THE SUPREME COURT OF THE UNITED STATES

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KESHIA CHERIE ASHFORD DIXON, :

Petitioner :

v. : No. 05-7053

UNITED STATES. :

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Washington, D.C.

Tuesday, April 25, 2006

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:07 a.m.

APPEARANCES:

J. CRAIG JETT, ESQ., Dallas, Texas; on behalf of the Petitioner.

IRVING L. GORNSTEIN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(10:07 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Dixon v. United States.

Mr. Jett.

ORAL ARGUMENT OF J. CRAIG JETT

ON BEHALF OF THE PETITIONER

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

In this case, the parties agree that Federal courts, including this Court, have addressed nonstatutory defenses for almost 200 years and that Congress, in enacting criminal law statutes, legislate against a background of Anglo-Saxon common law, such that a defense of duress was likely contemplated by Congress when it passed the gun control statutes. It is, therefore, required that courts apply defenses, such as the duress defense, based on the background principle of construction that the prosecution must prove criminal intent beyond a reasonable doubt.

The Government would have this Court discount the development of over 110 years of common law that has produced a substantial, well-established, well-reasoned majority rule in both State and in Federal courts that places the burden on the Government to

disprove the absence of duress once that defense has been raised by the evidence.

The development of the majority rule began with this Court's decision in Davis v. United States in 1895.

JUSTICE GINSBURG: Mr. Jett, do I take it, from what you've just said, that you are recognizing this is a question of Federal common law and not due process, so that if Congress placed the burden on the defendant, there would be no constitutional infirmity? You're just arguing that this is the Federal common law?

MR. JETT: Our -- our first issue and our first contention is that Federal common law will govern the decision in this particular case, but we also have a due process point that we also believe is germane. But --

JUSTICE GINSBURG: You -- you -- then you think that Congress could not say that the defendant has the burden on the question of duress.

MR. JETT: We think that Congress could not under the -- the precedents of this Court and under the -- the basic common law construction that's fundamental, I think, to the -- to the criminal law in this -- in this country.

CHIEF JUSTICE ROBERTS: What do you do with Martin against Ohio?

MR. JETT: Well, we understand about Martin v. Ohio, Your Honor, and we think that -- that based on recent precedents, Martin v. Ohio should be reconsidered. The -- the significant issue is that duress is based on the fact that there -- that there must be free will, and if free will is dispensed with, in this case by duress, then the -- the defendant doesn't have the requisite criminal intent. And -- and in our -- and since the beginning of -- since before the beginning of common law in -- in our system, it has been recognized that in order to have a criminal -- a crime, there have to be two things: one, a vicious will and the other an act -- an evil act concurrent with the vicious will. And --

CHIEF JUSTICE ROBERTS: Well, there may be -- there may be crimes where duress would vitiate an intent element, but there may be other crimes where it wouldn't. And -- and I don't understand your argument to be -- is it that in every case duress negates an element of the crime or only in some cases?

MR. JETT: Well, we think that in -- that in every criminal case, with possibly the exception of -- of public welfare cases, that -- that there is an

underlying background construction for our criminal law, which requires the Government to prove beyond a reasonable doubt criminal intent.

JUSTICE KENNEDY: Which is the easier of the two cases for the defendant? A, the case where the argument is a burden of proof should be on -- on the -- the State as a due process matter or a common law matter in an insanity defense and, B, in a duress defense?

MR. JETT: Which is easier for the State?

JUSTICE KENNEDY: Well, either way.

MR. JETT: Well, we -- we contend that in a -- a -- duress is -- is different. Insanity deals with really the internal workings of somebody's mind, so that's perhaps more difficult for the State. But in a -- in a duress case, you're dealing not only with the internal workings but also external factors as well -- as well that impose somebody else's will upon the defendant.

JUSTICE SCALIA: I would think that it's easier in -- you know, we had -- we had a -- this term another case in which the argument is that you cannot have a separate insanity defense essentially and -- and exclude from the mens rea element of a crime the -- the lack of -- of mental capacity to -- to have that mens

rea. This is the same thing you're arguing before us. And -- and it seems to me that if it applies to duress, it applies even -- even more strongly to -- to insanity. How can an insane person form the intent to commit a crime that -- that requires mens rea?

MR. JETT: Well, we -- we agree that -- I agree -- we agree that an insane person cannot form that particular intent. We think that they are similar except that the duress case is perhaps easier for the -- for the defense because we have external factors that often bear on what the defense is unlike --

JUSTICE KENNEDY: But -- but we've held, at least under the M'Naghten version of the defense, that the State -- that the burden can be put on the defendant to show that he was not insane under the M'Naghten test.

MR. JETT: Well, we -- and we understand that, and again, our --

JUSTICE KENNEDY: And as Justice Scalia said and as I was considering in asking my question, in your case we know that there was a conscious, knowing and intentional, in some sense, act when -- when the person bought -- bought the weapons. She says the intent, of course, was induced by -- by the threat. It seems to me you have a more difficult case than in the insanity

case.

MR. JETT: Well, our -- our -- we think that they're -- that they're similar because both deal with -- with the mental state, and -- and then historically, at least since -- since 1895 in this Court, this Court has said that you've got to have the vicious will in order to constitute a crime. And so you have the same issue here. Did Mrs. Dixon have the vicious will or was she acting under the will of someone else?

JUSTICE SOUTER: Well, but doesn't vicious will mean simply the will to commit the crime?

MR. JETT: Actually, no. It means the -- the criminal intent, not just to commit the crime but having the criminal intent, the vicious mind, to violate the law. Mrs. Dixon's --

JUSTICE SOUTER: Well, what do you mean by vicious? I mean, that the person is -- is nasty, that the person is antisocial or asocial?

MR. JETT: No.

JUSTICE SOUTER: I don't know what the added element is.

MR. JETT: The -- this -- this Court has -- has frequently equated the vicious will with moral blameworthiness, that is, the desire to do wrong, that is, the desire to do something -- to -- the free desire

based on the -- the choice of having -- being able to do the right thing or do the wrong thing and freely choosing to do the wrong thing, that is, moral blameworthiness.

JUSTICE KENNEDY: The phrase Justice Harlan used in the Davis case.

