OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: WAYNE ESTELLE, WARDEN, Petitioner v. MARK OWEN McGUIRE

CASE NO: 90-1074

PLACE: Washington, D.C.

DATE: Wednesday, October 9, 1991

PAGES: 1 - 54

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IN THE SUPREME COURT OF THE UNITED STATES

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WAYNE ESTELLE, WARDEN, :

Petitioner, :

v. : No. 90-1074

MARK OWEN McGUIRE :

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Washington, D.C.

Wednesday, October 9, 1991

The above-entitled matter came on for oral argument before the Supreme Court of the United STates at 10:02 a.m.

APPEARANCES:

DANE R. GILLETTE, ESQ., Deputy Attorney General of California, San Francisco, California; on behalf of the Petitioner

ANN HARDGROVE VORIS, ESQ., San Francisco, California; on behalf of the Respondent

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P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in case No. 90-1074, Wayne Estelle v. Mark Owen McGuire.

Mr. Gillette.

ORAL ARGUMENT OF DANE R. GILLETTE

ON BEHALF OF PETITIONER

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

This case is before the Court on a writ of certiorari to the United States Court of Appeals for the Ninth Circuit. Like Coleman v. Thompson last term, this is a case about federalism.

Specifically, it deals with the extent to which a Federal court may review the admission of evidence in a State criminal trial pursuant to the due process clause of the Fourteenth Amendment.

Although this Court has long recognized that a defendant may be denied due process if his trial is not fundamentally fair, and has also noted that the test for evaluating fundamental fairness is less demanding than the beyond-a-reasonable-doubt test of Chapman v. California, it has not provided any specific guidance to assist the lower Federal courts in evaluating such cases.

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While we recognize, of course, that bright lines are difficult to draw in an area as amorphous as due process, we nevertheless believe that some more specific guidance can be provided, and that this case illustrates the need for precisely that type of guidance.

I want to touch very briefly upon a few of the facts in the case which will highlight what the Ninth Circuit did, and then turn to the two-part test which we propose, and discuss the reasons why we urge its adoption upon this Court.

Respondent in this case was convicted, in 1982, by a jury in Oakland, California, of second degree murder. The victim was his 6-month-old child, Tori. Tori was brought to the hospital emergency room on July 7, 1981, by respondent and his wife. She was pronounced dead 40 minutes later.

Testimony from the coroner and the pediatrician who examined her in the emergency room established that she had sustained significant injury as a result of a beating. There were contusions on her chest and abdomen, and there was massive damage to her internal organs.

Both of those witnesses were allowed to testify as experts that Tori was the victim of battered child syndrome. In support of that diagnosis, the experts were also allowed to refer to trauma apart from the injuries

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which had resulted or which had caused the death of the child -- specifically, two earlier injuries: a tearing wound to the rectum, and evidence of previously broken ribs, or fractured ribs. Neither -- that injury was not completely healed yet. Both of those injuries were at least several weeks old.

The diagnosis of battered child syndrome, as well as the admission of the priors as a part of the prior injuries, as a part of that, was admitted pursuant to long-standing and accepted California case law, permitting the battered child syndrome.

QUESTION: Mr. Gillette, now that evidence, the battered child syndrome evidence, is relevant for what purpose?

MR. GILLETTE: To establish, specifically, that this child's death was not an accident; that she was intentionally killed.

QUESTION: Was it used in this case for any other purpose?

MR. GILLETTE: It was offered for the purpose of proving that the death was intentional. There has been an argument made that the jury might have used it as a result --

QUESTION: It was offered as a means of linking the defendant with the injuries?

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MR. GILLETTE: No, Your Honor, battered child syndrome does not identify the perpetrator of the offense.

QUESTION: Well, I'm talking about what happened in this case.

What -- there was an instruction given by the trial court?

MR. GILLETTE: Yes, Your Honor, that's correct.

QUESTION: And that instruction, apparently, said that the evidence could be used to show that the defendant committed the crime charged?

MR. GILLETTE: The argument has been made that a jury might so interpret the instruction.

QUESTION: Well, isn't that what the instruction said?

MR. GILLETTE: The instruction referred to evidence of prior acts by the defendant.

QUESTION: It said evidence has been introduced for the purpose of showing that the defendant committed acts similar to those constituting a crime other than that for which he is on trial.

MR. GILLETTE: Yes, that's correct. And --

QUESTION: And what evidence was that? Did that encompass the battered child syndrome evidence?

MR. GILLETTE: Well, the battered child syndrome evidence -- there were -- in addition to that part of the

instruction, which Your Honor has read, and an -- admonition to the jury not to consider any of that as evidence of character, of disposition, they were told that there was three, specific purposes for which other crimes, or other acts evidence was proper in this case.

One was to impeach the testimony of the wife. The wife testified that she did it.

QUESTION: Did that evidence, referred to in the instruction, include the battered child syndrome evidence?

MR. GILLETTE: To the extent that it encompassed the prior injuries, I would suspect that it did. Because one of the bases that the --

QUESTION: Is to establish the battered child syndrome.

MR. GILLETTE: Correct, Your Honor.

QUESTION: And yet, the jury was told that it could be used to determine whether the defendant also committed the crime charged. And that does not seem to track what you say was the use, the relevance of the evidence.

MR. GILLETTE: Well, I agree that this instruction was not as clearly worded as perhaps it could have been.

It is -- it's also clear, though, that the jury was instructed that before they could use any evidence of

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prior acts, whether it was the assaults on the wife -- which came in to impeach her testimony -- or the evidence of observations by neighbors of his handle -- brutal handling of the child, or if it was the prior injuries, that they could only use that evidence if they found a clear connection between the prior acts and the crime in this case -- such that it would permit them to make a reasonable inference that having committed one, the defendant had committed the other.

QUESTION: Well, the California courts have acknowledged, haven't they, that this is an inevitable inference, if the defendant is one of the few people with custody of the child, and the child has a series of injuries over a period of time, it's almost inevitable that the jury will conclude that this defendant was either the prime suspect or the perpetrator.

