SUPREME COURT OF THE UNITED STATES

No. 91–1738

JERRY D. GILMORE, PETITIONER *v.* KEVIN TAYLOR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[June 7, 1993]

JUSTICE BLACKMUN, with whom JUSTICE STEVENS joins, dissenting.

The Court today holds that it cannot decide whether Kevin Taylor has suffered a denial of Due Process, because *Teague* v. *Lane*, 489 U. S. 288 (1989), and its progeny preclude the announcement or application of a new rule on federal habeas corpus. The Court further concludes, as it must in order to avoid reaching the merits, that neither exception to *Teague*'s proscription of a new rule applies in this case. See *ante*, at 11. The second *Teague* exception permits the retroactive application of "`watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding," *Saffle* v. *Parks*, 494 U. S. 484, 495 (1990) (quoting *Teague*, 489 U. S., at 311). Unlike the Court, I am fully persuaded that this exception does apply in this case. Therefore, even assuming *arguendo* that the majority is correct in concluding that Taylor asks this Court to announce a "new rule," *Teague* does not preclude the retroactive application of that rule.

Taylor argues that the substantive criminal law existing at the time of a defendant's alleged offense must be the law that governs the trial of that offense. I believe that he is correct and that the principle he asserts is a fundamental one. I therefore would affirm the judgment of the Court of Appeals.

At the time that Taylor was tried for the "murder" of Scott Siniscalchi, Illinois law defined murder and voluntary manslaughter as two distinct crimes, albeit with two elements in common. To be guilty of either crime, a defendant had to have (1) caused the death of the victim, and (2) intended to kill or cause great bodily harm to the victim.[1] The distinction between voluntary manslaughter and murder at the time of Taylor's offense was that a defendant who acted either "under a sudden and intense passion resulting from serious provocation," or under an unreasonable (but honest) belief that deadly force was justified to prevent the defendant's own imminent death or great bodily harm, was guilty of voluntary manslaughter but not guilty of murder. Ill. Rev. Stat., ch. 38, ¶ 9–2 (1985). In other words, under Illinois law at the time of Taylor's offense, a person who killed under specific circumstances of provocation was *innocent of murder*.

At the close of Taylor's trial, the presiding judge found that sufficient evidence in support of voluntary manslaughter had been presented to require a jury instruction under Illinois law. The judge therefore determined that he would "let the Jury decide . . . whether that provocation existed here or did not exist here." App. 96. No one has challenged this finding on appeal. Yet the presiding judge did not explain to the jury that provocation was an affirmative defense to murder. Instead, after telling the jury about the two elements of murder (intent and causation of

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[1]The intent element would also be satisfied if the defendant knew that his acts would cause or create a strong probability of death or great bodily harm, or if the defendant had been attempting or committing a forcible felony at the time. See Ill. Rev. Stat., ch. 38, ¶9–1(2) and (3) (1985).

death), the judge stated: "If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, you should find the Defendant guilty." *Id.*, at 129. The judge went on to instruct the jury that a person is guilty of voluntary manslaughter when he has killed an individual while possessing the requisite state of mind, and at "the time of the killing he acts under a sudden and intense passion resulting from serious provocatin [sic] by the deceased. Serious provocation is conduct sufficient to excite an intense passion in a reasonable person." *Id.*, at 130. Finally, the judge gave the following instruction in an apparent attempt to explain the relation between the murder and the voluntary manslaughter charges:

> "As stated previously, the Defendant is charged with committing the offense of murder and voluntary manslaughter. If you find the Defendant guilty, you must find him guilty of either offense; but not both. On the other hand, if you find the Defendant not guilty, you can find him not guilty on either or both offenses." *Id.*, at 131.

Even the prosecutor thought these instructions may have failed to inform the jury of the relation between the offenses of murder and manslaughter under Illinois law. *Id.*, at 98–99. He accordingly suggested that the judge include an instruction explaining that Taylor's provocation claim could serve to constitute a complete defense to the murder charge. *Id.*, at 99. The prosecutor indicated that he had raised this possibility because "I just don't want to knowingly create error here." *Id.*, at 101. The trial judge declined the suggestion and responded to the prosecutor's concern: "We're not doing it knowingly; we're doing it out of ignorance." *Ibid.*

After deliberations, the jury announced that it had found Taylor guilty of murder. It then returned a signed verdict form to that effect. *Id.*, at 131, 137.