MR. JETT: Yes, Your Honor.

JUSTICE SOUTER: But when you -- when you say freely choosing, what you mean, I take it, is choosing with -- without consideration of pressure from a third party. That's what you mean, isn't it?

MR. JETT: That's correct.

JUSTICE SOUTER: Okay.

MR. JETT: Yes, Your Honor.

JUSTICE SOUTER: But if the -- the third -- the third party may, indeed, exert pressure, but I take it you would agree that it is still the decision of the defendant whether to cave in to that pressure or not, whether to commit the crime or not to commit the crime.

MR. JETT: We believe that would not be a voluntary act. Certainly the defendant makes that decision.

JUSTICE SOUTER: Well, I -- I don't want to get lost in -- in rhetoric here. Isn't it still the case, even on your theory, that the defendant in these

circumstances makes a choice? It may be a troubled choice, a much more difficult choice to make than it would be otherwise, but the defendant still makes a choice as to whether to cave in to the third party's pressure or not, whether to commit the crime or not. Isn't that true even on your theory?

MR. JETT: Yes, it is true.

JUSTICE SOUTER: Okay.

MR. JETT: But the difference is, as you pointed out, Justice Souter, that the defendant is not acting of her own free will. She's -- she's acting based on the will of someone else, that that person has overborne her will.

JUSTICE SCALIA: It was her will to yield to the will of someone else. I mean, you can't blame somebody else for her making the choice.

MR. JETT: Well, we -- we would respectfully disagree, Judge. She believed that there was figuratively a gun at the head of her children, and if somebody puts a gun to the head of my child, you can make me do almost anything that you want.

JUSTICE SCALIA: That may be a very intelligent choice on your part to do what the person with the gun at the head of your children tells you to do. But to say that it's not your choice, which is

what you're arguing here, the only question is whether that has to be brought forward by reason of -- of a defense of -- of coercion or rather, whether it goes to whether you had the intent. That's all we're talking about here. And it seems to me you have the intent to yield to -- to the demand of whoever has the gun at the head of your children. It's a separate question whether the law should punish your yielding like that.

MR. JETT: Well --

JUSTICE SCALIA: But -- but you're telling us that you don't have the intent to -- to yield and -- and to do whatever criminal act that person tells you. Right? That just doesn't -- I just don't think it's true.

MR. JETT: What -- what we're saying and what I think that this Court -- the precedents of this Court have said is that you have to have criminal intent. That is the vicious will that -- that the Court -- Justice Harlan talked about in Davis and this Court has talked about in Morissette.

JUSTICE ALITO: Well, what is the statutory -- what is the mens rea under the statute for the offenses that the defendant was charged with? It's knowingly, isn't it?

MR. JETT: Well, on -- on seven or eight of

the counts, it's knowingly. Well, actually on the first count it's knowingly, but that is defined as -- as -- in this case, it was defined as voluntarily and intentionally. And then in the other counts, it was simply defined as knowingly. And so, indeed, that -- that's -- that is what the Congress said.

However, based on the -- the precedents of this Court, that even when there is a knowingly culpable mental state provided by Congress, this Court has impart -- imported the -- the criminal intent to -- into the statute. And so like in -- for instance, in Morissette, which was a theft case, what this Court did was the Congress had said knowingly didn't provide a -- a criminal intent. So this Court imported one and said that the Court -- that the Government had to prove that beyond a reasonable doubt. Once the defense was raised, it became an element that the Government has to prove beyond a reasonable doubt.

CHIEF JUSTICE ROBERTS: Well, counsel, under your view, how -- how is the Government supposed to prove a negative in every case? How are they supposed to prove the absence of duress?

MR. JETT: It's really no different than any other case, Mr. Chief Justice. In -- in any case, for instance, a self-defense case, the Government has got

to prove that -- disprove self-defense beyond a reasonable doubt once it's raised. They do it in the same way they do in the other case.

CHIEF JUSTICE ROBERTS: But that's something that -- but self-defense is something that's often a -- a factual element that you can discern from the circumstances of the crime. The -- the other guy had a gun, you know, that sort of thing. So if it's going to be presented -- so it's something that's within the control of either side.

Duress is something that in this case the Government would have no reason to suppose that it was even implicated until it's raised, and then they have no way of getting at what the particulars are because they're all within the control of the defendant.

MR. JETT: Well, we -- we would respectfully disagree with that. And this case is a very good example of -- of that -- of that circumstance. The Government -- early on in this case, they searched Mrs. Dixon's apartment and found evidence. They -- they interviewed her. They actually interviewed the abusers prior to trial before we gave them notice. They -- they were able to investigate her background partially before we gave notice, partially afterwards, so that they were able to -- to investigate her and

circumstances of her life. But not only that, they were able to call as witnesses the seven gun dealers from which the guns were purchased who witnessed the purchase and who did provide testimony that she did not appear to be under duress, and they so testified.

So in this particular case, it's really just like any other cases. You can certainly imagine a circumstance where that would be hard, but in very many cases, the facts are there just like a self-defense case or, for that matter, just like --

CHIEF JUSTICE ROBERTS: But I thought the gist of her duress defense was not that she was under duress when she was purchasing the guns, but that she had reason to believe that her children were being threatened by accomplices or associates of -- of this -- this individual. And there's nothing in the facts of the -- the scene that would lead the Government to have any access to that evidence.

MR. JETT: Well, what -- what she was in duress about is she was told at the time that there was somebody at home with a gun who was just a cell phone call away. So as far as she was concerned, there was somebody there with a gun to the head of her children and she was in fear of her children's life.

In terms of what -- what the Government knew

in this particular case, the Government had notice. The trial judge required that we provide notice of a defense. The trial judge required that if we -- said that if we had an expert, we had to give the Government notice of the expert and the subject matter of the testimony of the expert. So the Government was very well informed prior to trial what the defense was so that they hired their own expert who actually was able to interview the -- the accused without me being there and -- and so was prepared to testify about the issues of duress.

JUSTICE KENNEDY: What -- what is the threshold test that the defendant has to cross before the judge will give the instruction to the jury? Obviously, the burden of production is with the defendant. When can a judge say, well, you know, this -- this is just too flimsy for a duress defense? I'm not going to instruct a jury on that.

