IN THE SUPREME COURT OF THE UNITED STATES

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PHILLIP MORRIS USA INC., :

Petitioner :

v. : No. 07-1216

MAYOLA WILLIAMS, :

PERSONAL REPRESENTATIVE :

OF THE ESTATE OF JESSE D. :

WILLIAMS, DECEASED. :

- x

Washington, D.C.

Wednesday, December 3, 2008

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

APPEARANCES:

STEPHEN M. SHAPIRO, ESQ., Chicago, Ill.; on behalf of the Petitioner.

ROBERT S. PECK, ESQ., 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

(10:02 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 07-1216, Philip Morris v. Williams.

Mr. Shapiro.

ORAL ARGUMENT OF STEPHEN M. SHAPIRO

ON BEHALF OF THE PETITIONER

MR. SHAPIRO: Thank you, Mr. Chief Justice, and may it please the Court:

We are here today because the Oregon court failed to follow this Court's directions on remand and because the ground it gave is not adequate to show a forfeiture of due process rights.

This -- this Court vacated after finding that the Oregon Supreme Court applied the wrong constitutional standard, and it remanded with directions to apply the standard that the Court laid out. But the Oregon court didn't do that. It never even addressed the constitutional issue. The Oregon court, of course, refused to follow this Court's direction because it believed there were mistakes in another paragraph in our instruction request dealing with what the court referred to as "unrelated issues."

But that isn't what this Court mandated.

And the specific forfeiture theory adopted here for the first time after nine years of appellate litigation is completely inadequate to avoid this mandate.

JUSTICE GINSBURG: Mr. Shapiro, we are dealing with a State supreme court, and our bottom line always reads "for further proceedings not inconsistent with this opinion." And it was my understanding that a State court can resolve a case on an alternate State law ground, if there is such a ground in the case.

MR. SHAPIRO: Yes, Your Honor. We believe that this disposition is quite inconsistent with what the Court mandated. The Court heard arguments in this case about the "correct in all respects" rule, but it still mandated an application of the constitutional standard, including the prohibition on punishment for harm to non-parties, and that standard simply was never applied. We say that is inconsistent with this Court's opinion.

JUSTICE SOUTER: But it seems to me the problem with the argument is that to say it is inconsistent with the opinion we implicitly have to say that the Oregon Supreme Court has to confront State law issues in a certain sequence, and that if it does not do so those issues are waived, as it were, not only by the court but by the party who raised it. And the

difficulty, I think, with your position here is that on the assumption, which I do make, that the -- that the issue, "correct in all respect" issue, was properly raised by the other side, if we accept your position, we in effect are saying the other side is not going to have an opportunity to argue that before the Oregon Supreme Court. And that's, it seems to me, kind of a steep hill for you to climb.

MR. SHAPIRO: Well, we don't say that the court can never adopt a State law standard after remand from this Court, but we say that this disposition is inconsistent --

JUSTICE SOUTER: I know you are saying that but why -- why does the disposition that you are asking for not entail what I just said, and that is, in effect you cut off the claim by a party raised before the Oregon Supreme Court, not considered by the Oregon Supreme Court, and you cut off that claim simply because the Oregon Supreme Court chose to approach the issues in the case in a certain sequence? What business do we have to do that?

MR. SHAPIRO: Well, because the preservation issue was debated before this Court and it adopted a specific order here saying on remand now consider the constitutional standard, which is the prohibition on --

JUSTICE SOUTER: I know the language that you are referring to.

MR. SHAPIRO: Yes.

JUSTICE SOUTER: But the referring to that language simply skips over the issue that I am trying to raise. Isn't there a problem that we should be concerned with if we accept your position in cutting off the claim made by one party to the case which was never heard by the Oregon Supreme Court?

MR. SHAPIRO: Well, Your Honor, this is very similar to what occurred in the Sullivan case in this Court, where the issue of preservation was debated before this Court at the cert stage in the cert papers, and the Court said: We sub silentio passed on the adequacy of the State ground when we CDRed the case.

JUSTICE GINSBURG: Didn't -- did the Court -- suppose the -- what is it called -- "correct in all respects" had been raised and decided by the Oregon Supreme Court in the first instance. Suppose it had said, well, we don't have to deal with whether Instruction 34 was right or wrong in this particular, because it was wrong in other respects. Suppose that had been the first time around what the Oregon Supreme Court said. Would that have offended any Federal due process? Would that have been an appropriate

disposition for the Oregon Supreme Court to make?

MR. SHAPIRO: Well, that takes us to our second and principal argument, which is that that ground would not be adequate under this Court's criteria for adequacy. And we say that there are really three reasons why that would not be an adequate ground for forfeiting this constitutional right. It's an ambush. It was a surprise ruling that we couldn't anticipate. It is an exercise in futility because, even if we submitted a perfect instruction that complied with that rule, we would have been rejected anyway by the trial court that simply believed that this instruction wasn't required by the --

JUSTICE SOUTER: Isn't the place to make that argument in the Oregon Supreme Court?

MR. SHAPIRO: Well, no. The Oregon Supreme --

JUSTICE SOUTER: Wouldn't it have been appropriate to -- to hear the -- the issue that they are raising and for you to make the reply that you have just made?

MR. SHAPIRO: Your Honor, this Court has said repeatedly that adequacy is a Federal law question for this Court to decide.

JUSTICE SOUTER: I realize it's a Federal

law question and in approaching that question, I keep asking the question which I think I have now put to you three times and have yet to hear an answer on the merits on: Why is it appropriate for us to have a rule here that cuts off the right of a party that properly raised an issue in the Oregon Supreme Court and has yet to be heard on the merits in the Oregon Supreme Court?

MR. SHAPIRO: Well, there are two reasons. First under the adequacy decisions of this Court, including Lee v. Kemna, if it takes years and years after the trial to articulate a forfeiture rule like this that counts heavily against the adequacy of the State ground. This Court held that in Lee v. Kemna very recently.

And then secondly, this is a point that was argued to this Court four separate times now and when the Court remanded with explicit directions to apply the constitutional standard that's something that had to be done on remand. The Court did not invite the lower court to get into the question of whether this request was made. The Court found that the request was made.

JUSTICE SOUTER: Maybe -- maybe this Court insufficiently appreciated the significance of the issue which is now before us. And I still want to know, is there a good reason on the merits why it is fair for us

to cut off the right of the other side to raise an issue that they raise or to argue an issue that they raised in a timely fashion?

MR. SHAPIRO: Yes, there is a good reason, because this is -- adequacy is ultimately a Federal question for this Court to decide. The issue was debated here four separate times at great length. The Court remanded for a specific decision by the lower court. That wasn't done. And if we turn to the adequacy doctrine --

JUSTICE SCALIA: Excuse me. What -- what issue was debated here four times?