MR. GILLETTE: It certainly may be a reasonable inference. In this case --

QUESTION: That's almost inescapable.

MR. GILLETTE: I think that's very often, often the case. And in this situation there were only two people who could have committed this crime. It was either the respondent, or it was his wife.

And in addition to the other testimony, there was also evidence presented by the -- through prior

statements of the wife, that on earlier occasions before the death of the child, she had observed bruises on the child. And when asked -- when the husband was asked, the respondent was asked about that, he hadn't of -- had no explanation to offer.

QUESTION: And I guess the stand -- the standard evidence calculus -- it's not necessarily constitutional law, but just as a matter of law of evidence -- is whether or not the permitted purpose for which the evidence is introduced dominates, despite its prejudicial effect in other respects.

MR. GILLETTE: Yes, Your Honor, that's correct. And we do not perceive that as being a constitutional issue. We see, really, a separation of the two parts of this case. The Ninth Circuit found that there was error in the admission of the battered child evidence, and of the prior acts, which were offered in support of it, specifically finding that that evidence came in in violation of California law. Clearly, that was an inappropriate determination for the Ninth Circuit to make. They had no business reevaluating California law.

California courts had held -- the California Court of Appeal, had specifically held that that evidence was admissible and proper under California law, and I think it must be accepted as a given, for purposes of this

case, that the battered child --

QUESTION: Whether they were right or wrong about that, in the end, they had to find that the admission of the evidence was unconstitutional.

MR. GILLETTE: Precisely, Your Honor.

In the long run, I think that it doesn't matter so much whether the California court was right or wrong. The question is, the evidence having come in, this evidence not being shown to violate any specific protection or guarantee of the Bill of Rights, can the defendant, nevertheless, establish that its use in this case denied him a fundamentally fair trial?

QUESTION: Well, the California -- to say that -- whether there -- you know -- it doesn't make any difference whether the California court was right or wrong. You know, there is no such thing as right or wrong, a State law and Federal habeas. If it doesn't violate the Constitution, it's no concern of the Federal habeas court, isn't that right?

MR. GILLETTE: That is precisely right, Your Honor. And when I say right or wrong, I don't think it matters whether the California court in this case had found that it was admissible under California law, or if it had found that it was inadmissible under California law.

And I want to talk about the -- primarily about the question of the admission of the evidence, and the extent to which the admission of evidence --

QUESTION: May I ask, though, does it make any difference whether the evidence was admitted for the purpose of proving the battered child syndrome, on the one hand; or for the purpose of proving that the defendant committed the earlier brutal acts, and therefore to give rise to the inference that he may also have committed the one for which he is being tried.

And that was the third part of the trial judge's instruction. Is that relevant at all, do you think?

MR. GILLETTE: For constitutional purposes, I think it makes no difference.

The first question is, was this evidence properly evidence. The second issue is --

QUESTION: Let's assume it was clearly properly admissible for the purpose of proving the battered child syndrome. Does it also mean it's properly admissible to connect the defendant with the prior acts? And I -- as I understand it, there's nothing in the record to connect him with the prior acts, other than the possibility he had custody of the child. But he wasn't the only one with custody of the child during those earlier times, was he?

MR. GILLETTE: I don't think that states a

constitutional issue, Your Honor. The extent to which the instruction may have permitted that, does not necessarily establish that had it been used by the jury for that purpose, that it would have resulted in a fundamentally unfair trial within the meaning of the due process clause.

QUESTION: Mr. Gillette, I take it that in a trial in which the defendant is charged with the -- killing this child, the State offers evidence for the purpose of trying to persuade the jury that he's guilty. And that would include the evidence of the battered child syndrome, would it not?

MR. GILLETTE: Precisely.

QUESTION: To narrow the -- as you suggest -- narrow the possibility to someone who intentionally did it to the child, rather than accident.

MR. GILLETTE: That's correct. And the battered child syndrome does have added significance with respect to who did it in this case. Because very often, a part of that diagnosis, in addition to the observation of the actual injuries which the child has sustained, is evidence of an inconsistent or impossible explanation offered by a care-giver -- and we use that term advisedly -- as to how the child may have been injured.

In this case, on multiple occasions -- to his wife, to the emergency room nurse, to the police -- the

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defendant, the respondent in this case, insisted that Tori had fallen off of the couch. Yet the medical evidence demonstrate, persuasively, that there was no possibility that a fall by a 6-month-old child, whether it was sixteen inches, as the distance was measured from the couch to the carpeted floor in this case -- or even 16 feet -- could have resulted in that type of massive internal and external injuries.

In short, the battered child syndrome, in part, was supported by the fact the defendant gave a completely inconsistent and impossible explanation.

Now, that brings us back again to the question that I want to primarily discuss with the Court, if I may, for a few minutes -- and that is the issue of to what extent, and what is the process by which a Federal court should consider the issue of whether evidence came into the case in violation of due process, when there has been no showing of a specific violation of a guarantee of the Bill of Rights.

And we think that there is a two-part analysis, a very limited analysis that would be appropriate for the Federal court to undertake in a case of that sort.

The first question the Federal court should ask is was it relevant? If it was relevant, we submit that due process has been satisfied.

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If it was not relevant, the next step for the court to determine, the Federal court, is was it inflammatory? And to determine whether the evidence was inflammatory, we submit as appropriate the test which this Court has used in other situations for evaluating due process violations -- specifically, whether there is a reasonable probability that had this evidence been excluded, there would have been a different result in this case. From by a reasonable --

QUESTION: Mr. Gillette, the only problem I have, is how it -- how we should view the case in light of this misleading instruction. I mean, I can follow your argument that the evidence was admissible as a matter of State law, and that it's relevant to show that the prior injuries were not accidental, and that this was not either.

But how can we justify the instruction that tried -- said the jury could use it to link the defendant with the prior acts --

MR. GILLETTE: Because --

QUESTION: -- and this act?

MR. GILLETTE: I'm sorry. Because I think that you need to separate it into two, separate issues. I think the first, primary constitutional issue was, was this evidence even admissible by due process?

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QUESTION: Let's say we agree with you, that far. Now don't we also have to look, in this case, at the instruction to see how it was used?

