Burden of Proving Affirmative Defense Can Be Placed on Defendant

In *Patterson v. State*,[1] the U. S. Supreme Court held that New York's use of an affirmative defense to allocate to the defendant the burden of proving, by a preponderance of the evidence, the mitigating circumstance of extreme emotional disturbance involved no unconstitutional shifting to the defendant the burden of proving any fact essential to the offense charged. The Due Process Clause, as previously interpreted by the Court in *In Re Winship*,[2] prohibits the prosecution from placing on the defendant the burden of proving essential elements of the offense. Had the Court determined that the lack of extreme emotional disturbance was essential to the particular mental state required by the statute, the defendant's constitutional right to due process of law would have been violated.

Gordon Patterson and his wife Roberta had separated after experiencing marital difficulties. Subsequently, Roberta resumed an affair with John Northrop, a neighbor and prior fiance of Roberta. A few days after Christmas in 1970, Patterson went to the house of his father-in-law armed with a rifle, and upon viewing his wife in a semi-undressed condition in the bedroom of Northrop, entered the house and shot Northrop twice in the head.[3]

Patterson was charged with second degree murder. In accordance with New York law, the jury was instructed that even if it found beyond a reasonable doubt that the defendant had intentionally killed Northrop,[4] the defendant could introduce an affirmative defense of extreme emotional disturbance.[5] If the defense was proven by a preponderance of the evidence, the jury must find the defendant guilty of manslaughter rather than murder, which carries a considerably heavier penalty than manslaughter under New York law. The trial court judge emphasized in his charge that the defendant bore no burden as to proof of his innocence or guilt and that

1. ___ U.S. ___, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977).

2. 397 U.S. 358 (1970).

3. All facts are from the Supreme Court's opinion, 97 S. Ct. at 2321-2322, 53 L. Ed. 2d at 284-286.

4. Under N.Y. Penal Law §125.25(1) (McKinney 1975), the only elements of the crime of second degree murder are intent to cause the death of another and the death of that or another person.

5. Under New York's Murder Statute, N.Y. Penal Law §125.25(1)(2) (McKinney 1975), it is an affirmative defense that the defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse. New York's Manslaughter Statute, N.Y. Penal Law §125.20(2) provides that when the defendant acts under the influence of extreme emotional disturbance as defined in §125.25(1)(a), the crime may be reduced from murder to manslaughter.

the state was compelled to prove beyond a reasonable doubt that the defendant intentionally killed Northrop. The jury returned a verdict of guilty of second degree murder.

The Appellate Division affirmed,[6] and while the case was pending before the Court of Appeals of New York, the U.S. Supreme Court decided *Mullaney v. Wilbur.*[7] Patterson argued that *Mullaney* was controlling in his case in that the New York penal statute under which he was convicted was equivalent to the Maine statute in *Mullaney,* and therefore violated his constitutional right to due process under the Fourteenth Amendment. The New York Court of Appeals distinguished the two cases and affirmed the lower court decision.[8] On appeal to the Supreme Court of the United States, the decision was affirmed.

Historically, the burden of proof in a criminal trial has been placed on the prosecution, and through development in the common law that burden was generally required to be proof beyond a reasonable doubt.[9] Also deeply rooted in our legal system is the power of the state to establish the procedure by which its laws are to be implemented. The Supreme Court in *Snyder v. Massachusetts* held that it is within the power of the state to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion, "unless in doing so it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[10] The states have long maintained that it is a state prerogative whether to place upon the defendant the burden of proof of circumstances that may reduce the charge or even relieve him of guilt.[11] These excuses or justifications granted the defendant have traditionally been viewed as affirmative defenses.[12] The defense of insanity has been perhaps the most controversial as well as the most litigated affirmative defense.

In 1895, the Supreme Court, in *Davis v. State,*[13] held that sanity was an important element in the crime of murder in all federal prosecutions, and that therefore it must be proven by the prosecution beyond a reasonable doubt. Although the decision in *Davis* did establish a constitutional test—and a number of states did choose to relieve the defendant of the burden of proof of insanity—the Court made it clear in *Leland v. Oregon*[14]

6. 41 App. Div. 2d 1028, 344 N.Y.S.2d 836 (1973).

7. 421 U.S. 684 (1975).

