TRANSCRIPT OF PROCEEDINGS

IN THE SUPREME COURT OF THE UNITED STATES

RAY TAYLOR,)
)
Petitioner,)
)
v.) No. 86-5963
)
ILLINOIS.)

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WASHINGTON, D.C. 20543

Pages: 1 through 48

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 RAY TAYLOR, :

4 Petitioner :

5 v. : No. 86-5963

6 ILLINOIS :

7 -----------------------------------x

8 Washington, D.C.

9 Wednesday, October 7, 1987

10 The above-entitled matter came on for oral argument

11 before the Supreme Court of the United States at 1:54 p.m.

12 APPEARANCES:

13 RICHARD E. CUNNINGHAM, ESQ., Chicago, Illinois; on behalf

14 the Petitioner.

15 MICHAEL SHABAT, ESQ., Assistant State Attorney, Chicago,

16 Illinois; on behalf of the Respondent.

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1 C O N T E N T S

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1 P R O C E E D I N G S

2 (1:54 p.m.)

3 CHIEF JUSTICE REHNQUIST: Mr. Cunningham, you may

4 proceed whenever you wish.

5 ORAL ARGUMENT OF RICHARD E. CUNNINGHAM, ESQ.

6 ON BEHALF OF PETITIONER

7 MR. CUNNINGHAM: Thank you, Mr. Chief Justice, and

8 may it please the Court:

9 The issue in this case is whether the state's use of

10 a preclusion sanction as to relevant probative testimony of a

11 defense witness in order to enforce its discovery rules

12 violated the compulsory process clause of the Sixth Amendment.

13 On the second day of a four day jury trial, defense

14 counsel sought to amend his list of witnesses to include the

15 witness Alfred Wormley. The trial judge reserved his ruling on

16 this request until the following morning. At that time, the

17 court ordered that the witness testify under oath as an offer

18 of proof outside of the presence of the jury.

19 The witness' testimony was subjected to

20 cross-examination by both the prosecutor and the court. After

21 hearing this testimony and arguments, the court found that

22 there had been a blatant and willful violation of the discovery

23 rules. The court ordered that the witness be precluded from

24 testifying stating, "I feel that defense attorneys have been

25 violating discovery in this courtroom in the last three or four

1 cases blatantly, and I am going to put a stop to it, and this
2 is one way to do so."
3 He further remarked that he was considering reporting
4 the defense attorney to the disciplinary commission, and that
5 he did not think that any attorney should violate any orders
6 purposefully to get an edge for his client.
7 It is our position that the court's exclusion of the
8 witness was arbitrary and that it violated the Sixth Amendment.
9 Although there is a serious question as to whether the
10 preclusion sanction would ever be constitutionally permissible,
11 all parties are in agreement at the very least that before the
12 sanction may be employed that a balancing test must be used to
13 determine whether the state's interest in using preclusion
14 outweighs the defendant's right to present his defense
15 witnesses.
16 The balancing test that we urge this Court to adopt
17 is the one that has been employed by the vast majority of lower
18 courts addressing this issue. That test begins with a
19 presumption against exclusion of otherwise admissible defense
20 evidence. The presumption is required because the integrity of
21 the judicial system depends on a full and fair disclosure of
22 the defendant's version of the facts as well as the state's, so
23 that the jury may be decide where the truth lies.
24 QUESTION: Well, the integrity of the system depends
25 to a certain extent to one complying with rules of court

1 requiring you to give lists of witnesses.

2 MR. CUNNINGHAM: That is correct, Your Honor. And we

3 have to look at the intent of the discovery rules. The main

4 intent of the discovery rules is to prevent surprise for the

5 other party. And when the rule has not been complied with, we

6 feel that the proper steps that a court should take is to see

7 that the other party be made whole in terms of surprise.

8 QUESTION: Would that be a continuance?

9 MR. CUNNINGHAM: It would depend upon the

10 circumstances of the case, Your Honor.

11 QUESTION: Certainly, the prosecution never wants a

12 continuance in a criminal case. A continuance usually is

13 almost entirely for the benefit of the defendant.

14 MR. CUNNINGHAM: Well, I would point out in that

15 regard that in Illinois that there is a long line of cases that

16 were the state has violated the discovery rules and seeks to

17 now put what would be termed a surprise witness before the

18 court that if the defendant simply objects and asks for a

19 preclusion and the court then admits the testimony, on appeal

20 the defendant has waived his right to appeal if he has not

21 requested a continuance. Because the courts in Illinois hold

22 that that is conclusive evidence that the defendant was not

23 prejudiced by the admission of the testimony, since the

24 defendant did not even indicate that he needed a continuance to

25 prepare for that witness' testimony.

1 I am not saying that a continuance in every case
2 would be the proper remedy. Certainly, in the instant case, I
3 do not think that the state even needed a continuance here.
4 Once it heard what the witness' testimony was going to be, it
5 then had before it and knew what witnesses it needed in order
6 to reflect that testimony.
7 QUESTION: So you are saying in effect that you could
8 flagrantly, as the trial court finds, violate the rules of the
9 court and nothing would happen?
10 MR. CUNNINGHAM: No, Your Honor, I am not saying
11 that. I am saying that --
12 QUESTION: At worst you get thrown into the briar
13 patch, that is you get a continuance.
14 MR. CUNNINGHAM: I am not saying that either, Your
15 Honor. Again it would depend on each case. I certainly
16 believe, again to get back to the facts of this case, that no
17 continuance was required at all in order to make the state
18 whole. The Illinois discovery rules, I might point out,
19 provide that a continuance is one of the remedies. But another
20 remedy is that the other party be put on notice as to what the
21 material is that needs to be discovered.
22 In this case, we had the perfect remedy. We had the
23 state hearing under oath what the testimony of that witness was
24 going to be. We had the state able to cross-examine that
25 witness.

1 QUESTION: What about getting other witnesses to
2 impeach that witness?
3 MR. CUNNINGHAM: That is correct, Your Honor.
4 QUESTION: That would have required a continuance,
5 would it not?
6 MR. CUNNINGHAM: Not in this case, Your Honor. In
7 this case, the witness testified that he had observed and heard
8 the state witnesses plotting to go after Ray Taylor in this
9 case, and that he had observed the state witnesses with
10 pistols. Those were the very witnesses present at court that
11 day testifying for the state.
12 QUESTION: What about getting other people to come in
13 and say that this man is a congenital liar, other people who
14 knew this witness?
15 MR. CUNNINGHAM: Well, Your Honor, certainly if the
16 prosecution believed that they had other evidence that needed
17 to be investigated, they could request a continuance.
18 QUESTION: And the only way to get that sort of
19 evidence would have been a continuance.
20 MR. CUNNINGHAM: Well, our argument here, Your Honor,
21 is that the burden should be on the state. The state is
22 seeking to preclude the defendant from presenting a witness.
23 That is a constitutional right provided to the defendant.
24 QUESTION: If you are in violation of the rules, and
25 the burden is on the state. That seems strange.

