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PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-6461

TITLE EARLINE MARTIN, Petitioner V. OHIO

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IN THE SUPREME COURT OF THE UNITED STATES

EARLINE MARTIN, :

Petitioner :

v : No. 85-6461

OHIO :

Washington, D.C.

Tuesday, December 2, 1986

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:56 p.m.

APPEARANCES:

JAMES R. WILLIS, ESQ., Cleveland, Ohio;
on behalf of the Petitioner.

GEORGE J. SADD, ESQ., Assistant Prosecutor for Cuyahoga County, Cleveland, Ohio; on behalf of the Respondent.

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P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: We will hear arguments next in Earline Martin against Ohio.

Mr. Willis, you may proceed whenever you're ready.

ORAL ARGUMENT OF JAMES R. WILLIS, ESQ.,

ON BEHALF OF THE PETITIONER

MR. WILLIS: Mr. Chief Justice, and may it please the Court:

The issue, simply put, in this case is whether Ohio can punish one as a murder when it is just as likely that they acted in self-defense.

To more properly isolate the issue, it is important to note that in this case the court instructed the jury that the defendant had the burden of proving that she acted in self-defense by the greater weight of the evidence.

The court went on to indicate that the defendant must establish that the other party was the aggressor, and the defendant did not herself provoke or cause the injury.

The court then further indicated that if the weight of the evidence is equally balanced, or if you are unable to determine which side has the affirmative defense as to -- has the preponderance, then the

defendant has not establish such affirmative defense.

In essence, what the court was telling the jury, that if the evidence was in equipoise on the issue of self-defense, then the defendant had failed to establish her defense.

The critical aspect of this was that this was the defendant's sole defense. So in effect, the Ohio law can be understood as indicating that Ohio can, in fact, require a defendant to prove themselves not guilty.

I think this offends principles that have been in --

QUESTION: That assumes -- that assumes that the self-defense -- the defense of self-defense implicates some element of the crime.

MR. WILLIS: Yes, in one aspect it does.

QUESTION: What is it?

MR. WILLIS: Well, certainly self-defense is directed against the element of purposefulness, unlawfulness, in the context of the Ohio statute.

QUESTION: Well, now the State has to prove by a -- beyond a reasonable doubt that this murder was purposeful, doesn't it?

MR. WILLIS: Yes, it has to do that.

QUESTION: And that burden always stays with

it?

MR. WILLIS: Absolutely.

QUESTION: And it's like -- it's like a lot of -- the defendant may want to come in and say, I didn't shot them -- shoot this person at all, or I didn't have any purpose to do -- but if the State convinces the jury beyond a reasonable doubt that he did have that purpose, what's left of this self-defense argument?

All you're saying -- all the self-defense instruction says is that you -- if you succeed in putting in enough evidence that you acted in self-defense, you're excused.

MR. WILLIS: That's exactly what it's saying.

QUESTION: Yes.

MR. WILLIS: But it's saying that the defendant has to prove, by the same token, that he's not guilty.

The point is that self-defense is different from all other defenses. What the defendant is saying when he asserts self-defense is that he was engaged in lawful conduct, and that he has a right not to be punished for having done this.

QUESTION: Well, do you think the instruction reduces the State's burden in proving purposefulness?

MR. WILLIS: It certainly does, in the context

where you have a case that has a self-defense component. And certainly, when the issue of self-defense is submitted to the jury, it certainly ought to be submitted under proper instructions.

The critical point, as I understand it --

QUESTION: Well, the instructions did say that the State had to prove purposefulness beycnd a reasonable doubt.

MR. WILLIS: Yes, it did.

QUESTION: And then you say -- then the instruction on self-defense lowered that burden?

MR. WILLIS: It absolutely did. Because inherent in that instruction, of course, is the presumption that what the defendant did was unlawful, and I can develop that.

Back in 1872, or thereabouts, there was a case in Ohio known as Silvers, which referred to some common law cases out of England, the Forest Crown cases and King v. Winoncby, and at that point, in the Silvers case, the defendant requested an instruction that the jury be told that the defendant -- that the state had to prove the lack of self-defense beyond a reasonable doubt.

