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Shaun Sweeney

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Recent Decisions

AUTHORITY OF STATES TO DEFINE CRIMES—Aggravating Circumstances and Mandatory Minimum Sentences.


In 1982 Pennsylvania enacted the Mandatory Minimum Sentencing Act. The Act (hereinafter referred to as Section 9712) operates to divest the trial courts of discretion in sentencing by pro-

 Sentences for offenses committed with firearms
 (a) Mandatory sentence.—Any person who is convicted in any court of this Commonwealth of murder of the third degree, voluntary manslaughter, rape, involuntary deviate sexual intercourse, robbery as defined in 18 Pa. C.S. Section 3701(a)(1)(i), (ii) or (iii) (relating to robbery), aggravated assault as defined in 18 Pa. C.S. Section 2792(a)(1) (relating to aggravated assault) or kidnapping, or who is convicted of attempt to commit any of these crimes, shall, if the person visibly possessed a firearm during the commission of the offense, be sentenced to a minimum sentence of at least five years of total confinement notwithstanding any other provision of this title or other statute to the contrary.
 (b) Proof of sentencing.—Provisions of this section shall not be an element of the crime and notice thereof to the defendant shall not be required prior to conviction, but reasonable notice of the Commonwealth’s intention to proceed under this section shall be provided after conviction and before sentencing. The applicability of this section shall be determined at sentencing. The court shall consider any evidence presented at trial and shall afford the Commonwealth and the defendant an opportunity to present any necessary additional evidence and shall determine, by a preponderance of the evidence, if this section is applicable.
 (c) Authority of Court in sentencing.—There shall be no authority in any court to impose on an offender to which this section is applicable any lesser sentence than provided for in subsection (a) or to place such offender on probation or to suspend sentence. Nothing in this section shall prevent the sentencing court from imposing a sentence greater than that provided in this section. Sentencing shall not supercede the mandatory sentences provided in this section.
 (d) Appeal by Commonwealth.—If a sentencing court refuses to apply this section where applicable, the Commonwealth shall have the right to appellate review of the action of the sentencing court. The appellate court shall vacate the sentence and remand the case to the sentencing court for imposition of a sentence in accordance with this section if it finds that the sentence was imposed in violation of this section.
 (e) Definition of firearm.—As used in this section “firearm” means any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive or the expansion of gas therein.

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viding that a person convicted of any of the enumerated felonies is subject to a mandatory minimum of five years' imprisonment if the sentencing judge finds, by a preponderance of the evidence, that the convicted individual had visibly possessed a firearm during the commission of the offense.\(^2\) Section 9712 does not authorize a sentence in excess of the maximum sentence otherwise allowed for that offense.\(^3\) Section 9712 expressly states that visible possession of a firearm during the commission of an offense shall not be treated as an element of that offense and, further, that the provisions of Section 9712 are not to be applied until after the prosecution has obtained a conviction for that offense.\(^4\)

The four petitioners, McMillan, Peterson, Dennison and Smalls, were each convicted of one of the enumerated felonies to which Section 9712 applies.\(^5\) The Commonwealth gave notice that it would proceed under Section 9712, but each of the four sentencing judges before whom the petitioners had appeared found Section 9712 to be unconstitutional.\(^6\) In each case, the judge imposed a sentence of less than five years' imprisonment without ever determining whether the petitioner had visibly possessed a firearm during the commission of the offense for which he had been convicted.\(^7\) The sentencing judges concluded that the preponderance standard did not satisfy due process in that visible possession of a firearm becomes an element of the enumerated felonies when Section 9712 is applied. The judges further reasoned that, as an element of the crime, such possession must be proved beyond a reasonable doubt\(^8\) and not merely by a preponderance of the evidence as expressed in Section 9712. Accordingly, Section 9712 was not applied by the four sentencing judges before whom the petitioners appeared.

The Commonwealth appealed all four cases to the Supreme Court of Pennsylvania,\(^9\) where the cases were consolidated. The

\(^2\) Id.
\(^3\) Id.
\(^4\) Id.
\(^6\) Id.
\(^7\) Id.
\(^8\) Id.
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first question that the court had to answer in testing the constitutionality of Section 9712 was whether visible possession of a firearm during the commission of one of the enumerated felonies is an element of that crime because a finding of such possession mandates a minimum of five years’ imprisonment upon conviction. Pennsylvania’s highest court held that visible possession of a firearm was not to be considered an element of the enumerated felonies for several reasons.

The Pennsylvania Supreme Court noted that the state’s legislature has the duty of defining crimes and that the legislature explicitly stated that visible possession is not an element of the crimes listed in Section 9712. The court further observed that visible possession of a firearm is not included in the definition of any of those crimes as they appear in the Pennsylvania Crimes Code, and that visible possession is not included in the definition of “element” in the Crimes Code. Petitioners then argued that Section 9712 in effect creates a new set of upgraded felonies by requiring the minimum sentence of five years imprisonment. The court rejected this argument on the reasoning that Section 9712 in no way operates to increase the maximum sentence permitted upon conviction for any of the enumerated felonies. The majority’s opinion further stated that Section 9712 relates solely to sentencing proceedings and acts only to dispose of the following issues: whether or not total confinement is appropriate; and, whether or


11. 508 Pa. at 31, 494 A.2d at 357.
12. 508 Pa. at 31-32, 494 A.2d at 357.
13. 508 Pa. at 32, 494 A.2d at 357.
14. Id.
not to impose a minimum sentence of less than five years' imprisonment. According to the Supreme Court of Pennsylvania, Section 9712 does not relieve the prosecution of any burden of proof, creates no presumption as to any essential fact, and places no burden on the defendant. Therefore, the court concluded that under In re Winship, Mullaney v. Wilbur and Patterson v. New York, Section 9712 was constitutional.