1 MR. CUNNINGHAM: We believe that the burden is on the
2 state, Your Honor, because it is the state that is seeking to
3 preclude the witness from testifying. Now as the rules
4 themselves provide, exclusion is not the only remedy. The
5 committee comments to the rules and notes that there might be
6 constitutional problems if the defense was precluded from
7 presenting a witness.
8 QUESTION: Suppose you come up on the day of trial
9 with hearsay testimony, and the judge says I am not going to
10 let this in because it is hearsay.
11 Would you make the argument, well, it is important
12 evidence, you have to give me a continuance so that I can go
13 and get the fellow who really said it so that it will not be
14 hearsay anymore; you would not expect to get a continuance for
15 that, would you?
16 You have simply violated the rules of the game by
17 trying to introduce hearsay evidence which is not reliable
18 enough, and the court says I am sorry, we are going to move
19 ahead.
20 Would you expect a continuance to be able to go and
21 get the original declarer? You would not.
22 MR. CUNNINGHAM: My answer is that the court should
23 endeavor to ensure that the defense is able to present its
24 witnesses.
25 QUESTION: In that hearsay case, you would expect a

1 continuance?

2 MR. CUNNINGHAM: Well, it would depend. If the

3 defense had never gotten a continuance in the past and if it

4 was only going to be a one day continuance, I think that it

5 would be an abuse of the Court's discretion and a violation of

6 the Constitution to not grant that continuance.

7 QUESTION: Mr. Cunningham, what do you do at the

8 point where the court says you have been doing this over, and

9 over, and over again and I have got to stop it?

10 MR. CUNNINGHAM: Well, that is exactly what the judge

11 said here, not to that counsel personally, but he said that it

12 had been happening in his courtroom over and over.

13 QUESTION: The way that I read it he was talking

14 about that lawyer.

15 MR. CUNNINGHAM: Well, he said that this had happened

16 in three or four other cases. I do not think that he was

17 talking about that counsel. There is no indication in the

18 record that he was. He mentioned that it had happened in other

19 cases previously.

20 Our position is that the remedy that he contemplated

21 and then abandoned would be the appropriate remedy in that

22 case. And that is that he was considering reporting the

23 attorney to the disciplinary commission. We feel that

24 disciplinary sanctions of the attorney is the appropriate

25 remedy where the court is seeking to deter other attorneys from

1 failing to comply with discovery rules.

2 QUESTION: Would the case be different

3 constitutionally if instead of the attorney that it was the

4 defendant himself who had just not brought forth this witness

5 until the last minute because he is afraid that he might have

6 been intimidated, or maybe he intimidated the witness and did

7 not want to identify him until right before trial?

8 MR. CUNNINGHAM: I think that the case may well be

9 different, Your Honor. There are other factors to consider

10 too. But it could well be that if the defendant himself was

11 the one who had brought about this delay purposefully in order

12 to inject what appeared to be perjured testimony, that if you

13 combined that with evidence in the record that the state was

14 going to be prejudiced and was not going to be able to be

15 prepared through the use of other sanctions, then perhaps the

16 preclusion sanction would be appropriate. We certainly do not

17 have that in this case.

18 QUESTION: You do not take the position that the

19 preclusion sanction is never appropriate?

20 MR. CUNNINGHAM: Well, we have taken that position in

21 our brief.

22 QUESTION: But you just seemed to be abandoning it.

23 MR. CUNNINGHAM: Well, we have taken that. And we

24 are taking as our second position that even if it is not

25 appropriate that the balancing test must be employed in which

1 there is a presumption against preclusion.

2 QUESTION: But your more extreme position that it is

3 never an appropriate sanction would require us to even allow

4 the defendant to play games with the court?

5 MR. CUNNINGHAM: Well, as I pointed out in Braswell

6 v. Wainwright, the Fifth Circuit suggested that perhaps if it

7 were so flagrant that could be construed as a knowing and

8 intelligent waiver by the defendant of his Sixth Amendment

9 right to present witnesses and that would be approached in this

10 Court.

11 QUESTION: And you are saying that this kind of

12 waiver could be made on behalf of the defendant by his counsel?

13 MR. CUNNINGHAM: No, Your Honor. I believe that the

14 recent Second Circuit opinion in Escalera v. Coombe and the

15 Ninth Circuit opinion in Fendler v. Goldsmith are correct on

16 this point, that it is fundamentally unfair to put upon a

17 defendant, an innocent defendant, his counsel's bad faith in

18 this situation. Because another reason for that would be, as

19 this Court recognized recently in Rock v. Arkansas in citing

20 Ferata v. California, that this Court noted that the right to

21 compulsory process is a personal right to the defendant and is

22 not a right of counsel.

23 The test which we propose begins with a presumption

24 against exclusion of otherwise admissible defense evidence.

25 The presumption is required because the integrity of the

1 judicial process -- I am sorry, I mentioned that.

2 The denial of the defendant's right calls into

3 question the ultimate integrity of the fact finding process,

4 and requires that the competing interest be closely examined.

5 Maximum truth gathering rather than arbitrary limitation ought

6 to be the goal.

7 Put another way, the presumption against exclusion

8 puts the burden on the state to demonstrate a compelling

9 interest which requires the denial of the right.

10 QUESTION: It sounds to me like the inquisitorial

11 system, not the adversarial system which we have. I mean you

12 have a system in which each side.

13 MR. CUNNINGHAM: Exactly, and that is the truth

14 gathering system that I am referring to. That both sides ought

15 to be able to present their full case.

16 QUESTION: Subject to certain rules. And sometimes

17 you break a rule like if you try to introduce evidence that is

18 unreliable because it is hearsay, and it is simply excluded.

19 MR. CUNNINGHAM: That is correct, Your Honor.

20 QUESTION: And here what the court was saying is this

21 evidence is unreliable, because it has not been subjected to

22 the testing process that our requirements of advance notice

23 provide for. Since it is unreliable, I am excluding this.

24 MR. CUNNINGHAM: No. That was not the basis for the

25 court's ruling. I read the basis. The main basis for the

1 court's ruling was to act as a deterrent in other cases.

2 QUESTION: So that the system would work in other

3 cases, that advance notice and ability to check out witnesses

4 would occur in those case.

5 MR. CUNNINGHAM: But if that test is going to be

6 applied, if it is going to almost be a per se preclusion every

7 time the defense violates discovery such as it did in this

8 case, then we are not recognizing any longer the importance of

9 the Sixth Amendment right.