8. People v. Patterson, 39 N.Y.2d 288, 294, 347 N.E.2d 898, 902, 383 N.Y.S.2d 573, 576 (1976).

9. W. LA FAVE AND A. SCOTT, CRIMINAL LAW §8, at 44 (1972).

10. Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

11. *See* Twinning v. New Jersey, 211 U.S. 78, 106, 112 (1908); Hurtado v. California, 110 U.S. 516, 535 (1883).

12. W. LAFAVE and A. SCOTT, CRIMINAL LAW §21, at 152 (1972).

13. 160 U.S. 469 (1895).

14. 343 U.S. 790 (1952).

that the decision was not binding on the states. *Leland* held that the states could require a defendant to bear the burden of persuasion in proving that he was insane in order to avoid responsibility for his criminal acts. In placing this burden of proof on the defendant, the state was not requiring him to establish his innocence by disproving an element of the crime of murder, but rather to rebut the presumption of sanity that arises after the state has successfully proven all the elements of the crime beyond a reasonable doubt.[15] At the time *Leland* was decided, some twenty-two states required the defendant to prove his insanity at least by a preponderance of the evidence.[16]

In *In Re Winship,* the Court addressed the issue of whether proof beyond a reasonable doubt is among the essentials of due process and fair treatment required during an adjudicatory stage when a juvenile is charged with an act which would constitute a crime if committed by an adult. The Court held that §744 of the New York Family Court Act (1962), which required only proof by a preponderance of the evidence, was a violation of the Due Process Clause. The Supreme Court explicitly said that the Due Process Clause of the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[17] The Court in *Winship* emphasized several important interests that are implicated in a criminal prosecution and that justify placing a more onerous burden of proof on the prosecution. The accused, in a criminal prosecution, is faced with the possibilities of losing his liberty and of having irreparable damage done to his reputation due to the stigma that attaches to a criminal conviction.[18] Public policy demands, according to the Court, that the possibility of the conviction of an innocent person be made as remote as possible. Indeed the respect and confidence of society in its criminal laws is at stake.

Winship left little doubt that there was a constitutional mandate incumbent upon the states to prove all of the elements of a crime beyond a reasonable doubt, but the case failed to ascertain what factors may or may not be "elements" of a crime. Due to the narrow language used in the majority opinion, the scope of the *Winship* decision was the subject of much speculation in the legal community. Some legal scholars felt that *Winship* was an ambiguous decision which would result in much confusion in state criminal law and require federal intrusion to interpret how far "every fact" should be extended.[19]

---

15. *Id.* at 795.

16. *Id.* at 798 n.18.

17. 397 U.S. at 364.

18. Justice Powell, in his dissent in *Patterson,* emphasized that these same factors of punishment and stigma were applicable to the defendant Patterson. 97 S. Ct. at 2336, 53 L. Ed. 2d at 303.

19. *See* Allen, *Mullaney v. Wilbur, The Supreme Court, and the Substantive Criminal*

The holding in *Winship* did not address itself to the validity of affirmative defenses nor did it mention the *Leland* decision with regard to the insanity defense. However, it certainly put into serious doubt the continuing vitality of *Leland*,[20] as it would any affirmative defense placing the burden of persuasion on the defendant. Opponents to the *Leland* decision argued that to require the defendant to prove his insanity is to require him to disprove his culpability; and culpability has long been considered an essential element of the crime of murder.[21]

The scope of the *Winship* decision was finally addressed by the Supreme Court in the case of *Mullaney v. Wilbur*. Stillman Wilbur was charged under Maine law with murder[22] for the fatal assault of Claude Herbert in the latter's hotel room. In a statement by Wilbur that was introduced by the prosecution, he claimed that his attack was in a frenzy provoked by Herbert's homosexual advances. In accordance with the criminal statutes of Maine dealing with homocide, the jury was instructed that the defendant could introduce evidence and prove by a preponderance of the evidence that his actions were in the "heat of passion on sudden provocation" and the degree of homicide could be reduced from murder to manslaughter.[23] The court also charged the jury that "malice aforethought" was an indispensable element of the crime of murder, without which the homicide would be manslaughter. The defendant argued that since proving the defense of "heat of passion on sudden provocation" negates the element of "malice aforethought" in murder, the result is that the prosecution has shifted to the defendant the burden of proof of an essential element of the crime which, under *Winship*, must be proven by the prosecution beyond a reasonable doubt.