MR. GILLETTE: You look to the instruction, but you're looking for something different in that situation. You're looking -- and I think appropriately you would use the test the Court stated in Boyde v. California. Is there a reasonable likelihood that the jury was misled in a way that would allow them to use this evidence in some unconstitutional or inappropriate manner? And it has to be a violation of the Constitution, in the way that it was used.

Now, if the jury were to consider this evidence as evidence directly of guilt, that they conclude that the defendant committed those two prior injuries, and as a result they're convinced that he committed the murder with which he was charged, in order to do that, under the instruction in this case, they have to find a clear connection between the prior injuries and the injuries that resulted in the child's death.

I think that's an important point to emphasize, because the Ninth Circuit consistently has misquoted that instruction, by leaving out the requirement that the connection be clear. I do not think due process is -- is violated if a defendant's conviction is based upon part on

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the use of evidence from a jury which -- in which they found a clear connection between prior acts and the acts that were specifically charged, so that they can reasonably conclude the defendant must have committed them.

Now, there is one other possible use that has been suggested, that would be inappropriate for the jury in this particular case, given this instruction. And that would be to establish the defendant had some general, criminal disposition that he was just basically a real bad guy. And as a result, his character was such that the jury should convict him alone on that evidence has been suggested in one of the amici brief in support of respondent, that reaching that conclusion or an instruction permitting that inference would violate the due process clause of the Fourteenth Amendment.

The problem, however, is that this is not a case in which even if the jury drew an inference of character, it would be drawing an inference of general character or disposition.

QUESTION: Well, what do you say about the amicus proposition? Could there be an instance -- suppose there's an instruction that ladies and gentlemen of the jury, common sense might tell you that if this defendant committed a murder a year ago, he probably committed the

one this year for which he's now on trial -- the grossest form of prior bad acts testimony. Is that a violation of the Constitution?

MR. GILLETTE: I don't be --

QUESTION: Because it's not inflammatory. Your test is whether or not it's inflammatory. It's maybe prejudicial and takes away the burden of proof that should belong to the Government and so forth, so forth. It's not inflammatory.

MR. GILLETTE: Well, our test, with respect to inflammatory, is first that the evidence has to be found to be irrelevant before you get to the issue of it being inflammatory.

With respect to the instruction, that's a somewhat different issue. If it were admitted solely on that ground, we think that it would be relevant, and that would be the end of the inquiry as far as due process was required.

We do not believe that the Fourteenth Amendment -- based on any cases which this Court has decided -- establishes that general character evidence would violate due process.

QUESTION: Excuse me, why would it be irrelevant? Why would it be irrelevant? Something is relevant if it tends to show that it's -- if it is a fact

that makes it more likely that another fact exists or not? And you don't think it's more likely that somebody who murdered a year ago is guilty of this -- you don't think that a person who murdered before is more likely than the average citizen who has never murdered, to have -- to murder again?

MR. GILLETTE: I'm sorry, Your Honor. I may have misspoken. I do not think that would be irrelevant. I think that would be.

What I was suggesting is that once the Federal court had determined that it was relevant, constitutionally --

QUESTION: That's the end of it.

MR. GILLETTE: That would be the end of the discussion for their purposes.

QUESTION: But you agree, don't you, that the issue of whether it is relevant constitutionally includes the issue, or must include the issue whether there is a foundation in other evidence to tie potentially relevant evidence to this specific defendant?

In other words, you're using relevance, I assume, in a broad sense, including foundational evidence.

MR. GILLETTE: We are using relevance, Your Honor, in the very broad sense that this Court used it in New Jersey v. TLO, in which it suggested that evidence is

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universally recognized as relevant if it has a tendency to prove any fact of consequence to the action that is being tried.

QUESTION: But the tense is important there. If it does have that tendency -- and evidence does have that tendency only if there is, in the usual case, a foundation connecting that evidence to this particular defendant. Any piece of evidence, I supposed, theoretically can be relevant. But it may not, in fact, be relevant in the case because there's nothing tying it to the proposition that you've got to prove, nothing tying it to this defendant.

And so that's why I asked the question. When you say it's got to be relevant, I assume you mean there has got to be a foundation for its -- to demonstrate its relevance.

MR. GILLETTE: Certainly its relevance to the particular action that's on trial. For example --

QUESTION: So that in this particular case, if there is a -- nothing more than a 50/50 chance that at the time of the prior injuries it was the defendant rather than the wife who had the custody, would you say that this was -- that the -- that the syndrome evidence was relevant based on that foundation?

MR. GILLETTE: I wouldn't even go that far, Your

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Honor. Because I think the Syndrome evidence is admissible right from the start, in any case in which -- whether it's a murder, or it's a child abuse --

QUESTION: Well, then you were saying, I think, that the evidence is relevant, regardless, for your -- for your constitutional test. The evidence is relevant regardless of the foundation which may tie that evidence to this particular defendant.

You're not saying -- do you really mean that?

MR. GILLETTE: What I'm saying is I think this evidence would always be relevant to prove that in a case where the prosecution must establish that the child was intentionally injured or killed -- and in this case, the prosecution, to establish second degree murder under California law had to prove an intent to kill -- that evidence of the battered child syndrome would assist the prosecution in making that point.

It wouldn't matter who actually committed the crime. Because neither of the experts -- the pathologist, nor the pediatrician who had examined the child in the emergency room -- testified as to who did it.

QUESTION: Well, I think then that you're saying that your concept of relevance does not include the kind of foundational requirement that I'm talking about.

MR. GILLETTE: It may not, as to -- it --

QUESTION: And it does not in this case, I think you're saying.

MR. GILLETTE: To be foundational in this case, would not require linking to a particular defendant. It requires showing that it has relevance to proving a fact in this case. The fact in this case was the intent to kill. And it was certainly relevant to prove that point.

QUESTION: May I just clarify one thing in my own thinking?

Assuming that the battered trial -- the evidence you seek to introduce is three prior acts of violence to the child that are provable by medical evidence and you can establish the dates when they took place. That would be admissible, as I understand your theory -- and I think I agree with you -- regardless of whether you tie that to the particular defendant?

