in having the Fourth Circuit overturned.

QUESTION: Do you know exactly how much time he'd have to serve?

MR. LEAGUE: No, sir. I don't.

The Wynn case, which Mr. Nakell relied on, dealt with my conduct and not pleading forfeiture in a particular case rather than the State Supreme Court's reaction to such an issue. And I don't think I have the power to make an otherwise adequate state rule inadequate.

There are two new -- new developments in the law: the recent case of State v. Bush, interpreting our -- or brought under our later post-conviction statute,

the one that superseded the former one, I believe in 1978. In that case the State Supreme Court did review the issue on the merits in order to propound the law they did. They did not rely on procedural default in that case.

What kind of harbinger for the future I can't say to you. If it continues, of course, and it's repeated, you would not find the state ground I'm relying on adequate on down the line. However, Mr. Ross would probably get the benefit of any change in that regard.

15A-1419, a new post-conviction relief statute, now called Motion for Appropriate Relief in our jurisdiction, references retroactive decisions as a basis for reopening a prior post-conviction proceeding. However, that's only in the instance that the issue is ruled on on the merits in the prior proceeding. It's not a situation such as I have argued to you that we have here; that is, where a decision was made on procedural grounds.

Mr. Nakell filed a number of cases last week with you-all in support of this position, as I understand it, and I think it's important to consider there that what the Supreme Court was doing was waiving its procedural defaults again in the direct appeal

context where the court had an opportunity to deal with the issues presented at that time, and not waiving them in a post-conviction context.

Additionally, the rules involved there are rules that are somewhat dissimilar, not applicable tc this fact situation that we're dealing with here. One dealt with the assignments of error being properly constructed primarily or referenced in the brief or having the exceptions set out with regard to them.

Again, that's not a situation that we're concerned with here, because the issue again was not presented in Petitioners' case on direct as it was in each of these. Similarly, it's not a -- there's no request by the lawyer after giving up all its assignments at error, asking the court to conduct such of a plain error review. I would say in most of the other cases Mr. Nakell --

QUESTION: Well, what was -- what was the court doing when it said it reviewed the instructions?

MR. LEAGUE: Your Honor, I assume that it was reviewing those instructions on its own to see if there was any plain error at that time under state law. That's my assumption.

QUESTION: And -- but you think that's a completely different thing than -- than forgiving a

procedural lapse?

MR. LEAGUE: You mean in the cases Mr. Nakell cited, the later cases, as opposed to --

QUESTION: Well, I suppose if -- if the Supreme Court of your state regularly accepts some constitutional challenge to a set of instructions even though those challenges weren't presented below, there wouldn't be any lapse at all, would there?

MR. LEAGUE: Your Honor, they don't do that. They don't accept regular constitutional or certain constitutional challenges --

QUESTION: But they will always review it for plain error?

MR. LEAGUE: Apparently on request, at least in these cases -- and I believe there were five of them that fit that mold -- the lawyer says I cannot find anything wrong with this -- with this appeal; I am abandoning my assignment of error; would you please look it over? And they have done so.

QUESTION: So you think it might -- you think the case might come out differently if he had raised his objection below and preserved it and presented it to the Supreme Court of the state?

MR. LEAGUE: Well, he wouldn't have had to raise it below under the law at the time of the trial.

He would have since 1981 if it had been tried then. I don't think the case would come out differently or should come out differently in this Court, Your Honor. Going back to my argument a little bit earlier about if the waiver was only to a certain degree by the State Supreme Court -- that is, dealing with plain error, presumably under state law -- then certainly I would argue to you that the interest in comity dictates that the federal courts go no further.

QUESTION: Well, of course, the cause in prejudice is beside the point if there hasn't been any lapse.

MR. LEAGUE: Oh, I understand. Yes, sir. It assumes that we've got a forfeiture in the first place.

Going on to the next hurdle we must get over, and that's whether Wainwright v. Sykes applies in the appellate context at all. Since that dealt with trial at faults, I certainly urge you to go ahead and adopt that course, if you would.

The majority of the circuits have done that. The interests that Wainwright v. Sykes serves, of course, are not quite as strong in the appellate context as they are in the trial context, because you don't avoid retrial. That's not to say they're not without strength, though.

I would certainly argue to you that they are, as much as you want to make the trial the decisive and portentous event with regard to the criminal procedure. With regard to things that you can talk about there, certainly it seems to me that you want to make the appeal the decisive and portentous event with regard to matters of record that you can go ahead and correct there.

The interests in finality and accuracy are similarly enhanced because of the difference in timeliness you have on appeal as a practical matter and as you have with regard to post-conviction or collateral attack.

In this particular case I believe the appeal was resolved some eight months after the trial, whereas the post-conviction proceedings, as you know, are now in their twelfth year. Even Mr. Nakell's suggestion were adopted by you-all that we should have laid down and given him a new trial in '77 when he first came down the pike, we'd still be talking about eight years, so there's a substantial difference. It brings to mind Mr. Justice Harlan's concerns in the Mackey case about ultimately the retrial being as unreliable as the original trial was.