Having reached this point in its analysis of Section 9712, the Supreme Court of Pennsylvania still had one more issue to resolve: even if visible possession of a firearm has been held not to be an element of crimes, does proof of such possession by a preponder-

15. 508 Pa. at 35-36, 494 A.2d at 359.
16. Id.
20. Winship, Mullaney and Patterson will be discussed extensively throughout this article. Accordingly, some background information on each of these cases is in order.

In re Winship involved a juvenile who had been found, by only a preponderance of the evidence, to have stolen $112.00 from a woman's purse. The family court judge in New York ordered that the juvenile be placed in a training school for eighteen months, subject to annual extensions until the juvenile reached the age of eighteen. Section 744(b) of the New York Family Court Act provided that a juvenile could be punished for committing acts of delinquency if guilt was established by a preponderance of the evidence. The Supreme Court of the United States found the Act to be unconstitutional, holding that the prosecution must prove beyond a reasonable doubt every fact necessary to constitute the crime charged.

Mullaney v. Wilbur originated in the state of Maine where the defendant had been convicted of murder. A Maine statute required the defendant to prove by a preponderance of the evidence that he had acted "in the heat of passion upon sudden provocation" in order to reduce the homicide from murder to manslaughter. If the prosecution proved that the homicide was both intentional and unlawful, the third element of murder, malice aforethought (which was the only element distinguishing murder from manslaughter in Maine), was to be presumed. According to the Maine courts, malice aforethought and heat of passion were two inconsistent things, and by proving the latter, the defendant would negate the former and reduce the homicide to manslaughter. In essence, instead of requiring proof of every element of murder beyond a reasonable doubt, the Maine law required the felonious homicide defendant to prove the nonexistence of one of the elements (malice aforethought) by a preponderance of the evidence. The Supreme Court of the United States reversed, holding that the defendant does not have to prove heat of passion by a preponderance to reduce the homicide to manslaughter, but that the prosecution must prove the absence of heat of passion beyond a reasonable doubt in order to sustain a murder conviction.

Patterson v. New York involved the constitutionality of a New York law which required a defendant in a second degree murder prosecution to establish by a preponderance of the evidence the affirmative defense of "extreme emotional disturbance" in order to reduce the homicide to manslaughter. Unlike Mullaney, the factfinder in Patterson could not presume or infer the presence of any element upon proof beyond a reasonable doubt of the other elements. The Supreme Court of the United States noted these distinctions and upheld the constitutionality of the New York law.
The majority recognized that the sentencing process, as well as the trial itself, must be conducted in accordance with due process. However, the particular process which is due in sentencing procedures is not necessarily the same process which is due in proceedings to determine the guilt or innocence of the accused during trial.\textsuperscript{22}

The standard of proof required (to satisfy due process) in any particular proceeding depends on society's judgment of the values of the interests at stake.\textsuperscript{23} For instance, the "preponderance of the evidence" standard used to determine liability in civil actions indicates that society is only minimally concerned with the outcome of such cases and that the litigants should share the risk of error in roughly equal fashion.\textsuperscript{24} When the state initiates criminal proceedings to deny a defendant life or liberty, however, the standard of "beyond a reasonable doubt" is employed.\textsuperscript{25} The stringency of this standard excludes as much as possible the risk of error in the criminal prosecution and reveals society's judgment that the weight and gravity of the interests at issue demand as much protection as possible.\textsuperscript{26}

In ruling upon the constitutionality of Section 9712's preponderance standard, the Supreme Court of Pennsylvania weighed the liberty interests of those individuals who have been convicted of one or more of the enumerated felonies against the Commonwealth's interest in imposing mandatory minimum sentences upon the individuals who use firearms while committing such acts.\textsuperscript{27} Because the preponderance standard is not used until after the defendant's guilt has been established beyond a reasonable doubt, the court found that Section 9712 does not affect any significant liberty interest.\textsuperscript{28} By the time the preponderance standard is applied (at sentencing), the convicted defendant no longer has the right to remain free of confinement.\textsuperscript{29} The only "liberty interest"

\textsuperscript{21} 508 Pa. at 36, 494 A.2d at 359.
\textsuperscript{24} \textit{Id}.
\textsuperscript{25} \textit{Id}.
\textsuperscript{27} 508 Pa. at 39, 494 A.2d at 361.
\textsuperscript{28} \textit{Id}.
\textsuperscript{29} \textit{Id}.
possessed by a defendant at this point is the interest in receiving a sentence of less than five years' confinement. However, this interest is not supported by any right, according to the court; for the convicted defendant, like any other individual convicted of a crime, has no cognizable right to leniency at sentencing and no substantive right to a particular sentence within the range authorized by statute.\textsuperscript{30}

