OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: JERRY D. GILMORE, Petitioner v. KEVIN TAYLOR

CASE NO: 91-1738

PLACE: Washington, D.C.

DATE: Tuesday, March 2, 1993

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IN THE SUPREME COURT OF THE UNITED STATES

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JERRY D. GILMORE, :

Petitioner :

v. : No. 91-1738

KEVIN TAYLOR, :

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Washington, D.C.

Tuesday, March 2, 1993

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:59 p.m.

APPEARANCES:

MARK E. WILSON, ESQ., Assistant Attorney General of Illinois, Chicago, Illinois; on behalf of the Petitioner.

LAWRENCE C. MARSHALL, ESQ., Chicago, Illinois; on behalf of the Respondent.

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P R O C E E D I N G S

(12:59 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 91-1738, Jerry Gilmore v. Kevin Taylor.

Mr. Wilson.

ORAL ARGUMENT OF MARK E. WILSON

ON BEHALF OF THE PETITIONER

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

This is a habeas corpus case. Kevin Taylor's murder conviction became final almost 6 years ago, and he now asks this Court to upset his final conviction because he says a State law jury instruction error at his trial also violated the Due Process Clause of the Fourteenth Amendment.

The due process right that Taylor invokes in this Court is a right to present a defense. As he characterizes that right, it makes no difference whether or not the defense relates in any way to the elements of the charged crime.

Now, the issue in this case, of course, is not whether or not Taylor's theory of due process is correct or whether it is incorrect. The only issue is whether the Seventh Circuit misapplied Teague v. Lane below. And as the Court reaffirmed just a few weeks ago in Graham v.

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Collins, the question under Teague is whether a reasonable State court could have rejected that due process theory at the time the conviction became final.

Illinois believes that it was quite reasonable in 1987, as it is to this day, to believe that the right to present a defense is not nearly as expansive as Taylor describes it and that, therefore, this conviction did not, in fact, violate the Due Process Clause. Accordingly, Illinois asks the Court to reverse Kevin Taylor's conviction.

Now, as I mentioned, the question presented is whether Taylor invokes a new rule by claiming that his jury instructions violated his right to present a defense. I wish to first to -- I wish to first discuss the Teague new rule standard and then the reasonableness of Illinois' position that these instructions did not violate the Constitution.

If a State court decision --

QUESTION: May I just clarify one thing? You say you're going to argue that the instructions did not violate the Constitution?

MR. WILSON: I'm going to argue that Illinois' belief that the instructions do not violate the Constitution is reasonable under Teague.

QUESTION: But you acknowledged in the court of

appeals, as I understand it, that there was a constitutional violation.

MR. WILSON: We did, Your Honor, but as a factual matter, the reasonableness inquiry of Teague v. Lane is always wrapped up in the merits.

And Stringer v. Black I think is a good example of a case where the Court said that a -- an argument was unreasonable presented by the State, and that therefore the conviction actually did violate the Constitution. And the Court only addressed a Teague issue.

Saffle v. Parks. The only issue was whether the Teague new rule standard was met, and the Court said that the argument presented by the habeas petition was unreasonable. So, the reasonableness of a -- an argument is wrapped up within the merits itself.

QUESTION: At the time that the State argued this case in the Seventh Circuit, was there an outstanding Seventh Circuit case where it -- had Falconer been decided so that the constitutional question was not open in the Seventh Circuit?

MR. WILSON: Absolutely, Your Honor. And Illinois contested the -- Illinois argued in many cases that these instructions were, in fact, constitutional, and in fact, we argued in a series of cases the precise argument that we present to this Court as to why our

argument is reasonable. But the Seventh Circuit rejected it in so many cases, we didn't press it any further after getting some strong language by the Seventh Circuit.

QUESTION: When you argued that they were constitutional, did you also argue that they were substantively correct as a matter of criminal law, or did you concede that they were -- that they misstated the burden of proof, but that it was just not unconstitutional?

MR. WILSON: We conceded only that the Reddick decision, which was the Illinois Supreme Court decision that rejected these instructions under State law -- we conceded that, given Reddick, the instructions were invalid under State law. We certainly argued in favor of the instructions before the Illinois Supreme Court, but then it was an issue of State law after the Supreme Court of Illinois decided that case.

QUESTION: But Judge Flaum said that the State challenges neither the vitality of Reddick nor Falconer. So, I gather you did not challenge Falconer in the Seventh Circuit.

MR. WILSON: We didn't challenge Falconer, no. We challenged -- we only argued Teague --

QUESTION: You only argued the Teague point.

MR. WILSON: We argued Teague.

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The constitutionality of these instructions, Your Honors, was susceptible to debate among reasonable minds in 1987.

QUESTION: Excuse me, but you've left me with a little confusion. In arguing Teague, you are arguing that Falconer could reasonably have come out the other way.

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

I would suggest to the Court three reasons why these -- the constitutionality of the instructions was susceptible to debate.

First of all, these were pattern jury instructions. They had been in existence for 20 years before the Illinois Supreme Court struck them down under State law, and it took 22 years before the Seventh Circuit declared them unconstitutional under the Due Process Clause. And, for that matter, no other appellate court in Illinois had invalidated them before then either.

QUESTION: Can you summarize very briefly the reasoning of the Seventh Circuit's decision in Falconer?

MR. WILSON: Well, Your Honor, I believe that the decision in Falconer is confusing, and in fact, it confused the Seventh Circuit in a series of cases after --thereafter.

Parts of the Falconer decision suggest that the court believed that the instructions violated In re

Winship because of a burden of proof problem, and parts of Falconer suggest that the instructions effectively remove a defense from a defendant.

The Seventh Circuit, after it recognized that just because there was a burden of proof problem with relation to an affirmative defense -- after it realized that that really would not violate Winship, they essentially withdrew that part of the reasoning of Falconer.