The court in its -- the Supreme Ccurt of Chic indicated that that would eliminate the presumption that

what the defendant had done was unlawful.

Now, that presumption is the same presumption that this Court has declared unconstitutional in such cases as Sandstrom, Franklin v. Francis, and other cases.

We know that even in England, in 1937, the -- the House of Lords indicated that that reading of these English cases was wrong; and that those cases, the Forest Crown cases and others, had indicated that the burden was on -- the defendant had to prove the lack of provocation.

And given that context, which is referred to in Mullaney, we now know from this Court, as I indicated, in Sandstrom and in Franklin, that the presumption is an unconstitutional one.

So the State of Ohio is getting the benefit of that presumption. And it's interesting --

QUESTION: Mr. Willis, doesn't that all hinge on -- on the implicit assumption that a State could not make it a crime to kill somebody in self-defense? Isn't that the premise of your argument, really?

MR. WILLIS: That is the premise of my argument.

QUESTION: Well, why couldn't a State -- bear in mind that in order to be convicted, the defendant

here had to be shown to have intentionally, wilfully killed. He intended to kill, right?

MR. WILLIS: Deliberate and premeditated malice.

QUESTION: Right; so he intended to kill. Why couldn't a State court -- a State say, you shall not kill in self-defense? You can main, you can, you know -- but you cannot intentionally kill somebody in self-defense?

MR. WILLIS: Because self-defense is one of those fundamental or inalienable rights that were part of the rights that the people had when this Union was formed.

More specifically, if my recollection is correct, George Mason, who wrote the Declaration -- the Virginia Declaration and the Virginia Constitution, indicated that there were certain rights that the people possessed almost absolutely that could not be traversed.

About weeks later, this was engulfed by Madison and written into the Declaration of Independence. This then tells us - and then in the preamble to the Constitution, also written by Madison, we have inalienable rights.

QUESTION: I'm persuaded that you have the right to act in self-defense. But do you have the

right, necessarily, to kill in self-defense, intentionally to kill in self-defense?

MR. WILLIS: Well, I think you have the right --

QUESTION: Must that be a right that the State gives?

MR. WILLIS: I think --

QUESTION: In order to prove the defense of self-defense, what has to be shown in Ohio?

MR. WILLIS: In Ohio, they would have to show that you didn't precipitate the controversy that gave rise to the need, to the necessity of self-defense. You must not have violated any duty to retreat, and you must not have used no more force that was reasonably necessary.

QUESTION: No more than was reasonably necessary.

MR. WILLIS: Under the circumstances. Although, you have the right to act on appearances, and even if you're mistaken in those appearances, if in fact you believe that you are confronted with a situation where you might suffer death or grievous bodily harm, then you can act, and the jury would be compelled to acquit under those circumstances.

QUESTION: Mr. Willis, what you're saying, I

think, in another way, is that there are limits to what a State may make a crime.

MR. WILLIS: Absolutely. I think this Court said that in Speiser v. Randall. It referred to it again in McMillian and Patterson.

And I'm convinced that there are limits beyond which a State cannot go in defining its crimes and in allocatings its burdens of proof.

Indeed, this Court has gone so far as to say that there are certain facts that need not be elements that have to be proved beyond a reasonable doubt. That statement was recently indicated in McMillian where it interpreted Patterson as having given rise to that position.

And that's exactly what I'm saying here.

Now, the State of Ohio has indicated that if you prove points -- prove fact A, B, C and D, that you have proved unlawful conduct; and therefore, when you raise the issue of self-defense, if you are challenging exclusively unlawfulness, that you are not challenging any of the elements in Patterson.

Well, let's deal with Patterson. Patterson was a situation where New York created a gratuitous defense. It was created by legislative grace. The effect of Patterson was that a particular crime was

designated as murder.