The interests in sandbagging I think hold true

again. I'd argue to the Court that you don't have to overrule Fay v. Noia to permit this in this case, because that was a case where the Court viewed that Mr. Noia had been prevented wrongly by various circumstances --

QUESTION: Could you explain how you think the interest in sandbagging applies here? I don't quite understand that.

MR. LEAGUE: Okay.

QUESTION: I can understand in the trial context, but why -- why if the lawyer had a good point -- and presumably he has here if it's -- if -- why wouldn't he raise it on direct appeal and win as soon as he could?

MR. LEAGUE: Well, Your Honor, I think where it would come into play would be where there'd be a factual dispute about it and the lawyer would say --

QUESTION: Well, he's either entitled to the instruction or he isn't. I mean it's as simple -- this one is -- this one is no big fact problem, is it?

MR. LEAGUE: Oh, I don't say sandbagging occured here.

QUESTION: Pardon me?

MR. LEAGUE: No, sir. I don't say sandbagging occurred here. I don't believe he withheld it

intentionally in the sense of saying aha, I know this will --

QUESTION: Well, in an issue like this, how could sandbagging ever occur in the appellate context, unless you have a stupid lawyer? But then it's not sandbagging; then he's stupid.

MR. LEAGUE: Sandbagging, I would say, comes into play, Your Honor, when you're dealing with factual problems.

QUESTION: Yes. So it wouldn't apply here at all.

MR. LEAGUE: No, no. Not on this particular case. I agree with that. No, sir.

Going on to the matter of whether or not cause is shown by novelty -- novelty is sort of a shorthand way of referencing requiring extraordinary vision on the part of the defense lawyers, and perhaps it convey more than it ought to in view of its -- the word that should be used -- that is, requiring extraordinary vision.

Certainly from the Court's decision in In re Winship, outlining all the cases from the federal judiciary that indicated that burden of proof was a matter of due process over the years, that fact in conjunction with the wholesale application of federal constitution -- or federal trial rights to the state

criminal proceeding in the '60s indicates to me that you would not be requiring of a lawyer extraordinary vision to make the argument.

QUESTION: Do you think in that respect self-defense and malice are on the same footing?

MR. LEAGUE: As far as going ahead and making the argument, Your Honor, because you're dealing with argument by analogy, by and large. To some extent they both interact with the elements of the offense in North Carolina, because North Carolina offenses always have proceeded as a first element of definition as unlawful. Self-defense comes in there.

The presumption is that the state got the benefit coming in with the element of malice. I'd say --

QUESTION: Well, what -- have we held that the -- have we -- is there a decision in this Court on self-defense?

MR. LEAGUE: Not to my knowledge, no, sir. I attempted to get the Wynn case brought up here on that basis, but cert was denied.

QUESTION: Well, we haven't held, have we, on a decision on the burden on self-defense, did we?

MR. LEAGUE: Not to my knowledge.

QUESTION: And --

QUESTION: What have we -- what have we held

on? Insanity in Leland against Oregon. Then Patterson held what?

What was it, Bryon? Do you know?

QUESTION: It's malice, isn't it?

QUESTION: Well, it's random malice. But anyway, the malice thing is clear now. But the -- if malice is an element of defense -- of the offense, the prosecution must prove it.

MR. LEAGUE: Oh, yes. Yes, sir.

QUESTION: That's clear.

MR. LEAGUE: Yes.

QUESTION: That's clear. But that isn't so on self-defense. I mean we haven't covered it.

MR. LEAGUE: No, sir. No, sir.

QUESTION: But a lot of states put the burden on the prosecution.

MR. LEAGUE: Yes, sir.

QUESTION: But is there any -- none of those cases -- or do any of those cases rely on the federal Constitution for that? I doubt it.

MR. LEAGUE: Putting on the burden of proof? Well, in the circuit, the Fourth Circuit's decision -- and Wynn was a habeas case -- so that was based on the overview of federal law that the Fourth Circuit adopted. They went the other way in Virginia, on a

Virginia case because Virginia doesn't use unlawfulness as an error.

The North Carolina Supreme Court in Hankerson held substantially the same way, that the state ought to have the burden of proof on self-defense by virtue of the reference to unlawfulness as an element.

QUESTION: But you're not raising --

QUESTION: That's a state, sort of a state law.

MR. LEAGUE: Well, that's their interpretation of Mullaney. I differed with it and argued against it in Wynn, but I didn't convince anybody.

QUESTION: Of course, you're not raising that question here, are you?

MR. LEAGUE: No, sir. No, sir.

And the Isaac, of course, referenced three cases that were decided before Mr. Ross' trial and the year before, and that would tend to indicate, too, what we're talking about or --

CHIEF JUSTICE BURGER: You're now cutting into your colleague's time.

MR. LEAGUE: Thank you, Your Honor.

CHIEF JUSTICE BURGER: Mr. Kneedler.

ORAL ARGUMENT OF EDWIN S. KNEEDLER, ESQ.,

AS AMICUS CURIAE

MR. KNEEDLER: Thank you, Mr. Chief Justice,

and may it please the Court:

I would like to pick up on the novelty question that was just beginning to be addressed here.