The pattern instructions were written by a pattern instruction committee established by the Illinois Supreme Court composed of law professors, judges, and practitioners. The instructions were used in hundreds upon hundreds of cases, in the cases dealing with the most serious crime in Illinois, murder. And it seems extremely unlikely that these instructions were so obviously unconstitutional as to survive the Teague new rule standard, but at the same time no member of the criminal defense bar of the State of Illinois could convince a -- an appellate court of the unconstitutionality of the instructions for over 2 decades.

If there were any case from this Court --

QUESTION: Had they tried?

MR. WILSON: They most certainly did, Your Honor. And I would point Your Honor to People v. March,

which was an Illinois appellate court decision referred to in the Illinois Supreme Court's decision in People v. Flowers, as an example of how the Illinois appellate courts had been faced with constitutional challenges in the past, but had affirmed the constitutionality even given the precise argument that Taylor makes here, that essentially the instructions were wrong because they didn't clarify to the jury that it had to find the defendant not guilty of manslaughter before it found him guilty of murder. That was presented to the courts over and over again and that was why the Illinois Supreme Court said, well, if these are unconstitutional, they're unconstitutional under a new rule because no one knew why there were unconstitutional until --

QUESTION: Do you have the citation of People against March?

MR. WILSON: I don't have it in front of me, Your Honor.

QUESTION: I don't think you cite it in your brief. It wasn't cited in the brief, and I mention it only because it was cited in the People v. Flowers case.

QUESTION: Well, it might be -- you might have thought it was important to recite the cases that -- in which the defense bar tried to overturn these instructions without success.

MR. WILSON: In hindsight, Your Honor, I would have included --

QUESTION: Is that the only case?

MR. WILSON: That's the only case that I know of that specifically addressed a constitutional challenge, although the instructions were challenged in other cases, and I believe --

QUESTION: Well, have they been challenged on State law grounds?

MR. WILSON: Yes.

We did cite in our brief the series of cases after Reddick which disputed whether or not the instructions were constitutional. That --

QUESTION: You really couldn't grapple with the constitutional question until you grappled with the State law question, could you? I mean, the constitutional challenge would have been hard to mount before Reddick, wouldn't it?

MR. WILSON: I certainly believe that's right, Your Honor, because that is part and parcel of our argument that this is essentially a State law problem.

People v. Flowers, as I mentioned, was where the Illinois Supreme Court adopted Teague for purposes of State collateral review and found that these instructions were only unconstitutional under a new rule. The court I

think applied a very straightforward application of Teague v. Lane. It said based on the principles underlying Teague, predictability in the constitutional law, finality of State court judgments, that these pattern instructions couldn't violate the Constitution except by virtue of a new rule given that it upset an established State practice in Illinois.

A second reason, beyond the fact that these were pattern instructions, as to why these -- the constitutionality of these instructions was susceptible to debate is the line of Connecticut Supreme Court cases that we cited in our reply brief in response to citations by Taylor.

In that line of cases, the Connecticut Supreme Court, in a situation completely removed from this Illinois problem, of course, and in a completely different context, came to the same conclusion under the Due Process Clause that we are asserting in our case, and that is that the right to present a defense extends to elements of crimes, but not to affirmative defenses. And whether or not the Court would agree with that in a case on direct appeal, the fact of the matter is there was good reason to believe that was the law in the mid '80's and nothing since then has changed that.

Thirdly, the Seventh Circuit itself disputes the

constitutionality of these instructions. One judge below does not believe that these instructions are unconstitutional. And in two separate opinions, in the Cole v. Young case and in the Flowers case, Judge Easterbrook presented cogent arguments as to why there is a -- there are conflicting principles in the case law in this area, and he believes that one fair way to rationalize the cases is to say that instructions like these are constitutional. That to me is a quintessential example of how a constitutional rule would be new. People disputed the law in this area.

Taylor essentially asks this Court to declare that the unanimous Connecticut Supreme Court and the minority view within the Seventh Circuit is unreasonable given this Court's existing precedent. Illinois believes that this Court would radically transform the Teague new rule inquiry if it were to accept that reasoning because the right to present a defense case -- line of cases that Taylor relies upon are far too removed factually from the facts of this case to dictate the result that he sees.

It is quite true that there is a line of cases that explains that criminal defendants generally have a right to present a defense. There is also a line of cases, though, saying that States have the ability to adjudicate their own procedural errors with regard to

affirmative defenses.

Engle v. Isaac is the most important case in this regard. In that case, the instruction to the jury -- -instructions -- required the defendant to prove by a preponderance of the evidence that he acted in self-defense. The instructions were patently wrong under State law because under State law, the instructions should have told the government to disprove self-defense beyond a reasonable doubt, and the court held that the instructions did not violate the Due Process Clause simply because they related to an affirmative defense.

It would have been perfectly reasonable for an Illinois court -- an Illinois judge to pick up Engle v. Isaac and say, well, it seems like the Supreme Court has decided that affirmative defense jury instruction errors don't violate the Constitution, but jury instruction errors under -- in elements cases would.

QUESTION: Was it the same error in Engle as it was here? There it was a burden of proof problem, wasn't it?

MR. WILSON: That's correct, Your Honor, and that is certainly an arguable distinction.

The problem with that distinction, though, is that the error could well have been exactly the same. The unfairness to the defendant could just have been just the

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same in Engle as it was here, and the court's reasoning does not suggest that that distinction makes a difference in its reasoning. Presumably the court would have said, well, these instructions are unfair because the burden of proof is wrong, would have considered the most serious error -- the most serious unfairness to a defendant, and said, well, even in that case it still doesn't violate the Constitution. It's still not fundamentally unfair.