10 QUESTION: Well, the Sixth Amendment right is such as

11 the Justice suggests to rules of evidence. A defendant cannot

12 simply come up with any piece of evidence that he feels is

13 relevant and say, look, the Sixth Amendment guarantees me the

14 right to place this before the jury. It is all subject to an

15 elaborate system of rules.

16 MR. CUNNINGHAM: That is correct, Your Honor, but I

17 do not think that the rules take precedence over the right.

18 Certainly, the right is above it. In any event, I think that

19 when anyone is seeking, as the state was seeking here, to

20 abridge that right that the burden has to be on the state to

21 show that there were no other remedies to make the state whole.

22 And here the state has totally failed to do that.

23 It never argued in the trial court that it was not

24 prepared to meet Mr. Wormley's testimony once it had heard that

25 testimony. And our argument is that the burden is on the

1 state. If it is seeking to abridge the Sixth Amendment right,
2 it has to demonstrate that there is a compelling interest on
3 the other side for the abridgement. To do that, the state had
4 to show that it could not have met that testimony. There were
5 other effective remedies that would have fully met the intent
6 of the discovery rules here.
7 QUESTION: Mr. Cunningham, may I inquire, please,
8 when the compulsory process claim was presented to the courts
9 below? I have no found any reference to it.
10 MR. CUNNINGHAM: There was an exception taken in the
11 trial court, and it was noted in the post-trial motion. In the
12 appellate court --
13 QUESTION: Well, but never under the rubric of a
14 compulsory process claim?
15 MR. CUNNINGHAM: That is correct. In the appellate
16 court, the state is arguing that this court does not have
17 jurisdiction on the ground that the issue we raised below is a
18 different issue than the one that we are raising here.
19 QUESTION: And it did seem to me. I just wondered if
20 you had any comment.
21 MR. CUNNINGHAM: Yes, I do. The state does not
22 question that we preserved a due process claim.
23 QUESTION: Right.
24 MR. CUNNINGHAM: In the appellate court, we cited the
25 due process clause. In our original appellate brief, we did

1 not specifically cite either the Sixth Amendment or the
2 compulsory process clause. However, we did cite Washington v.
3 Texas and Chambers v. Mississippi, two compulsory process
4 clause cases as our main authority along with an Illinois case,
5 People v. Rayford, which the Solicitor General has agreed is a
6 compulsory process case.
7 Our position is that the case law of this Court makes
8 clear that the question is whether the substance of the federal
9 claim below is the same as the substance of the federal claim
10 presented here, and our position is that it was. We did in
11 fact cite the Sixth Amendment in our rehearing petition to the
12 appellate court, and then we cited it in our petition for leave
13 to appeal to the Supreme Court.
14 But as I said, the case law makes it clear that it is
15 a question of the substance of the federal claim, and we did
16 not have to cite book and verse on the Constitution. We did
17 properly preserve the claim by citing the due process claim.
18 QUESTION: But you did not really make a
19 constitutional argument to the trial judge at the time of his
20 ruling, you did not say that there was a constitutional
21 requirement of the balancing test?
22 MR. CUNNINGHAM: At the time of his ruling, the
23 defense attorney did not, but the state has not contested that.
24 There was no issue raised in the appellate brief that the issue
25 had been waived certainly. And when I orally argued the case,

1 there was no question.

2 QUESTION: But what I am really suggesting is, I am
3 not suggesting, that technically there is not jurisdiction.
4 But you are in effect saying that the trial judge committed
5 constitutional error because he did do a balancing test that he
6 was never asked to perform. The trial lawyer said, well, you
7 have got to balance my interests against the other.

8 MR. CUNNINGHAM: Your Honor, our position is that it
9 is not the burden of the client, not the burden of the
10 defendant, I am sorry, to impose upon the court that balancing
11 test. The court has that duty.

12 QUESTION: In doing the balancing under your view,
13 would the judge's doubts about the credibility of the witness
14 be a factor that he could weigh, and here the judge did express
15 such doubts?

16 MR. CUNNINGHAM: He said, for what it is worth, he
17 expressed some doubt about a portion of the credibility.

18 QUESTION: That part of his testimony is inherently
19 improbable.

20 MR. CUNNINGHAM: No, Your Honor. It is our position
21 that the credibility of the witnesses is for the jury to
22 determine. This Court has made that clear time and time again
23 in Rock v. Arkansas, and Chambers v. Mississippi.

24 QUESTION: What about harmless error?

25 MR. CUNNINGHAM: Well, Your Honor --

1 QUESTION: I mean if one were to find that there may
2 be a violation of a compulsory process clause say in a
3 hypothetical case, but the witness' testimony was so tangential
4 or so minor that it could not possibly have affected the
5 outcome, certainly that sort of a review for harmless error
6 would be permissible, would it not?
7 MR. CUNNINGHAM: I do not believe that in the trial
8 court that should be permissible, frankly. But I believe that
9 certainly there is a harmless error analysis to any of these
10 case, I would agree.
11 QUESTION: An appellate court reviewing your claim
12 could say true, there was a violation of the compulsory process
13 clause, but it was just harmless error.
14 MR. CUNNINGHAM: There is no question about that.
15 But the standard would be harmless beyond a reasonable doubt,
16 as it is in Schneble v. Florida.
17 In this case though, to get to the balancing test if
18 we can for a moment, keeping in mind that there should be a
19 presumption against preclusion in applying the test.
20 QUESTION: And also a presumption in favor of the
21 rule.
22 MR. CUNNINGHAM: Your Honor, the rule that we are
23 talking about --
24 QUESTION: You have got two presumptions here. One
25 is the rule is good unless you say it is bad, and you have to

1 prove that it is bad.

2 MR. CUNNINGHAM: The rule that we are talking

3 about --

4 QUESTION: So you are going to put the burden on the

5 state to prove that it is good, how do you do that?

6 MR. CUNNINGHAM: The Illinois statute, the Illinois

7 discovery statutes, do not require preclusion, Your Honor. The

8 Illinois statute --

9 QUESTION: But the judge does.

10 MR. CUNNINGHAM: Well, that is our argument.

11 QUESTION: That is the rule.

12 MR. CUNNINGHAM: That would be a mechanistic

13 approach. That would be a totally arbitrary rule to just

14 exclude. Every time that the defense violates discovery, to

15 exclude the witness would be a mechanistic approach. As I say,

16 there is a long line of Illinois cases where the state violates

17 the rule, where if the defendant only objects and asks for

18 preclusion and the judge goes forward and allows the witness to

19 testify, that the courts on appeal then hold that there is no

20 error. They hold that because the defense failed to ask for a

21 continuance that is conclusive proof that there has been no

22 prejudice.

23 QUESTION: But the defendant did not ask for that in

24 this case.