MR. SHAPIRO: Whether or not there was an adequate State ground because of the "correct in all respects" rule. That was debated in the merits brief, in the cert oppositions twice. It was debated again in the cert opposition this time around. But the Court has never accepted it.

JUSTICE STEVENS: But the State court hadn't ruled on it at that time.

MR. SHAPIRO: That's correct.

JUSTICE STEVENS: So how do we rule on it as a matter of first impression?

MR. SHAPIRO: Well, because, Your Honor, the Court considered, just as it did in Sullivan, it

considered these issues in the cert papers and then remanded the case for a different issue to be decided by the lower court.

But we don't hesitate from debating the adequacy issue.

JUSTICE SCALIA: Did our opinion decide that -- that question? Did our opinion say that that question was decided against your opponent?

MR. SHAPIRO: No. What the Court said in Sullivan was that it was a sub silentio determination.

JUSTICE GINSBURG: How could we have determined it when the Oregon Supreme Court itself hadn't made any determination?

MR. SHAPIRO: Because the parties debated this extensively in their briefs.

JUSTICE GINSBURG: But we don't decide questions, particularly questions of State law, that may have a Federal check. But we don't decide them in the first instance.

And there's one point, Mr. Shapiro, that I think affects this concern of fairness to the parties who raised this "correct in all respects" from the beginning. This Court had not clarified, had it, until the Williams case itself, the rule about harm to others. In State Farm we were talking about harm to

nonresidents. So if I recall correctly, Williams was the first time we ever clarified that harm to others included people within the same State; is that correct?

MR. SHAPIRO: Yes. That's true.

This -- this, as the Court expressed it, was a slight extension of the previous decisions. But Your Honor, if the Court feel that this adequacy issue hasn't been dealt with previously by this Court, it's presented squarely here. It is a Federal question, which this Court says has to be decided by this Court. And we don't hesitate from --

CHIEF JUSTICE ROBERTS: I suppose one reason -- one reason to think it may not have been decided is that, unlike the other situations you have discussed, it would not have been a bar to our consideration of this case the last time because, just as you raise the question in your second question presented that whether the award complies with due process, we may have thought there might have been an adequate and independent State ground on a procedural question, but we were going to go ahead. We granted cert on the substantive question on whether the damages award was unconstitutional.

MR. SHAPIRO: Well, Your Honor, if -- if we're not right about the decision resolving the adequacy issue already, we're happy to turn to it now

and address it as we do in our briefs. This is not an adequate State ground under this Court's decisions. The first reason for that is that this is a futile gesture that the State court requires of us.

JUSTICE STEVENS: I want to ask you about that. That's the thrust of your argument: It would have been futile to comply with the specific, drafting a perfect -- perfect instruction "correct in all respects." But I have to think the trial -- the record is subject to the reading that the trial judge thought the issue had already been adequately taken care of, rather than it would be an incorrect instruction.

MR. SHAPIRO: Well, the trial judge asked, is there any authority that requires me to give this instruction on harm to non-parties? And we said, in our view it's the BMW case. And she said, well, if there is not an authority right on point I'm not going to give this instruction. She said that very clearly. So if we submitted a separate piece of paper, it would have made no difference; and if we had taken out the two mistakes --

JUSTICE STEVENS: Where in the record is the portion of the colloquy about the instructions most clearly stated in your view, on your side of that issue?

MR. SHAPIRO: Let's see. It's the

instruction conference. This begins on page 17a, where Mr. Beaty starts discussing the second prong of this paragraph. He says -- he quotes the language, and the judge -- the judge says: "Well, I think that that's covered by giving an instruction that punitive damages are not compensatory." And he says: No, no, that is not -- "That is not the point of this instruction." This is pages 17 and 18a.

JUSTICE STEVENS: But that's exactly the point I make. I think the trial judge was saying, I think it's already covered, which is different from saying, no matter how you phrase it, I won't give it.

MR. SHAPIRO: Well, she said she just disagreed with the idea that there should be protection against punishment for harm to non-parties. And she said unless there's a case requiring that, I'm not going to give that instruction. And she said --

JUSTICE SOUTER: Didn't she also say that she was going to give, and ultimately did give an instruction, to the effect that punitive damages are punitive, they are not for the compensation of this person or any other person, and to -- she then turned to Philip Morris's counsel and said: What about that? And Philip Morris's counsel said okay.

MR. SHAPIRO: What he was saying when he

said okay was: I understand your ruling and I'm not going to continue to argue a point that I've already lost. But he pressed that point --

JUSTICE SOUTER: It doesn't sound like much of an objection.

MR. SHAPIRO: Well, the -- the State courts both held -- both of the appellate courts held our instruction was rejected. And this Court said it was rejected, too, in its opinion. And that's exactly right. You can't antagonize the trial judge by arguing and arguing after your position has been rejected.

JUSTICE BREYER: But -- but the -- the problem that I am having at the moment is that they did -- from your point of view, is that they -- the other side listed 28 cases in which they said the Oregon courts have followed this rule that the instruction has to be good as a whole.

Now, I have looked up those 28 cases, and they do -- they do say that. They do say it, or they imply it, or they apply it. They are not completely on point, but they are not completely out of point, either. And -- and so I suppose what happened is that the judge there just looked at this instruction on 32(a). It looks like sort of it's all together. It really does look like it's all together, the (1) and the (2). And

he ran his eye down the page and he said, well, here are two other ways in which it's no good, and so that's the end of it. You can't raise your objection. Maybe you should have had four instructions instead of one, but you did just have one.

And under Oregon law, unless every part of it is right, the judge is correct in not giving it, even if he never mentions the other part. And that 28 -- it does seem as if that's what those 28 cases do say. So what do we say about that?

MR. SHAPIRO: The -- the reason we say that those 28 cases did not give us reasonable notice that we had to submit a separate piece of paper or change another paragraph in the instruction request is that none of them dealt with a situation where you have separately numbered requests --

JUSTICE BREYER: Well, I mean -- please, I -- I don't want to appear skeptical, but I am. And -- and that's because I have looked up in some of those cases, and then I sort of looked at the -- which doesn't -- most of them don't give you the instructions, so it's a little hard to say. But then I looked on page 32(a) of this appendix and looked at what your instructions looked like.

And -- and if I were sitting there as a

judge, I would think, well, gee, that looks like a single thing there. They have it indented, and they have a (1) and a (2), and it just looks like it's one ball of wax. So can I really fault this Oregon court for just doing what I said?