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

QUESTION: And it would still be admissible if, after it goes in, the defendant proves that he was in Europe, or something like that, at the time of the earlier incidents, and therefore could not have committed those acts. It would still be admissible, wouldn't it?

MR. GILLETTE: Yes, it would, Your Honor.

QUESTION: So it would -- but it would not be admissible for the purpose of proving that the defendant

committed the prior acts, unless you had some evidence that the defendant had the opportunity, and all the rest.

MR. GILLETTE: Yeah --

QUESTION: My problem with this case is, in this case, the trial judge seems to have told the jury that those prior acts were offenses for which the defendant was responsible. And I don't know what the evidentiary foundation for that instruction was.

MR. GILLETTE: Well, I think that -- the problem is, that the trial judge was not as careful in the wording of this instruction.

QUESTION: Well, the question is whether he made such a bad instruction that it may have tainted the verdict.

MR. GILLETTE: And my submission to you, Your Honor, is that it did not.

QUESTION: Did not.

MR. GILLETTE: There is no reasonable likelihood.

QUESTION: Do you think it would have if he had said to him, the evidence in this case shows that the defendant committed these prior acts, and you may infer from that -- that evidence, that he also committed this act.

Would that have been an unconstitutional

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instruction, do you think?

MR. GILLETTE: I don't think that would raise a Federal constitutional violation, no, Your Honor.

I think it's important to emphasize, as I started to a moment ago, to -- to the extent we are talking about disposition evidence in this case and whether it's a demonstration of bad character, this is not a general disposition case. And that is why I think that ultimately the argument with respect to the Fourteenth Amendment analysis by the amici is really not necessarily relevant to this case.

At most, what the evidence of the prior injuries showed was that if there was a linkage, this particular defendant had a disposition or tendency to mistreat this particular victim. This was specific disposition evidence. It went to the relationship between this defendant and this victim.

And the California courts have drawn a very clear distinction between that type of specific disposition relating to the relationship between the victim and the defendant, as opposed to some general type of character evidence.

QUESTION: Well, this instruction starts out by saying evidence has been introduced for the purpose of showing that the defendant committed acts similar to those

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constituting a crime other than that for which he was on trial. And he says, such evidence, if believed --

MR. GILLETTE: Precisely.

QUESTION: -- may be used for da, da, da, da.

So I suppose the jury had to consider, under this instruction, whether there was enough evidence to believe that the defendant committed these prior acts.

MR. GILLETTE: Well, they would have to believe it, that's correct. That's another part of it, Your Honor.

QUESTION: Yes.

MR. GILLETTE: They were told they couldn't use it for general disposition. They had to believe it. They had to find a clear connection, before they could use it.

QUESTION: They had to -- they had to believe that the -- under this instruction -- that he committed these prior acts.

MR. GILLETTE: That is also correct. The instruction does require it. It's somewhat specific in that regard.

The --

QUESTION: But that's quite -- but that would not have been necessary if it had merely been offered for the purpose of proving battered child syndrome.

QUESTION: Exactly.

MR. GILLETTE: Yes, that's true.

QUESTION: And so this is a -- this is a -- this goes beyond -- this makes it harder to use this evidence than if you were just offering battered child evidence.

MR. GILLETTE: Perhaps. It certainly -- the instruction could have been more carefully worded. I don't disagree with that. And to the extent that it was not as carefully worded as it perhaps should have been, there's a potential that a jury may have misunderstood.

QUESTION: No, but this is more favorable to the defendant than --

MR. GILLETTE: It could have that -- it could have that effect.

QUESTION: -- than just offering -- you could have gotten in this battered child evidence without requiring proof of the defendant's connection with the prior acts?

MR. GILLETTE: Correct, Your Honor, certainly that's the --

QUESTION: Well, there was no proof of the defendant's connection with the prior acts, was there?

QUESTION: Well --

QUESTION: Other than the fact he carried the child by one arm, at one time, and pinched her cheeks. And those had nothing to do with the serious injuries that

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are the subject of this evidence.

MR. GILLETTE: Well, they --

QUESTION: Am I wrong on that?

MR. GILLETTE: No, you're not wrong about that. They certainly were not the events which led to the child's death.

QUESTION: But the instruction says evidence has been introduced for the purpose of showing that the defendant committed those prior acts.

MR. GILLETTE: Yes.

QUESTION: And that you have to believe that -- unless the jury believed that evidence -- believed that the defendant committed that -- committed those crimes, the evidence shouldn't have been used by them at all.

MR. GILLETTE: That is true. They may well have been precluded from using it in any way.

And the problem I think the court got into was trying to take three very separate types of what may be loosely termed prior-act evidence and putting them all together into a single instruction --

QUESTION: Mr. Gillette, what was the evidence referred to in the instruction that had been introduced for the purpose of showing the defendant committed acts similar to those constituting the crime?

MR. GILLETTE: There was -- I'm sorry.

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QUESTION: Exactly what was that evidence?

MR. GILLETTE: There were three types of evidence which, I believe, were governed by this instruction: one was the prior acts that we've been talking about.

QUESTION: What prior acts?

MR. GILLETTE: The prior injuries to the child.

QUESTION: The injuries to the child, the battered syndrome evidence.

MR. GILLETTE: The two injuries which were not a part of the fatal injuries, yes.

QUESTION: Yes.

MR. GILLETTE: That was one part of it.

QUESTION: Yes.

MR. GILLETTE: And that probably should have been separated out, but it wasn't.

The second type of prior injury evidence was testimony that the defendant had been brutal in his treatment of the wife, and that she had previously complained about his treatment of her, and had sought assistance -- information on a battered wife's shelter. That evidence had been offered to impeach her testimony that she was not afraid of the defendant.

And then the third type was the evidence of the -- specifically, of the mishandling, the very brutal,

mishandling of the child, that had --

QUESTION: The pinching, and the holding by the arm?

MR. GILLETTE: Correct, as well as Mrs. McGuire's statement to friends that she was very concerned about the -- respondent's mistreatment of the child.