MR. JETT: Well, the -- the first thing the judge would have to determine is that has -- has there been evidence of each of the elements of duress, and the trial judge found that we -- we've produced evidence of each of the elements of the duress.

The -- in -- in the circuit court cases, they've not been consistent, but we would -- we would

suggest that the -- the standard would be that there would be sufficient evidence, when viewed in the light most favorable to the defendant, that would raise a reasonable doubt with a rationale jury, sort of the -- the other side of -- of the prosecution's burden that they have to reach in order to get to the jury.

JUSTICE ALITO: What is the -- the methodology that you think we should follow in determining where the burden should be allocated under any particular criminal statute? Is it the -- the majority rule at the time when that particular statute was enacted or at -- is it -- you don't think it's the -- the old common law rule. What -- what is the -- at what point of time do we look at the -- at what's going on throughout our country?

MR. JETT: Well, I think you've got to look at two points in time. And certainly we agree. We don't look at the old common law because -- because there's been 110 years of -- of development of common law in this country since Davis v. United States. So I think the Court has got to look at -- at what the common law was at the time that the relevant statute was passed, which in this case was 1968.

But I think in addition to that, there -- there have been amendments to the statute.

JUSTICE ALITO: So the burden would be different under different statutes?

MR. JETT: Well --

JUSTICE ALITO: If we were dealing with a -- with a much older criminal statute, the burden might be allocated differently?

MR. JETT: No, because I think the -- I think you have to consider that. But the other thing you'd have to consider is the development of the common law since that time and what -- what courts have done, what the rationale has been that they have employed over time.

And in this particular case, for instance, we have -- we have six Federal circuits and 29 States who have found that the burden of proof -- the burden of production should be on the defendant, but the burden of persuasion should be on -- on the Government to disprove duress once it's raised.

JUSTICE SCALIA: And you have 21 States and how many circuits --

MR. JETT: Six circuits and 29 States, Justice Scalia.

JUSTICE SCALIA: No. I'm saying how many are on the other side?

MR. JETT: On the other side of the circuits,

we count three; on the States, we count 14. Some States have not addressed the issue.

JUSTICE SCALIA: Well, that's -- that's sort of a horse race. I'm -- I'm not sure, even if I agreed with your theory, that -- that what the Constitution requires changes on the basis of an evolving common law.

Of course, it can only change in one direction. Right? It can only change favorably to -- to your client, favorably to the defendant. It can't change to be more harsh to the defendant because the Constitution prohibits that.

MR. JETT: We would agree --

JUSTICE SCALIA: Right? So -- so we have a one-way -- a one-way altering Constitution.

MR. JETT: Well --

JUSTICE SCALIA: But even -- even if I agreed with that, I'm not sure that, you know, 21 versus 14 is -- is an overwhelming demonstration of -- of the new common law.

MR. JETT: But, Justice Scalia, it's 29 versus 14. And -- but it's --

JUSTICE SCALIA: 29 versus 14.

MR. JETT: But it's clearly a 2 to 1 majority in favor of placing the burden of persuasion on the

Government.

JUSTICE SOUTER: Okay. But are you making the argument that this number indicates a congressional intent and that what we ought to do is come up with a rule because Congress intended it? Or are you making the argument that yours is the better rule, and as a matter of common law, which -- which it is our responsibility to develop, we should see it your way? Which argument are you making?

MR. JETT: We're -- we're basing our argument primarily on -- on the common law that has been developed in -- in this country since really Davis v. United States through the present and has -- has --

JUSTICE GINSBURG: Mr. Jett, there's one piece of this picture that's different -- that distinguishes duress from, say, self-defense. If it's self-defense, you take a snapshot on the scene. You know exactly what happened. No one taking a picture of these gun purchases would have any idea of all of this.

And the judge, when asked to give -- to allow the defense of duress, said, it's frankly a close call in my mind, but when it is a close call, better give it than not.

Now, he thought that the defendant would have the burden of proof. Perhaps the judge would call that

close question the other way if he thought he was saddling the prosecution with the ultimate burden of persuasion.

MR. JETT: In my mind it would be -- if it's a close question, I don't think the burden of proof in that particular circumstance would make a difference because it still is -- because he would then be taking it away from the jury. And in my experience, judges are -- are not want to take the questions away from the jury, and they will provide the -- the jury instruction in a close case. And that would be the right thing to do because ultimately we want the jury to make that decision.

But the -- but the judge does have a gatekeeping function in -- in a duress defense, so that a judge -- in any circumstance, if the judge decided that the evidence was insufficient to get to the jury, the judge can make that determination so that you have the trial court acting with the -- the -- to make sure that what the jury is going to hear is -- is an issue for which there is evidence. So I think that the gatekeeping function that the trial court would -- would prevent there from being -- juries making a decision on insufficient facts.

JUSTICE SCALIA: Mr. Jett, a thought occurred

to me, by reason of your agreement, that -- that it's a one-way ratchet, that when the common law changes in the -- in the direction of favoring the defendant, it becomes the duty of the courts to allow that. But, of course, it can't change in the other direction because the Constitution would prevent it. You sort of agreed with that.

But -- but if -- if you agree with that, how can you explain our -- our 1895 decision in Davis which held that the insanity defense had to be proved by the Government which was then overridden by a Federal statute. How could -- how could -- if -- if Davis was right about what the -- what the common law required, how could Congress possibly have changed that by a statute? I would assume that all of the basic elements of the common law are picked up in the Due Process Clause. Why wouldn't -- why wouldn't the necessity of -- of proving the mental element of a -- of a crime, even when that mental element is overcome by insanity, why wouldn't that have been embodied in the Due Process Clause so that the congressional statute would have been ineffective?

MR. JETT: Well, two reasons. One, Davis was a common law case, and -- and subsequently in Leland v. Oregon, this Court said Davis was a common law case.

And so this Court can decide the common law issue with respect to the Constitution.

JUSTICE SCALIA: No. I'm not questioning whether we could do it. I'm questioning whether Congress could do it, whether Congress could overrule what we did in Davis. If Davis said that common law was that the Government has to prove -- disprove insanity, wouldn't that have been part -- become part of the Due Process Clause if it was the common law?