In contrast, the Pennsylvania Supreme Court found the Commonwealth's interest in applying Section 9712 at sentencing to be extremely important.\textsuperscript{31} In discussing the Commonwealth's interest, the court pointed out that Section 9712 serves to protect the state's citizens from armed criminals and acts as a deterrent to those who would illegally use firearms to engage in violent crime.\textsuperscript{32} The majority also recognized the state's interest in punishing those who commit crimes with guns.\textsuperscript{33} At the conclusion of the balancing of interests, the Supreme Court of Pennsylvania ruled that "[t]his societal interest is at least as compelling as the defendant's interest in lenient punishment."\textsuperscript{34} In short, the answer to the second question before the Pennsylvania Supreme Court was that it is constitutional for the defendant and the Commonwealth to share equally in the risk of error involved when Section 9712 is applied at sentencing, and therefore Section 9712 is constitutional.\textsuperscript{35}

In a concurring opinion,\textsuperscript{36} Justice Larsen addressed only the question of the constitutionality of the preponderance standard without commenting on whether visible possession should be treated as an element of the enumerated crimes. According to Justice Larsen, the question of what process is due depends on the interests at stake in the particular proceeding.\textsuperscript{37} To that end, Justice Larsen stated:

The interests at stake here are the convicted criminal's interest in obtaining a light or lenient penalty for his crime as opposed to society's twofold interest in: (a) sure and certain incarceration for those who commit crimes with guns and (b) deterring the illegal use of firearms in the Commonwealth.\textsuperscript{38}

\textsuperscript{30} 508 Pa. at 40, 494 A.2d at 362.
\textsuperscript{31} 508 Pa. at 41, 494 A.2d at 362.
\textsuperscript{32} Id.
\textsuperscript{33} Id.
\textsuperscript{34} Id.
\textsuperscript{35} 508 Pa. at 42, 494 A.2d at 362-63.
\textsuperscript{36} 308 Pa. at 42, 494 A.2d at 363.
\textsuperscript{37} 508 Pa. at 45, 494 A.2d at 364 (Larsen, J., concurring), citing In re Martorano, 464 Pa. 66, 346 A.2d 22 (1975).
\textsuperscript{38} 508 Pa. at 45-46, 494 A.2d at 364 (Larsen, J., concurring).
After weighing these interests, Justice Larsen agreed with the majority that proof by a preponderance of the evidence at sentencing under Section 9712 satisfies due process.\(^3\)

To support his finding that use of the preponderance standard at sentencing is constitutional, Justice Larsen cited a case where use of that standard by a defendant who had pleaded not guilty by reason of insanity was constitutional.\(^4\) Also cited for support were cases involving suppression hearings where trial judges admitted into evidence confessions that were found only by a preponderance of evidence to have been made voluntarily.\(^5\) Cases involving parole and probation revocation proceedings were also cited in the concurring opinion\(^6\) to support Section 9712's preponderance standard.

The Supreme Court of the United States granted certiorari,\(^5\) and in a 5-4 decision affirmed the ruling of the Supreme Court of Pennsylvania.\(^4\) Justice Rehnquist wrote the majority opinion, in which Chief Justice Burger, and Justices White, Powell and O'Connor joined. Justice Marshall filed a dissenting opinion in which Justices Brennan and Blackmun joined.\(^6\) Justice Stevens wrote a separate dissenting opinion.\(^4\)

Again, petitioners contended that visible possession of a firearm is, in fact, an element of the felonies listed in Section 9712, notwithstanding the language of that law which expressly states that such possession is not an element.\(^7\) Although the Court conceded that there are constitutional limits to a state's power in defining

\(^3\) 508 Pa. at 46, 494 A.2d at 365 (Larsen, J., concurring).
\(^7\) 106 S. Ct. 58 (1985).
\(^8\) 106 S. Ct. 2411 (1986).
\(^9\) Id. (Marshall, J., dissenting).
\(^11\) 106 S. Ct. at 2415.
what constitutes an element of a crime, the Court stressed that a state legislature's definition is usually dispositive. Without providing any clues as to where the constitutional boundaries lie in this area, the majority opinion generalized that states are not permitted to redefine crimes to the detriment of criminal defendants and in certain limited circumstances may be required to prove beyond a reasonable doubt facts not formally designated as being elements of the offense charged.

After noting that Pennsylvania's legislature had specifically expressed that visible possession was not an element of the enumerated felonies, the Court examined the elements of those crimes. The majority observed that those elements and the maximum permissible penalties for those offenses were established long before Section 9712 was enacted and were not altered by the passage of that law. The Court took particular note of several aspects of Section 9712, including the requirement that the preponderance standard is not used until after conviction, the requirement that the prosecution always has the burden of proof, and the requirement that the finding of visible possession does not expose the criminal defendant to a separate or greater punishment. These characteristics of Section 9712 persuaded the Court to conclude that visible possession of a firearm was not to be treated as an element of the crimes listed in Section 9712, but rather as a sentencing factor to be considered only after the specified elements of those crimes have been proved beyond a reasonable doubt.