QUESTION: And so this instruction covers all those things?

MR. GILLETTE: That is correct. And it has the three sub-parts to it: to impeach Mrs. McGuire, to establish battered child syndrome, and then the clear connection to establish its connection.

QUESTION: And also other -- I mean, it was also shown, was it not, that he was one of only two people who had general custody of this child?

MR. GILLETTE: That's true. And more importantly --

QUESTION: Now that's not enough to, alone, establish that he was guilty. But it is certainly highly probative evidence, which, together with other evidence, would prove it.

MR. GILLETTE: Absolutely, and that other evidence included not just that he was only one of two people who could do it, he was the only person who could have committed this crime. Because he had -- and it was

uncontradicted -- sole, and exclusive custody of the child for at least a 10-minute period prior to her death. And the medical testimony established that that child's death had to occur within a very short time of the infliction of the injuries.

QUESTION: So that might have been -- it might have been smarter not to even introduce the prior evidence -- evidence of prior injuries.

MR. GILLETTE: Except, Your Honor, that --

QUESTION: If you knew you were going to get into this kind of trouble.

(Laughter.)

MR. GILLETTE: If we had known 9 years ago, I'm not sure that that all would have happened.

But that is considered a legitimate part -- in every court which has considered the issue of battered child syndrome, because all those previous injuries tend to show the pattern that this child's -- what happened to this child in this case was a result of a pattern of mistreatment, and that her death could not have been accidental, that she was intentionally killed. And the prosecution had to prove that to the jury beyond a reasonable doubt.

Now, in addition to the other evidence we've discussed, and the fact that he had sole custody, we also

have the confrontation between Mrs. McGuire and the respondent in the emergency room after the child has been brought in. And Mrs. McGuire, while Tori is being treated in the emergency room, asks the respondent, point blank, what happened to Tori? And his response was, she fell off the couch. And she -- Mrs. McGuire asks him again, and he repeats the same explanation, she fell off the couch.

And finally she says to him, you are responsible. And the respondent says nothing. Now, that failure to respond to her accusation was proper evidence, in California, of a silent adoption of that accusation -- consciousness of guilt.

QUESTION: Well, if the jury didn't believe that the defendant committed these prior acts -- why there's certainly the admission of this evidence didn't hurt anybody. And then the question is, was there enough other evidence to convict?

MR. GILLETTE: Yes, Your Honor.

QUESTION: And I doubt if any of them would say there wasn't.

MR. GILLETTE: There certainly was other evidence.

QUESTION: And if the defendant -- if the jury did believe that he committed these prior acts, I suppose there might be a question of whether there was enough

evidence to sustain that conclusion. But it sounds to me like there probably was.

MR. GILLETTE: And I would submit that even if there was not, that evidence was not so inflammatory, given the overall case, that there's a reasonable probability. That had it been excluded, or had the jury not been allowed to consider it in that way, that it would have led to a different or more favorable result for the respondent.

Simply put, in our view, the Ninth Circuit erred in this case. The defendant was -- the respondent was not denied a fundamentally fair trial.

QUESTION: Would you allow us to substitute the word prejudicial for inflammatory?

MR. GILLETTE: I have no objection, Your Honor.

QUESTION: Well, I mean, would that accord with your theory?

MR. GILLETTE: We use inflammatory based on language in this Court's decision in Moore v. Illinois that admission of evidence which did not violate State law, did not violate due process.

QUESTION: Well, this is gruesome evidence, usually --

MR. GILLETTE: That it was not irrelevant --

QUESTION: Here the question is super-relevancy,

which makes it more probative -- so probative that the rest of the trial is obscured, isn't it?

MR. GILLETTE: That would ultimately be the determination.

Thank you, Your Honor.

QUESTION: Thank you, Mr. Gillette.

Ms. Voris, we'll hear from you now.

ORAL ARGUMENT OF ANN HARDGROVE VORIS

ON BEHALF OF THE RESPONDENT

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

The Ninth Circuit said that the aggregate effect of the admittance of irrelevant, highly prejudicial evidence, compounded by the trial court's instruction to use that evidence in the most prejudicial manner possible, rendered the trial arbitrary and fundamentally unfair.

Mark McGuire was denied due process of law by the use of the prior injury evidence, coupled with a jury instruction which gave maximum prejudicial effect, rather than a limiting effect.

The Attorney General has suggested a test which requires that we first look at the relevance and then at the prejudice.

The first point which I would like to make is that the battered child syndrome evidence -- the battered

child syndrome could have been proven without the prior injuries, at all. The battered child syndrome can be, and Dr. Levine testified, that the battered child syndrome could be proven with the acts which took place which killed the child.

None the -- so, I'm not sure that even on the threshold test of relevance, that this evidence passes the threshold test.

QUESTION: Well, Ms. Voris, suppose that the trial court had told the jury that they could only consider the evidence of battered child syndrome as tending to show that the child did not die accidentally, and the jury was so instructed, would you still be here arguing that is unconstitutional?

MS. VORIS: I do not believe so. In fact, Justice O'Connor, the defendants proposed a jury instruction at the time, which stated that evidence of prior injuries have -- has been introduced for the purpose of showing that Tori -- Tori McGuire suffered from the battered child syndrome. Such evidence, if believed, was not received, and may not be considered by you to prove that defendant is a person of bad character, or that he has a disposition to commit crimes. Such evidence was received, and may be considered by you only for the limited purpose of determining if it tends to show the

injuries suffered by Tori McGuire, July 7, 1981, were not accidental. That was the defendant's proposed jury instruction.

QUESTION: Ms. Voris, why can't you use it to prove -- to prove the crime? Suppose a child has died from a punctured lung, the lung being punctured by a broken rib. And the prosecution introduced evidence -- introduces evidence that this defendant has been one of two custodians of a hundred other children over the past 2 years. And every one of those other children had broken ribs.

Are you saying that evidence could not be admitted?

MS. VORIS: No, I'm not. Under California law, that evidence can be admitted. Under Federal law, that evidence can be admitted. Battered child syndrome evidence is admissible.