However, the defendant was given the right to reduce that crime from murder to manlslaughter upon certain proof.

As I read Patterson, what this Court said was that it is all right, and due process considerations are not offended, if New York elects to convict one as a murderer when it it just as likely that they were acting -- that they only committed manslaughter because they were acting under extreme emotional stress.

This is to be distinguished from what Ohio's done. Ohio has said, you can convict one as a murderer when it is just as likely that they were acting in self-defense.

Now, if self-defense is a basic right, and I contend that it is, then something benefits the defendant, at least to the extent that the State should prove that he was not acting in self-defense.

It's significant that 48 of the 50 States require the state to ultimately carry the burden of persuasion on that issue.

Some of the states, Maine and a few others that we can possibly name, have indicated that the defendant has the burden of production, that he has to establish that there is enough evidence in the case to

create the issue.

QUESTION: Well, certainly, that's not unreasonable, is it? Because most of the time the defendant would have that knowledge far better than the State?

MR. WILLIS: I accept that proposition. I agree with that. That's not the issue, but I adopt it, the inference in the Court's question.

And we do not question the fact that the defendant ought to be burdened with that of production.

But once the issue is in the case, it just seems clear to me that the State ought to be able -- ought to be required, under fundamental criteria, to prove that the defendant was not acting in self-defense.

As I said, 48 of the 50 States require this. Now, the State is talking in terms of the difficulty in doing this. Even the United -- even in the Federal courts, the Government has the burden of proving the lack of self-defense, and I do not quarrel with this.

QUESTION: Well, if you prove beyond a reasonable doubt that it was purposeful, you've gone a long ways to prove that it wasn't done in self-defense.

MR. WILLIS: Well, it depends on the circumstances under which the killing took place. If it's a life and death struggle between two people, then

obviously, he may very well intend to kill.

But that's the problem with Martin v. Ohio. Martin v. Ohio, the opinion in the Supreme Court of Ohio, is to the effect that self-defense is likened to confession and avoidance.

They state that when one claims self-defense, he admits the facts as alleged by the prosecutor.

Well, certainly, one can kill in self-defense without intending to kill. He can shoot to wound in self-defense. He can shoot to scare in self-defense. It can be a reflex action in self-defense without any particular purpose whatsoever.

Are we to say that mens re has no -- that self-defense doesn't impact on mens re? Well, certainly it does. That's --

QUESTION: Well, I know, but the State -- the State has to prove the mens re beyond a reasonable doubt.

MR. WILLIS: Absolutely. They have to prove that there was an intent to kill.

QUESTION: If there wasn't, they shouldn't be convicted.

MR. WILLIS: Because he was acting -- he did so -- she did so, if it please the Court, while she was acting in self-defense. And I think it's appropriate under these facts that we --

QUESTION: Well, go ahead.

MR. WILLIS: -- that we concern ourselves with the propriety of the instruction that control the ultimate verdict that was rendered by the court -- rendered by the jury.

Now, back to my concern about Patterson.

QUESTION: Let's talk about the 48 states that have it. You say they apparently get along with it.

MR. WILLIS: Yes.

QUESTION: But I find it difficult to see how you can -- if you're being genuine about proving it beyond a reasonable doubt, how can you ever prove beyond a reasonable doubt, in a private struggle between two individuals, with no witnesses, as occurred here, how can you prove beyond a reasonable doubt which one was the aggressor and which one wasn't?

MR. WILLIS: Well, in that context, you would simply have to look at the circumstantial evidence to the same extent the State would have to look at -- rely on circumstantial evidence to prove the contrary.

QUESTION: And you really think you can prove beyond a reasonable doubt which one was the aggressor?

MR. WILLIS: I've seen it done. And so therefore I believe it can be done.

QUESTION: And so what if the State succeeds

in proving it. And no matter how difficult it is, the jury finds that there was intentional, purposeful killing?

MR. WILLIS: And they also find that it was not done in self-defense, then that's a valid verdict, as I perceive it. And I would have no problem whatsoever with accepting that.