MR. SHAPIRO: Well, I -- I think so, because the pattern instruction here told both parties to include all their paragraphs pertaining to punitive damages in one numbered instruction, 34.

JUSTICE BREYER: Well, they had some other handbook that says beware of that.

MR. SHAPIRO: Yes.

JUSTICE BREYER: Because you are going to run into this rule that says if there is any part of a single instruction that is wrong, goodbye, even if the trial judge never mentioned it.

MR. SHAPIRO: But that handbook came out in 2006. And after all, that was a practice tip. It was not a State court ruling saying you had to organize your instruction this way.

We had separate paragraphs, separately numbered. They dealt with different issues. One was the Constitution and the other was the State statute. And there's no Oregon case that said that in that situation you have to break it out into a separate piece

of paper.

JUSTICE GINSBURG: I thought the notion was one issue, one charge. And it wasn't in just one practice manual. There were a few cited in the brief that the charge should be limited to one issue, one point of law.

MR. SHAPIRO: Well, the pattern instructions told us to put every point pertaining to punitive damages in Instruction No. 34. Both sides did that. And the Court was working with plaintiff's instruction, taking their --

JUSTICE BREYER: I mean, it would be pretty odd. Did the person who wrote that read these 28 cases or some share thereof? And if you were going to do that -- it wasn't you, I know -- why -- why wouldn't you just, if you have one instruction, copy the -- the model instruction? Then you won't make errors in the other parts.

MR. SHAPIRO: Well, you see, the -- the pattern -- the pattern instruction didn't include the due process point.

JUSTICE BREYER: True, but you could add that to the pattern.

MR. SHAPIRO: That's what we tried to do, and the -- the judge invited us while dealing with the

other side's instruction to go through this one by one. She -- she was asking us: Now, what's your next addition?

And we -- we got to the due process point, and she said: What is your authority? And we told her, and she said: I don't think that instruction is necessary.

It was separately argued. It was separately decided by the State courts in the prior decisions, decided by this Court as -- as a separate matter, and that is exactly how the trial court approached this. Her request was to go through this item by item.

She wasn't taking an all-or-nothing approach to this instruction. She started with plaintiff's document and asked what from our menu of additions was necessary.

JUSTICE BREYER: I'm not speaking of this from the point of view -- I mean I -- when I read that petition for cert, I thought this is a run- around, and I'm not sure that I think that now. That is, the reason is because I put myself in the position of not the trial judge. The person to put yourself in the position of is the Oregon Supreme Court justice. And what he is doing is he's reading that instruction. And -- and what can you say in response to what -- what he might have

thought?

He knows this rule. The rule is if the instruction is -- is unfavorable in any part, if it's wrong, you are out.

MR. SHAPIRO: Well --

JUSTICE BREYER: He knows that rule, because there have been a lot of cases on it. And then he reads your instruction, and as I looked carefully -- I didn't know this the first time when it was here, but he said because it's right in paragraph 1 -- I mean it's wrong in paragraph 1, where he was wrong -- I don't have to go to the rest of it.

MR. SHAPIRO: Yes.

JUSTICE BREYER: Now we send it back, so he says: Okay, now I've got to go to the rest of it.

MR. SHAPIRO: You know, Justice Breyer, this is very similar to what was at issue in the Flowers case which reached this Court. The Alabama Supreme Court had said if you intermix different appeal points in your brief, we are not going to consider any of them if there are any errors to be found in any of the paragraphs in their brief.

JUSTICE GINSBURG: But I thought the whole thing about -- this is the NAACP case you that you were discussing?

MR. SHAPIRO: Yes.

JUSTICE GINSBURG: -- that this was something that the Alabama Supreme Court really sprung at the last minute, that it was not like this rule. There were not 28 cases in the Alabama Supreme Court applying the rule. It seemed to be quite a novel rule.

MR. SHAPIRO: Well, what -- what the State argued there was that for 60 years the "correct in all respects" rule was in effect in Alabama, and they cited dozens of cases applying it. But this Court unanimously held that that approach was pointless severity. Even though the State supreme court there said, we can't disentangle these arguments, it's too complicated, it's too much of a burden on the State supreme court, this Court unanimously found that was pointless severity. And at that point --

JUSTICE STEVENS: There was a basis for questioning the good faith of the court in that case, I think.

MR. SHAPIRO: Well --

JUSTICE STEVENS: And I don't think that's true here.

MR. SHAPIRO: I -- I -- we don't question the good faith of the court, but we say that this is pointless severity, a rule that this Court has applied

more recently in Lee v. Kemna where there was no issue of bad faith. The Court thought that it was pointlessly severe and unnecessarily severe to insist on a perfect proposal in that case.

JUSTICE BREYER: The best you have come up with -- and I think you have researched this pretty thoroughly -- and the best you have come up with to find a case where they didn't apply the rule is that George case, right? "George," I think, is the name of it.

And there, there is an alternative ground which is that the judge had to -- had to give the instruction himself, and it's a criminal case. And we Shepardized it and it has only been cited twice. And -- and so I'm slightly at sea, to tell you the truth. And -- and what is the standard I'm supposed to use to decide whether that State ground is adequate as a matter of Federal law or not?

MR. SHAPIRO: Well, there is an earlier case that is interesting, State v. Brown, which comes several years before, and it's cited in our brief. In that case an imperfect instructional request was made, and the Court still found that there was a duty to give the instruction based on due process. And the reason was that the parties during the charge conference had debated the issue. It was a fair-enough exposition for

the trial court to understand the need for the charge.

And here this really is much like the Osborne case. You know, in the Osborne case the defendant didn't make any instructional proposal, and this Court still reversed and required a new trial with the correct instruction. It said due process required that. And the Court said that we -- that the party had sufficiently brought this to the attention of the trial judge for Federal adequacy purposes even though no instruction was -- was proposed.

The lawyer there merely moved to dismiss the proceeding, never proposed an instruction, but this Court required a retrial with a correct set of instructions to the jury. That's an a fortiori case, I think; and also the Flowers case, I believe, is a fortiori. There really was a strong and compelling State interest there in having the lawyers break their arguments up into separate headings and subheadings so the appellate court could follow the argument.

But here there wasn't any burden placed on the trial judge at all by our request. She was going through these one by one, and she asked us: What's your next point that you want added? We proposed it. It was on a silver platter. She didn't have to retype it. She could have simply read it to the jury in that form. It

didn't have to be edited or amended. There literally was no burden on the trial judge at all. And so we --

JUSTICE GINSBURG: She didn't get to the -- the other grounds, because I think it was all about that paragraph and whether that paragraph was adequate under our then precedent. And I don't think that -- that the -- the incorrect portions of the charge that have now -- are now before us were -- were even reached then.

