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Evidence: Standard of Proof in Voluntariness Hearings: Lego v. Twomey, 404 U.S. 477 (1972)

majority's analogy seems correct insofar as it reveals the Court's aversion to complete grants of immunity. A non-immunizing case which the majority failed to cite, but which strongly adds to their argument, is *United States v. Blue*.[57] In *Blue*, Justice Harlan, writing for a unanimous Court, stated:

> Even if we assume the Government had acquired incriminating evidence in violation of the Fifth Amendment, Blue would at most be entitled to suppress the evidence and its fruits if they were sought to be used against him at trial.... Our numerous precedents ordering the exclusion of such illegally obtained evidence assume implicitly that the remedy does not extend to barring the prosecution altogether. So drastic a step might advance marginally some of the ends served by exclusionary rules, but it would also increase to an intolerable degree interference with the public interest in having the guilty brought to book.[58]

The opinion in *Blue* strongly reinforces the notion that absolute immunity from prosecution is not necessary in order to protect an individual from governmental overreach. *Murphy* and *Kastigar* are consistent with *Blue* in that they indicate the Court's preference for relying on suppression of evidence as the means by which to safeguard fifth amendment rights.

Ultimately, the wisdom of the majority opinion will depend upon whether the theory of immunity from prosecutorial use is empirically sound, or whether it is merely jurisprudential theory behind which the substance of the privilege is lost. According to the majority opinion, a person accorded use immunity is not dependent for the preservation of his rights upon the integrity and good faith of the prosecuting authorities. Rather, the prosecution has the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony. Thus, the statute, by granting use immunity, assures that the compelled testimony can in no way lead to the infliction of criminal penalties.[59] If the majority analysis is correct, then one who testifies pursuant to a grant of use and derivative use immunity will be in the same position vis-a-vis the threat of prosecution and conviction as if he had remained silent.[60] If their analysis is wrong, however, as Justice Marshall in his dissenting opinion contends, then tainted evidence will, in fact, pass into evidence and the substance of the fifth amendment privilege against self-incrimination will be lost.

[57] 384 U.S. 251 (1966). Blue was charged in a criminal proceeding with wilfully attempting to evade income taxes. The district court dismissed the indictment on the grounds that defendant had been compelled to be a witness against himself in that he was required to file petitions for review of jeopardy assessment in tax court. In holding that the indictment should not have been dismissed, the Supreme Court reasoned that even if the government had acquired incriminating evidence in violation of the fifth amendment, defendant's remedy would be to suppress the evidence and its fruits if they were sought to be used against him at trial.

[58] *Id.* at 255.

[59] 406 U.S. at 453.

[60] What "uses" use immunity actually proscribes, however, is open to debate. Could, for example, the prosecution use for impeachment purposes testimony given under a grant of use immunity? The Court's contraction of Miranda v. Arizona, 384 U.S. 436 (1966), in Harris v. New York, 401 U.S. 222 (1971), with regard to an analogous situation points to an affirmative response.

EVIDENCE

Standard of Proof in Voluntariness Hearings: Lego v. Twomey, 404 U.S. 477 (1972)

Although *Jackson v. Denno*[1] required a preliminary hearing by the judge on the voluntariness of a criminal confession,[2] it left undecided the standard of proof to be applied at the hearing.[3] In *Lego v. Twomey*[4] the Supreme Court resolved this issue and held that the Constitution does not require a confession to be ruled voluntary beyond a reason-

[1] 378 U.S. 368 (1964).

[2] *Jackson* would allow a state to empanel a separate jury to decide the issue of voluntariness of a confession, rather than leave it to the judge. *Id.* Judges however may decide the issue. Reference to the "judge" in this note will be a shorthand form for the fact-finder on the issue of voluntariness, unless otherwise appropriate.

[3] *But see* the dissenting opinion of Justice Black, 378 U.S. at 405, in which he objected that the Court should then have determined the standard of proof to be applied in the voluntariness hearing.