The Supreme Judicial Court of Maine rejected the defendant's argument and held that under Maine law the crimes of murder and manslaughter are not distinct crimes, but merely different degrees of a single generic offense of felonious homicide.[24] After the case made several appearances on the federal court level,[25] the U.S. Supreme Court accepted the Maine court's interpretation of its homicide statute but found the statute involved a shift in the burden of proof of an essential element of the crime to the defendant—a shift which violated the Due Process Clause.

Law—An Examination of the Limits of Legitimate Intervention, 55 TEX. L. REV. 269 (1977).

20. *See* United States v. Eichberg, 439 F.2d 620 (D.C. Cir. 1971) (Bazelon, C.J.).

21. *See* Justice Frankfurter's dissent in *Leland*, 343 U.S. at 802.

22. ME. REV. STAT. tit. 17, §2651 (1964) provides: "Whoever unlawfully kills a human being with malice aforethought, either express or implied, is guilty of murder and shall be punished by imprisonment for life."

23. ME. REV. STAT. tit. 17, §2551 (1964) provides: "Whoever unlawfully kills a human being in the heat of passion, on sudden provocation, without express or implied malice aforethought . . . shall be punished . . . by imprisonment for not more than 20 years . . . ." *See also* ME. REV. STAT. tit. 17, §2651 n.13 (1964).

24. State v. Wilbur, 278 A.2d 139 (Me. 1971).

25. 349 F. Supp. 149 (Me. 1972); 473 F.2d 943 (1st Cir. 1973); 496 F.2d 1303 (1st Cir. 1974).

The Court in *Mullaney* relied on the *Winship* decision and rejected state arguments against its application. The state contended that the *Winship* rationale need only be applied to facts that would wholly exonerate the defendant, and therefore was not applicable to facts involving mitigating circumstances that cast no doubt upon his actual guilt or innocence. Where mitigating circumstances are involved, the state argued, the defendants' concern with liberty and the stigma of conviction are no longer of such paramount importance because, regardless of the application of the mitigating defense, the defendant will lose his liberty and be subject to the stigma of conviction. The Court rejected this argument and emphasized the fact that the guilt or innocence of the defendant is not the sole determination on which these factors rest, but also involved is the degree of culpability. It would be equally as unconscionable to convict a man of murder who as likely as not is only guilty of manslaughter as it would to convict an innocent man of murder. The state also suggested that because the factors involved in determining heat of passion on sudden provocation are uniquely within the control of the defendant this would create an unduly burdensome requirement for the state to satisfy. The Court dismissed this argument by finding that a heavier burden is traditionally placed on the prosecution and is indeed essential to our system of criminal justice.

Mr. Justice Powell, speaking for the majority in *Mullaney* stated:

> [I]f *Winship* were limited to those facts that constitute a crime as defined by state law, a state could undermine many of the interests that decision sought to protect without effecting any substantive change in its law. It would only be necessary to redefine the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment.[26]

Mr. Justice Powell appeared to be setting the stage for a sweeping decision that could possibly encompass all affirmative defenses. However, the narrow language merely expanded *Winship* to include facts that mitigate the punishment as well as "facts" that constitute the crime.[27] Even more doubt was cast on the actual scope of *Mullaney* in the concurring opinion by Mr. Justice Rehnquist, in which he stated that there was no inconsistency between this holding and the holding in *Leland*.[28]

The interpretation as well as the criticism of *Mullaney* was varied and it became evident that the decision did not assist to any degree in the clarification of the state's power to define its own criminal prohibitions. Not only did *Mullaney* fail to formulate a test to determine the substance of a crime, it failed to formulate any test at all.[29] The critics of the

26. *Id.* at 698.

27. *See* Comment, 43 BROOKLYN L. REV. 171 (1976).

28. 421 U.S. at 705.

29. *See* Allen, *Mullaney v. Wilbur, The Supreme Court, and the Substantive Criminal Law—An Examination of the Limits of Legitimate Intervention*, 55 TEX. L. REV. 269 (1977).