25 MR. CUNNINGHAM: No, it was the state who failed to

1 ask for a continuance or failed to demonstrate in any manner
2 that it was going to be prejudiced in this case.
3 QUESTION: Well, did defendant have no responsibility
4 at all?
5 MR. CUNNINGHAM: Your Honor, to put it on the
6 defendant would be very difficult, because he does not know
7 what position is in in terms of prejudice. The defendant would
8 not be able to articulate to the court why it is that the state
9 is not prejudiced or why it is that the state does not need a
10 continuance. It is up to the state who is seeking to preclude.
11 If you look at the colloquy, it was the state arguing very
12 strongly that this witness should be precluded because of a
13 flagrant violation of discovery. It should have been the
14 state's burden to articulate to the court why it was that
15 lesser sanctions would not apply here.
16 QUESTION: I do not see where you shift the burden
17 here. I think that the burden, of course, is on the state to
18 prove its case, but there is also a shift in responsibility
19 when the rules say that you should do this and you do not do
20 this.
21 MR. CUNNINGHAM: Well, I think that we should look at
22 the intent of the rules. The rules are not just set up to be
23 applied in a mechanistic fashion. The rules are set up to
24 ensure that neither party will be surprised, that both parties
25 can prepare for the testimony of the other side's witnesses.

1 QUESTION: But there is really more than that at
2 stake, it seems to me, there also. In every case, when you get
3 your witnesses in the courtroom and you have got the jury in
4 the box and you are all ready to go, and then something like
5 this happens, and there is a request for a continuance,
6 automatically there is prejudice to the whole process, if you
7 have to send everybody home and you do not know whether you
8 will get the witnesses back three days later.
9 There is inherently prejudice in every case with a
10 last minute continuance, is there not? And plus after, you
11 have to verify the man's story.
12 MR. CUNNINGHAM: I think that we have to maybe
13 measure what the quantum of prejudice is when you say that in
14 every continuance there is prejudice. There are continuances
15 in jury trials in Cook County day after day after day after day
16 and in the middle of trials too, I might add.
17 QUESTION: I know, and they are not a healthy thing.
18 MR. CUNNINGHAM: So I think that we have to take a
19 realistic view. I mean the point is that the defense is being
20 precluded from presenting relevant probative testimony, as was
21 done in this case, and I think that you have to weigh that
22 against whatever prejudice there will be.
23 The point that I am trying to make is that in this
24 particular case that the witnesses needed to rebut Mr.
25 Wormley's testimony. Maybe if I could briefly discuss what the

1 testimony was.

2 The issue in this case was a credibility question of

3 who shot the complaining witness, Jack Bridges. The state's

4 witnesses were Jack Bridges and his three relatives. They

5 stated that Ray Taylor had shot him during a fight that Mr.

6 Bridges and his relatives were having with Ray Taylor and his

7 friends.

8 The defense presented two witnesses, two eyewitnesses

9 to the event, who testified that Ray Taylor was not armed

10 during the event, that it was Jack Bridges' brother who fired

11 shots into the crowd trying to protect Jack Bridges and who

12 shot Jack Bridges. Also I might add that Bridges and Bethany,

13 his brother, had both testified that they were unarmed on that

14 night.

15 Mr. Wormley, the excluded witness, would have

16 testified that prior to the incident sometime earlier in the

17 evening that he joined a group of people including Jack Bridges

18 and his family on the porch of Bridges' sister. He had

19 observed Bridges handing a blanket containing two pistols to

20 his girlfriend. And he had further overhead Bridges and his

21 family discussing how they were going to go after Ray Taylor.

22 Now this testimony was very crucial to the defense.

23 Number one, it corroborated the other two witnesses, and it was

24 an independent source of corroboration in that it occurred at a

25 different time and at a different location.

1 Number two, it directly rebutted the testimony of
2 Bridges and Bethany that they were unarmed on that night. And
3 number three, it added an element to the defense's case which
4 was totally lacking, and that is the element of planned
5 aggression on the part of Bridges and his family. So this
6 testimony was crucial to the defense.
7 Now once the state had heard all of that testimony
8 and the offer or proof, they were no longer surprise, and
9 surprise is the main thing that we are looking to overcome. At
10 that point, they were no longer surprised. Also I might add,
11 at that point in the trial, there were still three of the state
12 witnesses to be presented, and all of the defense to be
13 presented. The trial did not end until the following day.
14 So at that point, the state basically knew the
15 witnesses that it needed to rebut Mr. Wormley's testimony.
16 They needed the complaining witness and his family who were all
17 present there. Now if from talking to them they felt that they
18 needed additional witnesses, then they could inform the court
19 as to what they needed and how much time they needed. And then
20 perhaps the court could make a determination as to whether that
21 would be so prejudicial to the state to have to grant a
22 continuance at that time that he would consider precluding the
23 witness.
24 But absent any showing at all that the state was
25 going to be prejudiced, we feel that this Court must find that

1 there was a violation of the Sixth Amendment.

2 QUESTION: To take once again the application of your

3 Sixth Amendment theory to hearsay.

4 If Wormley was not present but you tried to introduce

5 someone who said, well, Wormley is not here but Wormley told me

6 that he saw thus and so affirming your client's version of the

7 facts, do you think that the court could not just immediately

8 say I am sorry, we have a rule against hearsay evidence because

9 we think that it is not sufficient?

10 MR. CUNNINGHAM: I think that we have to look at the

11 other factors.

12 QUESTION: Every case, case by case?

13 MR. CUNNINGHAM: I think so, case by case.

14 QUESTION: No absolute rule excluding hearsay, you

15 have to say, well, let's see, maybe we will have to have a

16 continuance so you can go get the original declarant, go get

17 Wormley?

18 MR. CUNNINGHAM: Yes. I was not saying that they

19 could admit the hearsay. I was not suggesting that.

20 QUESTION: No, you are just saying that you are

21 entitled to a continuance.

22 MR. CUNNINGHAM: No, I am saying that you would have

23 to look at it case by case. If the defense had been causing a

24 lot of continuances. If the continuance in that case if it

25 could be shown would severely prejudice the state, then

1 perhaps.

2 QUESTION: The judge could not just say look it,

3 today is the trial date, you know what the rules of evidence

4 are, you should have been here with your evidence. If your

5 counsel is so bad that he has tried to get in hearsay when he

6 should have had the original declarant, if it is just a bad

7 mistake that it amounts to ineffective assistance, you can have

8 that relief, but this trial is going ahead, a judge could not

9 say that?

10 MR. CUNNINGHAM: Perhaps he could, Your Honor. That

11 is not the case that we have here. Here we have --

12 QUESTION: But it is the same principle that you are

13 urging under the Sixth Amendment, that the rules designed to

14 assure the reliability of evidence do not have to be absolutely

15 followed. But in each case, the court is supposed to weigh

16 whether bending them in this case or allowing a continuance so

17 that they can be remedied will be in the interests of justice.