The majority then analyzed petitioners' claim that use of the preponderance standard during sentencing violates due process. Citing Williams v. New York, the Court stated that there need not be any prescribed burden of proof at all in sentencing proceed-

49. Id.
50. 106 S. Ct. at 2417.
51. Id. The Court declined to define precisely the constitutional limits to the power of the states to reallocate or reduce burdens of proof in criminal proceedings, but stated: "Our inability to lay down any 'bright line' test may leave the constitutionality of statutes . . . to depend on differences of degree, but the law is full of situations in which differences of degree produce different results." 106 S. Ct. at 2419.
52. 106 S. Ct. at 2416-17. See also 106 S. Ct. at 2417 n.3.
53. 106 S. Ct. at 2419.
54. Id.
ings when a valid conviction has been obtained. The Court found no constitutional infirmity with Pennsylvania’s legislature providing judges with a standard to be used with regard to a particular factor in a sentencing proceeding. Finally, in dismissing the petitioners’ due process challenges to the use of the preponderance standard, the Court relied on Proffitt v. Florida, a case in which the sentencing court was permitted to consider “facts related to the crime” without having to prove those facts beyond a reasonable doubt.

In the final paragraph of the majority opinion, petitioners’ argument that Section 9712 denies them their sixth amendment right to trial by jury was dismissed. Visible possession of a firearm was determined to be a sentencing factor rather than an element of the crimes; the sixth amendment only guarantees jury determination of all ultimate facts concerning the offense committed, not the post-conviction sentencing factors. As there is no right to jury sentencing (even when the sentence turns on specific findings of fact), the petitioners’ assertion was without merit and Section 9712 was held not to be in violation of the sixth amendment.

Justice Marshall’s dissenting opinion addressed only the issue of whether visible possession should be treated as an element of the crimes. In addressing that issue, Justice Marshall concluded that “[w]hether a particular fact is an element of a criminal offense . . . is a question to be decided by this Court and cannot be abdicated to the States.” Justice Marshall’s opinion asserted that such deference would lead to states undermining the protections of In re Winship, which held that all facts which are necessary to constitute a crime must be proved beyond a reasonable doubt. In quoting Justice Stevens’ dissent in McMillan that “if a state provides that a specific component of a prohibited transaction shall give rise to both a special stigma and to a special punishment, that component must be treated as a ‘fact necessary to constitute the

56. Id.
57. 106 S. Ct. at 2420.
59. Id.
60. 106 S. Ct. at 2420.
61. Id.
62. Id.
63. 106 S. Ct. 2411 (Marshall, J., dissenting).
64. 106 S. Ct. at 2421 (Marshall, J., dissenting).
65. See supra note 20 and accompanying text.
66. 106 S. Ct. 2411 (Stevens, J., dissenting).
crime' within the meaning of In re Winship.' Justice Marshall believed that Section 9712 attaches a special stigma and a special punishment to visible possession and that therefore such possession should have to be proved beyond a reasonable doubt.

Justice Stevens contended that due process is not provided when a state's legislature is permitted to dispense with proof beyond a reasonable doubt when targeting conduct for severe criminal penalties. Because Section 9712 mandates a minimum sentence of five years' incarceration upon the finding of certain prescribed conduct, Justice Stevens reasoned that conduct should be proved beyond a reasonable doubt. Although acknowledging that the states have the power to punish a wide variety of objectionable transactions, Justice Stevens emphasized that the Supreme Court of the United States has never authorized a state to decide which ingredients of a proscribed transaction are elements that must be proved beyond a reasonable doubt. Justice Stevens stressed that Winship requires that visible possession be proved beyond a reasonable doubt, for such possession, according to Justice Stevens, gives rise to both a special stigma and a special punishment.

Another point discussed in the Stevens dissent is the distinction between aggravating and mitigating circumstances, and how that distinction is critical in terms of due process. Justice Stevens urged that the majority's reliance on cases upholding the preponderance standard at sentencing was misplaced because those cases involved mitigating circumstances. Such authorities were not persuasive in the opinion of Justice Stevens for the reason that mitigating circumstances are considered to reduce punishment while a finding of aggravating circumstances (e.g., visible possession of a firearm) exposes the criminal defendant to greater stigma and punishment. According to Justice Stevens, the procedural safeguards of Section 9712 do not adequately protect the criminal defendant and thus do not comport with due process.

Historically, the administration of criminal justice has been a function of the states, and crimes in the United States are gener-

67. 106 S. Ct. 2421 (Marshall, J., dissenting), citing Justice Stevens' dissent at 2426.
68. 106 S. Ct. at 2421 (Marshall, J., dissenting).
69. 106 S. Ct. at 2422 (Stevens, J., dissenting).
70. Id.
71. Id.
72. Id.
73. 106 S. Ct. at 2424 (Stevens, J., dissenting).
74. Id.
75. 106 S. Ct. at 2426 (Stevens, J., dissenting).
ally what the laws of the individual states make them, subject to the limitations of the Constitution. As the states' legislatures are the "makers" of the crimes, they of course choose the ingredients, or elements, of the crimes. Before imposing criminal sanctions upon a wrongdoer, the states must prove all the elements of a crime beyond a reasonable doubt. Obviously then, the states choose what they must prove beyond a reasonable doubt by their choice of elements. However, due process questions may arise when the legislature expresses that certain facts related to the crime are not elements of that crime but are aggravating circumstances that do not have to be proved beyond a reasonable doubt. Before discussing the due process concerns, the difference between the elements of a crime and the aggravating circumstances surrounding the crime must be understood.