MR. JETT: I think -- I think that if it -- if it does become part of the Due Process, then obviously Congress cannot overrule it.

JUSTICE SCALIA: Right.

MR. JETT: If it simply becomes the common law -- the rule of -- of the Federal courts that this Court has -- has established based on its supervisory powers, then the Congress would be able to do that.

JUSTICE SCALIA: Well, it makes me suspect that Davis was wrong.

MR. JETT: Well, the thing about Davis that even though the -- the insanity holding about Davis was overruled, the core holdings of Davis was not overruled. And one of the things that Davis said was that, again, to constitute a crime against human laws, there must be the vicious will and, secondly, the

unlawful act.

The other thing that Davis said, which was very significant, is that the plea of not guilty is not like in a civil case where there's confession and avoidance. What it does is it negates or it controverts all of the allegations of -- of the State, and so that it controverts the existence of each fact that the State has to prove. If it -- if it, indeed, does that and what duress does is it negates the evil -- the evil intent, then -- then the Government has got to prove that there's criminal intent. It's got to negate one of the elements that the Government has got to prove beyond a reasonable doubt. And that's -- that -- that's part of the holding of Davis, and the Congress has not affected that with its decision on the insanity defense.

JUSTICE STEVENS: May I ask, if -- if you know, whether Congress has ever been asked to address this precise issue that we're debating today?

MR. JETT: Congress has -- has never ruled on the duress defense. I think a few years ago, there -- there was a proposal to -- to amend the Federal Criminal Code, and in that particular -- it didn't pass but I think the result of that was that Congress just took out the duress provision and said that the courts

should make the decision as to how that would be handled based on -- on all the -- the normal considerations that a court looks at in making those decisions.

So that the Congress has had many opportunities to rule on duress. The Congress -- just like the Congress has said you have to have notice of alibi and just like they passed the -- this -- the rule about -- I mean, the statute about insanity. The Congress could have -- have abolished the duress defense. I don't think they could have constitutionally, but they could have passed a statute and spoken to that, but they've chosen not to. And I think what that tells us is that the Congress is probably aware of the common law and have chosen not to interfere with the development of the common law in this country.

CHIEF JUSTICE ROBERTS: What about a defense that I was on drugs and -- and didn't know what I was doing because of that and couldn't form the requisite intent? Does the Government have to disprove that as well?

MR. JETT: If that is a defense that is recognized by -- by the common law or -- or by statute, then the Government would have to do that if that

particular defense --

CHIEF JUSTICE ROBERTS: How is the Government -- how would the Government do that?

MR. JETT: Well --

CHIEF JUSTICE ROBERTS: A person just says, I was -- I was on, you know, PCP or whatever and -- and I couldn't form the requisite intent.

MR. JETT: Well, the Government could do that much the way they do like in an entrapment defense. In an entrapment defense, the Government has to -- once there's entrapment shown, the Government has to disprove the predisposition of the defendant or prove the defendant has predisposition. And so --

JUSTICE GINSBURG: But that's based on the defendant's -- the prosecution's conduct. The Government's conduct in entrapment concerns how the Government behaved.

MR. JETT: Justice Ginsburg, it does but it still -- that case still deals with somebody overriding the will of the defendant, the Government imposing its own will on the defendant. In that regard --

JUSTICE GINSBURG: But if the Government is out there trying to achieve that result, it's quite different from the Government having nothing to do --

MR. JETT: Well, we -- we contend that it's

still the same because it's a third party, whether it's the Government or somebody else, who's overbearing the will of the accused.

And if there's no other questions, I'd like to reserve the balance of my time.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Gornstein.

ORAL ARGUMENT OF IRVING L. GORNSTEIN

ON BEHALF OF THE RESPONDENT

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

For three reasons, the burden of proving duress should be on the defendant, and the Government should not be required to disprove duress beyond a reasonable doubt.

First, duress is an affirmative defense that excuses what would otherwise be serious criminal conduct. When the Government proves that a defendant has engaged in criminal conduct and has done so with the mens rea specified by the crime, it is fair to require the defendant to prove that duress excuses that criminal conduct, so that here, the Government proved that Petitioner knew she was lying when she filled out the forms and that she knew it was unlawful for her to receive firearms.

CHIEF JUSTICE ROBERTS: So there may be cases where the nature of the mens rea required would require the Government to disprove duress.

MR. GORNSTEIN: There could conceivably be such cases, Mr. Chief Justice.

CHIEF JUSTICE ROBERTS: The sort of crimes where -- where your culpability depends on your motive. Right?

MR. GORNSTEIN: Well, if you had a crime, for example, that said someone who does something while not under -- acting under duress, that would be an obvious example. But there are --

CHIEF JUSTICE ROBERTS: It would be an easy example.

MR. GORNSTEIN: It would be an easy example.

(Laughter.)

MR. GORNSTEIN: But there -- there are --

JUSTICE SCALIA: Good catch.

CHIEF JUSTICE ROBERTS: What about a -- you know, a hate crime, a bias crime, you know, an act of violence done with a particular motive or intent? And the -- and the suggestion is I didn't do this because of a particular motive. I did this because they had a gun to the head of my children.

MR. GORNSTEIN: Right. In -- in that kind of

situation, the facts that go to duress could also go to undermining the proof of the motive in that case, and in that situation, the Government always has to prove the element of the offense beyond a reasonable doubt. But if the defendant wants to add to that a duress -- a specific duress defense, then the burden of proof would be on the defendant to prove duress. Now, normally in that --

JUSTICE SCALIA: The Government wouldn't -- wouldn't have to disprove duress in the hate case. It would just have to prove hate.

MR. GORNSTEIN: Correct.

JUSTICE SCALIA: And to the extent that duress undermines that, it would be a defense considered by the jury on the hate question.

MR. GORNSTEIN: That's correct, Justice Scalia.

Now, the --

JUSTICE STEVENS: How does self-defense fit into this equation?

MR. GORNSTEIN: The Government's position is that on self-defense, the burden of proof is on the defendant, but it recognizes that there are important distinctions between self-defense and duress that could allow the court to reach different conclusions about

the two defenses.