The jury never mentioned the manslaughter charge and returned unsigned both the guilty and not-guilty forms for that offense. *Id.*, at 139–140.

A jury instruction is unconstitutional if there is a "reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde* v. *California*, 494 U. S. 370, 380 (1990).[2] I explain in greater detail below why testimony that demonstrates that a defendant killed under provocation is constitutionally relevant evidence in a murder trial in Illinois. A threshold question, however, is whether the jury's instructions in this case created a reasonable likelihood that the jury would not consider such provocation evidence.

No one appears to contest the proposition that a jury of lay people would not understand from the instructions that it should find Taylor not guilty of murder if it concluded that he acted under provocation. The judge explained to the jury that it could convict Taylor of either murder or manslaughter (or neither) but not both. App. 131. In instructing that Taylor could not be found guilty of both offenses, however, the judge failed to explain that a defendant, in fact, could satisfy the elements of both offenses. He failed to inform the jury that indeed *whenever* the elements of voluntary manslaughter (intent, causation, and provocation) are satisfied, the elements of murder (intent and causation) are satisfied as well.

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[2]The Court implies, *ante*, at 8, that the *Boyde* standard might be confined to capital cases. The Court's citation of *Estelle* v. *McGuire*, 502 U. S. ___ (1991), however, belies that implication, because *Estelle* v. *McGuire* reaffirmed the *Boyde* standard and was itself not a capital case. See also *ante*, at 3–4 (O'CONNOR, J., concurring in the judgment).

And, of course, he therefore did not clarify that the jury must choose manslaughter over murder in the event that the elements of both offenses are made out.

The relation between murder and voluntary manslaughter in Illinois at the time of Taylor's offense was a complicated one. Provocation was both a component of manslaughter and a defense to murder. The easy way to convey this idea is to explain that to find a defendant guilty of murder, the jury must find (1) that there was intent, (2) that there was causation, and (3) that there was no provocation. The prosecutor explained to the judge that he might have had to provide such an instruction under Illinois law. See *id.*, at 99.

What the judge actually did, however, was simply to list the elements of each offense, starting with murder, tell the jury that it could convict Taylor of only one but not of both, and send the jury to deliberate. In the deliberation room, the jurors had four sheets of paper[3], each of which provided spaces for the jurors' signatures. The sheets indicated, respectively, verdicts of "Not Guilty of the offense of murder," "Guilty of the offense of murder," "Not Guilty of the offense of Voluntary Manslaughter," and "Guilty of the offense of Voluntary Manslaughter," in that order. See *id.*, at 135, 137, 139–140. The jurors signed neither the guilty nor the not-guilty verdict forms regarding voluntary manslaughter. This is almost certainly because the instruction for murder preceded the instruction for manslaughter, the verdict forms for murder preceded the verdict forms for manslaughter, and the jurors understood that once they had found Taylor guilty of murder, they

[3]Two additional sheets referred to the crime of home invasion, for which Taylor was tried and convicted. This conviction, however, is no longer at issue in the case.

could not, consistent with the judge's instructions, find him guilty of manslaughter. There was therefore no need, under the instructions they received, to consider manslaughter and provocation. Taylor's jury never knew that provocation made out a complete defense to murder.

The State itself concedes that the instructions "violated state law by permitting the jury to find Taylor guilty of murder without considering his affirmative defense." Brief for Petitioner 12. According to a unanimous Illinois Supreme Court evaluating the same instructions given in another case: "These instructions essentially assure that if the jury follows them, the jury cannot possibly convict a defendant of voluntary manslaughter." *People* v. *Reddick*, 123 Ill. 2d 184, 194, 526 N. E. 2d 141, 145 (1988). The Seventh Circuit concluded: "No matter how clearly either the State or the defense proved the existence of the mitigating `manslaughter defenses,' the jury could nevertheless return a murder verdict in line with the murder instruction as given." *Falconer* v. *Lane*, 905 F. 2d 1129, 1136 (1990). Because of the jury's ignorance, respondent Taylor suffered a fundamental deprivation of his constitutional rights that seriously diminished the likelihood of an accurate conviction.