The elements of a crime are "[t]hose constituent parts of a crime which must be proved by the prosecution to sustain a conviction." The general common law rule is that every crime must contain two elements: an act, and an intent. An aggravating circumstance, on the other hand, is "[a]ny circumstance attending the commission of a crime . . . which increases its guilt or enormity or adds to its injurious consequences, but which is above and beyond the essential constituents of the crime. . . ." Aggravating circumstances are considered by the sentencing judge on the reasoning that "the punishment should fit the offender and not merely the crime." The crucial difference between the elements of the crime and the aggravating circumstances surrounding the crime is that the Supreme Court of the United States has never held that aggravating circumstances must be proved beyond a reasonable doubt to satisfy due process. Although

both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed.

77. The term "makers" refers to the states' legislatures and common law.
78. See supra note 20 and accompanying text.
79. BLACK'S LAW DICTIONARY 467 (5th ed. 1979).
80. United States v. Apfelbaum, 445 U.S. 115, 100 S. Ct. 948, 63 L.Ed.2d 250 (1980). "In the criminal law, both a culpable mens rea and a criminal actus reus are generally required for an offense to occur." 100 S. Ct. at 957.
81. BLACK'S LAW DICTIONARY 60 (5th ed. 1979).
Within limits fixed by law, there is no set standard of proof that must be adhered to by sentencing judges during the post-conviction deliberations.

When a state's legislature declares that certain matters related to the substantive qualities of the offense are not elements of that offense to be proved beyond a reasonable doubt but instead are to be considered at post-conviction proceedings as bearing on the extent of punishment, due process questions tend to become involved. Although the Supreme Court has recognized the potential problem of legislatures exercising unchecked authority in this area, the Court has not yet provided the legislatures with any recognizable boundaries that should be observed when enacting criminal laws. The three Supreme Court cases discussed at length by the McMillan Court involved challenges to state legislature definitions of crimes, but taken together, none of these decisions provided an enlightening analysis for the McMillan Court to use.

In re Winship of course held that “the Due Process Clause 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.” While Winship did not limit the proof beyond a reasonable doubt to only the elements of the crime, that case also did not provide any clue as to when a fact should be viewed as one necessary to constitute a particular crime and thereby subject to proof beyond a reasonable doubt.

Mullaney v. Wilbur recognized that the Winship requirement of proof beyond a reasonable doubt was not confined to the state-defined “elements” of crimes:

Moreover, if 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 . . . . The rationale of that case requires an analysis that looks to the ‘operation and effect of the law as applied and enforced by the state,’ . . . and to the interests of both the State and the defendant as af-

83. Id. at 246, 69 S. Ct. at 1082, 93 L.Ed at 1341.
84. Perhaps the best example of the Supreme Court’s reluctance to provide any criteria with which to analyze the legislatures’ definitions of crimes was the statement made in the majority opinion in Patterson v. New York that “there are obviously constitutional limits beyond which the States may not go in this regard.” 97 S. Ct. at 2327. However, no such limits were ever discussed or revealed, and the Court went no further than this statement.
85. See supra note 20 and accompanying text.
86. See supra note 20 and accompanying text.
In deciding whether a particular factor requires proof beyond a reasonable doubt within the meaning of *Winship*, the Court in *Mullaney* made use of two inquiries. The first inquiry focused on how the proof of the factor in question affected the extent of punishment. The factor focused upon in *Mullaney* was "heat of passion upon sudden provocation," which, if proved by the defense by a preponderance of the evidence would reduce the homicide conviction from murder to manslaughter. The minimum sentence for manslaughter was a $1,000 fine and the maximum was twenty years' imprisonment. The sentence for murder was a mandatory term of life imprisonment. The second inquiry utilized by the *Mullaney* Court applied an historical analysis to the factor at issue. The Court looked to whether the presence or absence of the factor at issue has historically been an important factor in determining the degree of culpability to be attached to the crime. Because there was a substantial difference in punishment depending on the presence or absence of "heat of passion" ($1,000 fine as compared to mandatory life imprisonment), and also because that factor has historically been the single most important factor affecting the extent of punishment attaching to the related crime (felo-nious homicide), *Mullaney* held that the prosecution must prove absence of that factor beyond a reasonable doubt to sustain a murder conviction.

The *Mullaney* two-inquiry test, which was created to decide the issue of whether a particular factor related to a crime must be proved beyond a reasonable doubt, can be summarized as follows:

1. Inquire as to whether the presence or absence of the factor makes a difference in punishment depending on the presence or absence of "heat of passion" ($1,000 fine as compared to mandatory life imprisonment), and also because that factor has historically been the single most important factor affecting the extent of punishment attaching to the related crime (felo-nious homicide), *Mullaney* held that the prosecution must prove absence of that factor beyond a reasonable doubt to sustain a murder conviction.