[4] 404 U.S. 477 (1972).

able doubt. Therefore, the Illinois practice of admitting confessions into evidence if shown voluntary by a preponderance of the evidence was held permissible.[5]

Prior to trial, petitioner Lego sought to have a confession excluded because it was not made voluntarily. He testified that the police beat him into confessing because the victim of the crime was a friend of the police chief. The police denied the beating. Lego's story was corroborated by a photograph taken on the day after arrest showing his face swollen and bloody, but was weakened by his own testimony that he had had a scuffle with the victim. The trial judge ruled the confession voluntary and admissible, concluding that the testimony of the police chief and four police officers was credible and Lego's was not.[6]

The Illinois supreme court affirmed Lego's conviction in accordance with long-standing Illinois law governing the admissibility of confessions.[7] The United States District Court for the Northern District of Illinois denied Lego's petition for habeas corpus,[8] and the Court of Appeals for the Seventh Circuit affirmed.[9] Finally the Supreme Court affirmed the denial of Lego's petition for habeas corpus in a 4–3 decision,[10] with Justice White writing the majority opinion, joined by Chief Justice Burger and Justices Stewart and Blackmun. Justice Brennan wrote a dissenting opinion, joined by Justices Douglas and Marshall. Justices Powell and Rehnquist did not take part in the decision.

Lego first argued that he was not proven guilty beyond a reasonable doubt, as required by *In re Winship*,[11] because the confession used against him was proven voluntary by only a preponderance of the evidence. Justice White, writing for the majority, disagreed, believing that petitioner had failed to show how a lower standard of proof on the preliminary issue necessarily meant that on the ultimate issue of innocence or guilt the state's higher burden of proof was not met.[12] Justice White thought that the argument relied upon the faulty assumption that the reason for excluding involuntary confessions is that they make jury verdicts less reliable.[13] However, the *Jackson* hearing on the voluntariness of a confession is not designed to insure that the ultimate determination of innocence or guilt is accurate,[14] reasoned Justice White. Rather, its sole purpose is to "police the police"; that is, to compel law enforcement authorities to comply with the constitutional rights of the accused.[15] The majority contended that a coerced confession is excluded not because it is unreliable, but only because the method used to obtain it violates the fifth amendment, whereas *Winship* imposed the higher standard for proof of guilt in order to make jury verdicts more reliable and thereby implement the presumption of innocence.[16] Justice White did not see any connection between the reliability of the determination of innocence or guilt and the reliability of the determination of whether the police used constitutional methods.[17] He was, therefore, unconvinced that *Winship* threw any light on the standard of proof to be used in determining the voluntariness of a confession.

Petitioner's second argument for the adoption of the higher standard of proof was that it would give better protection to the values which the exclusionary rules are designed to serve.[18] Justice White answered that the right to be free from coerced confessions is not related to the standard of proof for determining whether a confession is voluntary. Furthermore, Justice White said, the petitioner had not shown that constitutional rights would suffer by the adoption of the lower standard of proof, so there was no reason to expand the exclusionary rules.[19] In the absence of such a showing, Justice White felt that it was open to speculation whether the possible deterrence of unlawful police conduct would be great enough to outweigh the public interest in placing probative evidence before the juries.[20] In the face of this conjecture, he would not adopt the higher standard of proof and expand the exclusionary rules. Thus Justice White saw the selection of the lower standard of proof as a means to adequately accommodate two sets of values, and strike a balance between them.

Having rejected defendant's constitutional ar-

[5] For a discussion of the "reasonable doubt" standard as compared with the "preponderance of the evidence" standard, *see* 9 J. WIGMORE, EVIDENCE, §§2497–98 (3d ed. 1940) [hereinafter cited as WIGMORE].

[6] 404 U.S. at 480 & n.2.

[7] People v. Lego, 32 Ill. 2d 76, 203 N.E.2d 875 (1965).

[8] United States *ex rel.* Lego v. Pate, 308 F. Supp. 38 (N.D. Ill. 1970).

[9] The decision is unreported; United States *ex rel.* Lego v. Pate, No. 18,313 (7th Cir. October 8, 1970).

[10] 404 U.S. 477 (1972).

[11] 397 U.S. 358 (1970).

[12] 404 U.S. at 486–87.

[13] *Id.* at 482.

[14] *Id.* at 484–85.

[15] *Id.* at 485.

[16] *Id.* at 486–87.

[17] *Id.* at 487.

[18] *Id.*

[19] *Id.* at 488.