QUESTION: No, no, this is no the same child. These are other children, other children, 100 other children. And it is not being introduced for showing battered -- battered child syndrome. It is being introduced to show, ladies and gentlemen of the jury, is it likely, is it likely that a hundred other children, within the custody of this defendant and one other person, should all have broken ribs, just as this child does? Why

isn't that relevant, and why shouldn't it be admissible?

MS. VORIS: Justice Scalia, that hypothetical tracks exactly United States v. Woods, wherein the Federal court stated that it was proper to admit battered child -- the evidence of her previous seven children. Mrs. Woods had all these children which died of sudden infant death syndrome, or various forms of strangulation. And finally when the court determined that all her previous children had died, then they were able to use that evidence for battered child syndrome purposes.

QUESTION: Well, why --

MS. VORIS: That --

QUESTION: Why isn't this evidence of the same sort? This child had had -- all of these -- child had these other injuries, and he was one of two people who had custody of her. It doesn't conclusively prove that he's guilty, but it's -- it's relevant evidence, which, together with other evidence, can help a jury to decide that he was.

MS. VORIS: First, because the murder, itself, was sufficient to prove the battered child syndrome; and second, because there was absolutely nothing tying him to these prior injuries.

There must be a foundational requirement.

QUESTION: He was one of two people, one of only

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two people who had continuing custody of her.

MS. VORIS: That's correct. And the other person testified on the stand that she committed not only the acts which led to the infant's death, but also the acts which were a part of the prior injuries.

QUESTION: It seems to me you're confusing conclusiveness with relevance. It can be relevant without being conclusive. It's just one of many pieces of evidence that lead to the conclusion. But it doesn't have to be conclusive to be admitted. Surely the fact that he was only one of two is something the jury ought to know.

Isn't it more likely that he caused those prior injuries, than that I did -- much more likely?

MS. VORIS: I believe, Your Honor, that that's precisely the reason that character evidence is excluded, and similar evidence is excluded without a foundation to be shown, because the inference to be drawn is so powerful.

QUESTION: So it isn't on the grounds of lack of relevance. It's perhaps that the relevance is too much, as you say?

MS. VORIS: Yes, it's as -- as Justice Kennedy used the term super-relevant. And as Justice Cardozo had said, the natural and inevitable tendency to give character evidence excessive weight, justifies

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condemnation to the jury, irrespective of the guilt on the present charge.

And in --

QUESTION: And how about -- are you calling prior bad acts evidence? Are you subsuming that under character evidence?

MS. VORIS: What I'm doing, Your Honor, is what happened here was --

QUESTION: Can you answer my question?

MS. VORIS: Yes.

QUESTION: You are classifying bad acts evidence as a form of character evidence?

MS. VORIS: Yes.

QUESTION: Do you think there is a prohibition in the Federal Constitution against using that sort of evidence to prove the likelihood of this particular defendant having committed the crime?

MS. VORIS: No, Mr. Chief Justice, my belief is that every single State of the Union, and every -- and the Federal system requires that there be an analysis of the evidence prior to its admission. And in this case, when the analysis was to be undertaken, the court was told and believed that no analysis was necessary. This position is still being taken, that this prior -- that battered child syndrome evidence is admissible, without any guidance

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regarding the characters in terms of similars.

Now, what happened in this case, was then an instruction was given, which took it from being battered child syndrome evidence to rebut an accident defense, and turned it into similars evidence, by means of a connection made by the instruction -- not by the evidence.

And what happened also is that intent and identity were provided not by evidence in this case, but by this instruction. And in so doing, the burden of proof was shifted, and the presumption of innocence was taken away.

When that happened, fundamental fairness was taken away, and due process was denied.

QUESTION: Well, how -- the trial court, I take it, charged that the burden of proof was on the State, did it not?

MS. VORIS: Yes.

QUESTION: So how was -- how was admission of this evidence change the burden of proof?

MS. VORIS: The way it did was that it -- it gave the jury permission to identify -- an argument was made that the evidence could -- some facts do double duty, it was argued. And so the -- the evidence was admitted for one purpose. And then it was used, through the means of the instruction, for an entirely different purpose, to

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establish his bad character.

QUESTION: Well, that -- that might be a misuse of evidence, perhaps, or a use -- as you say, fact -- but I don't say how that changes the burden of proof. The trial court clearly charged the jury where the burden of proof was.

Your analysis would make every -- almost every error in the admission of evidence, you would be a claim that there's been a shift in the burden of proof.

MS. VORIS: Oh, no, Your Honor. I do not believe that simply the admission of the evidence. It's the evidence, coupled with this erroneous jury instruction.

In --

QUESTION: Well, the jury instruction plainly said that they couldn't use this evidence of prior injuries to show bad character.

MS. VORIS: Well --

QUESTION: That's what it said.

MS. VORIS: At one point it said -- it did say that. But the rest of the instruction --

QUESTION: Or to prove that the defendant has a disposition to commit crimes.

MS. VORIS: That's correct, Your Honor. That portion of the instruction was in accordance with the

Constitution. That portion of the instruction was in accordance with California law.

The rest of the instruction negated that portion of the instruction which said -- that dealt with the disposition. And I'm referring to the instruction which is on page 6 of respondent's brief, which states that evidence has been introduced for the purpose of showing that defendant committed acts similar to those constituting a crime other than that for which he's on trial.

Now, that very first line designates the evidence as being similar, in advance. It was not introduced for the purposes of being similar evidence. It was introduced for the purposes of the battered child syndrome only and to negate a potential accident defense.

QUESTION: Well, don't you think under this -- these instructions, however, that the jury was told to use this evidence of prior injuries -- the jury had to find that the defendant committed these other offenses?

MS. VORIS: Yes, it not only told them that it had to find that he committed them --

QUESTION: No, no, not had to. Not had to. That the evidence could only be used if the jury found that the defendant committed these prior offenses.

MS. VORIS: I believe that it told them

both -- that it said, this is similar evidence, this is evidence of similar crimes. And it then went on to say that -- it was -- such evidence was received, and may be considered by you only for the limited purpose of determining if it tends to show three things: (1) the impeachment of Daisy McGuire's testimony that she had no cause to be afraid of the defendant; (2) to establish the battered child syndrome; and (3) also a clear connection between the other two offenses and the one of which the defendant is accused, so that it may be logically concluded that if the defendant committed --

QUESTION: If the defendant committed other offenses.