In addition to the point that's already been made about the degree of factual overlap between self-defense on the one hand and duress on the other on the basic crime, there are three additional considerations.

One is that the -- the circuits and the States are virtually uniform on self-defense, whereas there is a significant division of authority on the question of duress.

Second, self-defense has always been a more favored defense because when the defendant acts legitimately in self-defense, he's not harming an innocent person. But when a defendant is actually under -- acting under duress, that defendant is still endangering or harming innocent third parties.

And the third reason is that there's always been a significant degree of judicial skepticism about claims of duress, but there's never been that same kind of judicial skepticism about self-defense.

So while we do take the position that the burden of proof is still on the defendant, the Court could take a different view on that issue and agree with us on duress.

JUSTICE STEVENS: Why is the number of decisions -- number of States that have gone one way or --

or the other on the issue relevant? If it's not an Eighth Amendment question --

MR. GORNSTEIN: No. I -- I think it's just a Federal common law question here, and it's only as good as the reasoning that underlies it. But when you start to see a uniform body or a consensus of opinion on one side of the equation, then there -- it's much more likely that there are certain reasons that are underlying that justify it.

JUSTICE SCALIA: What -- what if you're a judge like me who -- who thinks that any significant element of -- of the criminal law, when the Due Process Clause was -- was adopted, remains in effect and it doesn't change with the times as you seem -- as your last comment seems to have said? What do I do with a case like Davis? Not a case like. What do I do with Davis? Davis tells me that this was the common law when the Due Process Clause was adopted.

MR. GORNSTEIN: No, I don't think Davis was taking the position --

JUSTICE SCALIA: No?

MR. GORNSTEIN: -- that this was the common law when the Due Process Clause was adopted. Davis took the position that the common law had evolved to the point where on the specific defense of insanity,

that this was the result that should follow, that there should be a burden of production on the defendant, and then the Government should have to disprove insanity beyond a reasonable doubt. But Davis was not a constitutional holding.

JUSTICE SCALIA: Oh, I know it was not a constitutional holding, but --

MR. GORNSTEIN: And it wasn't a holding about what --

JUSTICE SCALIA: I'll have to go back and look at it.

MR. GORNSTEIN: -- the early common law was --

JUSTICE SCALIA: Okay.

MR. GORNSTEIN: -- because it's clear that under -- at the time of the Constitution, the burden of proof on all of these defenses was on the defendant. And that was also true at the time the Fourteenth Amendment was adopted. The burden of proof was on the defendant. There was some evolution after that.

Now, the -- the other thing I wanted to talk about with respect to Davis is it was based on the understanding that the Court had about the relationship between the insanity defense on the one hand and the mens rea element of the crime on the other hand. And

here, there's simply no corresponding overlap. Whether or not the Petitioner acted under duress, she knew she was lying when she filled out the forms, and she knew it was unlawful for her to purchase firearms. So there's simply no relationship between the duress defense and the mens rea element of these crimes.

Congress has also overruled Davis by statute, and we don't think it would be appropriate for the Court to extend Davis to a new defense when Congress has rejected it with respect to the only defense that it applied to. And -- and there's -- and certainly Congress acted constitutionally in overruling the Davis decision under this Court's decision in Leland and in other cases like Martin and Patterson, which say that there is no constitutional problem in putting the burden of proof on the defendant for established common law affirmative defenses. And --

JUSTICE SOUTER: Is -- is -- I didn't mean to cut you off.

MR. GORNSTEIN: No.

JUSTICE SOUTER: I was -- you have a tougher argument, don't you, when you -- when you face the comparison between duress here and entrapment because it's -- it's quite true in -- in entrapment you're talking about the actions of a -- of a third party

which is causing something, but the -- the ultimate determination that has to be made is a determination about the -- in effect, the -- the inclination, the willingness, the readiness of the defendant to have committed the act. And -- and yet, I take it, it's -- it's assumed that so far as the entrapment defense is concerned, the burden is on the Government. So if the burden is on the Government in what is a -- a somewhat difficult issue for the Government to carry the burden on in entrapment, wouldn't coherence suggest that a fortiori it ought to be on -- on duress?

MR. GORNSTEIN: No, and here's the reason. The -- the burden of proof on entrapment is actually on the defendant initially.

JUSTICE SOUTER: Well, the burden of going forward with evidence.

MR. GORNSTEIN: No. The burden of proof on the element of inducement. That is, there are two elements.

JUSTICE SOUTER: You mean the burden of persuasion.

MR. GORNSTEIN: Burden of persuasion on the element of inducement is on the defendant. The defendant has to prove more likely than not that the Government induced this crime in the sense that it took

actions that are likely to override what a innocent person would have done. At that point, the burden shifts to the Government to show that this particular defendant was predisposed.

Now, that's consistent with background common law principles under which, once it's shown that one party has been engaging in wrongful conduct, i.e., inducement, then the burden shifts to the wrongdoer to show that its conduct did not have its likely effect in that case. And that's why the Government then has to come back and show that with respect to this particular individual, that particular individual was predisposed, even though we took wrongful actions that would have induced an innocent person to do this.

JUSTICE KENNEDY: You could almost argue that the other way. I mean, it -- it seems to me on predisposition that the defendant knows more about it than the Government does.

MR. GORNSTEIN: That -- that's true, but again, if it was just a matter of who has access to the relevant evidence, then that would -- the burden should have been on the defendant, that it wasn't just a matter of that. There was this other principle which is that the -- there was already a showing -- there's already a showing that the Government has taken

wrongful action to induce the crime. And that's why the burden shifts to the defendant -- to the Government to show that this particular person wasn't predisposed.

JUSTICE KENNEDY: I'm not sure what the criteria are that I have to follow -- that we have to follow in deciding the case. Just count up all the cases and --

MR. GORNSTEIN: No, I don't think that the Court --

JUSTICE KENNEDY: Let me ask -- let me ask you this. Is -- is there any evidence that -- that we can take account of, commentary, law reviews, to show that the Government has difficulties in -- in meeting a duress defense?

MR. GORNSTEIN: It -- there is nothing that I can point you to that shows there is an empirically evidence that the Government is not going to be able to deal with this burden.