To understand why an instruction that prevents the jury from considering provocation evidence violates the Constitution, it is necessary to examine the operation of the criminal law in regulating the conduct of citizens in a free society. As explained below, the instructions in this case in effect created an *ex post facto* law, diminished the likelihood of an accurate conviction, and deprived Taylor of his right to a fair trial.

This Court consistently has held that the Constitution requires a State to provide notice to its citizens of what conduct will subject them to criminal penalties and of what those penalties are. See *Miller* v. *Florida*, 482 U. S. 423, 429 (1987) (explaining the constitutional prohibition against *ex post facto* laws, U. S. Const., Art. I, §9, cl. 3, §10, cl. 1); *Beazell* v. *Ohio*, 269 U. S. 167, 169 (1925) (same); *Buckley* v. *Valeo*, 424 U. S. 1, 77 (1976) (explaining the Due Process requirement that defendants be on notice that their conduct violates the criminal law); *Bouie* v. *City of Columbia*, 378 U. S. 347, 351 (1964) (same). People can conform their conduct to the dictates of the criminal law only if they can know what the criminal law has to say about their conduct. Proper warning is a constitutional imperative.

Illinois, through its criminal statutes, warned Taylor that his actions, as conceded at trial, were against the law. Illinois, however, did not warn him that murder and voluntary manslaughter would be treated as interchangeable or equivalent offenses. A defendant convicted of voluntary manslaughter, for example, could be incarcerated for as short a term as 4 years, and could be imprisoned for a maximum term of 15 years. A convicted murderer, in contrast, could be imprisoned for no fewer than 20 years and up to a maximum of 40 years, absent aggravating factors. See Ill. Rev. Stat., ch. 38, ¶¶9–2(c), 1005–8–1(1) and (4) (1985). Under Illinois law at the time of Taylor's acts, then, the offense that he claims he committed—voluntary manslaughter—was not treated as an offense of nearly the same seriousness as murder.[4] Nevertheless, in the presence of

[4]This distinction between murder and voluntary manslaughter is hardly a recent innovation in the criminal law. "[T]he presence or absence of the heat of passion on sudden provocation—has been, almost

provocation evidence, a murder instruction read without an adequate explanation of the affirmative defense of provocation treats murder and voluntary manslaughter as equivalent offenses. Because provocation evidence was undisputedly present in this case, the failure to explain its operation as a defense to murder amounted to the application to Taylor of an *ex post facto* murder law.

A useful analogy to the relation between voluntary manslaughter and murder in this case is the relation between self-defense and murder elsewhere in the criminal law. In those States in which self-defense is an affirmative defense to murder, the Constitution does not require that the prosecution disprove self-defense beyond a reasonable doubt. See, *e.g.*, *Martin* v. *Ohio*, 480 U. S. 228 (1987). This is because only *elements* of an offense impose this heavy burden of proof upon the State. *Ibid.* Despite its status as an affirmative defense, however, self-defense converts what is otherwise murder into justifiable homicide. In other words, the person who kills in self-defense, instead of being guilty of murder, is guilty of no offense at all.

It is easy to see in the context of self-defense how the omission of an affirmative-defense instruction fundamentally denies the defendant Due Process. Consider the following hypothetical example. As a citizen who is presumed to know the law, see *Atkins* v. *Parker*, 472 U. S. 115, 130 (1985), Jane Doe chooses to kill John Smith when he threatens her with substantial bodily harm or death, on the correct theory that she is not committing murder under state law. Doe has a right to rely on the representation of

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from the inception of the common law of homicide, the single most important factor in determining the degree of culpability attaching to an unlawful homicide." *Mullaney* v. *Wilbur*, 421 U. S. 684, 696 (1975).

her state legislature that her conduct is legal. If the State then were to try her for murder and not permit her to plead self-defense, the State's breach of this representation undoubtedly would violate principles of fundamental fairness.