MS. VORIS: -- he also committed the crime charged in this case.

QUESTION: Well, the jury's going to have to find that the -- that the defendant committed the prior offenses.

MS. VORIS: Right, and the question here is why didn't the court use this particular instruction, proposed by the defense attorney, which said prior injuries. It specified them -- rather than --

QUESTION: But --

MS. VORIS: I'm sorry.

QUESTION: Ms. Voris, that might have been a

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preferable instruction, the one you tendered. But that doesn't render this conviction unconstitutional under the Federal Constitution, that the trial court chose between two instructions and chose one that was, perhaps, vaguer or less precise than the one you wanted.

MS. VORIS: That's correct. However, the problem with this instruction is that it says -- it refers to other offenses. Also included in here are the incident where he slapped his wife, the incident where he carried his baby by one arm. Those matters, those were introduced and argued by the prosecutor to prove the point that the violent person in this household was Mr. McGuire. You must --

QUESTION: Did you object to those instructions?

MS. VORIS: I'm sorry?

QUESTION: Did you object to that evidence?

MS. VORIS: Did the trial attorney object to the evidence?

MS. VORIS: Yes.

QUESTION: Of the pinching and carrying by the arm?

MS. VORIS: I believe so, although there was some discussion, which I did cite in my brief, that she acceded to the evidence regarding the pinched cheeks on the ground that she did not believe, and she understood

from the previous discussions, that that would not be associated with the prior injuries to the baby. So I cannot say unequivocally that she did object.

QUESTION: But in any event, your case is -- or it seems to me has to be -- that the jury was told that this evidence proved the acts. And that's quite different from saying that this is a question for the jury to determine.

And it seems to me that the fairest reading of part 3 of this instruction is that this is for the jury to determine. The word "if," as Justice White points out. There's a difference.

MS. VORIS: Except that the other offenses aren't identified. When you throw into an instruction evidence of prior violence and tell the jury that if you believe that he committed these other offenses, and they're not identified -- and in fact, there is reference to the impeachment of Daisy McGuire, in that he slapped his wife, and therefore she was intimidated, and therefore, that is therefore that is the reason that she testified that she committed the murder of her own baby and that she committed the other acts which were used against him -- and throw that in with the establishment of the battered child syndrome, and then tell the jury that it can make a clear connection between the other two

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offenses and the one of which the defendant is accused, so that it may be logically concluded that if the defendant committed other offenses, he also committed the crime charged in this case. The other offenses were not murder, and the other offenses are being used to conclusively tell the jury to -- to use the prior injuries to identify him as the perpetrator of the crime in this case.

QUESTION: Let's assume that's true, Ms. Voris, and you're right, that generally speaking, certainly in Federal court and most State courts I'm familiar with you don't let in evidence of prior character like that.

But let's assume we have a State that wants to do it. Why is it unconstitutional to do that? Why is it unconstitutional to say, look it, this person beat the child within an inch of its life on five other occasions. We think the jury should know that.

The prosecution can show on five previous occasions this person beat the child so severely the child almost died. Then the sixth time the child is brought in, the same kind of thing, and the child dies.

Does the Constitution require that this evidence of the prior behavior by this defendant be excluded? Why does the Constitution require it?

MS. VORIS: The Constitution requires that the hypothetical be, as you expressed it, that it be the prior

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behavior of the defendant, that it not just be some -- an act which took place at an unknown time, by an unknown person, in an unknown place, with no witnesses -- except a witness who said she did it -- and be used against the defendant in that case.

QUESTION: So you're saying it's not relevant enough, is that it? The proof of the prior -- the proof of the prior is -- behavior is not sufficient. Is that your objection? You needed more proof of the prior, of the prior character?

MS. VORIS: There must be some tie to the defendant.

QUESTION: Well, Justice Scalia's hypothetical did make that tie.

MS. VORIS: Right.

QUESTION: I'm frankly surprised at your answer. I thought you would have told Justice Scalia no, this can't be introduced. It's too probative. It's too prejudicial. We don't allow that in any State. But you seem now to be abandoning that and saying, oh, well, if it's not tied to the defendant -- that wasn't his question.

MS. VORIS: Well, maybe I misunderstood his question.

My understanding of the hypothetical -- and

correct me if I'm wrong -- was that you have five prior cases. Where -- and the cases -- there are a legion of cases where some -- where babies are brought in, and they've got bumps on their heads, and their fathers bring them in, and it happens time after time after time.

And finally, the baby dies, or some terrible neglect takes place. And there -- results in peritonitis. And yes, those injuries can be -- all the previous injuries, which are tied to the defendant, can be brought in to prove the battered child syndrome. They can be brought in when the person trips over the -- says he --

QUESTION: No, I'm not bringing it in to prove the battered child syndrome. I'm bringing it in to prove that this is the person who battered the child -- not that the -- just that the child was battered by somebody, intentionally. But that this was the person who battered the child intentionally. Because this person did it five times before, admittedly did it five times before.

And ladies and gentlemen of the jury, this was the sixth time. He is a person of that character. He's done it five times before. We think he did it the sixth time.

Now, as I -- it's my impression, although you seem to contradict it -- that most States and the Federal courts would not allow it to be used for that purpose.

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And maybe that's good, but I don't know that the Constitution requires that those States take that position.

And I would like you to tel me why the Constitution requires it.

MS. VORIS: Well, I believe that under 1101(b), and 404(b), both of the Evidence Code, if you have a modus operandi, if you have something that is an identifying trait of -- that the court can use, such as you're saying, you know, if the baby's been dropped on his head by this guy five previous times, that, yes, it can be used. No, there is not a constitutional mandate that says that evidence cannot be used. But it must be tied to the defendant. It must be tied -- there must -- there's a foundational requirement.

QUESTION: So you are saying that the evidence here was simply not relevant enough?

MS. VORIS: No.