Whether or not that is true, of course -- whether or not the court would, in fact, hold that isn't really the question. The question is whether a judge could have read it that way, and courts had read it that way, in fact. And I think Judge Easterbrook's discussion in Cole v. Young is a good example of how --

QUESTION: Is it important or critical here that the defendant did not object to the instructions at the time?

MR. WILSON: Well, the fact that the defendant didn't object in a way makes it hard to apply the Teague v. Lane standard because you don't -- because there was actually, in fact, no decision on the merits issue. But it would be a strange rule, indeed, if the fact that the defendant didn't object could somehow get the defendant beyond the Teague new rule standard once it gets to habeas corpus.

I think -- and, in fact, I would point, Justice O'Connor, to Stringer v. Black as a case where the habeas petitioner had procedurally defaulted in the State courts. That was in the recitation of facts in Stringer, but the court still addressed the Teague new rule standard. So, the court has in the past faced a situation like this and has addressed the Teague new rule standard anyway.

This case, therefore, is very similar to Butler v. McKellar because in that case, the issue was whether Roberson v. Arizona was dictated by Edwards v. Arizona, and the court held no, it wasn't dictated because the result of Roberson was subject to dispute at the time. And the court pointed to the dissents within the court itself as to the outcome of Roberson. It pointed to the fact that there was a circuit dispute before Roberson was decided on that issue, and the same can be said here. There were judges, perfectly reasonable judges, who had reached opposite conclusions in the past, and it was -- thus, the result was susceptible to debate among reasonable minds.

And in sum, Your Honors, the Due Process Clause permits a certain level of serious error in State jury instructions before the Due Process Clause requires the court to strike them down as unconstitutional.

QUESTION: How much? What's the line? At what

point is there too much error? So long as the error says something which, if it had been State law, would be constitutional?

MR. WILSON: Well, we believe that the court has suggested that the line should be drawn at elements versus affirmative defenses. And if the State decides to charge someone with a crime, it has to prove -- it has -- a whole panoply of rights get instilled within the criminal trial with the criminal defendant concedes a certain level of criminal protection from the Bill of Rights.

But if the State decides to permit a defendant to plead and prove something that would mitigate his punishment, and if the Constitution doesn't require that affirmative defense in this case -- or perhaps it would be an aggravating factor or mitigating factor in the noncapital case. If the Constitution doesn't require those things in the first place, it's hard to see what the difference between Federal constitutional law and State law would be if the Court were to accept Kevin Taylor's argument.

QUESTION: Let me be sure I understand your point. Supposing there is an affirmative defense of self-defense, say, it's something like that, which the Constitution doesn't require, but the State law authorizes. Is your submission, if I understand you

correctly, that the court could properly instruct the jury not to consider self-defense and not violate the Constitution even though it's flatly in violation of State law?

MR. WILSON: If the court were -- Your Honor, I believe that the court has almost addressed that question already in Engle v. Isaac because the instructions may well have prevented the jury from considering self-defense.

QUESTION: No, I understand. But I do fairly state your position, do I?

MR. WILSON: That's correct. You do.

And I would simply emphasize that we are talking about Teague here, not a merits complaint.

Given the fact that there's no case directly on point and given the fact that there are mixed signals coming from the case law in this area, Illinois submits that the constitutionality of the instructions was susceptible to debate among reasonable minds, and we ask the Court to reverse.

Thank you.

QUESTION: Thank you, Mr. Wilson.

Mr. Marshall, we'll hear from you.

ORAL ARGUMENT OF LAWRENCE C. MARSHALL

ON BEHALF OF THE RESPONDENT

MR. MARSHALL: Chief Justice, Your Honors, may it please the Court:

At the outset, it's imperative to distinguish between two different issues that are floating around in this case.

On the one hand, there's the issue in Reddick in which the Illinois Supreme Court held, as a purely matter of State law, that Illinois must bear the burden of negating the affirmative defense of provocation. We do not rely in any sense on that right, and we concede that there was, in fact, a great deal of confusion prior to Reddick about that.

Now, the State has cited People v. March for the first time at this stage, and it's somewhat difficult to prepare a response to a case that's not cited in the briefs. But the discussion in People v. Flowers that they refers to demonstrates exactly this point. The court in Flowers says prior to this Court's ruling that the State has the burden to negate the voluntary manslaughter mental states, at least one panel had ruled that the State did not bear this burden. See People v. March. That has nothing to do with the claim before this Court today.

The claim before this Court today is that Kevin Taylor is more than delighted to bear the burden of showing that he was not a murderer but committed only

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voluntary manslaughter. He asks only for the opportunity to demonstrate that to the jury. Yet, every single court -- every single court -- that has been faced with these instructions has concluded that they were reasonably likely to lead the jury to believe that it should totally ignore the affirmative defense, wholly notwithstanding the question of who bears the burden, that the jury would read these instructions, go into the jury room, and say we've been told if he killed with the requisite intent, he's guilty of murder. Let's go home for dinner. It's over because they were never told to proceed to then discuss the issue of whether any affirmative defense applied.

QUESTION: Your claim, Mr. Marshall, does not then relate to the inability to adduce evidence at trial, but to the instructions that the jury was given for considering that evidence.

MR. MARSHALL: That's right, Your Honor, but the ability to adduce evidence is, of course, simply a means to an end of having the jury consider that evidence, and this Court has held that on numerous occasions.

QUESTION: What case from this Court would you say comes the closest to supporting the Seventh Circuit's decision in this case?

MR. MARSHALL: I would say that a whole line of cases, Your Honor, and on the nexus that the Chief Justice

just asked about, I would cite to Kuhl v. United States and the notion that --

QUESTION: Kuhl was the Federal case, was it not?

MR. MARSHALL: Which relied on due process, Your Honor, relied explicitly on Washington v. Texas, which was --

QUESTION: And it was unargued per curiam?