Mullaney decision felt that the Court's application of *Winship* was so vague that it seemed to indicate that the principles of *Winship* had no limits.[30] Other criticism of *Mullaney* focused on the Court's failure to extend *Winship,* in clear and precise language, to require that all of the burdens of proof in a criminal case, including that of affirmative defenses, constitutionally rest on the state.[31] Clearly, however, the trend appeared to be toward ultimate extension of *Winship* through *Mullaney.*[32]

Faced with the historical backdrop of the presumption of innocence and the precedents discussed above, the Supreme Court upheld the constitutionality of the New York penal statute in *Patterson.* In affirming the decision, the Court distinguished *Mullaney* on the grounds that the New York statute involved no shifting of a burden of proof to the defendant to dispose of any fact essential to the offense charged. The New York affirmative defense of extreme emotional disturbance, according to the Court, bears no direct relationship to any element of the crime of murder. The Court applied a narrow reading to *Winship* and restricted *Mullaney* to the very narrow set of facts based on the interrelation of the "malice aforethought" element of murder in Maine and the common law "heat of passion on sudden provocation" defense.

The Court traced the history of burdens of proof and affirmative defenses and placed particular emphasis on *Leland* and the affirmative defense of insanity. The Court indicated that it had been presented with several opportunities to review the holding in *Leland,* and that it had failed to find the decision contrary to the constitutional requirements of the Due Process Clause. In *Riviera v. Delaware,*[33] for example, the Court upheld the validity of *Leland* by dismissing for lack of a substantial federal question an appeal on the application of the Delaware affirmative defense of insanity, which allowed the state to place the burden on the defendant.[34] The Court concluded that in order to reverse the conviction in *Patterson,* the decisions in both *Leland* and *Riviera* would have to be reconsidered, and it was unwilling to do so.

The Court applied the rationale in *Leland* to justify placing the burden of proof of affirmative defenses on the defendant. The Court reasoned that when the state establishes the specific elements of a crime, it is required to prove each and every one beyond a reasonable doubt. After the guilt of

30. *Id.* at 274.

31. Comment, 11 HARV. C.R.-C.L. L. REV. 390 (1976).

32. In Evans v. State, 28 Md. App. 640, 349 A.2d 300 (1975), *aff'd* 278 Md. 197, 362 A.2d 629 (1976), the Maryland court extended *Mullaney* to include any burden of proof placed on a defendant for mitigation, excuse, or justification. For further extensions of *Mullaney, see* Fuentes v. State, 349 A.2d 1 (Del. 1975); People v. Tewksbury, 15 Cal. 3d 953, 544 P.2d 1335, 127 Cal. Rptr. 135 (1975).

33. 429 U.S. 877 (1976).

34. A dismissal for want of a substantial federal question was accorded precedential weight in Hicks v. Miranda 422 U.S. 332 (1975).

the defendant has been established under this burden, the state may allow the defendant to introduce and show by a preponderance of the evidence that mitigating circumstances existed which would render him less culpable. This showing in no way negates any of the facts proven by the state, but may justify a reduction of the crime to one which carries a lesser penalty. The Court stressed that the state shoulders no less of a burden of proof and that the affirmative defense merely allows the defendant to present evidence of his mental state, an aspect of the case that is generally uniquely within his control. Also, solely because there is a showing of mitigating circumstances surrounding the killing, the defendant is no less a murderer under the state statute, but rather a less severe penalty is justified. As Judge Breitel pointed out in *People v. Patterson,* if the legislature decided that the burden on the prosecution was too great, it has the alternative of totally excluding the affirmative defense.[35] This, in effect, would allow the absence of such mitigating circumstances to be inferred from all of the evidence presented by the prosecution surrounding the homicide.

While recognizing the possibility of abuse by the states, as explained by Justice Powell in *Mullaney,*[36] the Court did not find it so persuasive as to justify interference with a state legislative function. The traditional view is that criminal law remains the particular reserve of the states.[37] Historical background demonstrates that the states have not abused their powers of legislation in the determination of their criminal laws.[38] The recent trend shows that a majority of states have placed all burdens, with the exception of the burden of production, on the prosecution, including affirmative defenses introduced by the defendant.[39] The Court emphasized obvious constitutional limitations in defining crimes beyond which the states may not go. The majority refused to read *Mullaney* as an absolute bar to placing any burdens on a defendant, but narrowly construed it to apply only to an instance where an essential element of the offense is presumed or implied by other elements of the crime.