MR. SHAPIRO: She did look at the illicit profits point. And she said: I'm not going to give that; that's unnecessary. She did -- she didn't address the "may versus shall" issue because she was working with plaintiffs' proposal. So all -- really she just had before her our request for this due process instruction. She analyzed it separately, it was debated before her.

And this is much more specific than what the lawyers did in the Osborne case. They didn't even propose an instruction. We served it up on a silver platter. She could have used it, and indeed there was no work for the trial judge at all because she was simply telling the lawyers, make this change, make that change that we've discussed, so there is zero burden on the court.

And you have to ask in this situation, what

is the legitimate State interest that would support this massive forfeiture of a very important due process right? The plaintiff says the State interest here is that it promotes affirmance of jury verdicts whether or not there has been a due process violation. But think about that. That's hardly a State interest.

JUSTICE BREYER: The State interest in the rule in general, I take it, is to require the lawyers, if they are going to object to the instructions that the judge is going to give, to produce an instruction that is a correct instruction of the law. That's -- that's why, I guess, they have this rule.

MR. SHAPIRO: Oh, yes.

JUSTICE BREYER: And -- and you'd better get it right, because if you don't get it right, you're going to lose your ability to claim that the judge was wrong in refusing to give any part of it.

Now, if that's the reason they have that rule, that would seem to apply as much in this case as in any other case. Why wouldn't it?

MR. SHAPIRO: Well, please recall that in both Osborne and in the Lee case, there was a general State purpose of that kind that supported the rule, but the Court said it was an exorbitant or unnecessarily severe application of the rule. And that's what we

contend here, that this is exorbitant, it serves no legitimate purpose. It is truly a game of gotcha that just nullifies the defendant's due process rights.

And that precedent I think would be of great concern in various fields of law. This is a rule of law that will apply in civil rights cases in the future, criminal cases, all sorts of cases.

So I -- I think if this Court does apply its own criteria here, it will see that this is an exercise in futility, it was an ambush as a practical matter. We didn't have any reason to think we had to submit this again on a separate piece of paper.

JUSTICE STEVENS: Could you just tell me, well, why was it an exercise in futility? That's what I don't quite understand.

MR. SHAPIRO: Oh, because the judge had ruled as a matter of substantive law that she wasn't going to give this instruction. It wouldn't matter if we separated it.

JUSTICE STEVENS: But she said she thought it was already covered. That's what I -- on that very page you pointed me to.

MR. SHAPIRO: Well, she -- she said that was all she was going to say about the point. And we said, well, that doesn't cover our point, because we want

protection against punishment for harm to non-parties. And she said: I'm not going to give that instruction; I deny the rest of your request, No. 34.

JUSTICE GINSBURG: And where is this colloquy? I mean, we went through the parts, she said I think it's covered and it was okay. You seem to be saying more than ws included in that colloquy.

MR. SHAPIRO: Well, I -- I think if -- if you look at the whole colloquy, that's the gist of it. I -- I have paraphrased it, but --

JUSTICE GINSBURG: You've made it much clearer than it was.

MR. SHAPIRO: Perhaps --

(Laughter.)

MR. SHAPIRO: -- perhaps I did. But I -- I would just point out that in Osborne the lawyer didn't make it clear at all. The lawyer didn't even propose an instruction.

We proposed a good instruction that this Court has quoted from emphasizing our language, saying -- saying it correctly captures the due process principle. So that is enough to satisfy Federal criteria of -- of adequacy, and that is sufficient to preserve the point. There is no dispute that this is preserved for appellate purposes in Oregon.

Unless the Court has further questions, I -- I would reserve the balance of our time.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Shapiro.

Mr. Peck.

ORAL ARGUMENT OF ROBERT S. PECK

ON BEHALF OF THE RESPONDENT

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

This Court's constitutional mandate in this case is conditioned in several significant respects, and it invites the discretion and judgment of a State court that's applying it. First of all, it says that States have flexibility in coming up with a procedure to address this procedural due process issue.

It also says that it has to be an appropriate case; there has to be a significant risk of juror confusion, and a request. There's no indication in the opinion that this Court intended to federalize the State procedure over how that request occurs.

CHIEF JUSTICE ROBERTS: You don't dispute that it's a Federal question whether that procedure is adequate and independent?

MR. PECK: I do not, but I also submit that it is more than adequate. Exist -- what the Oregon

Supreme Court decided was that the existing procedure permitting a limiting instruction to be requested -- in Oregon it's Rule 105, same language as in the Federal rule -- and such a request has to be timely, it has to be specific, it has to be on the record. And Oregon precedent says that when we mean specific, the proponent has to give us the exact language -- this is part of the party presentation principle -- the exact language that they are asking us to use.

And that means that we also apply our traditional 92-year-old rule that requests for instruction must be clear and correct in all respects.

JUSTICE STEVENS: The problem --

JUSTICE BREYER: I would say the 28 cases are not quite as clear as I suggested. That is, I couldn't find in those 28 cases really a comparable situation.

MR. PECK: Well --

JUSTICE BREYER: In each instance it seemed as if one of two things was the case: Either, A, where the instruction was in error, it really was the matter brought up in the first place, or the court said, but he gave the essence of the instruction he wanted anyway.

Now, which of those cases do you think -- I am leading up to, what of -- what of those cases do you

think is your best support, because I couldn't -- they are not perfect.

MR. PECK: I would look first at Reyes-Camarena, which is a 2000 -- a 2000 decision involving the death penalty. And there, there were two parts of this request, in a single request. The request asked for a mitigating factors instruction, which the court found was correct on the law and -- and would have been given had it been asked for separately.

But it also asked the jury to consider sympathy for the defendant, which they found to be contrary to Oregon law, and therefore, it was not error for the trial court to have refused this.

JUSTICE BREYER: What -- what you can't tell from that is what was the part of the sympathy instruction that they thought was wrong, and was the part that they thought was wrong really part and parcel of the part that the -- that the appellant was complaining about.

MR. PECK: Well, the court, though, did cite a prior decision that talked about a sympathy instruction and claimed that this one was no different than that. It was contained in a single instruction. It makes clear, the opinion does, on that.

Owings v. Rose is that another case which

both parties have cited. And in Owings, it's very clear. There you have two different parts of an instruction that are offered at the same time, and -- and one part is right. And this -- this one deals with third party liability.