[20] *Id.* at 489.

guments,[21] Justice White felt the Court was left with a question of evidence, and there was no reason to require the states to settle it on anything but traditional rules of evidence.[22] By those rules, the standard of proof of facts governing admissibility of evidence is unrelated to the standard of proof of the ultimate facts in issue in the case. The standard for the former is proof by a preponderance of the evidence.[23]

Justice Brennan wrote a strong dissent, joined by Justices Douglas and Marshall. Justice Brennan saw the absolute language of the fifth amendment, that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself," as demanding unusual protection against admitting a possibly involuntary confession, even at the risk of excluding some voluntary confessions.[24] To Justice Brennan, the fifth amendment commands that an involuntary confession never be admitted, and the Court had no choice but to take whatever steps were necessary to meet that command.[25] Because in many instances the only evidence on the issue of voluntariness is conflicting testimony of the police and the defendant, the standard of proof chosen will be controlling on the question of admission.[26] In such cases, the dissent argued, the higher standard is the only means to provide the protection that the fifth amendment demands to insure that no involuntary confession ever be admitted.[27]

Justice Brennan drew support for his argument from *Winship*, which for the first time placed the traditional right to a presumption of innocence on a firm constitutional basis. In that case, the constitutional right to a presumption of innocence was granted the protection of the reasonable doubt standard, in order to give it "concrete substance."[28] In *Lego*, Justice Brennan quoted passages from Justice Harlan's concurrence in *Winship*, in which Harlan argued that the higher standard of proof should be chosen to implement the presumption of innocence because it is far worse to convict an innocent man than to let a guilty man go free.[29] To Justice Brennan the fifth amendment represents a similar societal judgment that it is far worse to admit involuntary confessions than to exclude voluntary confessions.[30]

It is the difference in outlook on the reasons for the exclusionary rules that is crucial, and explains the difference in outcome between the majority and minority opinions in *Lego*. An unspoken premise of the minority position is that the exclusionary rules involve personal rights of the defendant, and are not merely judicial tools for encouraging constitutional practices. The dissent concluded that the fifth amendment demanded a standard sufficient to eliminate the risk of admission of involuntary confessions in all cases. But the majority, by placing heavy emphasis on the deterrent value of the exclusionary rules, sidestepped the question whether there is a personal fifth amendment right to the higher standard of proof. The majority decided that there is only the possibility of deterring unconstitutional practices by a judicial rule of a high standard of proof of voluntariness. Justice White's position implied that to impose a higher standard of proof would be judicial legislation which might possibly encourage constitutional practices. But White did not feel the fifth amendment compelled the Court to make this decision, as did the minority.

In addition to highlighting the majority's concept of the exclusionary rules, there is another curious aspect to the majority opinion. Petitioner argued that the *Winship* requirement of proof of guilt beyond a reasonable doubt could not be satisfied unless his confession were proven voluntary by the same standard.[31] This argument is based on two assumptions: first, that an involuntary confession uniquely affects the reliability of a verdict both because of the special probative force of a confession and because of the relationship between voluntariness and reliability; and second, that the *Jackson* hearing on voluntariness is designed to keep those confessions from juries because they are unreliable.

As to the first assumption, the majority conceded that there is a relationship between voluntariness

[21] Petitioner's final attack upon his conviction concerned his right to a jury determination of the confession's voluntariness. He argued that even if the judge ruled against him, Duncan v. Louisiana, 391 U.S. 145 (1968), required a jury determination of voluntariness before the confession could be used against him. The Court disagreed, stressing that *Duncan* was not intended to change the rule that admissibility of evidence was a question for the judge rather than the jury, even when admissibility is attacked on Constitutional grounds, 404 U.S. at 490.

[22] 404 U.S. at 489.

[23] 3 WIGMORE §2550 n.6.

[24] 404 U.S. at 493.

[25] *Id.* at 493–94.

[26] *Id.* at 492.

[27] *Id.* at 493.

[28] *In re* Winship, 397 U.S. at 363.

[29] 404 U.S. at 493–94.

[30] *Id.* at 494.

[31] 404 U.S. at 482.

and the truth or falsity of a confession.[32] And, given the probative force of a confession, if a conviction is based on a confession of questionable reliability, then the verdict itself may well be subject to doubt and the accused's rights under *Winship* may be violated.[33] Yet Justice White did not believe that false confessions have a significant impact on the validity of the verdict, arguing that the jury is able to give the proper weight to a confession if doubt is cast upon its voluntariness.[34] Whether juries can do this may be incapable of proof. However the history of exclusion of involuntary confessions because of their unreliability[35] indicates a judicial belief that juries are unable to give proper weight to a confession of questionable voluntariness. The Court in *Jackson* held that a jury is incapable of completely disregarding a convincing confession which it finds definitely involuntary.[36] Seemingly it would be just as difficult for a jury to discount a convincing confession of questionable voluntariness.