88. Justice Powell, who wrote the Court's opinion in *Mullaney*, did not express in the context of that opinion that the Court was specifically applying a two-inquiry test to reach the holding. However, in his dissent in *Patterson*, Justice Powell asserted that the *Mullaney* Court's analysis was concerned only with the two inquiries to be discussed.
89. 95 S. Ct. at 1886-90. (Differences in punishment are discussed.)
90. 95 S. Ct. at 1882-83.
91. 95 S. Ct. at 1886.
92. 95 S. Ct. at 1883 n.3.
93. 95 S. Ct. at 1886-88. (The Court provides a historical analysis.)
94. 95 S. Ct. at 1888.
95. 95 S. Ct. at 1892.
96. *See supra* note 20 and accompanying text discussing *Mullaney*.
97. *See supra* note 88 and accompanying text.
substantial difference in punishment. If the answer to this inquiry is negative, there is no need to go any further and the State's treatment of the factor is constitutional. However, if the answer to this inquiry is affirmative, go on to the second inquiry.\(^{88}\)

(2) Has the presence or absence of the factor at issue historically affected the degree of culpability to be attached to the related crime? If the answer to this second inquiry is negative, the State's treatment of the factor is constitutional. If the answer to this second inquiry is affirmative (which is likely if the answer to the first inquiry was affirmative), then the prosecution must prove the presence or absence of that factor beyond a reasonable doubt before imposing the more severe punishment.\(^{89}\)

*Patterson v. New York* involved the constitutionality of requiring a second degree murder defendant to prove "extreme emotional disturbance" by a preponderance of the evidence in order to reduce the crime to manslaughter.\(^{100}\) In addressing the question of the constitutional limits to the states' authority to define crimes, the Court made the bald statement that "there are obviously constitutional limits beyond which the States may not go in this regard."\(^{101}\) The majority opinion did not mention any "test" that should be used when a state's definition of a crime is under a due process attack. The *Mullaney* two-inquiry approach was not discussed at all by the majority in *Patterson*.\(^{102}\) Instead, the *Patterson* opinion stressed that *Mullaney* was distinguishable because the statute involved in *Mullaney* presumed the existence of an element of the crime at issue.\(^{103}\)

The *Mullaney* test undoubtedly could have been applied in *Patterson*, but it wasn't. The outcome of the *Mullaney* test is in no way affected by any presumptions or burdens of proof attached to the factor at issue.\(^{104}\) The factors under consideration in the two cases—heat of passion in *Mullaney*, extreme emotional distur-

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98. *See supra* note 89.
99. *See supra* note 93.
100. *See supra* note 20 and accompanying text discussing *Patterson*.
102. However, in his dissenting opinion, Justice Powell contended that the *Mullaney* test should have been applied in *Patterson*. 97 S. Ct. at 2335 (Powell, J., dissenting). Justice Powell further suggested that if the test had been applied in *Patterson*, the New York statute would have been declared unconstitutional. 97 S. Ct. at 2336 (Powell J., dissenting).
103. 97 S. Ct. at 2330. *See also supra* note 20 and accompanying text discussing *Patterson*.
104. Presumptions and burdens of proof are immaterial in the application of the *Mullaney* test. The factor under consideration is "plugged in" alone, separated from all burdens of persuasion and presumptions that would be attached to that factor at trial. The distinction made by the *Patterson* Court was irrelevant for purposes of applying the *Mullaney* test.
bance in *Patterson*—are both affirmative defenses to murder and are so similar that a different result could not be justified if those two factors were subjected to the same test. If the *Mullaney* test had been applied in *Patterson*, New York would no longer be permitted to require a defendant in a second degree murder prosecution to prove by a preponderance of evidence the affirmative defense of extreme emotional disturbance in order to reduce the crime to manslaughter. Instead, the state of New York, like the state of Maine, would have to prove beyond a reasonable doubt the absence of that affirmative defense to obtain the murder conviction.106 The question remains then, why didn’t the Supreme Court in *Patterson v. New York* utilize the test developed in *Mullaney* when the factors that were considered in those two cases were virtually identical?

The answer to this question is complicated, but can be found upon close examination of *Mullaney*. Although the *Mullaney* Court formulated a very handy and workable test to determine whether a factor related to a crime must be proved beyond a reasonable doubt within the meaning of *Winship*, by simply following *Winship* (as both the district court and court of appeals did) the Court in *Mullaney* would have reached the same result but by a much simpler route.

Instead, the Supreme Court chose to make the *Mullaney* decision more complicated than necessary by formulating and applying the two-inquiry test. Even though the test appears to be a very effective tool, misuse of it can lead to inconsistent and harmful re-

105. *See supra* note 102.

106. The Court in *Mullaney* stated that: “The issue is whether the Maine rule requiring the defendant to prove that he acted in the heat of passion on sudden provocation accords with due process.” 95 S. Ct. at 1886. As malice aforethought and heat of passion were mutually exclusive under Maine law, the issue also could have been whether the failure to require the prosecution to prove malice aforethought beyond a reasonable doubt accords with due process. If the Court had focused on malice aforethought rather than heat of passion when applying the test, *Mullaney* would have held that the prosecution must prove malice aforethought beyond a reasonable doubt. As malice aforethought was an element of murder under Maine law, such a holding could have been reached merely by following the precepts of *In re Winship*. In fact, the approach of focusing on malice aforethought, an element of the crime, would have been more logically in accord with *Winship*. *Winship* required proof beyond a reasonable doubt of every fact necessary to constitute the crime. Malice aforethought was a fact necessary to constitute murder in Maine, the absence of heat of passion was not. Heat of passion was an affirmative defense.