JUSTICE BREYER: But I remember that, because they said on that one -- some floor covering thing, wasn't it, that they had some liability for bad floors or designing the floors wrong --

MR. PECK: If --

JUSTICE BREYER: If that's the case, what they said was: Don't worry about it because basically he did give you the instruction that you wanted, though in a different way --

MR. PECK: But --

JUSTICE BREYER: -- and besides that, they added --

MR. PECK: And besides that --

JUSTICE BREYER: You're right.

MR. PECK: -- this was an alternate ground.

Then in Hotelling v. Walther, a 1944 case, the proposed instruction consist -- consisted of three separate sentences, and the Court does reprint that instruction. And each of those sentences has a different legal proposition in it. And it was only the

last sentence, the third proposition, that the Court found to be in error, and therefore, found that there was no error in failing to give this instruction because it was not clear and correct in all respects.

I -- I think that that --

JUSTICE BREYER: In the last one, what I have here is that the court said the so-called requested instruction was never requested at all --

MR. PECK: But --

JUSTICE BREYER: -- at all.

MR. PECK: But I do not believe that that was the --

JUSTICE BREYER: What is the -- what is the -- I will go look at that again. But what is the standard? I mean, remember, I think what your brother said at the end is correct. Imagine that yours is a death case and we have said as a matter of Federal law that this execution is unconstitutional, and then we send it back. And the court then says: Oh, we forgot; there are a couple of matters of State law here that bar the Federal consideration of the death question. And here they are. And then they come up with just this.

Is this -- is this a situation where you would be equally -- that's my problem. And so, put yourself in my shoes and -- and tell me what you would

do if this is the death case and not the case that you have?

MR. PECK: Well, you know, it's -- it's hard to get my arms around your hypothetical, because I don't know the grounds on which --

JUSTICE BREYER: I'm just imagining that what has happened is that the instruction that they have given for the defendant in the death case violates Federal law, and then we send it back, and what happens is that the State court says, oh, it may violate Federal law all right, but it's -- the Federal court is blocked from considering it because there are these two other State grounds that mean that the lawyer --

MR. PECK: I understand.

JUSTICE BREYER: Okay.

MR. PECK: But -- but the question would be then, why would that be a situation like this, where the trial judge -- contrary to your assumption, Justice Ginsburg -- the trial judge did find that there were other parts of the instructions offered by Philip Morris that were incorrect on the law, and the illicit profits was one of them.

JUSTICE SCALIA: Why didn't the trial judge just stop there? I mean, if this is the ruling in the State --

MR. PECK: Justice --

JUSTICE SCALIA: -- once the trial judge found that one of the other instructions was bad, he could have just said, I throw the whole thing out. Why did he go to all the trouble of going into this, the governing one?

MR. PECK: This is -- this is a process. Counsel in the case in a trial in Oregon can offer instructions every -- a proffered instruction up to the point when the jury is instructed under their law. So Philip Morris had the opportunity to correct it. The practical nature of a charge conference is that the parties come in with their proposed instructions. The plaintiffs followed the pattern instruction, which by the way does not require enumeration.

JUSTICE SCALIA: You -- you are acknowledging that the trial court did not apply the rule --

MR. PECK: The -- it's not a rule of trial procedure. It's a rule of appellate review.

CHIEF JUSTICE ROBERTS: Well, I -- yes, that's exactly right. And I think the purpose for the rule is to avoid confusion about the ground of decision for the trial court. If you have got two errors, and she says the instruction's no good, on appellate review

you don't know which basis was at issue. There is no doubt here the basis on which the trial court was ruling, is there?

MR. PECK: I believe there is -- there -- first of all the trial judge rejected this instruction on multiple grounds, and made it clear that the illicit profits request was contrary to the Oregon statute that sets up the criteria. She found other parts confusing and contradictory. But -- and -- but there are two things that I think are significant here.

You have to look at what was discussed here. The trial judge, if you turn to 21a of the joint appendix: "We are not here to punish for other plaintiffs' harms. We are here to punish, if we are here to punish at all, for the conduct that caused harm to Jesse Williams on or after September 1, 1988." This sounds very much like an acceptance of the rule that Philip Morris was advocating.

On 19a she says: "These punitive damages are not designed to compensate for other plaintiffs who are not here. " On 20a there is a colloquy; she expresses her belief that the risk is adequately guarded against, suggests language to express that, and asks: "Does that get you where you need to be?"

That's when Philip Morris's counsel says

"Okay." She had every reason to believe that she had satisfied it. She then follows up.

JUSTICE STEVENS: Do we give any weight in the case to the fact that the instruction that the Petitioners now request and the rule had not really been announced clearly as of the time of this trial? It's not exactly a new rule, but let's -- for our sake we will call it a new rule. Does that have any weight?

MR. PECK: I don't think it does.

JUSTICE STEVENS: But it does in our cause and prejudice jurisprudence. In habeas, which is also a civil action --

MR. PECK: I understand.

JUSTICE STEVENS: -- we say there is an overarching Federal principle that allows; because of cause and prejudice, we can consider the Federal issue. We do that all the time. Those cases weren't raised by the Petitioner, but it seems to me they're quite relevant here, especially when you consider the importance of the constitutional issue, which was not really -- let's face it -- clear to counsel on either side of the aisle or to the trial judge.

MR. PECK: Well, here's the reason why I think in the context of this record, and -- and this litigant, it is not significant. And that is, if you

look at 21a, the appendix in our -- our merit brief, there we have Philip Morris in another smoker trial in Oregon offering up a requested instruction on this issue. This is in 2002, so it's well before this Court's decision in this case.

It's even before State Farm v. Campbell, and the requested instruction says, one sentence: "You are not to impose punishment for harms suffered by persons other than the plaintiff before you."

JUSTICE STEVENS: But the trial judge didn't have the benefit of -- of the ruling that this Court has subsequently made on that point. The trial judge in fact here said: Now, if you can give me a case, then I will give you an instruction; you can't give me a case. And she was right.

MR. PECK: But she -- but that's actually not the same issue that she asked that on. Counsel cited page 17a of the joint appendix for that question. And if you look at the bottom of 16a, her question: "Let me stop first and go back to the proportionality point you are making. " This is the ratio point, the second guidepost of BMW v. Gore. She says: "Is there case law that says the trial court shall, in order to have a constitutional instruction, tell the jury about proportionality?" And this is where he says: It's

addressed post-verdict. She asks: Is there any case law; and she says: No, I'm not going to go there. I'm not going to go where no judge has gone before, because she did not want to be reversed.

So she is trying to be careful, and I think you have to credit the Oregon --

JUSTICE KENNEDY: Well, but I -- it sounds to me like that you are confirming my concerns.

MR. PECK: No. I -- I think that what she said is as to the proportionality issue. On the other issue, she even returns to it later when Philip Morris bring up a different issue with respect to punitive damages.

