

1 THE SUPREME COURT OF THE UNITED STATES

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3 KESHIA CHERIE ASHFORD DIXON, :

4 Petitioner :

5 v. : No. 05-7053

6 UNITED STATES. :

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8 Washington, D.C.

9 Tuesday, April 25, 2006

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

13 APPEARANCES:

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

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

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23
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C O N T E N T S

	PAGE
ORAL ARGUMENT OF	
J. CRAIG JETT, ESQ.	
On behalf of the Petitioner	3
IRVING L. GORNSTEIN, ESQ.	
On behalf of the Respondent	26
REBUTTAL ARGUMENT OF	
J. CRAIG JETT, ESQ.	
On behalf of the Petitioner	50

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

2 (10:07 a.m.)

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

5 Mr. Jett.

6 ORAL ARGUMENT OF J. CRAIG JETT

7 ON BEHALF OF THE PETITIONER

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

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

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

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

3 The development of the majority rule began
4 with this Court's decision in Davis v. United States in
5 1895.

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

11 You're just arguing that this is the Federal common
12 law?

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

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

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

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

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

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

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

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

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

10 MR. JETT: Which is easier for the State?

11 JUSTICE KENNEDY: Well, either way.

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

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

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

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

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

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

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

1 case.

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

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

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

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

19 MR. JETT: No.

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

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

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

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

7 MR. JETT: Yes, Your Honor.

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

12 MR. JETT: That's correct.

13 JUSTICE SOUTER: Okay.

14 MR. JETT: Yes, Your Honor.

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

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

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

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

7 MR. JETT: Yes, it is true.

8 JUSTICE SOUTER: Okay.

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

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

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

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

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

9 MR. JETT: Well --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 In terms of what -- what the Government knew

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

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

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

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

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

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

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

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

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

3 MR. JETT: Well --

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

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

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

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

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

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

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

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

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

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

13 MR. JETT: We would agree --

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

16 MR. JETT: Well --

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

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

23 JUSTICE SCALIA: 29 versus 14.

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

1 Government.

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

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

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

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

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

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

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

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

25 JUSTICE SCALIA: Mr. Jett, a thought occurred

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

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

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

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

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

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

13 JUSTICE SCALIA: Right.

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

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

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

1 unlawful act.

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

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

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

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

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

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

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

1 particular defense --

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

4 MR. JETT: Well --

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

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

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

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

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

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

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

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

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.

7 Mr. Gornstein.

8 ORAL ARGUMENT OF IRVING L. GORNSTEIN

9 ON BEHALF OF THE RESPONDENT

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

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

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

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

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

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

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

13 CHIEF JUSTICE ROBERTS: It would be an easy
14 example.

15 MR. GORNSTEIN: It would be an easy example.

16 (Laughter.)

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

18 JUSTICE SCALIA: Good catch.

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

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

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

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

12 MR. GORNSTEIN: Correct.

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

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

18 Now, the --

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

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

1 the two defenses.

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

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

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

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

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

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

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

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

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

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

21 JUSTICE SCALIA: No?

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

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

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

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

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

12 MR. GORNSTEIN: -- the early common law was
13 --

14 JUSTICE SCALIA: Okay.

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

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

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

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

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

20 MR. GORNSTEIN: No.

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

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

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

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

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

20 JUSTICE SOUTER: You mean the burden of
21 persuasion.

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

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

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

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

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

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

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

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

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

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

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

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

1 finding out what someone said to the defendant over the
2 telephone, what happened 4 years ago in a room where
3 the defendant was the only one now alive present.

4 There are lots of cases like that.

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

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

16 MR. GORNSTEIN: Justice Breyer --

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

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

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

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

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

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

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

12 MR. GORNSTEIN: But --

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

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

25 Yes, but if the burden of proof is on the

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

4 JUSTICE BREYER: If -- if does that --

5 MR. GORNSTEIN: If he does that --

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

10 MR. GORNSTEIN: If --

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

13 MR. GORNSTEIN: There are -- there are other
14 --

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

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

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

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

9 MR. GORNSTEIN: In the ordinary case.

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

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

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

23 (Laughter.)

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

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

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

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

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

16 JUSTICE GINSBURG: Do --

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

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

25 JUSTICE GINSBURG: Doesn't that come from an

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

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

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

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

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

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

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

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

18 MR. GORNSTEIN: Yes. Yes.

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

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

25 JUSTICE SCALIA: There are a lot of law

1 professors involved in it, aren't there?

2 MR. GORNSTEIN: Well, I'm sure.

3 (Laughter.)

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

6 CHIEF JUSTICE ROBERTS: Some judges too.
7 Right?

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

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

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

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

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

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

1 don't think that the Court should do that kind of nose
2 counting based on whether a statute was enacted in
3 1800, 1850, 1900, 1950 and potentially have different
4 rules for each statute. We think that the Court should
5 look at the entire --

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

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

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

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

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

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

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

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

18 JUSTICE KENNEDY: Is -- is --

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

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

24 MR. GORNSTEIN: Yes, after the defendant --

25 JUSTICE KENNEDY: And your test is that the

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

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

5 JUSTICE KENNEDY: More likely. More likely.

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

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

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

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

1 JUSTICE SCALIA: Clear and convincing.

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

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

14 JUSTICE GINSBURG: What about the insanity
15 defense?

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

23 JUSTICE GINSBURG: What about self-defense?

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

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

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

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

25 JUSTICE BREYER: What about mistake?

1 MR. GORNSTEIN: Mistake is --

2 JUSTICE BREYER: I thought it was a deer.

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

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

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

19 If the Court has no further questions.

20 CHIEF JUSTICE ROBERTS: Thank you, Mr.
21 Gornstein.

22 Mr. Jett, you have 4 minutes remaining.

23 REBUTTAL ARGUMENT OF J. CRAIG JETT

24 ON BEHALF OF THE PETITIONER

25 MR. JETT: To answer Justice Scalia's

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

13 JUSTICE SCALIA: And three -- three was what?

14 Three States that have adopted it --

15 MR. JETT: The statute. By statute.

16 JUSTICE SCALIA: By statute.

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

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

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

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

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

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

21 (Laughter.)

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

1 have shot him.

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

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

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

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

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

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

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

21 And I'm out of time. Thank you.

22 CHIEF JUSTICE ROBERTS: Thank you, Mr. Jett.

23 The case is submitted.

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