And had that happened here, I would not be here.

But I really want to make this point involving -- involving Patterson. And it goes back to the question asked by Justice Scalia.

If this case is truly analogous to Patterson, and if it's controlled by Patterson and not by Mullaney, New York can eliminate the statute that created that gratuitous or mitigating defense.

Are we to say, then, that Ohio can likewise eliminate, by statute, the right of self-defense?

Now, we talk in terms of the right to self-defense. It's significant that nowhere in the Ohio statutes is that right written in.

What the Ohio statute says on affirmative defenses is, simply put, that the defendant shall be burdened with proving self-defenses -- proving affirmative defenses.

And then we have these cases -- Poole, which relies on Silvers, which takes us back to the English common law cases which have been repudiated by the House of Lords.

What happens, then, that in Ohio a defendant is burdened to this extent: If the State produces evidence that a crime occurred, a homicide occurred, Ohio is willing to say that if you raise the defense of self-defense, it's confession and avoidance.

And I think that's inappropriate. I think it's wrong. I don't think that the defendant, simply by raising the defense of self-defense, admits that what she did would be unlawful.

What she's saying is, that I committed an act which was innocent. I was defending myself under the circumstances that I was currently confronted with; and that my actions were lawful, and the State ought to be required to prove to the contrary.

QUESTION: Well, Mr. Willis, is it your position that the State of Ohio does not allow a defendant to plead self-defense unless the defendant pleads guilty to the substantive elements of the crime?

MR. WILLIS: No, you don't have to say, I plead guilty. But if you read Martin, that's the essence of what they're saying.

They're saying that self-defense seeks to -- to justify admitted conduct.

Now, we admit that we shot and killed this man. But we don't admit that that was criminal.

So to say, as the State of Ohio said in Davis, which was State v. Davis, which was relied on in State v. Martin, and Davis came from the same circuit court of appeals as did Martin, and was cited in that case as well, if that's a valid premise, that the defendant is admitting that she did an act which would otherwise be unlawful and then seeks to justify it, that's the essence of what she's doing.

She's pleading -- she's actually pleading guilty. She's saying, I'm guilty if I don't prove I acted in self-defense.

The opposite of that is that she then has to prove herself innocent, and that runs afoul, as I see it, to all the cases that this Court has ever decided, including Patterson and even Leland --

QUESTION: But your client did not plead guilty?

MR. WILLIS: She plead, not guilty. Her defense was absolutely self-defense.

QUESTION: And the trial court required the State to prove the elements of murder against her, I

take it.

MR. WILLIS: That's exactly what the trial court did. And the court submitted, as I might add, the included offenses of manslaughter and -- murder and manslaughter coming down.

And of course the court instructed the jury on self-defense with reference to all of those issues. So --

QUESTION: Mr. Willis, can I come back briefly to what a State can do by way of eliminating the defense entirely?

I find it hard to conceive of a situation where you couldn't defend yourself without intentionally killing the other person. I mean, it'd be enough to incapacitate the other person, to render the other person unconscious.

So why couldn't the State say, you may not intend to kill somebody in self-defense? Now, that's what we're talking about here, intentionally killing in self-defense.

Why can't a State say, you can do anything in self-defense, you can maim, you can incapacitate, but you will not intentionally kill somebody in self-defense. And if you do that, you're going to be punished.

Is that against natural right?

MR. WILLIS: I think it is, and that's precisely my point. And it's interesting that this Court has said that there are certain fundamental concepts that the State can't traverse upon --

QUESTION: Including intentional killing, even though -- even though there may be something short of that that would --

MR. WILLIS: I think the answer is provided with an historical perspective. We can go back to where was self-defense first developed.

It was developed out the jury nullification concept. Because there was no right of self-defense way back yonder in the common law. But the jurors would simply not convict in certain circumstances.

And I take it obviously would be -- some of those circumstances would include those where it was obvious that the accused had no choice.

So the murder charge would be submitted to the jury, and the jury simply would not convict.