JUSTICE KENNEDY: Oh. Oh, you're -- you are saying that if our law had been clear at the time, that she still wouldn't have given the instruction?

MR. PECK: No. I'm saying that she thought she was complying with that. She stated on the record that: We are not here to punish for other plaintiffs' harms. Later on that other issue, if you look at 28a --

JUSTICE KENNEDY: So your -- your contention is, is that this trial court and the counsel in the case had all the guidance necessary to give the correct instruction --

MR. PECK: She --

JUSTICE KENNEDY: -- before -- before we even announced the rule?

MR. PECK: She seemed to accept -- she accepted the point before you announced the rule, and the Oregon Court of Appeals ruling in the Estate of Schwarz case where they offered that one-sentence instruction, reversed the verdict, in part because that instruction they said should have been given. So they anticipated this Court's rule. I think --

CHIEF JUSTICE ROBERTS: To move -- to move from the trial court to the appellate court, if you are correct that there is this routine, clear rule of State procedure, why would the appellate court say, in its head, well, I could rely on that, but I want to decide this complicated, difficult rule of Federal constitutional law instead?

MR. PECK: Well, in fact, the -- the court thought it was relying on it. In each of the previous iterations in the Oregon Court of Appeals and in the Oregon Supreme Court, they cited this rule, "clear and correct in all respects," in order to reject the "harm to others" instruction because they said it was inconsistent with State law.

CHIEF JUSTICE ROBERTS: So you think we just made a mistake in going ahead and reaching the Federal

procedural rule that we reached because it was barred by this adequate and independent State ground that the Oregon courts had relied upon?

MR. PECK: No. What I'm saying is that they went further then, and this is what gave this Court the authority to rule on that substantive issue. They said that that request was inconsistent with the Oregon statute. And they did so -- on page 48a of the petition, where they say: "In Williams 1, the Court of Appeals concluded that the instruction was incorrect under State law. We agree."

And then again on page 52a, they note that: "That is not correct as an independent matter of Oregon law respecting the conduct of juri trials and instructions" --

CHIEF JUSTICE ROBERTS: But then I think your --

MR. PECK: But --

CHIEF JUSTICE ROBERTS: But I think your answer -- go ahead with your but.

(Laughter.)

MR. PECK: But then they went on to say: "And nothing in due process requires us to look at this differently." That's where they made their error. That was the constitutional mistake that the Oregon court

made. They thought they were wrong on a State ground. They thought there was no Federal issue addressing that, and so they decided that they didn't have to reach any other State law issues. And they ignored the well preserved objections that Mrs. Williams made to the other parts of this unified instruction on punitive damages.

CHIEF JUSTICE ROBERTS: Well, I'm sorry. I still don't see that answer. You are saying they said yes, there was this rule of Oregon law, but you can still reach -- there might still be a Federal due process issue, so we just can't rely on that. And if that's true, then that seems to me to be a concession that this is not an adequate and independent State ground that would bar consideration of a Federal constitutional issue.

MR. PECK: What was not an adequate on independent State grounds was their decision that the Oregon statute which permits you to punish a misconduct in order to deter others from doing that allowed punishment for harm to non-parties.

That part was their interpretation of the statute, and if there were no due process equation here, that would have been an independent State ground. It was wrong as a matter of due process.

But there are other grounds, other mistakes, substantive mistakes, avoiding law in this instruction. And any trial court that gave instruction number 34, which was objected to as a whole, would have committed reversible error because they failed to follow the Oregon statute.

CHIEF JUSTICE ROBERTS: I guess I think it's the more routine practice for a court, if you have a -- again, as you argue -- a clear procedural rule that bars addressing the substantive issue, to go ahead and rely on that. Now, if the procedural rule is difficult and of uncertain application, maybe you go ahead and say, well, we we're going to decide on the merits anyway.

But it seems to me, under your presentation, it's the other way around. It's a clear and easy procedural rule, difficult Federal and State intertwined constitutional rule, and yet the court says, well, I'm going to do the hard work rather than the easy work.

MR. PECK: I think it was natural for the court to do that. That was the issue presented to them by Philip Morris. And courts do not reach out to do other issues. They reach -- they were being solicitous of Philip Morris, and they were addressing the arguments that Philip Morris made. And when they decided that that inured to Mrs. Williams benefit, not to Philip

Morris's benefit, then they said we don't need to address your other questions. And I think have you to look at the Oregon Supreme Court noting in their own decision that there was no futility here. In fact, the last time we were here Philip Morris said the reason they needed this instruction was because of what was said at closing argument.

JUSTICE BREYER: What are the elements? Imagine -- I'm trying to get help, if I were to try to put pen to paper on this. Suppose they win in this. Then we will be back at the State law issue that I thought was going to be there, which was the issue of -- you are talking about the colloquy. Did they give the essence of the Federal mandated instruction, or didn't they? And then look how cooperative the judge was, et cetera. But that isn't before us now.

What is before us now is something that blocks our consideration of that or anybody's consideration of that. And imagine this is not your case; imagine it is the most, you know, striking case, that's why I used a death example, and we go through exactly the same thing. And then the court does exactly the same thing, the State court, that happened here. And now what are the words that distinguish whether the court is in essence, to be colloquial, giving everybody

the runaround or whether the court is applying a -- an absolute, clear, you know, fair, standard of State law? Which really they should have gone into first and saved everybody a lot of trouble.

MR. PECK: I think the easiest way to look at this --

JUSTICE BREYER: Yes.

MR. PECK: -- is imagine that the statute of limitations, which now bars any such suit in Oregon, were brought today, after this Court's decision in Williams, and imagine that Philip Morris is the defendant, and at the end of the trial they offer their number 34 as it was before saying, "This Court said that they had made the right choice in asking for this instruction."

A trial court clearly would engage in reversible error if they gave that instruction because it materially departs from Oregon law. At the same time, they could deny that instruction. They could deny that instruction, and the Oregon Supreme Court would not violate the mandate of this Court's decision by saying that that is a correct decision on the part of the trial law court because it was not clear and correct in all respects.

And that is part of what distinguishes this.