In the Court's decision in Hankerson applying the Mullaney decision retroactively, the Court noted that in many cases the defendants might well not have raised the particular objection involved there, and that the courts -- or that the states may well be able to protect those convictions from collateral attack or other attack by enforcing what the court referred to as the normal and valid rule under which a claim is foregone if there is not an objection, contemporaneous objection to the rule.

And in Engle v. Isaac the Court addressed an aspect of that question. There had been no objection raised to the instruction in Engle v. Isaac. This was prior to the Hankerson decision. And a claim was made that under prevailing law at the time it would have been futile to raise such an objection, and the Court emphatically rejected that suggestion that futility, perceived futility in the state court was -- would be an adequate ground or cause for forgiving the procedural default in the state court. And the Court also noted that the allegation that the claim was novel was not sufficient in that particular case because the

defendants there had been tried after this Court's decision in In re Winship, which held that the due process clause requires proof beyond a reasonable doubt in criminal cases.

The effect of the Court's ruling there was to limit or to prohibit, in effect, the retroactive application of Mullaney to the most recent cases to that decision, those in the later years; but it reserved the question of whether a claim that was truly novel, one that would have required extraordinary vision, would constitute cause for excusing the procedural default.

Now, if this Court were to adopt that position, it would have the ironic effect not of preserving convictions that were most recent at a time when the rule itself was being questioned and yet setting aside convictions that were the oldest at a time when, by hypothesis, the right was not recognized and that the trial procedure was uniformly recognized as being fair.

The Court recognized in Engle v. Issac that the purpose of habeas corpus is to set aside a conviction where there is fundamentally unfair incarceration. And we would submit that if in Engle v. Isaac where the issue is beginning to be litigated there was not fundamentally unfair incarceration, then it

follows a fortiori here that there was not, if the suggestion is that the claim is not novel.

But, in fact, the claim could hardly be described as novel in the years prior to In re Winship. In In re Winship itself, the issue in the New York Court of Appeals was not the rule of proof beyond a reasonable doubt in a criminal prosecution; the rule was simply -- the question was simply whether that rule should apply in juvenile proceedings. And this Court's -- this Court's decision in Patterson stated that long before In re Winship, the universal rule in this country was that the prosecution bears the burden of proof beyond a reasonable doubt.

In fact, in 1968 before this Court's decision in Winship and before the Respondent's trial in this case, this Court had granted certiorari in Johnson v. Bennett and heard argument on the question of whether imposing the burden of proof on the defendant for an alibi defense violated due process. And the Court remanded for further proceedings on the basis of an en banc decision of the Eighth Circuit, also before Respondent's trial in this case, that struck down a similar instruction under the due process clause. And the Eighth Circuit had regarded the presumption of innocence and the corresponding rule of proof beyond a

reasonable doubt to be so well established that there was no real question of retroactivity in that case at all.

And finally, there were a substantial body of state law at the time, as Mr. Justice White identified, under which the burden of proof on malice and self-defense was on the prosecution rather than on the defendant. While those cases do not arise under the due process clause, they do recognize a recognition of the burden of proof issue as being an aspect of the fairness of the proceedings. Indeed, that's the rationale in the decisions for imposing the burden on the defense in those cases.

So, in fact, at the time of Respondent's trial, and as the Court said in Patterson long before that, the notion of proof beyond a reasonable doubt was a fundamental aspect of due process.

Now, even if the Court -- even if the right here, though, could be recognized or thought to be truly novel, as I said, we submit that that would not be cause for excusing the procedural default.

Now, first of all, in this case there's no indication that in fact that was the reason why no objection was lodged. There was also no indication to that effect in Engle itself.

Now, if the attorney had focused on the question of the burden of proof under the due process clause and decided not to raise it, because, by hypothesis, no one had recognized a due process violation here, then the lawyer's judgment in that regard could not be questioned under an ineffective assistance of counsel rationale; and, in fact, Respondent doesn't suggest as much. So that if the lawyer had actually focused on it, it would have been a tactical judgment that this is one of the objections that's not worth making in a trial that requires many objections. That would be a tactical judgment which Respondent concedes would not constitute cause for excusing the procedural default.

So Respondent then is reduced to arguing with the fact that the lawyer didn't think of it. Even though if he had thought of it, it wouldn't have been cause, the fact that the lawyer didn't think of it must constitute cause because the right was novel.

QUESTION: Mr. Kneedler, can you think of anything that would constitute cause for failing to appeal a point like this?

MR. KNEEDLER: For failing to appeal it?

QUESTION: Yeah. In fact, this is an appellate default because there's no trial court default.

MR. KNEEDLER: Right. I would think if -- in far different circumstances if the failure to include it in the arguments on appeal amounted to ineffective assistance of counsel, that may be -- that may be a basis. Or if there was a state procedural rule that barred the raising of such a claim on appeal, that would be -- that would be cause. In other words, the defendant must then --

QUESTION: Well, then it wouldn't be a default.

MR. KNEEDLER: Pardon me?

QUESTION: Then it wouldn't be a default.