But what I would say to you is that you should take the same approach that the Court took in The Diana case many years ago, which is it did not want to establish a regime that invites manufactured claims.

JUSTICE BREYER: Well, why is this worse in that respect? And lots of things in the case that you have to prove may be hard to prove because it requires

finding out what someone said to the defendant over the telephone, what happened 4 years ago in a room where the defendant was the only one now alive present. There are lots of cases like that.

Traditionally in the law, I take it, it's been that most instances where the defendant excuses his conduct on the ground he wasn't morally culpable, mistake, accident, self-defense. Entrapment? Not -- that's a different kind of ground. This one? Evidence mixed.

But you have to prove lots of things where it's really in the hands of the defendant, and the defendant saying I'm so innocent because I'm not morally culpable. I was asleep. I was -- you know, we can imagine. So I don't see why this is different.

MR. GORNSTEIN: Justice Breyer --

JUSTICE BREYER: And that's going back to Justice Kennedy's question. I would look -- I guess if we're supposed to get the better rule, the first place I'd look is what did the Model Penal Code think. They think you should have the burden.

Then I think has this turned into a practical problem in the 29 States that have had it for 20 to 40 years. And you say we don't have any evidence to that effect.

Now, I've listed about four things here that I'd like your response to.

MR. GORNSTEIN: Let -- let me start with -- I go back to The Diana case because I think the way the Court approached the question in The Diana case is the way this Court should approach it because it dealt with the same kind of defense, necessity. And what it wanted -- it said this is a defense where there is a there is a big danger that this can be manufactured in a way that it is difficult to disprove, and we are going to establish a regime that doesn't invite manufactured claims and that doesn't make it difficult for the Government to disprove something beyond a reasonable doubt. We have a choice here, and that's not the regime we want to establish. We want to establish a regime that makes it more unlikely that manufactured claims are going to come forward and that make it -- makes it more unlikely that if such claims do come forward, the Government isn't going to be able -- unable to disprove them beyond a reasonable doubt, compromising the entire statutory scheme.

JUSTICE BREYER: But if we're thinking of things logically, logically you're right. I can see that this is in the hands of the defendant. But I've wondered why hasn't this turned into evidence of a

problem in the 29 States. And the following occurred to me, which I'll put to you to see what your reaction is.

The defense has to do something if they are going to put duress in issue. They have to get the defendant to testify. So the prosecutor has something that the prosecutor doesn't ordinarily get. He has that defendant right on the stand, ready for jury evaluation. And that is something a -- a prosecutor may want, and it's something the defense lawyer may not want. He has to choose.

MR. GORNSTEIN: But --

JUSTICE BREYER: So when you get into the practicalities of it, I see things both ways, and I'd like to find some evidence of what's actually happened.

MR. GORNSTEIN: Well, take a recent case in which a defendant transported drugs from Mexico into the United States, and he claimed that he did that because someone threatened his family members in Mexico. Now, that's a case that somebody who has deliberately violated the law would find relatively easy to manufacture that defense. Yet, it would be very difficult for the Government to disprove that beyond a reasonable doubt.

Yes, but if the burden of proof is on the

defendant, then the Government can do what you were talking about. It can cross-examine that person and it can persuade the jury --

JUSTICE BREYER: If -- if does that --

MR. GORNSTEIN: If he does that --

JUSTICE BREYER: He has a few other things, the prosecutor. He has that defendant on the stand. There was an implication that you were in Chicago at the time.

MR. GORNSTEIN: If --

JUSTICE BREYER: Where you on the night of such and such?

MR. GORNSTEIN: There are -- there are other --

JUSTICE BREYER: And that's an advantage for the prosecutor.

MR. GORNSTEIN: That's true, Justice Breyer, but what I'm saying is, that it's one thing to be able to persuade the jury through cross-examination, that that is more -- not more likely than not. It's quite another thing to persuade the jury in that kind of situation that that defense is not true beyond a reasonable doubt.

JUSTICE SCALIA: Of course, in the vast majority of criminal cases, there's no doubt that the

person did the crime. And so the -- the benefit to the Government is just carrying coals to Newcastle. The -- the defendant would plead guilty but for the fact that he has a plausible coercion defense, and so he puts that coercion defense before the jury, and oh, sure, he does let the -- the Government cross-examine him. But the Government really doesn't need his cross-examination in the ordinary case. Isn't that right?

MR. GORNSTEIN: In the ordinary case.

JUSTICE SCALIA: And I -- I guess the only way we could really tell what the consequences are, as Justice Breyer would -- would like us to be able to tell, is to know how many people who have gotten off on the basis of this defense have gone on to continue a life of crime. And -- and we don't have any stats on that --

MR. GORNSTEIN: We do not have any statistics. And, of course, when -- when somebody gets off, it results in -- in an acquittal and so we don't get published decisions about that.

JUSTICE SCALIA: We never know the consequences of our decisions, by and large, do we?

(Laughter.)

JUSTICE BREYER: Well, that's why this is problematic.

MR. GORNSTEIN: I'm not sure I'll answer that.

JUSTICE BREYER: I mean, I don't have the experience as a criminal lawyer that allows me to say whether it would be one way or the other. You're saying -- and I'll repeat that. Is there anything at all I could look to try to figure this out? Because I think it is a question we're supposed to get the better rule.

What did the Model Penal Code authors do? Did they take testimony --

MR. GORNSTEIN: The -- the Model Penal Code takes the position that every defense, affirmative defense, goes on the Government, and that's just a policy judgment --

JUSTICE GINSBURG: Do --

JUSTICE BREYER: Did they have evidence or did they have -- take testimony? Did they go around trying to find out how prosecutors and defense attorneys -- you know. I don't know.

MR. GORNSTEIN: Justice Breyer, I do not know. I do know it is based in -- in its explanation of its rule for all affirmative defenses, which would include insanity, which Congress has rejected --

JUSTICE GINSBURG: Doesn't that come from an

underlying principle that your position is not entirely consistent with, that is, that the defendant is presumed innocent? So it's not as Justice Scalia may have suggested that, well, he would plead guilty, but we're going to let him -- we presume that the defendant is innocent. That's why the prosecutor has to have the burden on all issues. I thought that was the underlying principle.

