

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 PHILLIP MORRIS USA INC., :

4 Petitioner :

5 v. : No. 07-1216

6 MAYOLA WILLIAMS, :

7 PERSONAL REPRESENTATIVE :

8 OF THE ESTATE OF JESSE D. :

9 WILLIAMS, DECEASED. :

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11 Washington, D.C.

12 Wednesday, December 3, 2008

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

17 APPEARANCES:

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

20 ROBERT S. PECK, ESQ., Washington, D.C.; on behalf of the
21 Respondent.

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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.

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

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

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

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

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

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

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

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

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

3 MR. SHAPIRO: Yes.

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

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

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

1 disposition for the Oregon Supreme Court to make?

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

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

16 MR. SHAPIRO: Well, no. The Oregon Supreme
17 --

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

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

25 JUSTICE SOUTER: I realize it's a Federal

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

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

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

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

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

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

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

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

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

21 MR. SHAPIRO: That's correct.

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

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

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

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

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

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

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

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

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

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

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

4 MR. SHAPIRO: Yes. That's true.

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

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

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

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

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

13 MR. SHAPIRO: Well, the trial judge asked,
14 is there any authority that requires me to give this
15 instruction on harm to non-parties? And we said, in our
16 view it's the BMW case. And she said, well, if there is
17 not an authority right on point I'm not going to give
18 this instruction. She said that very clearly. So if we
19 submitted a separate piece of paper, it would have made
20 no difference; and if we had taken out the two mistakes
21 --

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

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

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

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

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

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

25 MR. SHAPIRO: What he was saying when he

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

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

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

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

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

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

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

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

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

25 And -- and if I were sitting there as a

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

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

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

12 MR. SHAPIRO: Yes.

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

17 MR. SHAPIRO: But that handbook came out in
18 2006. And after all, that was a practice tip. It was
19 not a State court ruling saying you had to organize your
20 instruction this way.

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

1 of paper.

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

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

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

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

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

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

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

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

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

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

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

1 thought?

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

5 MR. SHAPIRO: Well --

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

13 MR. SHAPIRO: Yes.

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

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

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

1 MR. SHAPIRO: Yes.

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

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

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

20 MR. SHAPIRO: Well --

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

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

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

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

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

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

1 the trial court to understand the need for the charge.

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

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

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

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

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

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

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

25 And you have to ask in this situation, what

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

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

13 MR. SHAPIRO: Oh, yes.

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

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

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

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

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

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

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

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

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

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

1 protection against punishment for harm to non-parties.

2 And she said: I'm not going to give that instruction; I
3 deny the rest of your request, No. 34.

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

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

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

13 MR. SHAPIRO: Perhaps --

14 (Laughter.)

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

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

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

3 CHIEF JUSTICE ROBERTS: Thank you, Mr.
4 Shapiro.

5 Mr. Peck.

6 ORAL ARGUMENT OF ROBERT S. PECK

7 ON BEHALF OF THE RESPONDENT

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

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

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

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

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

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

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

13 JUSTICE STEVENS: The problem --

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

18 MR. PECK: Well --

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

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

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

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

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

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

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

25 Owings v. Rose is that another case which

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

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

10 MR. PECK: If --

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

15 MR. PECK: But --

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

18 MR. PECK: And besides that --

19 JUSTICE BREYER: You're right.

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

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

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

5 I -- I think that that --

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

9 MR. PECK: But --

10 JUSTICE BREYER: -- at all.

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

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

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

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

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

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

14 MR. PECK: I understand.

15 JUSTICE BREYER: Okay.

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

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

1 MR. PECK: Justice --

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

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

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

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

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

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

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

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

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

25 That's when Philip Morris's counsel says

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

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

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

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

13 MR. PECK: I understand.

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

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

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

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

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

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

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

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

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

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

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

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

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

25 MR. PECK: She --

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

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

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

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

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

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

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

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

16 CHIEF JUSTICE ROBERTS: But then I think
17 your --

18 MR. PECK: But --

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

21 (Laughter.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7 JUSTICE BREYER: Yes.

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

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

25 And that is part of what distinguishes this.

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

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

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

1 that they had, and that debate informs this one.

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

4 MR. PECK: Right.

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

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

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

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

1 forth."

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

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

6 (Laughter.)

7 MR. PECK: Well, I think --

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

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

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

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

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

23 MR. PECK: Well, if you look --

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

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

5 MR. PECK: When considering --

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

10 MR. PECK: Your Honor --

11 JUSTICE SCALIA: So it was wrong?

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

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

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

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

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

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

25 MR. PECK: I believe there is. And I

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

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

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

12 MR. PECK: Yes.

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

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

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

25 MR. PECK: Except --

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

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

6 JUSTICE SOUTER: Yes.

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

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

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

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

25 JUSTICE KENNEDY: I excluded the Oregon

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

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

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

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

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

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

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

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

9 MR. PECK: I understand.

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

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

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

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

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

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

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

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

1 I thank you.

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

4 REBUTTAL ARGUMENT OF STEPHEN M. SHAPIRO
5 ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 think.

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

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

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

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

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

25 JUSTICE GINSBURG: But -- but was the

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

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

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

11 MR. SHAPIRO: We thank the Court.

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

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