MR. KNEEDLER: That's right. It's another --

QUESTION: But I'm trying to think of a case where there would be -- I can understand ineffective assistance of counsel, of course, which would be an independent reason for setting aside the conviction. But if you don't have an independent ground like that, I suppose you could never have cause.

MR. KNEEDLER: I would think that the -- I would think that the situations would be rare.

QUESTION: I think they're nonexistent.

MR. KNEEDLER: Ordinarily -- ordinarily -- ordinarily cause would be where the state has done something to prevent the -- the --

QUESTION: Then there's no default, by

hypothesis.

MR. KNEEDLER: Well, through -- through ineffective assistance of counsel, or -- or one -- one other circumstance where it might be as if the factual basis for the claim was not known at the time.

QUESTION: But then it wouldn't be in the record. It wouldn't be an appellate default then. That could only be raised by matter de hors the record.

MR. KNEEDLER: Ordinarily that's true, yes. So in the -- in the --

QUESTION: So I don't think there could be a case in appellate --

MR. KNEEDLER: In the appellate process, that's true. Now, there may be a situation involving a total failure to appeal as distinguished from the failure to raise an argument on appeal where the circumstances of Fay v. Noia, which the Court left those particular circumstances --

QUESTION: Well, other than ineffective assistance of counsel, even on a total failure of appeal what could be cause?

MR. KNEEDLER: Well --

QUESTION: There probably couldn't be, could there?

MR. KNEEDLER: Well, a total failure to

appeal, depending on the -- if the defendant was not informed of his right to appeal in some fashion, that -- that -- either by the lawyer or by the court or was unaware of it, in those circumstances that might be true.

But where -- where you're including an argument on appeal, as this Court recognized last term in Jones v. Barnes, the lawyer has to make difficult judgments as to what arguments to raise on appeal and what arguments not to raise on appeal once the defendant has made the fundamental right to go ahead.

So if by hypothesis this right was so novel that no one was litigating it at the time, then the lawyer could hardly be faulted for not including the right on appeal.

QUESTION: Well, suppose they didn't appeal it because there was a decision of this Court that would have indicated that his appeal was wholly out of bounds?

MR. KNEEDLER: Well, the only way --

QUESTION: And then later this Court reversed itself.

MR. KNEEDLER: Well, occasionally this Court has reversed itself, and it's done so presumably in cases --

QUESTION: Well, 175 times.

MR. KNEEDLER: -- In cases in which litigants

have chosen to reopen the issue even though it appeared to be foreclosed by this Court. And it -- even though --

QUESTION: So even then you would say there would not be cause for not raising it.

MR. KNEEDLER: That's right. Because the cause in prejudice --

QUESTION: I suppose you have to say that.

MR. KNEEDLER: That's correct. Now, of course, this is not -- this is not a situation where there was a change in the law in that sense, where a prior decision was overruled. And so even -- even if that was thought to be a separate category of cases, that's not this case, because here the principals involved here are an elaboration of the proof beyond a reasonable doubt standard, both with respect to self-defense and with respect to malice. Because in this particular case, under North Carolina law those are deemed to go to elements of the offense rather than to be, strictly speaking, affirmative defenses.

I would also like to point out the difficulty of the inquiry into whether a right is truly novel or not. As the debate in the brief suggests, it can require an exhaustive review of state law, federal law, law review articles, this Court's decisions -- all to the point of seeing when the first time a particular

right was identified as being raised.

Thank you.

CHIEF JUSTICE BURGER: Very well.

Mr. Nakell.

ORAL ARGUMENT OF BARRY NAKELL, ESQ.,

ON BEHALF OF THE RESPONDENT

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

Daniel Ross was convicted at a constitutionally unreliable trial. The state has conceded that he suffered prejudice as a result of the constitutional violation at his trial. It is the essence of fundamental fairness --

QUESTION: Well, the state can't concede in a federal constitutional issue, can it, say like on self-defense?

MR. NAKELL: Your Honor, the state has conceded that he suffered prejudice from the constitutional violation. Certainly it's clear from --

QUESTION: What constitutional violation?

MR. NAKELL: Well, I'm not sure what they would refer to. Certainly it's clear that Mullaney directly applies here.

QUESTION: On malice.

MR. NAKELL: On the malice issue, yes. And

that would be enough.

QUESTION: But not on the other.

MR. NAKELL: Well, that's enough, Your Honor.

QUESTION: Well, I agree that's enough. But so you're not really talking about self-defense.

MR. NAKELL: Well, the self-defense question is open, I believe, Your Honor. In Engle --

QUESTION: Yes. All right. All right.

MR. NAKELL: In Engle the Court said that it wasn't -- that it had -- at least had -- was not without merit. And I think that Engle is different from this case in at least three respects.

First, as Justice Stevens' questions have pointed out, the procedural failure in this case involved a failure on appeal, and not a failure at trial.

Secondly, the North Carolina courts are lenient in their treatment of procedural failures on appeal, regularly suspending their rules and overlooking the default in order to reach the merits, as they did in Ross' case both on appeal and on his post-conviction petition, and as they did in several other cases raising the same Mullaney issue.

QUESTION: The court of appeals for the Fourth Circuit didn't pass on this question, did it?