MR. GORNSTEIN: The -- the burden of -- the presumption of innocence, though, only applies to the essential elements of the crime under this Court's decision in In re Winship, et cetera, and not -- it doesn't apply to affirmative defenses, as the Court has consistently held in Martin and in Patterson and in Leland. That is, the -- it can be constitutionally -- you can put the burden of proof on the defendant to prove an affirmative defense, and the Constitution has nothing to say about that. The presumption of innocence goes to all the things -- the essential elements of the crime.

And here, Petitioner benefited from the presumption of innocence. The Government had to prove that she filled out those forms, that she filled them out with falsities, and that she knew she was lying when she filled out that -- those forms. It had to

prove that she received those guns and that she knew that it was unlawful for her to receive those guns. And it had to prove all of those things beyond a reasonable doubt.

Now, on the position of the States, a significant number of States are on --

CHIEF JUSTICE ROBERTS: Before you get there, what -- roughly speaking, how much of the Model Penal Code has Congress enacted into the criminal --

MR. GORNSTEIN: I don't think the Congress has enacted the -- the Model Penal Code. This -- this Court sometimes looks to the Model Penal Code as one source of what is -- of -- of thought out there, but that's all.

JUSTICE SCALIA: Who -- who develops the Model Penal Code? Is that the American Law Institute that does that?

MR. GORNSTEIN: Yes. Yes.

JUSTICE SCALIA: Which once upon a time purported to simply be embodying the -- the general law, the common law. But it doesn't even purport to do that anymore.

MR. GORNSTEIN: No. It doesn't -- it doesn't purport it. And in fact, in this particular case --

JUSTICE SCALIA: There are a lot of law

professors involved in it, aren't there?

MR. GORNSTEIN: Well, I'm sure.

(Laughter.)

MR. GORNSTEIN: In this particular case the Model --

CHIEF JUSTICE ROBERTS: Some judges too. Right?

MR. GORNSTEIN: -- the Model Penal Code said that it was expanding the common law defense of duress to a new place where it had never been. So it's not surprising that it would also have a different burden of persuasion than the traditional burden of persuasion.

Now, on -- on the practice of the States, the Court has never taken the view that it is just going to do a nose count and figure out what the best rule is based on the practice of the States.

CHIEF JUSTICE ROBERTS: When was this -- the underlying statute at issue here enacted?

MR. GORNSTEIN: I'm not remembering the -- the exact -- I think it's in the '70's, though.

CHIEF JUSTICE ROBERTS: Well, would we -- would our -- would our nose count be today or would our nose count be when the criminal statute was --

MR. GORNSTEIN: No. Mr. Chief Justice, we

don't think that the Court should do that kind of nose counting based on whether a statute was enacted in 1800, 1850, 1900, 1950 and potentially have different rules for each statute. We think that the Court should look at the entire --

JUSTICE STEVENS: Well, why not? Isn't it realistic to assume that Congress looked at the state of the law at the time it's passing a statute and presumably adopted what was the prevailing view?

MR. GORNSTEIN: I don't think it's right to say that it adopted the prevailing view unless it was a consensus view. I don't think, though --

JUSTICE STEVENS: Well, a consensus view. It would still be the time of the enactment of the statute is what would be relevant, I would think.

MR. GORNSTEIN: But I think the -- I think that the problem with that approach is to have a completely different rule for all the different statutes based on when they were enacted is unmanageable and impractical. And the Court has said the same thing in the context of mens rea requirements.

The Court doesn't import into statutes the mens rea requirement that was in vogue at a particular time. What it does now is it imports into all criminal statutes that do not specify a mens rea requirement --

it simply imports in a knowledge requirement, that there has to be knowing action. And that would be true regardless of whether it's an 1800 statute, an 1850 statute, a 1900 statute, or a today statute. And I think that the reason for that is one of practicality and administrability which the Court has talked about, in fact, in -- in other cases. The Bailey case.

JUSTICE SCALIA: Mr. Gornstein, just out of curiosity, of the 29 States that have the different rule, in how many of those States was the different rule adopted legislatively and in how many States was it pronounced by the State supreme court?

MR. GORNSTEIN: I -- I'm not sure of the exact breakdown, but I think that there are -- there are possibly something like 10 or so States on -- that have adopted it by statute, but I'm not sure of the exact number of that -- on that.

JUSTICE KENNEDY: Is -- is --

JUSTICE SCALIA: Maybe your -- your friend on the other side knows.

JUSTICE KENNEDY: Is the test proposed by the Petitioner that -- that you have to prove non-duress by beyond a reasonable doubt?

MR. GORNSTEIN: Yes, after the defendant --

JUSTICE KENNEDY: And your test is that the

defendant would have to prove it only by clear and convincing evidence?

MR. GORNSTEIN: No. More likely than not, the preponderance of the evidence standard.

JUSTICE KENNEDY: More likely. More likely.

MR. GORNSTEIN: More likely than not. And that -- the -- the Court in The Diana case, actually in the context of forfeiture, thought that a beyond -- the defendant should have to show it beyond a reasonable doubt.

But we -- and we -- we would take a step back from that, consistent the practice in the circuits that have put the burden of proof on the defendant and the States that put the burden of proof on the defendant and the burden of proof that -- that Congress has specified when it has thought about what the burden of proof should be outside the context of insanity --

JUSTICE KENNEDY: Do you think a State could put a burden on the defendant beyond a reasonable doubt for entrapment, duress, insanity?

MR. GORNSTEIN: For all of the affirmative defenses, I think that's the -- the Leland decision would allow a State to do that. Leland said that you could put -- require the defendant to show beyond a reasonable -- I'm sorry. Is it Leland?

JUSTICE SCALIA: Clear and convincing.

MR. GORNSTEIN: Yes. Beyond a reasonable doubt and so that there is -- there would be no constitutional problem in putting a -- a burden beyond a reasonable doubt on the duress defense either.

And in fact, this is a defense that Congress could -- could eliminate altogether, if it wanted to, and just take the position that it's going to -- these -- this kind of excuse would be considered along with all other kinds of excuses in either making a charging decision or -- or making a sentencing decision. There is no constitutional imperative that there be a duress defense at all.