18 That is basically what you are saying.

19 MR. CUNNINGHAM: Well, that is true. The interesting

20 thing here is that unlike Chambers, or Washington, or Rock, we

21 do not have a case here where the reason that the state was

22 seeking to preclude the evidence was that they believed that

23 the evidence was inherently unreliable. And I think that is

24 what makes this such a stronger case than those other cases.

25 Here we have a witness prepared to testify, a

1 competent witness who could give relevant evidence of matters
2 that he observed. There is no question of inherent
3 unreliability whatsoever. The only question is whether or not
4 the state could be prepared to meet that evidence.
5 QUESTION: How can you say that there is no question
6 of unreliability, if the state says one of the reasons why we
7 want you identify your witnesses in advance is so that the
8 other side will have a chance to do the investigation that is
9 necessary to determine their credibility?
10 MR. CUNNINGHAM: What I am saying --
11 QUESTION: It is designed in part for reliability
12 purposes.
13 MR. CUNNINGHAM: What I am saying, Your Honor, is
14 that there are other remedies for the state to be made whole so
15 that they would be put into that position.
16 QUESTION: Well, there are the same other remedies in
17 the hearsay example.
18 MR. CUNNINGHAM: Well, let me give an example, Your
19 Honor. If the defense had complied with discovery in this case
20 and had given the witness' name to the state, the witness would
21 have had no obligation to talk to the state whatsoever.
22 QUESTION: No, of course not. But they at least
23 could have found out who he was.
24 MR. CUNNINGHAM: So they would have known who he was.
25 QUESTION: Whether he was at the scene, and I guess

1 that he was not in concurrence with the scene.

2 MR. CUNNINGHAM: But instead of that what the state

3 got was that they got his full testimony under oath.

4 QUESTION: Well, yes.

5 MR. CUNNINGHAM: So what I am saying is that there

6 are other remedies, other less severe remedies, that we feel

7 are appropriate certainly in this case. And to impose a

8 preclusion sanction here would be arbitrary.

9 QUESTION: Does the state have no right to depose a

10 listed witness in Illinois?

11 MR. CUNNINGHAM: Not in Illinois, no.

12 If you have no other questions, I will reserve my

13 time for rebuttal. Thank you.

14 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Cunningham.

15 We will hear now from you, Mr. Shabat.

16 ORAL ARGUMENT OF MICHAEL SHABAT, ESQ.

17 ON BEHALF OF RESPONDENT

18 MR. SHABAT: Thank you, Mr. Chief Justice, and may it

19 please the Court:

20 The position of the State of Illinois in this

21 proceeding is that when a defendant as Petitioner Taylor did in

22 this case sought to compel witnesses to attend court, he did so

23 understandably in an effort to present evidence to a jury which

24 was going to decide his guilt or his innocence.

25 In the course of doing that or in the attempt to do

1 so, it is incumbent upon defendants as well as prosecutors in
2 this country to do so with compliance with established
3 procedures, procedures which we submit assure fairness and
4 reliability in the ascertainment of guilt and innocence. It is
5 not merely the element of surprise that discovery rules
6 address.
7 QUESTION: Mr. Shabat, may I ask, is there any
8 evidence that the defendant was closely involved in this
9 noncompliance with the discovery rule, or was it just the
10 lawyer who was responsible?
11 MR. SHABAT: Your Honor, the record reflects that at
12 the time, at the time during trial, after the jury had been
13 selected, after opening statements by both the state and the
14 defense, and after two of the state's key witnesses had
15 testified on both direct and cross-examination that the court
16 sent the jury home until the next day. And at that time, the
17 defense attorney stated that he had just learned of an
18 additional witness who could have and probably did see the
19 entire incident. There was a suggestion implicit in that.
20 QUESTION: Yes, but my question was was defendant
21 personally involved in the noncompliance?
22 MR. SHABAT: I suggest that it can be inferred that
23 when he learned, when the defense attorney is telling the court
24 that he learned, although we do not know directly and
25 specifically and we can only infer, that he learned it from his

1 client who was sitting there at counsel table.

2 QUESTION: Then the answer to my question is that

3 there is no evidence that the defendant was personally involved

4 in this?

5 MR. SHABAT: There is no direct evidence of that,

6 that is correct.

7 In the attempt to avoid surprise, we are really

8 talking about more than that. Because we are talking about an

9 effort to assure fairness and reliability in the ascertainment

10 of guilt and innocence.

11 To the extent that the Sixth Amendment may be

12 implicated in that or notions of due process, it does not

13 permit a defendant to present testimony that is free from

14 legitimate demands. The discovery rules in Illinois in the

15 specific instance are demands of an adversary system. Because

16 there is really no justification for a defendant under the

17 guise of any constitutional right to attempt to assert half

18 truths.

19 QUESTION: I take it then that you are saying then

20 that preclusion is automatically justified in every single case

21 of noncompliance?

22 MR. SHABAT: No, sir, that is not our position.

23 Preclusion under our discovery rules in Illinois and in most of

24 the states, and almost all of the states have such rules,

25 preclusion is an option. It is an option among other options

1 which a judge in his discretion can, must use, and did in fact
2 use in this case.
3 QUESTION: That may be the state rule, but is it your
4 position that the Sixth Amendment would never, never forbid
5 preclusion?
6 MR. SHABAT: No.
7 QUESTION: Sometimes?
8 MR. SHABAT: There are circumstances, there are
9 circumstances.
10 QUESTION: What are they, just name one?
11 MR. SHABAT: I think that it would involve a
12 circumstance where the nature of the violation, for example,
13 being one that was fairly technical. If, for example,
14 discovery had to be completed within a given jurisdiction after
15 a number of days, but in any event well before the parties
16 intended to go to trial.
17 QUESTION: Would the Sixth Amendment ever forbid
18 preclusion where there is a failure to reveal a name of a
19 witness in compliance with the rule?
20 MR. SHABAT: It might. It might after a
21 determination by the judge of all of the factors such as the
22 reason, the motivation behind the failure.
23 QUESTION: So do you think that there is a balancing
24 process that must go on in every case?
25 MR. SHABAT: Most certainly, Your Honor. I believe

1 that is appropriate.

2 QUESTION: The same in hearsay, of course, right, the

3 same with hearsay, because I mean the Sixth Amendment applies

4 to that too?

5 MR. SHABAT: Well, no, I do not believe so. I

6 believe that we have a different situation here. We have

7 unreliable evidence in that instance. And I do not believe

8 that --

9 QUESTION: I thought that you were telling us that

10 part of the purpose of this rule is if there has not been the

11 time to investigate the witness that the evidence is

12 unreliable. I thought that was part of your case.