MR. NAKELL: That's correct, Your Honor. The

district court considered the argument and held that the North Carolina Supreme Court had not in fact reviewed the issue, quoting only one part of the North Carolina Supreme Court's decision addressing this point.

The North Carolina -- the Fourth Circuit then said that the argument is not without force, but did not reach the issue; and so there is no decision of the Fourth Circuit on this issue, that's correct.

I might point out that in the list of cases that I submitted belatedly, which I would like to rely on -- these are later cases in which the North Carclina courts have relied on a new rule explicitly giving the court the authority that it already had to suspend the rules -- in many of those cases when the North Carolina Supreme Court and court of appeals did suspend the rules, they explained that they were doing so in the criminal context because of the severity of the offense and the severity of the punishment. And in all of those cases the offense was murder, and the punishment was life imprisonment.

QUESTION: Wculdn't --

MR. NAKELL: Exactly the same as Mr. Ross' case.

QUESTION: Wouldn't our practice indicate that if we were to resolve against you the questions that

were decided by the Fourth Circuit, that we would leave to the Fourth Circuit, the district court or some other court than this one this inquiry as to whether -- what practice the Supreme Court of North Carolina followed? Surely the Fourth Circuit knows more about North Carolina practice than we do.

MR. NAKELL: Well, Your Honor, I would not doubt that that is one option available to the Court, and I would certainly think that it's a mandatory option if the Court were to rule against me on the other issues, which I hope it would not do. The Court would either have to decide the issue or remand it to the Fourth Circuit where it would still be open.

Incidentally, for reasons I don't know, the Fourth Circuit did not address the argument that the North Carolina courts had overlooked this failure in these other series of cases. And I might say in that respect that it seems to me that this case is before this Court in the identical posture of Hankerson. If there is any difference, it's more favorable to this case.

But in Hankerson, Hankerson did not raise the Mullaney issue on appeal, did not raise it in the record on appeal as was required. Indeed, it wasn't until sometime after this Court decided Mullaney that

Hankerson moved to reopen his appeal and add an issue. That is -- that -- he had the opportunity to do that because his case was still pending at the time that this Court decided Mullaney. But his -- in that case, the North Carolina Supreme Court then overlooked the procedural failure, granted the motion and reached the issue.

Exactly the same was true in Daniel Ross' case. The only difference is that in Daniel Ross' case, Mullaney hadn't been decided, indeed Winship hadn't been decided, and certainly the North Carolina Supreme Court did not address those points. And I think that that difference does not matter because the argument is -- the point is not whether the North Carolina Supreme Court considered the precise argument, but whether it insisted on a forfeiture to enforce its procedural rule. And since the North Carolina Supreme Court excused the failure to raise the issue, that's all that need concern the federal courts. If the state courts do not insist on enforcement of their procedural rules by a forfeiture, then the federal courts show no disrespect for the state court procedures by continuing to consider the issue.

The third respect in which the present case differs from Engle against Isaac is that for Daniel Ross

at the time of his appeal, the Mullaney issue was not yet reasonably available. The foundation principle had not yet been decided, and no counsel or court, certainly not in North Carolina, and indeed, no place in the country, had perceived or begun to litigate the issue.

As this Court said -- expressed the test in footnote 41 of Engle, the issue was not yet a live issue at the time of Mr. Ross' trial and appeal. Accordingly, it was reasonable for Ross and his attorney to fail to raise it; or as North Carolina stated the position in its brief in this Court in Hankerson, Ross "quite properly took no exception thereto."

The state relies on the guilty plea cases in its brief -- McMahan against Richardson and Pollad against Henderson -- and that line of cases is entirely inapposite. Ross did not plead guilty. Ross did not give up any of his defenses. He did not give up any of his rights -- present, prospective or potential -- either absolutely or in exchange for any benefit or leniency. He insisted on his innocence, and he pursued respectively all of the state procedures as best he could at the time. He went to trial, he appealed, and when later this Court decided Mullaney and then decided that it applied to his trial in Hankerson, he didn't run to the federal courts right away. Instead, he filed a

post-conviction petition in the -- in the state courts, although without benefit of counsel. And only after he was unsuccessful there did he seek relief by way of federal habeas corpus.

So his only failure was the failure to raise the issue on appeal. And why didn't he raise the issue? Only because under the state of the law at the time, it was essentially unavailable to him because his attorney did not, quoting Engle, "exercise extraordinary vision" and anticipate Winship and Mullaney, and become the first attorney in the country to raise this kind of issue after Leland against Oregon in 1952; that is, to raise an issue challenging the placing of the burden of proof on a defendant with regard to an affirmative defense.

What was the state of the law at the time that Mr. Ross --

QUESTION: Well, now, you say -- you say with respect to an affirmative defense. Now, there are two issues in your case, right? One is self-defense, which this Court simply hasn't yet defined whether or not -- what line that side -- what side of the line that falls in. The other is malice, which really isn't an affirmative defense, is it?