MR. MARSHALL: It was a per curiam, Your Honor, which suggests certainly how obvious the right to present the defense --

QUESTION: And also that it is not as reliable a precedent as an argued case.

MR. MARSHALL: No, Your Honor, but in Washington v. Texas, the Court similarly recognized that the Constitution does not commit the futile act of giving the defendant the right to call a witness only to have that witness' evidence be deemed inadmissible --

QUESTION: Did that involve jury instructions, Washington against Texas?

MR. MARSHALL: No, Your Honor.

QUESTION: Do you have any case from this Court on the issue of jury instructions that supports you?

MR. MARSHALL: Your Honor, the -- no. The cases that I have are stronger than that, and just as in

Stringer, the case here follows a fortiori from the cases that this Court has decided. From time immemorial, this Court has said in every context, be it elements, be it school issues in terms of terminations of schooling, terminations of parole, probation, driver's license, racing licenses, every single type of deprivation this Court has held when the State seeks to effectuate it, the bare necessity is an opportunity to be heard in a meaningful manner.

How can one suggest that there's an opportunity to be heard in a meaningful manner when one has the right to present the defense, to present the evidence, but then the jury is told ignore what you've just heard? It's irrelevant to the issue of murder. And every court who have considered this issue has concluded that that's exactly what happened functionally in this case.

QUESTION: What errors in jury instructions getting the State law wrong would not be a violation of the Federal Constitution?

MR. MARSHALL: Your Honor, we certainly do not suggest that every error of State law is tantamount to a violation.

QUESTION: Why not? I don't understand why not. If, indeed, given any State law, whether the law is required by the Constitution or not, you're entitled to

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have the jury or the fact finder consider it properly, I don't know why any error in jury instructions wouldn't give rise to a constitutional deprivation.

MR. MARSHALL: It might give rise to a constitutional claim. It would then be up to this Court, as is the case with any prosecutorial misstatement, for example, to decide whether the error so infected the proceeding, so deprived the defendant of a right to a fair trial, that it was tantamount to an arbitrary and wholesale deprivation of the right to present a defense.

QUESTION: But I don't see why a mistake in jury instructions would not always do that. By definition it's instructing the jury of what it must find in order to convict, and that will always -- it seems to me you're in that situation, and that's the problem.

What's the difference between, you know, mistakes that are constitutional, Federal constitutional, errors and just simply State court errors?

MR. MARSHALL: That is, of course, an issue that this Court has to deal with, obviously, with respect to elements of an offense on a daily basis and Federal courts have to, and it's a line-drawing issue. And this Court has set up standards to evaluate that.

In Cupp v. Naughten, the Court stressed that the court -- Federal courts need to look at these instructions

as a whole, not to dissect them. Certainly no one has accused us of dissecting these instructions. We're looking at them as a whole, and every court has said they deprived Kevin Taylor of the right to have his defense considered.

QUESTION: What about drawing the line between elements of the offense and affirmative defenses?

MR. MARSHALL: Your Honor, what that --

QUESTION: Isn't that -- can't we at least argue about that one as a possible --

MR. MARSHALL: No, I --

QUESTION: You can't even argue about it? It's not even arguable.

MR. MARSHALL: No, Your Honor, I don't think you can because what that would mean is on the whole range of deprivations that government seeks to effectuate, be it the criminal area, the civil area, as -- again, issues as marginal as drivers' licenses and the like, there one has this right to be heard in a meaningful manner.

But with respect to affirmative defenses -- and affirmative defenses aren't trivial. Affirmative defenses in Martin v. Ohio meant the difference between being a murderer, on the one hand, and walking free as someone who killed in self-defense on the other.

The State's notion, for which they rely on Judge

Easterbrook so heavily, is ultimately the argument of the bitter with the sweet, that because the State did not have to create affirmative defenses, the State is free to adjudicate them in any manner no matter how unfair, no matter how unconscionable, as it sees fit.

QUESTION: What about a statute of limitations? That could make the difference between life and death. I mean, suppose -- well, at least between many years in prison and no years in prison. Suppose the State makes a mistake as to whether the statute of limitations has expired, and the person is in jail. There's no doubt that it had expired, but he has been convicted. Is that a Federal constitutional violation?

MR. MARSHALL: And on appeal, the State supreme court would hold in that case that the instruction was appropriate?

QUESTION: No, no. It's clear that the instruction was error. It's clear that the instruction was error under State law.

MR. MARSHALL: Well, then first of all, ostensibly the State court would give relief under normal circumstances.

QUESTION: No, they haven't though.

MR. MARSHALL: But they haven't. At a certain point, Your Honor -- at a certain point when the

misstatement of State law becomes so arbitrary and so grievous that it necessarily falls upon this Court to make a determination that there has been a violation of due process of law. There has been a singling out. In that case perhaps it may be argued, indeed, on some sort of equal protection grounds, but that's not our case here, Your Honor.

QUESTION: Well, Mr. Marshall, last term we held in Estelle against McGuire that errors of State law did not give rise to a Federal constitutional claim on habeas corpus.

MR. MARSHALL: Your Honor, Estelle v. McGuire is a very important case I believe. Number one, Estelle v. McGuire did not engage in any sort of Teague v. Lane analysis. The Court recognized that the fundamental fairness inquiry, the right to have a fair trial, is the type of right which is well-known and well-established and doesn't give rise to this kind of new rule type of analysis.

Second of all, Your Honors recognize most certainly that at a certain point the area of unfairness has to be quite extreme. It is not the type of challenge that anyone can make simply based on a notion there has been a minor error of State law.

QUESTION: But the case didn't say minor error

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of State law, Mr. Marshall.

MR. MARSHALL: Your Honor, the case said we have defined the category of infractions that violate fundamental fairness very narrowly. Beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation. We come, first of all, directly within that narrow operation.