This is still a rule that has to apply to its instruction --

JUSTICE BREYER: Well, what they say is -- look at the two errors they found. One is in saying "may" instead of "shall," and the other is in saying "illicit profit" instead of "profit." And they are pretty picky. So, this is very picky, they say. And not only are they being picky, but they are being picky after the event. And they could have raised it first, and they have 28 cases supporting them, but none of these cases is right on point because the subject matter is, you know, closer bound up. And so they put all this together and say it's an unreasonable application of a rule that was there. And you say --

MR. PECK: I would urge you, Justice Breyer, to look at the original case in 1916, the Sorenson case. There the court was face with a question: If there is the kernel of a correct instruction in there, is that adequate to ask the court to give that instruction or should we insist on what they thought at the time was the majority rule in the United States, that we should insist on an instruction that is clear and correct in all respects, and that the -- that the counsel has the responsibility to provide that? And they decided to go with the clear and correct rule. That was the debate

that they had, and that debate informs this one.

JUSTICE BREYER: Sorenson was the agent and the principal, the broker who was selling some land.

MR. PECK: Right.

JUSTICE BREYER: And I think in that case they also said, "By the way, you've got basically the instruction that you wanted, and you overlooked" -- no, that was the case where they said, "You overlooked in your instruction an important allegation of fact," which allegation was that the guy had been rehired as a broker.

MR. PECK: And there's a similar distinction that makes Osborne irrelevant, which counsel suggested was a -- an exemplary here.

In Osborne, an element of the crime had not been instructed upon. That's why there didn't have to be the offer of an instruction. But the party presentation principle puts the onus on counsel to do so, and Philip Morris showed, in 2002, well before this Court's decisions that they know how to do it when they want to.

JUSTICE SCALIA: Mr. Peck, are you -- are you asserting that our remand order was in error? After all, it did say, "We remand this case so that the Oregon Supreme Court can apply this standard we have set

forth."

MR. PECK: And I -- I'd contend, Your Honor, that the --

JUSTICE BREYER: We didn't say it was in error. I mean, there is nothing wrong with that.

(Laughter.)

MR. PECK: Well, I think --

JUSTICE SCALIA: If you say it's in error, my next question is going to be --

MR. PECK: I think the Oregon Supreme Court read that decision --

JUSTICE SCALIA: -- can -- is it up to a State court to sit in judgment about whether our remand orders are in error or not?

MR. PECK: Well, I'm prepared to say that the Oregon Supreme Court took that remand order to mean that they had to have in place -- this was a procedural due process decision -- that they had to have a procedure that was fair, outcome neutral, applied --

JUSTICE SCALIA: If that's what they took it to mean, they were just wrong. I mean, that's not what it says.

MR. PECK: Well, if you look --

JUSTICE SCALIA: The opinion concludes, "As the preceding discussion makes clear, we believe the

Oregon Supreme Court applied the wrong constitutional standard when considering Philip Morris's appeal." And it goes to the constitutional issue we are talking about.

MR. PECK: When considering --

JUSTICE SCALIA: "We remand so that the Oregon Supreme Court can apply the standard we have set forth," which has nothing to do with the issue we have been discussing this morning.

MR. PECK: Your Honor --

JUSTICE SCALIA: So it was wrong?

MR. PECK: No, it was not wrong. I don't think it was wrong, and here's the reason I don't think it was wrong: You corrected the Oregon Supreme Court when that thought that due process does not inform the analysis on harm to non-parties. You corrected that substantive error, and that part is what they got wrong.

Much of this opinion said that they got lots of other things right. And so Oregon looked at it and said, "Okay, we got that issue wrong, but there are other problems with this instruction that are adequate and independent grounds for --

JUSTICE SCALIA: That's very nice, but that's not what we remanded for.

MR. PECK: You did not remand for that, but

when this Court decides a constitutional issue of one part, it doesn't necessarily tell the court anything different. What -- the essence of this Court's opinion is that where there's a significant risk of jury confusion, the State has to provide a procedure and has flexibility in providing that procedure. There is no indication that the procedure for limiting instructions does not satisfy that.

JUSTICE SOUTER: The problem that I think we all have is how do we guard, in effect, guard against making constitutional decisions which are simply going to be nullified by some clever device raising a procedural issue or an issue of State law when the case goes back? Is there any way for us to ensure against, in effect, a bad faith response to our decision except by purporting to require the State courts to follow a certain order of battle in the decision of issues before them so that when the case gets to us, we can be assured that there is no lurking issue that has not yet been decided as a matter of State law that in effect could then be resurrected to nullify our decision? Is there any way to guard against that except by telling the State courts what the sequence is in which they have to make decisions?

MR. PECK: I believe there is. And I

believe that it would be error to suggest to the State supreme court that they must, even though prudent, follow a specific sequence, simply because that would mean that they would have to necessarily decide every State law issue in the case --

JUSTICE SOUTER: I -- I see the problem. I mean, that's why I raised the question, how can we ensure --

JUSTICE KENNEDY: But we do that all the time in cause and prejudice cases. We do it all the time --

MR. PECK: Yes.

JUSTICE KENNEDY: -- because of the importance of the constitutional right.

MR. PECK: I understand that, but I think the adequate and independent State law ground provides all the protection. You assume, and I think properly so, that State supreme courts will operate in good faith. Even in Flowers, after the fourth trip to the U.S. Supreme Court, were -- Alabama Supreme Court was still trusted to apply the decision.

JUSTICE SOUTER: Okay. Your -- your answer is there is -- there is no way to guard against it except --

MR. PECK: Except --

JUSTICE SOUTER: -- by reviewing the good faith of what the court does on remand.

MR. PECK: Well, by -- by accepting that if the rule that has been imposed was invoked properly by the party that invoked it at the right time --

JUSTICE SOUTER: Yes.

MR. PECK: -- that it IS firmly established and regularly followed, then it should satisfy the Court --

JUSTICE KENNEDY: But it serves very little interest. Nothing the trial judge would have done, nothing the plaintiff's counsel has done below, nothing that the intermediate clause would have done, would have -- would have been different if they had submitted what they call the "correct in all respects" rule.

If they had filed the "correct in all respects" rule and submitted that rule -- if she had said, judge, I want to type a little piece of paper, everything would have been the same.

MR. PECK: I suggest that it would be different. I think the Oregon Supreme Court decided, when they decided that there was no futility in offering another one, that it would be different. And the fact of the matter is that --

JUSTICE KENNEDY: I excluded the Oregon

Supreme Court from my list of -- of participants who would have done something differently.

MR. PECK: But -- but -- but the fact of the matter is, if after closing arguments which was the trigger that Philip Morris urged upon this Court for needing this substantive rule, if after -- if after that Philip Morris's counsel had returned to the judge -- you know, they said a few things that we think would tell the jury to punish for harm to others. We don't think the instruction is adequate. We will give you the same instruction, that one-sentence instruction like we gave in Fink v. Schwarz. I believe the court would have given that instruction.

CHIEF JUSTICE ROBERTS: There is, of course, another way to protect our constitutional authority in this case. We are talking about procedures for addressing the substantive due-process challenge to a punitive damages award. That is the second question presented here.

