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Constitutional Law - Burden of Proof at Voluntariness Hearing to Determine the Admissibility of a Confession

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Recent Decisions

CONSTITUTIONAL LAW—BURDEN OF PROOF AT VOLUNTARINESS HEARING TO DETERMINE THE ADMISSIBILITY OF A CONFESSION—The United States Supreme Court has held that the prosecution at a voluntariness hearing to determine the admissibility of a challenged confession must prove voluntariness at least by a preponderance of the evidence, and that a stricter standard of proof is unnecessary.

Lego v. Twomey, 404 U.S. 477 (1972).

Lego was tried for armed robbery. The evidence introduced against him at trial included a confession which he had made to police after arrest and while in custody at the station house. When Lego challenged the voluntariness of the confession, the trial judge conducted a hearing out of the jury's presence. Lego testified that he had been beaten, while the police denied any beating or threats. The trial judge decided in favor of the police and ruled that the confession was voluntary and admissible. Although the judge had made no mention of the standard he used, Illinois law permitted a preponderance standard at a voluntariness hearing.

On direct appeal, the Illinois Supreme Court affirmed the conviction.[1] Four years later Lego sought a writ of habeas corpus in the United States District Court for the Northern District of Illinois, which denied relief on the merits.[2] The Court of Appeals for the Seventh Circuit affirmed.[3]

The United States Supreme Court granted certiorari[4] to resolve the question whether the fact finder at a coercion hearing must determine the voluntariness of a confession by a stricter standard of proof than a preponderance of the evidence.

Justice White, speaking for the majority, stated that the purpose that a voluntariness hearing, required by *Jackson v. Denno*,[5] is designed to serve, has nothing to do with improving the reliability of jury verdicts, or with implementing the presumption of innocence.[6]

1. People v. Lego, 32 Ill. 2d 76, 203 N.E.2d 875 (1965).
2. United States *ex rel.* Lego v. Pate, 308 F. Supp. 38 (N.D. Ill. 1970).
3. The Court of Appeals for the Seventh Circuit's affirmance is unreported. Lego v. Pate, No. 18313 (7th Cir., Oct. 8, 1970).
4. 401 U.S. 992 (1971).
5. 378 U.S. 368 (1964).
6. Lego v. Twomey, 404 U.S. 486 (1972).

Therefore, it was not inconsistent with *In re Winship*[7] to determine voluntariness of a confession by a preponderance of the evidence. The Court also rejected the petitioner's argument that evidence offered against a defendant at a criminal trial and challenged on constitutional grounds must be determined admissible beyond a reasonable doubt in order to give adequate protection to the values which the exclusionary rules are designed to serve. The Court reasoned that the petitioner had not demonstrated that admissibility rulings based on the preponderance of the evidence standard were unreliable, and the Court found it very doubtful that an escalation of the burden of proof would be sufficiently productive to outweigh the public interest in placing probative evidence before juries.[8]

In a dissenting opinion, written by Justice Brennan, joined by Justice Douglas and Justice Marshall,[9] there was a marked disagreement with the majority as to the application of *Winship* to a voluntariness hearing. The dissent argued that the standard of proof required for criminal conviction and that required for the admissibility of an allegedly involuntary confession should be the same because both present similar situations; that it is just as serious to admit involuntary confessions as it is to convict innocent defendants. The dissent reached such a conclusion by arguing that even though a higher standard of proof necessarily results in the acquittal of more guilty men than would a preponderance standard, the higher standard is necessary to preserve our fundamental societal values. Likewise, even though a higher standard of proof would mean that some voluntary confessions would be excluded as involuntary, such a standard is necessary to provide "concrete substance" for the fifth amendment's command against involuntary self-condemnation.[10] Hence, by the use of such analogous reasoning, the dissent concluded that a less strict burden at the voluntariness hearing than beyond a reasonable doubt would be a violation of the mandate of *Winship*.

In *Jackson*, the Supreme Court decided that when a defendant challenges the voluntariness of a confession, he has a right to a reliable and clear-cut determination of voluntariness at a separate voluntariness hearing out of the presence of the jury before the confession is ad-

7. 397 U.S. 358 (1970). This case ruled that the reasonable doubt standard was a part of due process as well as a prime instrument for reducing the risk of conviction by providing concrete substance for the presumption of innocence.
8. 404 U.S. at 489.
9. *Id.* at 491.
10. *Id.* at 495.

mitted into evidence.[11] Actually *Jackson* settled very little, and it was subsequently twisted, construed, read, and reread by various courts.[12] Consequently, the state and federal courts adopted a variety of standards ranging from a preponderance of the evidence to proof beyond a reasonable doubt,[13] depending upon their interpretation of the reasons for and the nature of the *Jackson* voluntariness hearing.