It is difficult to conceive of a more fundamental violation of due process of law than having a defendant present his evidence saying, yes, I killed Scott Siniscalchi. I did so because I acted under sudden and intense passion, and then have the trial court say ah-ha to the jury. Don't consider that. If you find that he did the act, convict him of murder.

So, the court did not throw out the notion of fundamental fairness. It simply said it's a limited area.

This is not a case like Estelle v. McGuire dealing with the introduction of evidence about prior abuse and a judgment call, was it fair, was it unfair, was it relevant, was it irrelevant. This is a case about a fundamental right which I would submit, based on the other aspect or prong, so to speak, of what Estelle said, really does cut indirectly to a specific guarantee enumerated in the Bill of Rights.

QUESTION: Well, I suppose we have to take the

case on your submission for analytic purposes. Of course, the trial judge didn't say that even in this case. There were three counts, murder, invasion of the home, and manslaughter, and the jury came back and its verdict said, number one, invasion of the home, number two, murder, which indicates to me that they did proceed from the bottom up.

We'll -- I'll take your case on the assumption that you give it to us, but I just point out that that is something of a stretch from what, in fact, happened at this trial.

MR. MARSHALL: Your Honor, I'm not sure it's such a stretch, and I refer the Court to pages 139 and 140, the last two pages of the joint appendix, where although the court -- the jury had signed the verdicts on murder and on home invasion, it totally left the verdicts blank with reference to voluntary manslaughter.

Now, if the jury had looked at voluntary manslaughter and decided, hmm, we don't think he acted under sudden and intense passion, then most certainly they would have had to find him, under the instruction, not guilty of voluntary manslaughter since that was, in fact, an element of voluntary manslaughter. It was a defense to murder. The jury wasn't told that. But it should have been an element and it was an element of voluntary

manslaughter. So, to the extent that we know anything about this jury, what we know from the forms is that apparently the jury did, in fact, ignore that.

And again, the State has conceded that there's a reasonable likelihood under the appropriate test that this jury convicted Kevin Taylor and never considered his defenses. The State's only claim is --

QUESTION: Mr. Marshall, is that your test? If there is an error of State law which was likely to have affected the outcome.

MR. MARSHALL: No, Your Honor.

QUESTION: That is not.

MR. MARSHALL: Let me --

QUESTION: I just don't like being at sea. I mean, I think we have to have -- how do you limit the number of State errors that we consider? Why wouldn't that be a proper one if it is likely to have affected the conviction?

MR. MARSHALL: Let me be cautious in my use of the word likely. In Boyde v. California, the Court dealt with a methodology of examining instructions and said what do we do with instructions where it's not clear how the jury might have understood them. At some times the Court in Francis v. Franklin, for example, said could a jury have misunderstood this. In this case, for example, could

a jury have gone in and not considered the defense at all?

So, we're dealing here with the question of might a jury have totally ignored. This is a statistical question about a jury totally ignoring, not a question about, well, how much did the jury ignore. If the instruction is read in the way that the Seventh Circuit, the district court, the Illinois Supreme Court read it, we are dealing with a reasonable likelihood, which is the test for examining instructions, that the jury went back at 3:50 p.m., got the instructions 15 or 20 minutes later, and then within the hour came back without ever thinking that it was supposed to look at the question of whether Kevin Taylor's affirmative defense was satisfied. Now, could any reasonable jurist in 1987 think that that comported with due process?

The State's only argument is that it didn't know that affirmative defenses were subject. It thought that the trial judge could give affirmative defense instructions in Portuguese, knowing full well that the jury didn't understand them, but that the Federal Constitution would have nothing to say about that, Your Honors.

Of course, the State's argument proves much too much because elements too are the products and creations of State law. The Constitution doesn't require the State

to make certain aspects elements of offenses. So, according to the State, not only would affirmative defenses be immune, but elements too should be immune unless they're that somehow -- and Justice Scalia was referring to judgment calls -- somehow part of this notion of core elements that the Constitution requires a State to make part of its criminal law. That is not the methodology this Court has used since Goldberg v. Kelly and well before that in adjudicating the issue of due process.

As Justice White wrote in 1985 -- and it wasn't new in '85, and it certainly wasn't new in '87 -- if a clearer statement is needed, we provide it today. And that's ironic language in view of the Teague v. Lane issue which looks to clear statements.

The State's argument that it didn't know that due process applied to affirmative defenses is about as persuasive as an argument that it didn't know in 1987 that the First Amendment applied to the States.

QUESTION: You think Engle against Isaac bears on this case somewhat?

MR. MARSHALL: No, Your Honor. Well, Engle v. Isaac bears upon this case in the sense that it makes the Reddick error unavailable as a matter of Federal constitutional law.

Engle v. Isaac was a case where the defendant claimed or the petitioner for habeas corpus, I should say, claimed that he had a right to have the State negate the affirmative defense. In other words, he wasn't claiming that the substantive entitlement to an affirmative defense triggered due process. He was claiming further that every procedural element that State law added on further then became an issue of Federal constitutional law.

And nothing could be clearer from this Court's cases than the notions are distinct. Substance necessarily must be defined by Federal -- by State law. State law creates entitlements in the criminal law through elements and affirmative defenses, as it does in the civil law.

On the other hand, the mere fact that the State adds an additional procedure and goes beyond what due process would require as a matter of Federal process does not mean that procedures then become sort of piggy-backed on to where every State procedure now becomes a substantive entitlement. The notions are distinct.

And here -- and I can't repeat this or emphasize it too much -- no one is relying on any State procedural rule, as was the case in Engle v. Isaac. We are relying simply on the legislators' determination through a statute that when Kevin Taylor killed under sudden and intense

passion, and a jury is yet -- at least there's a reasonable likelihood that a jury has yet to decide that issue -- that he may be sentenced only up to 15 years. He is not eligible for a 40-year sentence. He is not eligible for the death sentence as a murderer, although, of course, that didn't happen here.