If we went and granted that question and considered that issue, we would have protected our authority to reach that question despite the procedural objections alone. Why don't we just do that?

MR. PECK: Well, Your Honor, of course, the last time we were here you had a full briefing and even

some argument on that. And I -- I believe that we are prepared to stand on that briefing and argument.

We do not believe the Due Process Clause is an exercise in elementary school mathematics. It does not tell you something about this. Here you have to look at the enormity of the misconduct. And that did --

CHIEF JUSTICE ROBERTS: I'm not asking you to argue here today the second question presented.

MR. PECK: I understand.

CHIEF JUSTICE ROBERTS: But if we have some concern, if there is something malodorous about the fact that the Oregon Supreme Court waited until the last minute to come up with this rule that was before it all the time, which was a State court rule that you would expect the State court to be addressing as a matter of course, then -- then we -- we can avoid having to address what we do in a situation, having to characterize the nature of that -- that consideration, simply by saying: Look, we are going to go ahead with the questions presented. We can decide it in this case; and to avoid having to reach that, we will go ahead and do it.

MR. PECK: Well, it's -- it's certainly within this Court's power to do that. Philip Morris had made a very harsh accusation in this case of bad faith

on the part of the Oregon Supreme Court. There was no sandbagging here. The Oregon court did not act in that way.

Mrs. Williams raised the State-law issues at every opportunity, which is something that Philip Morris denied in their petition but then conceded in their merit brief. And the fact is it was before the Oregon Court of Appeals. It was before the Oregon Supreme Court, and we even raised it before this court.

JUSTICE GINSBURG: You -- in answer to the Chief Justice, you are not suggesting that we should go ahead and decide the second question when there has been no briefing on it?

MR. PECK: I am not suggesting that you decide the question, but I recognize the Court has the power to do so. Mapp v. Ohio came to this Court as a First Amendment case and came out as a Fourth Amendment case.

CHIEF JUSTICE ROBERTS: I -- I thought -- Mr. Peck, I thought you just told me that there has been full and adequate briefing on that question.

MR. PECK: I believe we had full and adequate briefing. We may not have had an opportunity to fully argue the case, and it's up for you to decide whether or not you -- you have enough on that.

I thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel. Mr. Shapiro, you have three minutes remaining.

REBUTTAL ARGUMENT OF STEPHEN M. SHAPIRO

ON BEHALF OF THE PETITIONER

MR. SHAPIRO: Thank you, Mr. Chief Justice. Justice Breyer asked about these various cases from Oregon, whether they provided guidance and a warning here. And counsel referred to three cases, Reeve, Owings and then Sorenson. If you look at those cases, you will see there were simple instructions proposed on a single topic that were infected with an error throughout.

And the court said if there is any valid proportion of this instruction, it was covered by something that was said to the jury already. So there was no harm in not giving that instruction.

That is certainly not our case. We have a separately numbered paragraph dealing with the Constitution, which is quite apart from the statutory factors.

Now, counsel referred to the charge actually given by the court as if it provided some protection against punishment for harm to nonparties. If you read that instruction, far from providing the protection that

the -- this Court said was obligatory, it invited global punishment. It told the jury they could return any punitive-damage award up to one hundred million dollars. Lo and behold, they come up with eighty million dollars, right within the suggested range of this charge. And there was no --

JUSTICE GINSBURG: Which portion of the charge specifically are you referring to?

MR. SHAPIRO: This is page 37a of our joint appendix. The -- the court concludes the amount of punitive damages you assess may not exceed the sum of one hundred million dollars. And that, of course, was the zone of reasonableness that the jury inferred from this, suggesting a global punishment to the jury with no protection.

Now this Court said that that protection has to be provided. The Court said the State must insist, that the State must give assurance, and it's an important constitutional right, as Justice Kennedy said. I don't think the State court --

JUSTICE BREYER: What is your response to the Chief Justice's suggestion that maybe we should reach the issue of due process on the amount?

MR. SHAPIRO: We wouldn't oppose that because this is clearly excessive under what the Court

said in State Farm: Where there is substantial compensatory damages, one to one is something of a norm.

CHIEF JUSTICE ROBERTS: I wasn't asking to you argue it, either but I mean I suppose the procedure the parties would prefer, if we were interested in that, would be for us to grant the second question and then have the normal briefing in consideration.

MR. SHAPIRO: Oh, that -- that -- yes, certainly, that -- that -- that is true. I -- I would comment, too, on Justice Breyer's question about what is the ultimate test here.

The Court has stated various criteria and opinions over the last century, but the -- the key ideas are? Was it an ambush, something that couldn't be anticipated?

JUSTICE BREYER: I mean I will tell you my subjective reaction going through these 38 cases is they are not quite in point, but they really take away the idea of the bad faith, particularly because the first time what the judge said, which I didn't understand its significance then, but the judge said: Well, since the first part of that paragraph was in -- was in error anyway, I don't have to reach the question of whether there were other mistakes under State law in the rest of the instruction. They did say that the first time, I

think.

MR. SHAPIRO: Oh, yes, but this is the first time the Court has ever taken this "correct in all respects" rule and extended it to a completely different topic, U.S. constitutional law in a separately numbered paragraph. And we had no notice that this had to be broken out on a separate piece of paper. If we did, we would have broken it out on a separate piece of paper. It's just like Lee against Kemna where the Court said --

JUSTICE GINSBURG: What about this point that was made that in 2002 that is exactly what Philip Morris did, give one simple, precise instruction?

MR. SHAPIRO: Well, no, that instruction was not harm to nonparties. That was harm for out-of-State injuries. It was a different issue. And it's true the lawyers there did break up their instructions differently, but the pattern instruction --

JUSTICE GINSBURG: Is it -- is it true that they gave one simple sentence stating their position on -- on what harm to others, how that --

MR. SHAPIRO: No. That's not true. That case did not accept our instruction. It did not. It accepted the State Farm instruction, which said that there can't be punishment for out-of-State harm.

JUSTICE GINSBURG: But -- but was the

instruction stated in a -- in a single paragraph, but all the other requests to charge were broken out?

MR. SHAPIRO: Yes. This -- this State Farm instruction was broken out. That's an option for lawyers. But under the pattern instruction, it's quite proper to put them all in one instructional basket. That's what the form instructions said, and that's what both parties here did.

CHIEF JUSTICE ROBERTS: Thank you, counsel. The case is submitted.

MR. SHAPIRO: We thank the Court.

(Whereupon, at 11:04 a.m., the case in the above-entitled matter was submitted.)

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