The dissent,[40] written by Justice Powell, author of the majority opinion in *Mullaney,* was unable to distinguish between the application of the New York and Maine penal statutes. Although the New York statute had adopted the affirmative defense of extreme emotional disturbance based on the Model Penal Code of the American Law Institute, there is no doubt that this defense is any more than a modern equivalent to the common law "heat of passion" defense applied in Maine. The only distinction the dis-

35. 39 N.Y.2d at 305, 306, 347 N.E.2d at 909, 383 N.Y.S. 2d at 584 (1976).
36. 421 U.S. at 698.
37. Irving v. California, 347 S. 128, 134 (1954).
38. 97 S.Ct. at 2327, 53 L. Ed. 2d at 292.
39. W. LA FAVE AND A. SCOTT, CRIMINAL LAW §8, at 50 (1973).
40. 97 S.Ct. at 2330-2338, 53 L. Ed. 2d at 296-305.

sent could determine was in language and not in substance. Justice Powell again expressed the greatest concern of the dissent:

> The test the Court today establishes allows the legislature to shift, virtually at will, the burden of persuasion with respect to any factor in a criminal case, so long as it is careful not to mention the nonexistence of that factor in the statutory language that defines the crime. The sole requirement is that any references to the factor be confined to those sections that provide for affirmative defenses.[41]

Reiterating his rationale in *Mullaney*, Justice Powell stated that because of the bearing that affirmative defenses have on the punishment of the defendant, it is very closely tied to the culpability and stigma associated with the crime. If the intent of the *Winship* decision had been followed, the burden of persuasion must be placed on the prosecution. The Court's decision in *Patterson* drained *Winship* of much of its vitality and virtually restricted *Mullaney* to a single specific set of facts. Justice Powell's sentiment was that the Court's concern with the notion that the area of substantive law belonging to the states should not be infringed upon was outweighed by the duty to afford the defendant all of the constitutional protections guaranteed to him under the Due Process Clause of the Fourteenth Amendment.

The clear trend in both the federal and state courts has been toward removing all burdens of proof from the defendant. A majority of the states have followed the federal holding in *Davis* and require the prosecution to bear the burden of proving the sanity of the defendant.[42] If *Mullaney* had been carried to its logical conclusion, the prosecutor's burden would not merely be to establish the defendant's guilt by proving the statutory elements of an offense beyond a reasonable doubt, but would include establishing the defendant's complete culpability by disproving all exculpating or mitigating circumstances that the accused might raise.[43]

The overall effect of the *Patterson* decision was to reverse a clear trend of the Court toward relieving the defendant of all burdens of proof in a criminal proceeding with the exception of the burden of production. The decision finally placed limits on the scope of the *Winship* holding by providing that it is the states' prerogative to define the elements of their penal statutes in the absence of a clear violation of the accused's due process rights. The Court affirmed the holding of prior decisions to the effect that the use of affirmative defenses does not constitute a violation of the Fourteenth Amendment.

The Court did not overturn its prior decision in *Mullaney*, but that decision was so narrowly construed as to take away virtually all of its

41. *Id.* at 2333-2334, 53 L. Ed. 2d at 300.
42. *Id.* at 2326, 53 L. Ed. 2d at 290, n.10.
43. *See* Comment, 11 HARV. C.R.-C.L. L. REV. 390 (1976).

effect. In order for the *Mullaney* holding to apply, the state's penal statute must include the common law "malice" murder coupled with the "heat of passion" defense.

Even if the Court in *Patterson* had decided that the use of affirmative defenses was constitutionally infirm under *Winship*, it is doubtful that the purposes sought by the dissent would have been realized. As the majority pointed out in *Patterson*, if the burden is placed on the prosecution to prove affirmative defenses, and the state legislature determines that the burden is too great, it could merely exclude all affirmative defenses from its penal code.[44] Under these circumstances, the absence of such mitigating factors is established by all the evidence presented by the prosecution. In order to make absolutely certain that the states could not abuse their power, an issue which was of primary concern to the dissent, it would be necessary for the Court to define specifically the elements of the state's criminal offenses. Such action would certainly constitute an unwarranted intrusion into the substantive law reserved to the states.

JAMES B. TALLEY, JR.

44. Since the *Mullaney* decision was handed down in 1975, Maine has revised its penal statute. *See* ME. REV. STAT. tit. 17-A, §§201-206 (1976).