And the State's lone argument is not, well, we didn't know that these instructions were bad, although I do need to correct something about that, Your Honor.

First of all, the State has, throughout its brief, talked about 22 years of these instructions being out there, and I really don't know where that figure comes from. These instructions, these pattern instructions, were promulgated for the very first time in 1981. Prior to 1981, the instructions were rather clear in articulating the difference between the affirmative defense and the elements of the offense vis-a-vis murder.

QUESTION: Mr. Marshall, suppose I believe, as Judge Easterbrook believes in his separate opinion here, that Reddick as a constitutional matter could have come out the other way, that it was just a State decision regarding State law, that the Illinois Supreme Court said this is what power, scheme, means under State law. The -- it could mean something quite different which would have rendered the instructions okay. Suppose I believe that.

Then would I not have a --

MR. MARSHALL: If the State --

QUESTION: Your client wouldn't have a claim here.

MR. MARSHALL: If the State defined its substantive entitlement in a way that made my client unentitled to it, then to be sure, elements and affirmative defenses, property and liberty is all had at the behest of the State.

QUESTION: But how did we know that before Reddick?

MR. MARSHALL: Your Honor, we knew that from a clear statute. I mean, certainly as Justice Scalia knows full well, there's a great capacity to read statutes and see on their face what a plain meaning is. Here the statute was quite emphatic. It said you are guilty of voluntary manslaughter not murder under these circumstances, and even prior to Reddick, it had been interpreted in that manner. All that Reddick added -- Reddick is an irrelevancy, Your Honor, just as Falconer is an irrelevancy.

The issue in this case is simply did Kevin Taylor rely on a new rule of law in 1987 when he said that these instructions, which everyone concedes led the jury to ignore the defense or reasonably like to have led the

jury, that that violated due process.

The reliance on Judge Easterbrook as the reasonable jurist -- and I don't in any way besmirch Judge Easterbrook's reasonableness -- is to ignore the fact that Judge Easterbrook himself suggests in the concurrences that are cited that he wants to change the law. He rejects Laudermill. He rejects Goldberg v. Kelly. He rejects Winship. He rejects Sandstrom. He rejects Connecticut v. Johnson. Certainly the fact that a judge uses an opinion to say that Supreme Court has it totally wrong, the Supreme Court should not say that there's this distinction between substance and process, certainly the State can't rely on that to create uncertainty.

Judge Easterbrook would be the first to admit and admits in his concurrences and his Law Review writings that the Supreme Court has been clear on this point. The only difference is Judge Easterbrook advocates change in the law. That certainly doesn't create uncertainty under Teague in any way, shape, or form.

QUESTION: Some of those cases that he rejected at least were decided after your client's trial, and his rejection of them was for the purpose of showing that there was genuine doubt as to what the law would be at the time of the trial.

MR. MARSHALL: Your Honor, there was no doubt --

there is no doubt at any time and there has been no doubt that if Kevin Taylor could prove his affirmative defense, he was entitled to be convicted only of voluntary manslaughter with a maximum 15-year penalty. That is a given.

There is no doubt, further, that these instructions carried with them a reasonable likelihood -- as Judge Easterbrook himself writes, these weren't confusing. They told the jury exactly what to do. They told the jury the wrong thing to do. That's all a quote from Judge Easterbrook. They told the jury not to consider the affirmative defense. There's no doubt that that's what these instructions did.

The State does not stand here and has not written in any of its briefs that that comports with the right to present a defense, that that comports with fundamental fairness. How could they? How could they argue that it's fair to tell a jury to ignore arbitrarily and totally an issue that State law makes decisive? Yet, their only --

QUESTION: You say the instructions told the jury to ignore. Now, isn't the finding of the lower courts that the instructions might reasonably be thought to tell the jury to ignore?

MR. MARSHALL: Your Honor, under Boyde v.

California --

QUESTION: I mean, can you answer my question yes or no?

MR. MARSHALL: Yes, Your Honor.

Under Boyde v. California, this Court --

QUESTION: Is this the answer or is this the explanation of the answer?

MR. MARSHALL: This is -- the answer was yes, Your Honor.

QUESTION: Okay.

MR. MARSHALL: The explanation is that under Boyde v. California, courts have to adopt a methodology, basically a burden of persuasion, how are we going to understand that instruction. Once the court reaches the determination that there was a reasonable likelihood that the jury understood it in X manner, then it seems to me the court needs to necessarily proceed as if it were certain at that point.

QUESTION: I don't agree with you, Mr. Marshall. I mean, it's one thing to say for purposes of a Sandstrom inquiry that this instruction a reasonable juror might have taken such a -- that doesn't mean that there weren't other ways that equally reasonable jurors couldn't have taken the instruction. So, for you to say that the instruction told the jury is a considerable overstatement

from simply saying a reasonable juror might have concluded.

MR. MARSHALL: Yes, Your Honor. I am dealing with the -- this issue from a somewhat juridical perspective saying that once the court goes through the Boyde v. California analysis and says that something is reasonably likely to have happened in a certain way, then for the rest of the analysis of the case, it is to be assumed -- and this is certainly how Sandstrom proceeded as well. The court is to assume that that's the method that we're forced to deal with this in, as Justice Kennedy suggested before. I don't --

QUESTION: Well, but that bears, it seems to me, on how formidable is this change. If the jury could reasonably construe it the wrong way, that's much different from saying that the judge explicitly told the judge -- the jury that they had to ignore it. And that goes to the gravity of the constitutional violation --

MR. MARSHALL: Well, Your Honor, I think --

QUESTION: -- and the clarity of the law before the case established it.