QUESTION: That just being one of two people, in prior custody of the child does not sufficiently tie it to this defendant to enable it to be admitted, as a matter of constitutional law?

MS. VORIS: Well, I would not characterize it as being that it's not relevant enough. I would characterize it as -- that the certain requirements which must be taken

foundationally to make it similars evidence, which is what I hear you as talking about, those -- that was not -- that did not happen here.

QUESTION: If the evidence were that no one else had ever had custody of the child except the defendant, would that satisfy your requirement?

MS. VORIS: I don't know. I -- my -- I do still believe --

QUESTION: If the evidence were that no one else in the child's life had ever touched the child except the defendant, that would not suffice to -- for -- for your similars analysis?

MS. VORIS: Well, I still believe that under the similars analysis, the -- and we are -- we are discussing, actually, evidence questions here. Under the similars analysis, I do believe that there -- it must be similar.

I do not believe -- and in all of the battered child syndrome cases the evidence was --

QUESTION: So if we have five cases of a broken wrist, and this is a case of a broken rib, that would be the objection that you are now referring to?

MS. VORIS: Well, now, but if it's a case of a brutal beating versus a rectal tearing, which is the only purpose to bring it in is to inflame the jury and make them want to jump out of the box and grab this by -- this

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guy by the throat, then what you have is extreme fundamental due process error. It's not similars.

QUESTION: So it's the dissimilarity of the acts in this hypo that raise the error, as you put it, to the constitutional dimension.

MS. VORIS: I do not believe that the evidentiary error raises this to a constitutional level, except for the fact that there was nothing which tied him to it. There was no evidence about --

QUESTION: Well, there was evidence that he was one of two customary custodians.

MS. VORIS: There was evidence -- there was some evidence of that. There was some evidence also that he --

QUESTION: Well, how much more did they need? I mean, I -- of course there was some evidence. There was enough evidence to go to the jury, and the jury could reasonably find that he was one of two customary custodians. What more, do you say, would constitutionally be required for its admissibility?

MS. VORIS: I believe that some foundational evidence that perhaps he -- there was no evidence regarding these prior injuries, other than the fact that they happened. There was no evidence, really -- there was some evidence as to time. They were perhaps 5 to 8 weeks

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old. There was no evidence as to who the rib injuries were inflicted, other than that -- that -- there was no evidence as to that.

And there was -- the only evidence regarding the other injury -- the only eyewitness testimony was from Mrs. McGuire, who said that she did it herself.

I do not -- I don't believe that they're similar enough. However, I don't believe that that is the constitutional question here. The question here is, if the evidence -- this evidence was introduced for a particular purpose, and then the jury was instructed to use it as character evidence, and to use it for the most prejudicial purpose that it could --

QUESTION: The jury was instructed not to use it for character evidence.

MS. VORIS: Well, in so many words it was. It was specifically instructed to that. But the rest of the instruction said, use it.

QUESTION: Well, do you think without the -- your claimed error in instructions, that there would have been a denial of due process? The court of appeals seemed to think so, because there was no defense of accident. And so the -- and that the evidence only rebutted the lack of accident, only showed the lack of accident.

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And the court said that we must -- so that the probative value of the evidence was negligible, and its prejudicial nature very high. And so they had to draw a balance. And that the prejudice outweighed the probative value, and therefore a denial of due process. Is that -- do you defend that proposition?

MS. VORIS: Yes, I do. Because the initial -- in using Mr. Gillette's test of relevance, there was no initial reason to bring this in. They had established the battered child syndrome simply with the acts that took place in the murder.

QUESTION: So it was relevant evidence, admissible relevant evidence, but as it turned out, it was -- its probative value was negligible and its prejudicial impact great.

MS. VORIS: No, I do not concede that it was admissible relevant evidence. It was irrelevant to this, because, for example, the --

QUESTION: Well, at least the court -- the Eighth Court of Appeals seemed to think it had some limited probative value.

MS. VORIS: But, if you were to weigh it under at least California Evidence Code 352, the probative value versus the prejudicial effect, the prejudicial effect was monumental. And when coupled with --

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MS. VORIS: Well, do you think that's a constitutional requirement, the provision of California Evidence Code -- whatever number it is?

MS. VORIS: When it is coupled with a jury instruction which makes the -- permits the jury to make a connection that the evidence does not make, that makes it -- brings it to a constitutional dimension.

It makes --

QUESTION: Pardon -- I think I can rephrase what Justice White asked you.

Part of the Ninth Circuit's reasoning here, was that the evidence need not have been admitted because the defendant did not raise accident as a defense. I gather they thought maybe a defendant filed an answer to an information or indictment in California.

Do you subscribe to that view?

MS. VORIS: Yes, all previous cases under California and Federal law --

QUESTION: I meant as a principle of constitutional law.

MS. VORIS: I subscribe to the view that all previous cases, when they analyzed the evidence on a foundational level, required certain foundational matters. Those were not looked at in this case.

QUESTION: But --

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MS. VORIS: As to whether that, in its -- on its own is a denial of due process, I don't believe that it's necessary to look at that because when the jury instruction was coupled with it, it completely took it out of the realm of a fair trial.

QUESTION: Ms. Voris, can I a question that -- do you know if on the appeal in the State court, there was an error asserted with regard to the instruction? I know the evidence question was preserved, but was the instruction error preserved?

MS. VORIS: The instruction error was preserved. The court of appeal did not discuss it at all. And a petition for rehearing was filed, and the rehearing was denied.

QUESTION: But it was -- I say it was raised, even though not discussed in the --

MS. VORIS: Yes.

QUESTION: This was in the Court of Appeals of California?

MS. VORIS: That's correct.

QUESTION: I would submit to the Court that the conviction of Mark McGuire was based on unlawful evidence and was coupled with a prejudicial instruction, which denied him due process.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Ms. Voris. The case is submitted.

(Whereupon, at 11:01 a.m., the case in the above-entitled matter was submitted.)

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WAYNE ESTELLE, WARDEN, Petitioner v. MARK OWEN MCGUIRE

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

BY Lora M. May

(REPORTER)