107. The district court and the court of appeals decided *Mullaney* using the approach discussed in note 106. But for reasons not clearly explained and wholly unpersuasive, the *Mullaney* Court departed from this approach and instead focused on the affirmative defense of heat of passion. 95 S. Ct. at 1885-86.
sults. Unfortunately, the Supreme Court misused the test in its first application when the Court subjected "heat of passion" rather than "malice aforethought" to the two inquiries. At first glance, the choice of heat of passion rather than malice aforethought as the factor to be tested does not appear significantly important, as those two factors were mutually exclusive. Because proving one proves the absence of the other, it would seem logical to conclude that the choice of which factor to subject to the test is unimportant.

But there is a crucial difference which cannot be overlooked—malice aforethought is often a fact necessary to constitute the crime of murder while heat of passion traditionally has been an affirmative defense to it. The importance of this distinction becomes obvious when one remembers that the two-inquiry test is geared toward deciding whether a particular factor is a fact necessary to constitute a crime and thereby require proof beyond a reasonable doubt. The Mullaney court mistakenly focused on an affirmative defense to the crime rather than on the factor which allegedly was necessary to constitute the crime but which did not have to be proved beyond a reasonable doubt under the state law. As a result of this misapplication of the test, the Court ended up requiring proof beyond a reasonable doubt of the absence of the affirmative defense rather than proof beyond a reasonable doubt of the factor which was necessary to constitute the crime. Because Maine law had not required proof of either the necessary factor (malice aforethought) or the absence of its negative (heat of passion), the result was consistent with Winship and the misuse of the test was not apparent.

The misuse of the test in Mullaney became apparent when Patterson v. New York reached the Supreme Court. Patterson was

108. Mullaney was the first and last application of the two-inquiry test.
109. See supra note 20 and accompanying text discussing Mullaney.
110. But see supra note 106 and accompanying text.
111. Subjecting an affirmative defense to the test is a mistake because the issue for which the test is designed is "whether a particular factor is a fact necessary to constitute the crime, thus requiring proof beyond a reasonable doubt." The issue is not "whether prosecution must prove the absence of a particular factor beyond a reasonable doubt." For further discussion on the inapplicability of the Mullaney test to affirmative defenses, see infra note 114.
112. See supra note 20 and accompanying text discussing Mullaney.
113. The Mullaney holding was consistent with Winship because Maine had declared malice aforethought and heat of passion to be mutually exclusive. Proof of one of these factors beyond a reasonable doubt was the same as proof of the absence of the other beyond a reasonable doubt.
different from *Mullaney* in that all of the elements of the crime involved in *Patterson* had to be proved beyond a reasonable doubt before the affirmative defense of "extreme emotional disturbance" was considered. As mentioned earlier, if the Supreme Court had subjected "extreme emotional disturbance" to the test, that affirmative defense would have received the same treatment that "heat of passion" had received from the test in *Mullaney* and the prosecution in New York would have been required to prove its absence beyond a reasonable doubt. Such a burden would have been required even though the prosecution had already proved every fact necessary to constitute the crime beyond a reasonable doubt. In essence, the prosecution would have been required to prove an additional element. The Supreme Court, of course, was not willing to place the additional and unnecessary burden on the prosecution and thus did not apply the *Mullaney* two-inquiry test in *Patterson v. New York*.

To be sure, *McMillan v. Pennsylvania* is distinguishable from both *Mullaney* and *Patterson*. However, the test which was needlessly formulated and then misapplied in *Mullaney* (ultimately to be disregarded in *Patterson* upon realization of its misapplication and potential detriment to affirmative defenses), is an excellent test to be used in resolving the issue in *McMillan*. The general issue in *McMillan* was whether a particular factor was a fact necessary to constitute the crime charged, thereby requiring

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114. Apparently at this point the Court realized that affirmative defenses should not be the subjects of the two-inquiry test. Because the test requires proof beyond a reasonable doubt of any subjected factor which "substantially affects the extent of punishment" and which "historically has affected the degree of culpability attached to the related crime," affirmative defenses by their nature and regardless of their constitutionality would be struck down. The *Patterson* Court must have foreseen this inevitable result and wisely refused to apply the two-inquiry test to the affirmative defense at issue in that case.

Affirmative defenses such as "extreme emotional disturbance" and "heat of passion upon sudden provocation" have been recognized almost from the inception of the common law of homicide. *Mullaney*, 95 S. Ct. at 1888. So, understandably the Supreme Court in *Patterson* was unwilling to apply the two-inquiry test to an affirmative defense and thereby set a precedent that would begin the gradual elimination of a tradition so deeply rooted in our legal system. The *Patterson* opinion expressed: "We thus decline to adopt as a constitutional imperative, operative countrywide, that a state must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of the accused." 97 S. Ct. at 2327.