MR. MARSHALL: Well, Your Honor, I think that it's important to distinguish here between what the rule of law was in 1987 and then a further question of whether this instruction clearly in everybody's mind would have

violated that rule. And I think this is the point Your Honor made so eloquently in Wright v. West.

The rule of law under Teague v. Lane was clear in 1987, and unless this Court adopts the State's very strained argument that, well, affirmative defenses may have been outside of the rubric alone --

QUESTION: Well, who published or propounded the -- these pattern instructions in 1981?

MR. MARSHALL: The Illinois pattern instructions were promulgated by a committee of --

QUESTION: Made up of completely unreasonable lawyers I suppose.

MR. MARSHALL: No, Your Honor, but committees work --

QUESTION: But what?

MR. MARSHALL: Committees work in strange manners, and within a year --

QUESTION: Unreasonably mostly.

MR. MARSHALL: Your Honor, Teague v. Lane has never before at least focused on whether a committee in --which is bound --

QUESTION: Were trial judges bound to -- by the pattern instructions or were they just available to them if they wanted to use them?

MR. MARSHALL: I believe under Illinois law the

pattern instructions were strongly recommended to be followed, but they certainly --

QUESTION: By whom?

MR. MARSHALL: By precedent I imagine, including --

QUESTION: Precedent? By the supreme court of the State I suppose.

MR. MARSHALL: Yes, that's true, Your Honor.

QUESTION: Some more very unreasonable judges.

MR. MARSHALL: Your Honor, the very first time that the attack in this case was brought against these instructions it was victorious. This is --

QUESTION: Nevertheless, how come that for -- how come that these -- that this plainly unconstitutional instruction was propounded by unreasonable -- a bunch of reasonable minded lawyers and was recommended to be used by the supreme court of the State? Now --

MR. MARSHALL: Your Honor, reasonable attorneys, reasonable individuals make oversights. They make mistakes. In this case, the chairman of the committee, my late colleague, Professor Hadad, within 1 year of the promulgation of these rules was writing Law Review articles say we made a grievous mistake. We made a mistake. Look at these instructions. They don't tell a jury to consider a defense to murder that's concededly

relevant.

And then the first time this claim was made to an Illinois court and to the Federal courts, the Federal courts --

QUESTION: That may be, but for years and years, trial judges gave these pattern instructions, and they didn't need to. They didn't have to. They would have just been -- and if a -- I suppose if some reasonable district judge, State district judge, had really thought these were unconstitutional, he would have blown the whistle and say -- and said, look, I don't have to give this instruction. I'm not going to.

Do you know of any district court judge who ever disagreed with them?

MR. MARSHALL: I do not know of that, Your Honor. I do not know of any district --

QUESTION: Do you know anybody who agreed with them? I guess they all -- anybody who gave them must have thought they were constitutional.

MR. MARSHALL: Your Honor, my understanding --

QUESTION: Is that right or not?

MR. MARSHALL: No, I do not believe that's right, Your Honor.

QUESTION: So --

MR. MARSHALL: I believe that the typical

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methodology in the courts of Illinois is to use the pattern instructions and, unless challenged, not to think about them.

Now, the question is why didn't the defense counsel challenge them, and that's a difficult question. And I don't know whether it's because of the uphill battle involved in challenging these. But within a few years, not 20 years, but a few years, a very few short years, they were challenged, and once challenged, every court agreed.

This is not a case, like this case had before --

QUESTION: Well, now, that's not right. We get back to People v. March, which was 1981. That court didn't agree. That court sustained the instructions.

MR. MARSHALL: No, Your Honor. That court sustained the instructions against a claim that the State had to bear the burden of negating a defense. That is not the claim that we're speaking of here. We're speaking now --

QUESTION: Well, then that court at least was -- did not see this obvious point that you're arguing to us today.

MR. MARSHALL: Your Honor, courts see points that are presented to them. Courts engage in restraint and pass on issues that are presented to them.

The fact is this Court has in the past realized, for example, in Penry v. Lynaugh -- the Court recognized that the mere fact that their State procedure is out there -- and let me stress this is not a Penry case because there's no jurek here. There's no jurek having held that these were okay. This is a case where simply, as part of the pattern, as part of the culture, these were ignored for a while. They were attacked within a few years. Immediately the courts, State and Federal, said uh-uh, these are problematic. They absolutely take away the right to present a defense. This is unconstitutional.

QUESTION: Well, they must have been more than problematic. They must have been so clearly unconstitutional that any fool should have known it.

MR. MARSHALL: Your Honor, again, I don't fully understand the confusion and the reason that the Illinois bar did not raise this more aggressively. What I do understand is that once this issue was raised --

QUESTION: Well, what's the test on Teague? Is it that reasonable judges could have disagreed?

MR. MARSHALL: The test under Teague is that reasonable judges could have disagreed about the appropriate rule, and the rule in this case --

QUESTION: Well, about the constitutionality of this instruction.

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MR. MARSHALL: I do not believe that the test is about the constitutionality of a certain fact pattern in this case's instructions.

Thank you, Your Honors.

QUESTION: Thank you, Mr. Marshall.

Mr. Wilson, you have 11 minutes remaining.

REBUTTAL ARGUMENT OF MARK E. WILSON

ON BEHALF OF THE PETITIONER

MR. WILSON: Your Honors, Mr. Chief Justice, I don't want to take up much of the Court's time.

I can offer a reason as to why the criminal defense bar didn't raise this particular challenge to these instructions over those 22 years.

And, by the way, it was 22 years. As Judge Easterbrook's opinion in Flowers makes clear, the change in 1981, which counsel points to was -- excluded an instruction that combined the murder and voluntary manslaughter instructions into one separate instruction, the pattern instructions. But the fact of the matter is, before that time, people still -- judges still used the instructions in a way that would create this very problem, and Mr. Flowers' case was a good example of that because he was convicted before the 1991 instructions came out.