13 MR. SHABAT: In this case, that is right.

14 QUESTION: Well, just in this case, but not generally

15 under these rules?

16 MR. SHABAT: No. Prosecutors must have an

17 opportunity to fully investigate their case. It is not

18 sufficient for a prosecutor to have to sit at trial after

19 having prepared his case and investigated the evidence, having

20 selected a jury, having selected a jury I might add with a mind

21 towards the type of witnesses that will be presented during the

22 case --

23 QUESTION: Mr. Shabat, suppose in this case instead

24 of saying what he did to the judge, as I understand what you

25 told us, that what defense counsel said was I have just

1 learned, suppose he had gone to the judge and said, judge, I
2 made an awful boner here, it is not my client's fault, I have
3 known about this witness and I forgot to put it down, and that
4 is why I did not comply with the discovery rule, and I do not
5 think that my client should be penalized by denying him his
6 right under the Sixth Amendment in those circumstances, what
7 would you do with a case like that?
8 MR. SHABAT: I would have to weigh that factor, Your
9 Honor, with due regard to the other factors present in the case
10 such as when does this occur.
11 QUESTION: Just when it occurred here.
12 MR. SHABAT: That is essentially what the defense
13 lawyer tried to say. Because on the very next page after he
14 has just indicated that he just learned of this witness, he
15 sort of retracts that, and he says on page 206 of the record of
16 Joint Appendix, page 13, "The defendant told me about him
17 sometime ago, but I could not locate him."
18 Of course, that does not relieve him of an
19 obligation. All he had to do is write the name and address
20 unknown, and that would have satisfied Illinois discovery.
21 QUESTION: Your position is just that the balancing
22 was properly done here, you agree that there has to be
23 balancing in every case?
24 MR. SHABAT: Yes, sir, that is correct. And we are
25 not at all suggesting --

1 QUESTION: There is not much of a dispute really, is
2 there, between you and the other side? We took this case to
3 decide whether the balancing was properly done in this case. I
4 thought that we were going to talk about whether the balancing
5 was necessary.
6 MR. SHABAT: My opponent, I believe, is arguing that
7 a preclusion is never appropriate. There is only one place
8 that I have read within the documents filed in this Court where
9 the Petitioner indicates that there might be a rare case where
10 it could be appropriate, but he then imposes on the state some
11 restrictions in that regard before they can avail themselves of
12 that.
13 QUESTION: Did you not argue that we should overrule
14 Washington v. Texas? It seemed to me that you took a little
15 more extreme position maybe in the brief.
16 MR. SHABAT: In the brief submitted by the State of
17 Illinois, we suggested that based on our historical analysis of
18 the evolution of the writing of the compulsory process clause
19 that perhaps Washington v. Texas should be reconsidered. Even
20 if it were not to be reconsidered, it is our view that only
21 arbitrary, only arbitrary rules, and procedures, or statutes
22 which interfere with the compulsory process clause ought to
23 follow that clause.
24 This is not an arbitrary procedure. The judge has
25 discretion to choose this sanction and it is not arbitrary

1 because on its face the discovery rule which provides sanctions
2 here in Illinois provides alternatives. So there is discretion
3 inherent in the nature of the options available to the judge.
4 QUESTION: Let me change Justice Brennan's
5 hypothetical a little.
6 Suppose that the name of the witness was on the list
7 that counsel had prepared but that his secretary just omitted
8 one name out of twenty, you would come to the same conclusion,
9 I take it?
10 MR. SHABAT: It is possible. It would depend again
11 on the timing of that discovery, and what inferences if any or
12 what specific conclusions could be drawn after an examination
13 of the attorney in court, whether it was designed as a
14 strategical tactical advantage, an improper one I might add, or
15 whether in fact it was merely technical.
16 QUESTION: The hypothetical that I gave you was that
17 it was a sheer secretary's oversight.
18 MR. SHABAT: That would certainly weigh in favor of
19 not precluding.
20 QUESTION: Do you have in Illinois a notice of alibi
21 rule?
22 MR. SHABAT: Yes, and it is reciprocal as well.
23 QUESTION: And you would take the same position with
24 respect to that that you are taking here?
25 MR. SHABAT: Yes, I would, Your Honor. In fact, back

1 to Justice Brennan's question, when the defense attorney later
2 changed his mind about what he knew, he indicated that he had
3 been told sometime ago about Alfred Wormley, this witness, but
4 that he could not locate him.
5 Well, the next day at the judge's request, Alfred
6 Wormley appeared in court. This was communicated to the
7 defense attorney by the judge, and the defense attorney brought
8 him to court the next day. And prior to the jury coming out to
9 hear the third state's witness, third, fourth, fifth, and
10 sixth, Alfred Wormley was voir dired.
11 And it was during the course of that voir dire that
12 we learned that in fact this defense attorney had visited
13 Alfred Wormley, this newly discovered witness, at his home a
14 week prior to the commencement of trial, a week before they
15 picked that jury, a week before opening statements, a week and
16 a day.
17 QUESTION: Mr. Shabat, does it make any difference in
18 the balancing how crucial the evidence is that the witness
19 intends to give, do you suppose?
20 MR. SHABAT: Yes, it can and it should, because it is
21 important.
22 QUESTION: How important was this evidence?
23 MR. SHABAT: Not very, Your Honor. It is our
24 position that although the defendant could argue that there is
25 some conceivable benefit, some conceivable benefit that could

1 have been derived from this testimony, that it certainly was
2 not the kind of testimony which having been excluded and
3 reflecting upon the entire record as we must do at this point
4 that one could conclude that this trial was unjust, and that
5 the verdict was somehow compromised by that.
6 QUESTION: Mr. Shabat, if you believe that the victim
7 was armed and his brother was armed, or at least his brother,
8 when they testified to the contrary and that the only gun was
9 that of the defendant, and if you believe the man, it would
10 really change the facts quite a bit.
11 MR. SHABAT: Perhaps. The judge had an opportunity,
12 although not the best opportunity, to observe the demeanor of
13 this witness during that voir dire. In fact, he concluded that
14 he did not believe that he was a very credible witness. And I
15 think that great weight should be placed on that given these
16 circumstances in this case.
17 QUESTION: Perhaps it really does not have anything
18 to do with the issue, but was this retained counsel,
19 defendant's counsel, or was this appointed counsel?
20 MR. SHABAT: Yes.
21 QUESTION: Retained counsel?
22 MR. SHABAT: I believe it was, yes.
23 QUESTION: Does that answer the Petitioner's repeated
24 point about that you could have gotten a postponement of a day
25 or so, do you think that your last answer answers that?