With regard to the second assumption, that a *Jackson* hearing on voluntariness is designed to keep knowledge of involuntary confessions from a jury because of their unreliability, Justice White concluded that a *Jackson* hearing has nothing to do with improving reliability of jury verdicts. Relying on *Jackson*, he reasoned that coerced confessions are excluded solely because of the method used to obtain them.[37] *Jackson* held that asking the jury to determine both voluntariness and guilt by disregarding a confession if they found it involuntary was too great a burden because they might find the confession involuntary, but nevertheless very reliable, and they probably could not disregard it.[38] Thus *Jackson* represented only a shift in emphasis in the reasons for excluding involuntary confessions, a shift from the question of unreliability to the question of the legality of the police methods regardless of the reliability of the confession. *Jackson* did not reject unreliability[39] as a reason for excluding involuntary confessions, but merely added another more important reason, by saying that the use of an involuntary confession[40] was prohibited even if it were reliable.

The *Lego* decision will not change the law in most states. Many state courts which had considered the issue prior to *Lego* held that only proof of voluntariness by a preponderance of the evidence is necessary.[41] Others, adopting the higher standard of proof, based their decisions on grounds that were not entirely clear. In fact, some gave no reason for their choice.[42] These states, along with those that adopted the higher standard incidental to their implementation of *Jackson*,[43] will now have an opportunity to reconsider whether their own state law requires the reasonable doubt standard. Upon reconsideration, state courts are free to require the higher standard because *Lego* says only that the states are not constitutionally mandated to do so. Since many jurisdictions had already been using the lower standard of proof, *Lego's* impact would have been greater if it had required the standard of

[32] 404 U.S. at 484.

[33] The *Winship* requirement of proof beyond a reasonable doubt on the ultimate issue did not specifically preclude a conviction based on doubtful evidence.

[34] 404 U.S. at 485–86.

[35] *See* 3 WIGMORE §§822–23. While the 1970 edition of this treatise by Chadbourn revised these sections in order to conform to the recent shift away from the theory of unreliability, *see* text accompanying note 39 *infra*, Wigmore's 1940 edition examines the exclusion of involuntary confessions from a historical viewpoint. He traces the doctrine through more than two centuries of judicial history and concludes that the sole reason for excluding out-of-court confessions is unreliability. 3 WIGMORE §823.

[36] Jackson v. Denno, 378 U.S. at 388–89.

[37] 404 U.S. at 484–85.

[38] Jackson v. Denno, 378 U.S. at 388–89.

[39] *Id.* at 385–86 (emphasis added). The language of *Jackson* makes it clear that unreliability, along with the unlawfulness of the method, remains a reason for excluding involuntary confessions.

> It is now inescapably clear that the Fourteenth Amendment forbids the use of involuntary confessions not only because of the probable unreliability of confessions that are obtained in a manner deemed coercive . . . .

Id.

[40] White's majority opinion in *Lego* acknowledged the presence of this language, but discounted it. White relied on a case prior to *Jackson*, Rogers v. Richmond, 365 U.S. 534 (1961), for the proposition that the purpose of a voluntariness hearing is not exclusion of unreliable confessions. 404 U.S. at 484–85 n.12. It is true that the emphasis in recent years has been on the exclusion of involuntary confessions because of the method used, 3 WIGMORE §822 (Chadbourn rev. 1970), but unreliability has long been recognized as another reason. Moreover, some scholars have argued that the privilege against legal compulsion to testify against oneself and the rule of exclusion of involuntary out-of-court confessions have a common pre-fifth amendment origin. L. LEVY, ORIGINS OF THE FIFTH AMENDMENT, 495–97 n.43 (1968). *Cf.* Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 763 (1935).

[41] *See* cases cited in 3 WIGMORE §860a n.4 (Chadbourn rev. 1970) and in Lego v. Twomey, 404 U.S. at 479 n.1.

[42] *E.g.*, People v. Huntley, 15 N.Y.2d 72, 78, 204 N.E.2d 179, 183 (1965).

[43] *See, e.g.*, State v. Thundershield, 83 S. Dak. 414, 422, 160 N.W.2d 408, 412 (1968); State *ex rel.* Goodchild v. Burke, 27 Wis. 2d 244, 264, 133 N.W.2d 753, 763–64 (1965), *cert. denied*, 384 U.S. 1017 (1966).