But the fact of the matter is the reason that no criminal defense lawyer raised this for so many years was

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that all of the Illinois cases show the reason, and that is that the closest cases on point from this Court are Mullaney v. Wilbur, Patterson v. New York, and the other burden of proof cases because everyone thought that at most this was a burden of proof problem, and that was -- those are the cases closest on point.

The reason this argument was never presented to a court was because no criminal defense lawyer could find a case that was close enough on point, and no one thought they would win.

QUESTION: Was it based also, do you think, on the underlying assumption that, after hearing arguments of counsel, both sides of the case, the jury would consider this?

MR. WILSON: I do believe that as well, Your Honor. That goes to the merits of why these instructions -- that's why Illinois argued so vigorously that they really did not violate the Constitution.

QUESTION: How many cases -- how many convictions you suppose are involved -- would be involved if we affirm?

MR. WILSON: If the Court affirmed -- well, we don't have --

QUESTION: Well, everybody who -- convicted could go to Federal habeas I suppose.

MR. WILSON: That's precisely right, Your Honor. I don't have a number to give you because Illinois doesn't have that specific statistic, but as we asserted in our petition for certiorari, there are hundreds of convictions that are potentially at issue here, and we certainly have dozens upon dozens in the Criminal Appeals Division of the Illinois Attorney General's Office that are stayed right now pending the outcome of this case. So, at this stage, if we have dozens pending, I suggest that many more are potentially out there.

Counsel relied on Stringer v. Black arguing that --

QUESTION: Well, if we affirm, it wouldn't be much of a burden on you, would it?

MR. WILSON: Your Honor, it would be, indeed, an incredible burden.

QUESTION: Well, I guess you have to retry everybody.

MR. WILSON: We would have to do something. A retrial would be -- that's what the Seventh Circuit ordered, yes.

Counsel relied on Stringer v. Black for the proposition that his argument follows a fortiori from a number of cases. Your Honors, there are only three cases from this Court that found, under Teague, that the habeas

petition was relying on an old rule. Those cases are Stringer v. Black, Penry v. Lynaugh, and Wright v. West. In all of those cases, the reasoning that the habeas petitioner relied upon was much, much closer. There was a much easier reasoning that the habeas petitioner could rely upon than in this case.

If you look at Penry v. Lynaugh, for example, although that case has caused some controversy, the reasoning of the majority in Penry was simply that the habeas petitioner was asking nothing more than to have the Court apply the specific holding of an earlier case.

QUESTION: Mr. Wilson, can I ask you a question about all these pending cases?

MR. WILSON: Yes.

QUESTION: Are -- have any of them been decided by the Illinois appellate court yet? Are any of them between the Illinois appellate court and the Illinois Supreme Court?

MR. WILSON: Well, the pending cases I was referring to were the -- were district court habeas corpus cases.

QUESTION: Oh, I see. And they've all already been decided by the Illinois appellate system.

MR. WILSON: Yes, and in fact, in the Illinois appellate courts, of course, the people in this situation

could not get a new trial because under People v. Flowers, the decision of Reddick doesn't apply retroactively.

QUESTION: And so, there are dozens of cases that have refused to follow Reddick because of the Illinois Teague rule.

MR. WILSON: Absolutely, and that, as pointed out by Judge Easterbrook, I think it's quite a fair comment that here we have a Federal court effectively saying that even though the Illinois Supreme Court decided to clean up a jury instruction problem, we're going to grant all these people new trials even if the Illinois Supreme Court doesn't think we should.

The Illinois Supreme Court said in Reddick that this is a serious problem, and then they say in Flowers that it's not that serious to upset a bunch of final convictions. And that seems to be a fair application of the Teague principles. And the Seventh Circuit simply ignored that holding, and that is inappropriate given the principles underlying Teague.

Counsel argued that Judge Easterbrook was trying to change the law by his separate opinions in these areas. With all due respect, I don't believe that that's a fair reading of Judge Easterbrook's opinions. Judge Easterbrook wrote those separate opinions because he thinks that he was right, not because he thought the

majorities were right in those cases. He was trying to reconcile conflicting principles in this Court's case law. There was no case clearly on point, and he was offering a very reasoned solution. I don't believe --

QUESTION: Yes, but his solution would require us to change some of our decisions like Winship, wouldn't it?

MR. WILSON: I don't believe so, Your Honor, because Winship has been limited to elements of offenses in many different contexts. And so, all he was doing was asking the court -- saying that that element/nonelement distinction should be applied in one more context. He wasn't changing Winship. He was applying it.

I do believe that counsel's argument, Kevin Taylor's argument, is essentially what Justice Scalia pointed out. Essentially he is arguing that every error of State law is going to violate the Constitution because that is just -- that is why this case is indistinguishable from Estelle v. McGuire. In that case, the argument was that these jury instructions violated the California pattern instructions and that was so egregiously wrong that it was fundamentally unfair in violation of due process.

It seems obvious that any error that seriously misstates Illinois law could deprive a criminal defendant

of a right that he otherwise would have had. A serious jury instruction error may deprive someone of their right to counsel. It may deprive someone of their right to testify in their own behalf. The fact of the matter is that happens, and unless the Court is willing to say that States -- the Due Process Clause requires perfect trials, that cannot be a rule of due process.

The last point I make, Your Honor, is that if a judge instructs a jury in Portuguese on an affirmative defense, what would happen is the judge could be challenged most likely for bias against that defendant. I don't think the challenge would depend on some particular analysis of affirmative defenses versus elements. That would be a patently unfair judge, and that would be the reason for a due process challenge.

Thank you very much.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Wilson.

The case is submitted.

(Whereupon, at 1:56 p.m., the case in the above-entitled matter was submitted.)

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BY Lora M. May

(REPORTER)