Subsequent to *Jackson*, those courts which required less than a reasonable doubt standard viewed the voluntariness hearing as merely a ruling on the admissibility of evidence which was not an essential element of the crime to be proved beyond a reasonable doubt in order to implement the presumption of innocence.[14] The *Jackson* hearing, as interpreted by these courts, was a ruling on a preliminary matter of admissibility.[15] Therefore, since the voluntariness of a confession was hardly to be distinguished from any other preliminary evidentiary matter of admissibility, a burden of proof beyond a reasonable doubt seemed to be an unwarranted burden.[16]

However, other courts which have had occasion to consider the matter after the *Jackson* decision have emphasized the view that a *Jackson* voluntariness hearing has a much more crucial function than a mere ruling on the admissibility of a preliminary matter. Under these decisions, the devastating nature of a confession required that it be admitted only when a high standard of proof is attained.[17] This point was succinctly expressed in *State v. Keiser*:[18]

> Because of the persuasive character of a confession as evidence, it would seem only fair to say that on the issue of voluntariness a mere preponderance of the evidence should not satisfy the court. It should be conceded that, in many instances, the impact of a voluntary confession admitted into evidence is so devastating as

11. Jackson v. Denno, 378 U.S. 368 (1964).
12. Roe, *The Quantum of Proof Required in Confessions*, 6 GONZAGA L. REV. 35, 41-42 (1970).
13. *See* 3 J. WIGMORE, EVIDENCE §§ 860a, 861 (Chadbourn rev. 1970) [hereinafter cited as WIGMORE].
14. Commonwealth *ex rel.* Butler v. Rundle, 429 Pa. 141, 239 A.2d 426 (1968).
15. *See* Duncan v. State, 278 Ala. 145, 176 So. 2d 840 (1965); State v. Milow, 199 Kan. 576, 433 P.2d 538 (1967); Barnhart v. State, 5 Md. App. 222, 246 A.2d 280 (1968); State v. White, 146 Mont. 226, 405 P.2d 761 (1965), *cert. denied*, 384 U.S. 1023 (1966); State v. Brewton, 238 Or. 590, 395 P.2d 874 (1964).
16. Clifton v. United States, 371 F.2d 354 (D.C. Cir. 1966). This case was subsequently overruled by Pea v. United States, 397 F.2d 627 (D.C. Cir. 1969).
17. *See* State v. Ragsdale, 249 La. 420, 187 So. 2d 427 (1966), *cert. denied*, 385 U.S. 1029 (1967); State v. Yough, 49 N.J. 587, 231 A.2d 598 (1967); People v. Huntley, 15 N.Y.2d 72, 204 N.E.2d 179, 255 N.Y.S.2d 838 (1965); State v. Thundershield, 83 S.D. 414, 160 N.W.2d 408 (1968).
18. 274 Minn. 265, 143 N.W.2d 75 (1966).

> to almost assure a verdict of guilty. Under such circumstances, the trial court takes an important part in making a fact determination. That being the case, it would seem to us that the evidence of voluntariness should be of such persuasive force as to satisfy the court to a moral certainty or beyond a reasonable doubt . . . .[19]

Such a view was obviously a recognition that the voluntariness hearing relates to a matter which is usually the key item in the proof of guilt, and thus deserving of a higher standard of proof than that attributed to ordinary preliminary matters of admissibility; judicial error at the voluntariness hearing could seriously impair the fairness of the entire trial.[20] Therefore, as another case concluded, the reasonable doubt standard is, contrary to the majority in *Lego*, directed at the preservation of the integrity of the fact-finding process in a jury trial.[21] This interpretation of the purposes which a *Jackson* hearing is designed to serve gains decisive importance in jurisdictions following the orthodox rather than the Massachusetts rule for determining the voluntariness of confessions.[22]

Under the orthodox or Wigmore rule for determining voluntariness, the issue of voluntariness is finally and solely decided by the trial judge for admissibility while the jury considers voluntariness as affecting only the weight and credibility of the confession.[23] Another procedure utilized in other jurisdictions is the Massachusetts or "humane" rule, in which the judge, after hearing evidence on the challenged confession, gives his own answer to the coercion issue, admitting only those confessions that he deems to be voluntary. The jury may then judge the voluntariness issue anew and perhaps disagree with the judge's determination and ignore it entirely.[24] It can be seen that under the orthodox method, the *Jackson* voluntariness hearing is certain to have an extremely crucial impact on the character of the entire trial.[25]

It is, therefore, puzzling why the *Lego* decision failed to adequately distinguish between these two types of procedures in relation to the

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19. *Id.* at 270, 143 N.W.2d at 79.
20. *Developments in the Law of Confessions*, 79 HARV. L. REV. 935, 1071 (1966).
21. Fernandez v. Beto, 281 F. Supp. 207 (N.D. Tex. 1968).
22. *See* State v. Dillon, 93 Idaho 698, 471 P.2d 553 (1970), *cert. denied*, 401 U.S. 942 (1971).
23. Illinois, the jurisdiction of the *Lego* case, followed the orthodox rule.
24. WIGMORE § 861.
25. *See* Clifton v. United States, 371 F.2d 354 (D.C. Cir. 1966) (dissenting opinion), where the need for a finding beyond a reasonable doubt in an orthodox jurisdiction is noted.