MR. NAKELL: Your Honor, under the law of

North Carolina at the time, and indeed, the law of North Carclina as it had prevailed fcr over a century since 1864, for 105 years at the time, the North Carolina courts had declared this to be an affirmative defense; that is, a matter of excuse or extenuation. And on the basis cf that distinctiон had imposed the burden of proof on the defendant. So that under North Carolina law it was treated and regarded as an affirmative defense, both issues. Both were treated in exactly the same way under North Carolina law, and both -- just coincidentally, I ncted in Ieland against Oregcn the insanity defense in Oregon, the burden of proof was put on the defendant in that -- in that regard beginning in 1864. It was in exactly the same year that North Carolina expressly declared this law, and it was always based cn that distinction between the elements of the offense and affirmative defenses.

QUESTION: But the -- it was also true that -- that malice was an element of the defense, but it was just presumed.

MR. NAKELL: Well, Ycur Honor, the --

QUESTION: Isn't that right?

MR. NAKELL: The North Carolina courts indulged in two rationales in crder to -- in order tc impose the burden of proof on the defendant. Sometimes

they talked only about the presumption, but they always talked in terms of either affirmative defenses or matters of excuse --

QUESTION: But nevertheless, the -- nevertheless, an ingredient of the offense was malice, and it was presumed.

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

QUESTION: And then the -- then the defendant had to overcome it.

MR. NAKELL: That's correct, Your Honor. That's correct. In -- in Patterson against New York in 1977, in summing up in reviewing the course of the law earlier, this Court did say, as the Solicitor General represented, that it had long been assumed that the burden of proof was constitutionally required to be put on the prosecution. But in Patterson the Court also pointed out that it had been "the long accepted rule that it was constitutionally permissible to provide that various defenses were to be proved by the defendant."

The Court recognized in Patterson that that had been the long accepted rule, notwithstanding the general assumption that the burden of proof generally had to be put on the prosecution. And that long accepted rule with regard to affirmative defenses was certainly supported, or the Court's statement about it,

in Patterson, was certainly supported by the decision in Leland against Oregon back in 1952 in which this Court upheld placing the burden of proof on the defendant with regard to the insanity defense -- not only the burden of proof and not only beyond a preponderance -- by a preponderance of the evidence, but indeed, the burden of proof in Leland against Oregon on the defendant was beyond a reasonable doubt, and the Court upheld that. The Court rejected the line of cases, including Todd against United States, dealing with presumptions and the constitutionality of presumptions that could have been raised, and said they had no bearing at all in this respect.

No wonder Leland against Oregon seemed to settle the law, and after Leland against Oregon, nobody started to raise the issue again until after Winship. Indeed, the only cases raising --

QUESTION: Well, how did it get raised in Winship if it was so foreclosed?

MR. NAKELL: Well, Winship was an unusual case, Your Honor, in which the trial judge in a juvenile proceeding said that he would -- he found the defendant guilty by a preponderance of the evidence, but not if the test were beyond a reasonable doubt. The issue then came up in that pure form.

Now, at that time there had been the decisions that the Court discussed in its footnote 39 in Engle, the decisions in Stump against Bennett primarily, and also State against Nales. Both of these decisions involved the question of the burden of proof on the elements of the offense, not affirmative defenses. And indeed, Stump, in Stump, the Eighth Circuit distinguished Leland against Oregon expressly on that basis; that an affirmative defense was not involved in that case.

But even as to this issue, even as to the burden of proof on the elements of the offense, that same case, Stump, came before this Court five years earlier on a petition for certiorari, and this Court denied that petition in 1963, even with regard to an element of the offense. And, of course, that has no precedential effect, but it wasn't until 1968 that the courts were even considering the issue of the burden of proof being placed on the defendant with regard to the elements of the offense, the basic elements; and that was just shortly before Ross' trial.

And Winship was decided after Ross' trial, and it was after Winship that all the activity started. And not even right away then. It took a little while after Winship for attorneys to start thinking about the impact

of that on affirmative defenses. And the activity got underway at that time, but not until after Winship. No place in the country, no attorney, no court, and certainly not in North Carolina, and certainly not the North Carolina courts considered the impact of Winship on the burden of proof for affirmative defenses. Indeed, even just before and just after Ross' trial and appeal, and even a couple of years later, the North Carolina Supreme Court was still routinely reiterating the general burden of proof rule with regard to affirmative defenses, these two affirmative defenses; and that is that the burden of proof was on the defendant, without any consideration that there was even a constitutional question about it.

Mullaney was not decided until five years later, and in Mullaney, in Patterson against New York, in Jackson against Virginia, and in Ivan V. against New York, this Court said in all of those cases that it all began with Winship.

Engle, of course, involved trials that occcurred -- two were just before Mullaney, but while Mullaney was pending in this Court, and one occurred after the Mullaney decision. At that time, as the Court noted, dozens of lawyers had begun to raise the issue as to affirmative defenses, including the affirmative

defense of self-defense. There were law review comments that said that Mullaney had an impact on this issue, and indeed, even the state law had been changed to impose the burden of proof in that way.