1 MR. SHABAT: Your Honor, I believe that a
2 continuance would have been inappropriate in this case. First
3 of all, I do not believe that an interruption of a trial at
4 this stage of the proceedings is in the interests of justice
5 and truth seeking. The jury has been empaneled, the jury has
6 heard opening statements, the jury has listened --
7 QUESTION: Trials have been interrupted before in
8 Illinois and Chicago, have been interrupted in the middle of a
9 trial, right? I assume so in every city that I have ever heard
10 of.
11 MR. SHABAT: Most likely, hopefully not for this
12 reason though. But in any event, that does not advance the
13 efforts of the participants in the justice system, not the
14 least of which the judge has a tremendous case load that he has
15 to work through, that is being forestalled because of this kind
16 of conduct.
17 And once a jury is listening to evidence and they are
18 in the state's case in chief, I think that it is fair to
19 conclude that delays that occur under those conditions do not
20 advance the interests of a state which desires to proceed
21 witness after witness to conclusion of the state's case in
22 chief.
23 QUESTION: But you could have had the continuance
24 come after the state's case in chief, could you not, because
25 Wormley was not going to be called until the defense case.

1 MR. SHABAT: There is another aspect to that, Your
2 Honor. Yes, that could have happened. I do not believe that
3 that would have been sufficient either. When the state
4 prepares for trial, it does so with a thorough investigation of
5 all of the witnesses, all of its witnesses, in an attempt to
6 find if they cannot interview because a witness does not have
7 to talk to the state, but nevertheless to use its investigatory
8 resources to find out something about that witness in some
9 detail to see where that witness really was.
10 QUESTION: That does not happen in all criminal
11 cases.
12 MR. SHABAT: What is that?
13 QUESTION: Have you not ever heard of a criminal case
14 where the lawyer says you are the arresting officer, well tell
15 what happened? That does not show any investigation.
16 MR. SHABAT: Well, that --
17 QUESTION: If they waited two days or one day, there
18 could have been a preliminary investigation, could there not?
19 You have an efficient police department.
20 MR. SHABAT: Yes, I believe we do. But I do not
21 believe that one or two days would have necessarily been
22 sufficient time. And I also do not believe that in light of
23 the fact that we are in the middle of a trial, the middle of a
24 trial, where a jury has been listening to evidence, that the
25 possibility of its losing its train of thought --

1 QUESTION: We all understand. You do not have to
2 keep saying in the middle of a trial. We know exactly what it
3 means.
4 MR. SHABAT: I think that is central to my argument,
5 Your Honor. I think that it is imperative that things like
6 this not come about as a surprise well past the eleventh hour.
7 I think that for that reason with liberal discovery
8 appropriate --
9 QUESTION: Well, let me ask you then.
10 MR. SHABAT: Yes, sir.
11 QUESTION: If this happened on the first day, would
12 you be in favor of a postponement, a continuance?
13 MR. SHABAT: If by the first day, Your Honor, I take
14 your meaning to be prior to the selection of the jury, prior to
15 opening statements?
16 QUESTION: Well, do you want this to be a case
17 limited to the facts in this case?
18 MR. SHABAT: No.
19 QUESTION: If you do not want it limited to facts in
20 this case, then stop emphasizing these facts.
21 QUESTION: Mr. Shabat, I have another problem
22 relating to the facts in this case.
23 If this whole thing is to be decided on a balancing
24 test, as you say, should we not require that the judge in fact
25 conduct a balancing test, and what evidence do we have that he

1 conduced any balancing test here?

2 He did not even receive an objection from the

3 prosecution to the effect that we think that this evidence is

4 unreliable and we want to interview some witnesses. I mean all

5 of these great and serious reasons you are giving us now are

6 brain spun. They were not brought before the District Judge at

7 the time.

8 MR. SHABAT: Your Honor, I believe to the contrary,

9 that we have a record here that shows that the judge was if not

10 specifically articulating any of the criteria that we have

11 discussed today as part of his decision in deciding to preclude

12 the witness that he was fully cognizant of the actions

13 available to him. He also by his deeds did not only preclude a

14 witness, Alfred Wormley, who was tendered and identified to the

15 state when he was, but there is evidence in this record that

16 prior to trial before the first witness was called but after

17 jury selection that the defense asked leave of court to amend

18 his list of witnesses in this case and he was permitted to do

19 so, and they were not excluded.

20 What the judge did, however, in that instance was I

21 believe a very measured and appropriate response from which I

22 derive inference that he was conducting a balancing approach.

23 He told the state that for those witnesses before they were

24 allowed to testify that time would be taken for the state to

25 attempt to interview them. I think that this shows a measured

1 response which is an indication of his cognizance of why he was
2 doing what he did and what was available to him beyond that
3 which he did for any of the witnesses for whom discovery was an
4 issue in this case.
5 And I also believe that the judge was weighing in his
6 mind as evidenced by his words the problem that he was
7 confronting and that he had confronted, and that other judges
8 of the Circuit Court of Cook County had confronted in previous
9 cases, where surprise ambush defense tactics had been
10 perpetrated upon the state.
11 And I believe that a sense of his frustration is
12 evidenced by this record. And it is clear to us that he was
13 attempting to devise the appropriate sanction or remedy to be
14 applied in each of the instances of belated discovery of
15 witnesses to the state.
16 QUESTION: Let me ask you about this repetitious
17 problem that happened over and over again.
18 In your view, was the judge saying that this is
19 significant because it is a nuisance to the court to have to
20 grant repeated continuances, or do you read him as saying that
21 there is some problem about the risk that some unscrupulous
22 lawyers may try to be fabricating false testimony?
23 MR. SHABAT: Yes to both. I would answer yes to both
24 of those questions.
25 QUESTION: Because I suppose that if you look at it

1 as the latter as part of the problem, then the rather shabby
2 behavior of this lawyer is relevant and perhaps partially
3 attributable to his client.
4 MR. SHABAT: Yes, that is our position. We believe
5 that as the appellate court found in this case under an
6 analysis under Strickland that this defense attorney was
7 competent. That issue was presented to the appellate court,
8 and it was resolved in that manner. And indeed, he was
9 competent. He presented pre-trial motions, he argued them, he
10 examined witnesses at some great length, and put on witnesses
11 as well. This was not the kind of representation that one
12 could ever argue was incompetent.
13 QUESTION: Was this a new practitioner, do you know?
14 MR. SHABAT: Yes, I know the people from my
15 generation in our felony trial courts. We are not familiar
16 with him. But the newer people who are trying cases today in
17 our felony trial courts were aware of his presence from time to
18 time in our trial courts at 26th and California in Chicago.
19 QUESTION: You are saying that your generation did
20 not know him, but the younger generation did?
21 MR. SHABAT: That is correct.
22 QUESTION: He only tried young cases or what, I do
23 not understand.
24 MR. SHABAT: The obligation that was placed on the
25 defendant in this case to comply with discovery was certainly