JUSTICE GINSBURG: What about the insanity defense?

MR. GORNSTEIN: The same is true of the -- the insanity defense that the Congress could take the position. It hasn't taken that position, but it could take the position, that this is a defense that will be considered, along with other excuses, in -- by prosecutors as they make charging decisions and by sentencing judges as they make sentencing judgments.

JUSTICE GINSBURG: What about self-defense?

MR. GORNSTEIN: The -- the same would be true of self-defense, again, that the -- the Government --

no State has ever taken that position and the Congress hasn't taken that position, and it would be very much against all the traditions that are -- that we have. But if a State made a policy judgment to that effect, that this is the policy -- we want to encourage people to retreat, we do not want to encourage people to take the law into their own hands, but what we will do is we will recognize this and we are sure our prosecutors are going to recognize it, we're sure our judges are going to recognize it as a -- a mitigating factor. And that would be constitutional.

JUSTICE STEVENS: Mr. Gornstein, there are some old cases that draw a distinction between justifications and excuses. And you carefully use the words excuse to describe that defense. Did you do so having in mind that distinction or just as a loose description of the -- of the defense?

MR. GORNSTEIN: I think that it -- it fits the defense and that you can draw a distinction between excuse and justification, but I don't think the distinction ultimately matters whether you call it an excuse or justification. It's still the burden of proof should be on the defendant and it shouldn't -- the nomenclature shouldn't matter.

JUSTICE BREYER: What about mistake?

MR. GORNSTEIN: Mistake is --

JUSTICE BREYER: I thought it was a deer.

MR. GORNSTEIN: Yes. Mistake is something that negatives the mens rea requirement of knowledge. So, of course, the Government has to prove knowledge beyond a reasonable doubt, and if somebody has mistake, then the Government isn't going to be able to satisfy its burden of proof beyond a reasonable doubt.

JUSTICE BREYER: And would you distinguish between instances of duress where it may a negative mens rea and instances where it may not?

MR. GORNSTEIN: Well, if it does negative mens rea -- and this is infrequent, but if it does, then the Government, of course, has to prove its element of the offense beyond a reasonable doubt. And if duress evidence undermines the Government's ability to do that, then the Government hasn't proven its case beyond a reasonable doubt.

If the Court has no further questions.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Gornstein.

Mr. Jett, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF J. CRAIG JETT

ON BEHALF OF THE PETITIONER

MR. JETT: To answer Justice Scalia's

question, a quick count, it looked like that there were perhaps three that we could count, but it was a quick count. We can't tell whether all those decisions were based on State statutes or not. The gun control statute was passed in 1968, and at the time, the Model Penal Code had been passed in 1962, and the Eighth Circuit had said that the law was and there is no doubt that the defendant does not have the burden of proving his duress defense. So we believe that at the time the statute passed, that the clear common -- the clear law in the country was that the burden was on the Government to disprove duress.

JUSTICE SCALIA: And three -- three was what? Three States that have adopted it --

MR. JETT: The statute. By statute.

JUSTICE SCALIA: By statute.

MR. JETT: Now, the Government talks about that the defendant can manufacture a defense, but you can do that in any case. You can manufacture a defense for a -- for a plea of not guilty, as to -- as to why you're not guilty. So it really doesn't make a difference. It would be the same thing for self-defense.

In this particular case, instead of Ms. Dixon having bought the guns, if she had gotten a hold of one

of Mr. Wright's guns and shot him, she would have had a self-defense, and if she had done that, then the burden of proof would have been on the Government to disprove self-defense beyond a reasonable doubt. But because she did the less blameworthy thing, that is, that she bought guns instead of shooting somebody or killing somebody, she is disadvantaged in -- in the courtroom. Because -- because she raised duress, she then had to prove her defense by a preponderance of the evidence. And it's simply not --

JUSTICE SCALIA: I'm not sure it's less -- less blameworthy. I mean, if somebody has a gun to the head of my child and I have a choice between doing a criminal act that he wants me to do and shooting him, you think it's -- the less blameworthy is to go do the criminal act?

MR. JETT: I think rather than -- than to kill somebody it certainly would be.

JUSTICE SCALIA: I wouldn't kill him. I'd just wound him.

(Laughter.)

MR. JETT: Well, Justice Scalia, I understand the sentiment, but she was -- she was threatened by somebody with -- with a gun and her children were threatened. And she might have killed him. She might

have shot him.

In either case, though, she is disadvantaged by the law. She would have been better off if she had shot him or killed him, and it's simply not consistent that she does a less blameworthy action, buying guns where nobody dies, her children didn't die, there were no funerals for her, no funerals for her children, no funerals for the abuser, nobody dies, but she's disadvantage because she doesn't --

JUSTICE GINSBURG: Do you take into account that this was not something that occurred at once? This was a long-term relationship. There were many opportunities in which she might have, when her children were with the grandmother, say, gone to the police.

MR. JETT: This was a long-term relationship. But what happened in this particular case is the level of violence escalated substantially immediately before the gun shows. The violence had been bruising where you couldn't see it. Suddenly it -- it escalated with a gun in the face and a split lip and a sudden threat to the children that we're going -- if I kill you, I'm going to have to kill your children. So even -- even though it had gone on for a while, it suddenly changed, and her state of mind suddenly changed because what was

most important to her was the safety of her children. And so she did what she thought she had to do in order to save her children and keep them safe.

And it simply would not be fair that if she had done the less blameworthy action, that she has -- is more advantaged in court. So you can't square the way duress is treated and the way self-defense is treated.

JUSTICE KENNEDY: Can the judge ask the defendant to produce evidence that there was no possibility to go to law enforcement officials, and if she does not produce that evidence, then refuse to give the defense?

MR. JETT: The judge could do that if he felt that that was -- was appropriate for one of the elements. The -- one of the elements is you didn't have an -- a reasonable opportunity to not do the crime. In her mind, she did not believe she did because she believed that there was somebody at home with a gun threatening her children.

And I'm out of time. Thank you.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Jett.

The case is submitted.

(Whereupon, at 11:03 a.m., the case in the above-entitled matter was submitted.)