It may be more difficult to sympathize with Kevin Taylor than with the hypothetical Jane Doe, because Doe acted legally and Taylor concededly did not. Not all crimes are equal, however, and if Illinois announces that it will treat murder more seriously than voluntary manslaughter, then Taylor has a right to rely on that announcement when he makes a decision to engage in conduct punishable as a less serious crime. This Court in *Mullaney* v. *Wilbur*, 421 U. S. 684, 698 (1975), said:

> "Indeed, when viewed in terms of the potential difference in restrictions of personal liberty attendant to each conviction, the distinction . . . between murder and manslaughter may be of greater importance than the difference between guilt or innocence for many lesser crimes."

By equating voluntary manslaughter with murder and thereby, in effect, applying an *ex post facto* murder law to Taylor, the instructions in this case made it highly likely that the jury would return an inaccurate murder conviction.

As explained above, under Illinois law at the time of Taylor's offense, the presence of provocation reduced murder to voluntary manslaughter. This meant that state law defined the category of murder to exclude voluntary manslaughter and therefore considered a person who was guilty of voluntary manslaughter also to be innocent of murder. Any procedure that increased the likelihood of a murder conviction despite the presence of provocation, thus also decreasing the likelihood of a manslaughter conviction, was therefore a procedure that diminished the likelihood of an accurate conviction by the jury.

Because the procedure in this case prevented the jury from even *considering* the voluntary manslaughter option, it severely diminished the likelihood of an accurate conviction. See *Butler* v. *McKellar*, 494 U. S. 407, 416 (1990). The instructions given in this case essentially ensured that a person guilty of voluntary manslaughter would be convicted, wrongly, of murder.

Returning to the hypothetical example set forth above, the omission of a self-defense instruction in Jane Doe's case would distort the definition of murder by causing the jury to include killings in self-defense within that definition. A person who kills in self-defense, however, like a person who kills under provocation, is not guilty of murder under state law and is therefore not subject to the penalties prescribed for murder. Any conviction that results from the omission of a state law affirmative defense is therefore, in the case of provocation and in the case of self-defense, an inaccurate conviction.

The State suggests that the right asserted by Taylor is the same as that recognized by this Court in *Beck* v. *Alabama*, 447 U. S. 625 (1980). See Brief for Petitioner 17. In *Beck*, this Court held that a capital defendant is entitled to a lesser included offense instruction if there is evidence in the record to support such an instruction. We left open the question whether *Beck* applies in the noncapital context. *Id.*, at 638, n. 14. The State here asserts that because many courts of appeals have rejected such a right in the noncapital context, this Court could do the same with respect to Taylor's claim. See Brief for Petitioner 17 and n. 7. This assertion is without merit.

Like the right Taylor claims, *Beck* entitles certain defendants to have the jury consider less drastic alternatives to murder. This, however, is where the similarity between the two rights ends. In *Beck*, the Court's concern and the reason for the required lesser

included offense instruction was that jurors might ignore their reasonable-doubt instruction. Where the defendant is "`plainly guilty of *some* offense,'" 447 U. S., at 634, quoting *Keeble* v. *United States*, 412 U. S. 205, 213 (1973) (emphasis in original), there is a risk that absent a lesser included offense instruction, the jurors will convict a defendant of capital murder, thereby exposing him to the death penalty, because they do not want to set a guilty person free. In other words, the failure to provide a lesser included offense instruction in the capital context is a problem only to the extent that we fear that jurors will choose to disregard or nullify their reasonable-doubt instruction.

In Taylor's case, the concern is just the opposite—that the jurors *will* follow their instructions and thereby convict the defendant of murder because they are ignorant of the fact that provocation reduces the offense to voluntary manslaughter. The failure to include a proper voluntary manslaughter instruction literally distorts the definition of murder by extending it to include voluntary manslaughter and thereby misinforming the jury.

Whether or not we would choose to extend *Beck* and its presumption of jury nullification to the noncapital defendant has no bearing on the outcome of this case. The right at issue here is one premised upon the notion that jurors faithfully follow what they understand to be their instructions. This premise clearly operates in the capital and noncapital contexts alike. See *Richardson* v. *Marsh*, 481 U. S. 200, 211 (1987).

Through his instructions, then, the trial judge in this case applied an *ex post facto* murder law to Taylor and thereby misled the jury as to the definition of murder. But the trial judge also violated another of Taylor's constitutional rights. When the judge

prevented Taylor's jurors from considering his provocation defense, the judge deprived Taylor of his Sixth Amendment and Fourteenth Amendment right to a fair trial.