burden of proof at the voluntariness hearing. For it may be suggested that even though the Court found that the voluntariness hearing is not designed to implement the presumption of innocence, the contrary can actually be the case in an orthodox jurisdiction where the voluntariness hearing can be considered to be a distinct disadvantage if the reasonable doubt standard is not required.[26] Indeed, although some of the cases cited in the majority opinion of *Lego* did not impose a reasonable doubt standard at the voluntariness hearing, they required, in compliance with the Massachusetts rule, that the issue be further submitted for the jury's ultimate consideration.[27] Therefore, it seems that the reasonable doubt standard promulgated in *Winship* is satisfied when, even though only the preponderance burden is required at the voluntariness hearing, the confession is later found voluntary beyond a reasonable doubt by the jury as a question of fact, or as an essential element of guilt.[28] The *Lego* Court should have recognized, at least, that it is this dichotomy of procedures for determining voluntariness, orthodox and Massachusetts, which ultimately should determine the cruciality and importance of the voluntariness hearing, and hence the burden of proof at that hearing.

The Supreme Court's rejection of Lego's alternative contention that the reasonable doubt standard is necessary to give adequate protection to those values of immunity from coercive police tactics and freedom from involuntary self-incrimination, which the exclusionary rules are designed to serve, reflects the Court's hesitance to place additional barriers to the presentation of probative evidence before a jury.[29] It may perhaps be proposed that this attitude, which seems to be increasingly dominant in the law of confessions, represents a desire to temper the pro-defendant rules which frequently seem to abort the production of probative evidence. It springs from a firm belief that even if *Jackson's* primary concern was the prevention of improper police conduct, there is no strict legal policy which declares that police hands must be

26. *See* Justice Black's dissent in Jackson v. Denno, 378 U.S. 368 (1964), where he criticized that Court's failure to decide the burden of proof to be required at the voluntariness hearing.

27. *See* Barnhart v. State, 5 Md. App. 222, 246 A.2d 280 (1968); Commonwealth v. White, 353 Mass. 409, 232 N.E.2d 335 (1967); State v. Brewton, 238 Ore. 590, 395 P.2d 874 (1964). In each of these cases, cited by the Court as applying a less strict standard than beyond a reasonable doubt, the preponderance standard was permitted at the voluntariness hearing but the issue of voluntariness was then submitted for the jury's reconsideration.

28. *See generally* Meltzer, *Involuntary Confessions: The Allocation of Responsibility Between Judge and Jury*, 21 U. CHI. L. REV. 317 (1954).

29. 404 U.S. at 489.

slapped, unless they act properly beyond a reasonable doubt.[30] Chief Justice Burger voiced this belief earlier, in 1966, when as a member of the Court of Appeals for the District of Columbia, he objected that the number of usable confessions was dwindling to the vanishing point, and "in the future trial judges will be evaluating only those utterances of an accused which have already passed through the whole gamut of screening processes outlined in *McNabb*,[31] *Mallory*,[32] *Escobedo*,[33] *Massiah*[34] and *Miranda*[35]".[36] Thus, the Supreme Court's decision in *Lego* not to impose a reasonable doubt standard at a *Jackson* voluntariness hearing appears to have been a rather predictable ruling to facilitate the admission of probative evidence. And so, the majority in *Lego* was quite willing to de-emphasize one of the primary values of the exclusionary rules which declared that it is the way that evidence is obtained and not just its relevance which is of constitutional significance to the fairness of a trial.[37]

In conclusion, the decision in *Lego* provided a much needed complement to the somewhat unfinished ruling in *Jackson* by clarifying the prosecution's burden of proof at the voluntariness hearing. However, *Lego's* failure to adequately distinguish between the two currently used procedures for determining voluntariness places the defendant in a disadvantaged position in an orthodox jurisdiction where he does not have a "second crack" at the challenged confession. The majority in *Lego* thus appears to have diminished the very importance of the *Jackson* voluntariness hearing by relegating it to hardly more than a preliminary hearing on the admissibility of an ordinary evidentiary matter.

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30. 429 Pa. at 146, 239 A.2d at 429 (1968).
31. McNabb v. United States, 318 U.S. 332 (1943).
32. Mallory v. United States, 354 U.S. 449 (1957).
33. Escobedo v. Illinois, 378 U.S. 478 (1964).
34. Massiah v. United States, 377 U.S. 201 (1964).
35. Miranda v. Arizona, 384 U.S. 436 (1966).
36. Clifton v. United States, 371 F.2d 354, 360 (D.C. Cir. 1966).
37. Mapp v. Ohio, 367 U.S. 643 (1961).