That's a very different situation than prevailed in 1969 at the time of Ross' appeal, and certainly a very different situation than that which prevailed in North Carclina. Indeed, the -- the Solicitor General -- excuse me -- the Attorney General of North Carclina in his brief in this Court in the Hankerson case advised this Court that there was no reason for anybody to anticipate that there was any constitutional problem with the putting of the burden of proof on the defendant as to affirmative defenses until after Mullaney. And the North Carolina Supreme Court in its opinion in Hankerson said that it was only Mullaney that cast any question on the state's rule.

So that's why Ross and his attorney did not even consider raising the issue. There was no strategy decision involved, no tactical decision. This was an understandable and excusable failure to anticipate the new development.

The Solicitor General has argued that -- that even this circumstance may not constitute cause under the Wainwright cause and prejudice test. But that can't

be the case, especially when the failure arises under the circumstances here -- on appeal rather than at trial, regarding a rule that the state courts regularly decline to enforce with a forfeiture, and concerning an issue that affects the reliability of the verdict.

The Solicitor General cites absolutely no authority in support of that proposition, and all the authority is unanimously to the contrary, including the decisions of this Court. In Engle the Court suggested that the unavailability of an issue might constitute cause. Certainly in O'Connor against Ohio the Court held precisely to that effect in 1966. O'Connor did not arise under the cause and prejudice standard, but it certainly showed this Court's opinion with regard to the issues of fairness involved in allowing a defendant the benefit of a retroactively applicable rule that he failed to raise only because it had not yet been decided and was not yet reasonably available.

There are many other cases to this effect from this Court which are cited on page 17 of my brief, including, I think, Fay against Noia, which demonstrates the way that this Court approached that issue. Fay against Noia was really a case in which the defendant declined to appeal because of the failure of his counsel to be able to anticipate the later decisions of this

Court. He said that he didn't appeal because he didn't want to put his family to the expense. And later, at about the same time as it decided Fay against Noia, this Court held in Douglas against California that because he was indigent, he would have been entitled to have the defense provided by the -- on appeal as well as at trial by the state.

His attorney testified that he was afraid of getting the death penalty on retrial. Years later, this Court held in North Carolina against Pearce that he essentially could not have been given an increased sentence on retrial unless there were some justification for it in terms of his conduct since the original trial.

So Fay against Noia is a case in which the Court recognized the fairness principle involved here. All other courts that have considered the issue have held that this is a paradigm example of cause, including the Norris case in the Seventh Circuit which the Solicitor General cited with special approval. All the law reviews, the analogy to Federal Rule 9, 9A and 9B, in which the unavailability of a decision that is later announced is established as cause. And finally, the legislation that the Reagan Administration has proposed and which passed the Senate on February 6th of this year is directly contrary to the position the Solicitor

General has taken in this case and directly supportive of Ross' position.

This case involves no failure at trial, but only a failure on appeal. And this Court in Wainwright against Sykes expressly recognized the difference. Indeed, Wainwright against Sykes was based on the difference. The Court in Davis against United States when it began to develop the cause and prejudice test specifically distinguished a failure to raise an issue at trial from a failure to raise an issue on appeal. And in footnote 8 in Hankerson, the dictum that suggested that the states could enforce an ordinary rule that failure to object to a jury instruction is a waiver certainly refers to a trial failure. Objecting to an instruction is language appropriate to the trial context. And, indeed, North Carolina read it that way in its answer in this case.

With regard to the issue of raising an issue on appeal --

QUESTION: Do you think there's a difference in logic?

MR. NAKELL: Yes, Your Honor. First of all --

QUESTION: Don't you think an appellate court has the same entitlement to be put straight that a trial court does?

MR. NAKELL: Your Honor, there certainly are som policies supporting a rule requiring an issue tc be raised on appeal, and comity considerations suggest that a federal ccurt shculd treat respectfully state rules in that regard, requiring issues to be raised on appeal.

My point is simply that those -- that that's the only policy that supports it, and all of the other policy reasons that the Court relied on in Wainwright against Sykes with regard tc a contempcraneous cbjection rule at trial just don't apply on appeal. Moreover, there are good reasons for not requiring -- not requiring defendants tc raise an issue on appeal in order to have it available on federal habeas corpus, at least where the issue has nct yet been decided.

And the most obvious is the one that the Court alluded to in Engle, and the institutional reason that attorneys, if we -- if the court does apply Wainwright against Sykes to appeals and nct excuse the failure where the issue is unavailable, attorneys will feel obligated on every appeal to raise every conceivable issue, even those that seem settled, as in 1969 as a result of Leland against Oregon, this issue seemed settled. And in Jones against Barnes this Court counseled against that kind of advocacy on appeal and recognized the importance of the attorney being

selective in the issues that are presented on appeal.

Certainly I agree with that. And I think that if Wainwright against Sykes is applied, the cause and prejudice test is applied to appeal, and there's no leeway for issues that are unavailable, attorneys will have to raise every issue. For example, in every jurisdiction that doesn't have a grand jury procedure, or in every jurisdiction that has such a procedure but has the preliminary hearing as an alternative, I think every defendant who appeals will have to argue from now on that the Fifth Amendment requirement of indictment by grand jury applies to the states through the due process clause.