1 not burdensome and it certainly was not very difficult. The
2 answer to discovery is a simple document to prepare. It is
3 what you have to be able to do to be able to prepare for trial.
4 All the defense attorney had to do here was to respond to our
5 motion. Even if he did not know Wormley's address, Wormley
6 would have testified had timely notice of his name been given.
7 I believe that the value of compliance here not just
8 to the state, frankly, but to the criminal justice system, and
9 specifically here the jury in its attempt to ascertain the
10 truth was great. No surprise, no delay, the state having an
11 opportunity to fully investigate and therefore enhance the
12 truth seeking function at trial.
13 We perceive the defendant's attempt here as an
14 attempt to in some way insulate the exercise of his Sixth
15 Amendment right and discovery rules from imposition of any
16 legitimate demands of our adversary system. And our great
17 concern, Your Honors, is that if he is successful here that he
18 is going to effectively emasculate the intent of our discovery
19 rules, rules which are designed for both sides, to afford both
20 sides an enhanced opportunity to prepare their case and present
21 their evidence.
22 These discovery rules are liberal rules, and they are
23 appropriately so. In Illinois, we virtually give our file in
24 its entirety to the defendant before trial. Certainly, given
25 that, it is not appropriate under due process or the Sixth

1 Amendment for the defendant to be able to obtain an advantage,
2 if he can get everything and go to trial and present as a
3 surprise untested evidence even though he has violated those
4 rules.
5 Defendant's violation of those rules were very
6 flagrant here. I believe that judge acted in a judicious,
7 tempered, and balanced manner, a manner which did not affect
8 the outcome of this trial, nor could it be said that the
9 absence of Wormley's testimony, although perhaps there is a
10 conceivable benefit that could have been derived from it, would
11 nevertheless never have affected the integrity of the verdict.
12 Thank you.
13 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Shabat.
14 Mr. Cunningham, you have four minutes remaining.
15 ORAL ARGUMENT OF RICHARD E. CUNNINGHAM, ESQ.
16 ON BEHALF OF PETITIONER - REBUTTAL
17 MR. CUNNINGHAM: Thank you, Your Honor.
18 Justice Scalia, in answer to your question which I
19 was never able to get to, it is true that all parties including
20 the Solicitor General agree that a balancing test must be
21 applied. In this case, it clearly was never applied by the
22 trial judge unlike what was going on in Illinois since People
23 v. Rayford in 1976. We ask that this Court apply the balancing
24 test. And if it does so, I think that the defense will win the
25 case.

1 QUESTION: If it has been going on Illinois since
2 1976, why did not anybody ask the trial judge and this Court
3 do it?
4 MR. CUNNINGHAM: Well, Your Honor, we have raised in
5 effect with assistance of counsel, we raised it before this
6 Court, and this Court chose to only accept the case on question
7 one. So unlike the state said, we certainly argued in effect
8 with assistance of counsel in this case. But again the burden
9 should be on the Court to apply that balancing test in any
10 event.
11 QUESTION: Well, do you think that the balancing has
12 to be articulated and made on the record?
13 MR. CUNNINGHAM: No, Your Honor.
14 QUESTION: Or can the trial judge just think it
15 through and weigh the pros and the cons and the prejudice?
16 MR. CUNNINGHAM: I think that he could think it
17 through.
18 QUESTION: Sure.
19 MR. CUNNINGHAM: Except the evidence of prejudice
20 would have to appear of record. And here we have no evidence
21 that the state would have been prejudiced had Mr. Wormley been
22 allowed to testify. Here we have no evidence that less severe
23 sanctions would not have been appropriate. And in answer to
24 another one of your questions about the materiality of the
25 witness, yes, that is part of the balancing test. And here I

1 believe that we have demonstrated that this witness was highly
2 material.
3 I might add that the jury went out to deliberate and
4 came back and sent a message requesting the testimony of the
5 complaining witness and his brother. It was not until after
6 they had reviewed that testimony until they returned a verdict
7 of guilt. This is a very close credibility case.
8 As to the fact that the record is clear that Mr.
9 Taylor was not responsible here for his attorneys at best
10 negligence, there is no question about it.
11 QUESTION: How do you say that, how can you say that
12 it is clear, maybe they did not prove it, but how do you know?
13 MR. CUNNINGHAM: Well, the state never argued that
14 below.
15 QUESTION: They do not know. The defendant never
16 testified in the case, and you do not know what he said to his
17 lawyer, and what the lawyer said to him.
18 MR. CUNNINGHAM: We do know. The lawyer said that
19 the defendant had told him long before trial of the existence
20 of Mr. Wormley, and we know that the lawyer interviewed Mr.
21 Wormley at his home a week before trial and served him with a
22 subpoena. I do not think that on those facts that it is at all
23 fair to an uneducated criminal defendant twenty years old to
24 put onto him that he was somehow aware of what these discovery
25 rules were about.

1 QUESTION: Well, I guess that the Supreme Court of
2 the State thought that the trial judge did enough, it affirmed.
3 MR. CUNNINGHAM: The Supreme Court denied the
4 petition for leave to appeal.
5 QUESTION: The appellate court.
6 MR. CUNNINGHAM: The appellate court affirmed.
7 QUESTION: Saying that it was a matter of discretion
8 and finding no fault with what the judge did or said.
9 MR. CUNNINGHAM: And the appellate court again
10 totally failed to apply any kind of balancing test at all.
11 They simply said that preclusion was one of the sanctions
12 permitted by the statute based on the flagrancy of the
13 violation, and we find no violation of the statute.
14 QUESTION: But in the appeal, counsel for your client
15 was not arguing for a balancing.
16 MR. CUNNINGHAM: I was the appeal counsel for my
17 client.
18 QUESTION: That just was not presented as a
19 compulsory process claim.
20 MR. CUNNINGHAM: Yes, it was, Your Honor. I argued
21 the case of Enoch v. Hartigan to the appellate court which is a
22 Sixth Amendment case. I argued Washington v. Texas, and
23 Chambers v. Mississippi. I argued People v. Rayford, which the
24 Solicitor General recognizes as a balancing test Sixth
25 Amendment case. I made all of those arguments to the appellate

1 court, Your Honor. It is in our briefs, and I orally argued
2 those arguments.
3 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Cunningham.
4 The case is submitted.
5 (Whereupon, at 2:46 p.m., the case in the
6 above-entitled matter was submitted.)
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1 REPORTER'S CERTIFICATE
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8 I hereby certify that the proceedings and evidence
9 are contained fully and accurately on the tapes and notes
10 reported by me at the hearing in the above case before the
11 Supreme Court of the United States.
12
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14 Date: October 14, 1987
15
16
17 Margaret Daly
Official Reporter
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