The Fifth and Fourteenth Amendments to the Constitution guarantee every criminal defendant the right to remain silent. Our precedents have explained that this right precludes the State from calling the defendant as a witness for the prosecution. See, *e.g.*, *South Dakota* v. *Neville*, 459 U. S. 553, 563 (1983) (the "classic Fifth Amendment violation" consists of requiring the defendant to testify at his own criminal trial); *Malloy* v. *Hogan*, 378 U. S. 1 (1964) (the Fourteenth Amendment Due Process Clause incorporates the Fifth Amendment right to remain silent against the States). The State must provide all evidence necessary to a conviction if the defendant chooses not to testify.

Taylor gave up this important right and took the witness stand to testify about his crime. He evidently did so to avail himself of the provocation defense provided by Illinois law. Taylor admitted under oath that he broke into his former wife's home and intentionally and fatally stabbed Scott Siniscalchi. App. 80–81. He also testified, however, that he had been provoked by the victim. *Id.*, at 76–81. In its closing argument, the defense therefore asked the jury to find that he had acted under sudden and intense passion when he killed Siniscalchi and therefore was not guilty of murder. *Id.*, at 112–121.

When the judge instructed the jurors, he effectively told them to disregard Taylor's provocation testimony. Absent that testimony, of course, the most important evidence before the jurors when they deliberated was that Taylor had taken the stand and had sworn to them that his actions violated both elements of the murder statute. As far as the jurors could tell, Taylor had confessed to the crime of murder in open court.

Taylor never indicated a desire to plead guilty to

murder. Indeed, he offered testimony that tended to show that he was *innocent* of murder. Yet the trial judge failed to follow the very statute that had prompted Taylor to testify. By so doing, the judge effectively transformed exculpatory testimony into a plea of guilty to murder. When a defendant intentionally pleads guilty to an offense, he has a constitutional right to be informed about the consequences of his plea. See *Mabry* v. *Johnson*, 467 U. S. 504, 509 (1984); *Marshall* v. *Lonberger*, 459 U. S. 422, 436 (1983). Taylor, however, was never apprised of the consequences of his testimony. Instead, he was affirmatively misled into unknowingly confessing to a crime of which he claimed he was innocent. The judge's erroneous instructions thereby vitiated Taylor's right to a fair trial, guaranteed him by the Sixth and Fourteenth Amendments.

The omission of an adequate affirmative-defense instruction constitutes a profound violation of a defendant's constitutional rights. It creates an *ex post facto* law, misinforms the jury as to the governing legal principles, and denies a defendant his right to a fair trial. "Although the precise contours of [the second *Teague*] exception may be difficult to discern, we have usually cited *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), holding that a defendant has the right to be represented by counsel in all criminal trials for serious offenses, to illustrate the type of rule coming within the exception." *Saffle* v. *Parks*, 494 U. S., at 495. The right to an affirmative-defense instruction that jurors can understand when there is evidence to support an affirmative defense is as significant to the fairness and accuracy of a criminal proceeding as is the right to counsel. It is indeed critical in a case like this one, where the defendant takes the stand and concedes the elements of murder in order to prove his affirmative defense.

Kevin Taylor has not requested a rule that would unreasonably place stumbling blocks in the path of law enforcement nor has he asked this Court to announce a rule that is only marginally related to the underlying right to a fair trial. On the contrary, he has asked that he be convicted of voluntary manslaughter if he is guilty of voluntary manslaughter, that he be spared a sentence for murder if he is innocent of murder, and that his judge not effectively instruct the jury to disregard the exculpatory part of his testimony and attend only to that which would ensure a conviction for murder. If he is denied what he asks, he is denied a fair trial.[5]

I respectfully dissent and would affirm the judgment of the Court of Appeals.

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[5]The Court's footnote 4, *ante*, at 12, added by THE CHIEF JUSTICE after the dissenting opinion circulated, hardly deserves acknowledgment, let alone comment. I had thought that this was a court of justice and that a criminal defendant in this country could expect to receive a genuine analysis of the constitutional issues in his case rather than the dismissive and conclusory rhetoric with which Kevin Taylor is here treated. I adhere to my derided "constitutional stew."