In 1884 this Court seemed to settle that issue in Ertado against California, but the fact that it's been settled would not be a justification for a defendant to raise the issue if the Court rules the way the Solicitor General has suggested. So that that's one issue, and I think that we could easily think of about 200 issues that would be part of boilerplate in every appeal just to make sure it's not waived.

What policy is served by requiring a procedure like that? If, indeed -- if Ross' attorney had been thinking about this issue in 1969 and had tried to raise it, he could not have done so in much other than

boilerplate fashion. He could just have said the instruction violates due process.

He couldn't have cited Winship. It wasn't available. He couldn't have cited Mullaney. It was years in the offing. And he would have had Leland against Oregon to contend with. So that there would be, if the Court were to accept the Solicitor General's argument, there would be an obligation on the part of attorneys to raise all of these issues no matter how settled they appear to be.

And that's one reason I think that the issue of an appeal is different from a trial. It's easier to raise these issues at trial than it is to clutter an appeal with raising all of these issues. Trials are accustomed and in part designed to receive a large number of defenses, to receive a large number of issues of varying degrees of import.

QUESTION: Well, now, do you really think it makes -- it's that much more difficult? If you listed one, two, three, down to thirteen points in a brief, isn't that just as easy as, if not easier, than to raise it at trial?

MR. NAKELL: Yes, Your Honor. And if -- is that all that we're talking about here, that Daniel Ross' attorney should have listed it? And what kind of

consideration would he have got in the North Carolina Supreme Court if he had done that?

QUESTION: We don't know, but the point was saving the -- saving the issue. That's what your focus has been.

MR. NAKELL: Well, Your Honor, if that is going to be the rule, then attorneys will do that, and attorneys will have boilerplate briefs that they file in every case.

QUESTION: Do you think they don't -- do you think they do not do it now in this Court and in most appellate courts?

MR. NAKELL: Your Honor, I think that there is too much of it now.

QUESTION: Well, it doesn't --

MR. NAKELL: But I think that this will require it to be done in all cases.

QUESTION: It doesn't bother the system. It may increase the printing bill, but that's about all.

MR. NAKELL: Well, I'm not sure what would be achieved by requiring it. In this case it seems to me it's clear that had Ross and his attorney done that, it would have accomplished nothing. The North Carolina Supreme Court would not have given the issue much consideration. Even after Winship when the issue was

raised in Sparks and Wetmore, the court said Winship doesn't have anything to do with this; we reject it. It was not given serious consideration.

QUESTION: Well, of course, the only thing you're really talking about is access to federal habeas corpus, which is an important matter, I suppose. You're talking about having access to that system 15 years after the crime.

MR. NAKELL: What we're talking about is getting relief from an unconstitutional conviction, no matter how long after --

QUESTION: Well, 15 years after the crime is committed.

MR. NAKELL: Well, Your Honor, not entirely 15 years. Mr. Ross filed his post-conviction petition years ago.

QUESTION: When was the crime committed?

MR. NAKELL: Your Honor, the crime was committed in 1968.

QUESTION: Well, then, it's 16 years after the crime was committed, wasn't it, from then until now?

MR. NAKELL: Until now, yes, Your Honor. But that's -- that's certainly not Mr. Ross' responsibility. He would have been much happier to have the issue cited much earlier. Indeed, he would have

been happier to have the instructions constitutional at his trial. As Mr. Justice Stevens has pointed out, Mr. Ross served almost all of his time and -- or he had a life sentence, but he was on the verge of being paroled at the time of the Fourth Circuit decision, and so the state, very properly I think, acquiesced in the order for his release. But he would have preferred to have this done much sooner. The delay worked to his detriment, not to the state's. He's been in prison all this time. He's served 15 years as a result of an unconstitutional conviction.

QUESTION: But suppose in Oregon there are a number of inmates in the prisons who are there because of Leland against Oregon. Now, suppose this Court were to say -- reverse its position in Leland against Oregon and say no, you can't put any burden. As you know, Oregon changed the statute a year after Leland against Oregon and made it just a preponderance of evidence.

But would you say that every one of those prisoners in Oregon, whether it's 15, 20 or 25 years, should have relief by way of federal habeas corpus because of a change in the rule?

MR. NAKELL: Good question, Your Honor. Let me respond to that with two points, if I might. The first is that in determining the retroactivity of an

issue, the first question that the Court focuses on is whether the issue is one that goes to the fairness of the factfinding process. If the Court were to find that the new rule should apply retroactively -- and I note that the Court has decided exactly the contrary in Leland, approved in Patterson against New York -- that if the Court were to find that that was such an unconstitutional rule that affected the fairness of the factfinding process, I would think so.

With regard to the number of cases, let me point out that the rule that I'm requesting in this case, that Ross is requesting, would not really affect many cases. First of all --

CHIEF JUSTICE BURGER: Well, your time has expired, counsel.

MR. NAKELL: Thank you, Your Honor.

CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 2:30 p.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:

#83-218-AMOS REED, ETC. AND THE ATTORNEY GENERAL OF NORTH CAROLINA
Petitioners v. DANIEL ROSS

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BY Pixie Hammond

(REPORTER)