115. See supra note 113 and accompanying text.

116. *Mullaney* and *Patterson* both focused on affirmative defenses while *McMillan* focused on the prosecution's burden of proof with regard to a factor which allegedly was necessary to constitute the crime charged.

117. See supra note 106 and accompanying text.
proof beyond a reasonable doubt under *Winship*. The *Mullaney* test was created to resolve precisely this issue. Accordingly, resolution of the issue in *McMillan* can be accomplished using the two-inquiry test.

Using the *Mullaney* test, the first inquiry in *McMillan* is: Does the presence or absence of visible possession of a firearm make a substantial difference in the punishment imposed? The finding of visible possession of a firearm during the commission of one of the enumerated felonies results in a mandatory minimum sentence of five years imprisonment under Section 9712. The felonies to which Section 9712 applies have maximum sentences ranging from ten to as many as twenty years imprisonment.\(^{118}\) These sentences may be imposed without ever considering whether the convicted defendant visibly possessed a firearm during the crime. Further, these maximum sentences were established long before Section 9712 became law,\(^{119}\) so it is obvious that Pennsylvania has not redone its Crimes Code, or redefined the crimes so that Section 9712 could be applied to the detriment of criminal defendants.\(^{120}\) For these reasons the mandatory five years' imprisonment required by Pennsylvania under Section 9712 is not a punishment substantially different from a sentence that could otherwise be imposed without considering visible possession of a firearm.\(^{121}\) Under the *Mullaney* test, there is no need to go further. The answer to the first inquiry is negative and the state's treatment of the factor is therefore constitutional. However, let us go on to the second inquiry for curiosity's sake (and for the sake of those who consider the mandatory five years imprisonment to be substantially different than the sentence which might otherwise be imposed without Section 9712).\(^{122}\)

Using the *Mullaney* test, the second inquiry in *McMillan* would be: Has the presence or absence of visible possession of a firearm historically affected the degree of culpability to be attached to the felonies enumerated in Section 9712? If visible possession of a firearm during the commission of one of the enumerated felonies is at issue, then truly the object of the inquiry is the instrumentality

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118. *See supra* note 10 and accompanying text.
119. *See supra* note 52.
120. In other words, Pennsylvania has not altered the definitions of any of the felonies enumerated in Section 9712, nor has Pennsylvania lessened the burdens of proof with regard to the elements of any of those crimes. Visible possession of a firearm was never an element of any of the enumerated felonies and never had to be proved beyond a reasonable doubt under any circumstances before Section 9712 was enacted.
121. *See supra* note 10 and accompanying text.
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used in committing a violent felony. As Justice Rehnquist noted in the majority opinion of *McMillan*, that factor "has always been considered by sentencing courts to bear on punishment."\(^{123}\) The answer to the second inquiry is obviously affirmative. But again, as the answer to the first inquiry was negative, the Supreme Court of the United States would have upheld the constitutionality of Section 9712 if the *Mullaney* test had been applied.

In conclusion, the Supreme Court of the United States in *McMillan v. Pennsylvania* was confronted with the issue of whether a particular factor related to a crime was a fact necessary to constitute the crime and thereby require proof beyond a reasonable doubt under *In re Winship*. The Court had previously faced the same issue in *Mullaney v. Wilbur* and had formulated an excellent test to resolve it. However, the inherent nature of the test prevented effective resolution of the issue when the test was applied to affirmative defenses rather than to the fact related to the crime in *Mullaney*. Subjecting an affirmative defense to the *Mullaney* test results in the elimination of that defense, regardless of its constitutionality. The *Mullaney* Court failed to recognize this limitation of the test and applied the test to an affirmative defense (heat of passion) rather than to the factor related to the crime (malice aforethought). For reasons elaborated upon at length in this article, the inherent limitation of the test and its misapplication in *Mullaney* went undetected until *Patterson v. New York* reached the Supreme Court, at which point the Court realized that the *Mullaney* test should not be applied to affirmative defenses. Accordingly, even though *Mullaney* and *Patterson* involved virtually identical affirmative defenses, the *Patterson* Court did not use the *Mullaney* analysis or two-inquiry test.

In *McMillan* the Court also did not make use of the two-inquiry test, even though that test is tailor-made for the issue in that case.\(^{124}\) Resolution of *McMillan* would have been much simpler and considerably less controversial if the test had been applied. Finally, *McMillan v. Pennsylvania* provided the Supreme Court of the United States with a perfect opportunity to correct the error made in the *Mullaney* case. In correcting the error of misapplication of the two-inquiry test in *Mullaney*, the Court in *McMillan* would have provided courts and legislatures with a workable test

\(^{123}\) 106 S. Ct. at 2419.

\(^{124}\) See supra note 51 and accompanying text. The Court in *McMillan* didn't use any test. *McMillan* was decided on facts unique to that case and no discernible proposition of law or precedent was established.
and some reasonably well-defined boundaries in the foggy area of the states’ authority to define crimes. In failing to correct the error in *Mullaney* and rejuvenate the test, the Court has continued to leave the several states in the dark to wonder just how far they can go with their definitions of crimes.

*Shaun Sweeney*