So early on in the common law, the concept of self-defense developed. So in answer to your question, Mr. Justice Scalia, jurors would not convict under those circumstances, because traditionally, we have recognized that we have the right of self-defense.

When the Constitution talks about inalienable rights, what are they talking about? When this Court says that there are certain limits beyond which the states cannot go in allocating burdens and in defining its crimes -- even in McMillian, as late as this last term, the Court didn't tell us what those -- what they were talking about, and so commented in the opinion.

We have admitted that there are certain limits, but we haven't defined those limits.

This case gives the Court an apt opportunity to define those limits. And I take --

QUESTION: Mr. Willis, can I ask you this question about the basic point as to whether there is an inherent, inalienable right of self-defense, when you recite to the Declaration of Independence and the like.

When is the first time, to your recollection, that someone asserted that there was such an inalienable right of self-defense that was constitutional -- a matter of constitutional, substantive due process?

That's, frankly, the first time I bumped into it was in your brief. But the founders didn't -- that's not one of the things they talked about, that I can recall.

MR. WILLIS: They had the Ninth Amendment, which said that there are certain rights reserved to the

people.

QUESTION: Right, but what is the first time that you can tell us about that somebody identified self-defense as one of those rights.

MR. WILLIS: Well, I certainly am not privvy to what the Court has read in this area. And I'm sure it's far more extensive than my reading.

I haven't run into it in any specific case. So if I'm to be credited for having brought it to the attention of the Court and asserting that it's inalienable and that it's fundamental, then so be it.

QUESTION: There's probably a lot of it in Rudyard Kipling. You could always use Rudyard Kipling.

MR. WILLIS: I didn't understand the question.

QUESTION: What if you're wrong on this? What if we don't agree with you on this being an inalienable right? Do you still win the case?

MR. WILLIS: I can still win the case.

QUESTION: On what theory?

MR. WILLIS: I can still win the case on the theory that self-defense is different. It's certainly different from insanity. It's different from duress. Because in all those instances, the defendant is saying he's not guilty.

In Patterson, the defendant was not saying he

was not guilty. He was saying, I didn't commit murder. In Mullaney the defendant was not saying, I'm not guilty. The defendant was saying that I committed a lesser charge.

QUESTION: What are you saying was self-defense? Yes, I committed --

MR. WILLIS: I'm not guilty. I committed no --

QUESTION: I committed murder, but I didn't commit a crime.

MR. WILLIS: No, no, I didn't commit a crime. I really would like to reserve any time that I have to respond --

QUESTION: It's the difference between mitigation and justification, is what you're talking about?

MR. WILLIS: Absolutely. That is the difference betwen mitigation and justification, and that's the argument that I make to the Court.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Willis.

We'll hear now from you, Mr. Sadd.

ORAL ARGUMENT OF GEORGE J. SADD, ESQ.,

ON BEHALF OF THE RESPONDENT.

MR. SADD: Mr. Chief Justice, and may it

please the Court:

On November 1st, 1978, the Ohio legislature enacted a law with respect to common law affirmative defenses.

That law, Section 2901.05, reads as follows:

Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt. And the burden of proof for all elements of the defense is upon the prosecution. The burden of going forward with the evidence of an affirmative defense and the burden of proof by a preponderance of the evidence, for an affirmative defense, is upon the accused.

The petitioner, at her trial, objected to this jury instruction. Consequently, the issue placed before this Court, is whether the due process clause of the Fourteenth Amendment required the State of Ohio to disprove the affirmative defense of self-defense beyond a reasonable doubt.

QUESTION: Had Ohio law been different before that?

MR. SADD: I'm sorry, I didn't hear you.

QUESTION: Had Ohio law regarding the issue of self-defense and who had the burden, had it been different before the statute that you're using?

MR. SADD: No, since its inception into

statehood, Ohio has followed the common law view approach that the proponderance of -- the defendant must prove the affirmative defense by a preponderance of evidence with an exception of a two-year period from 1976 to 1978.

QUESTION: And all the 48 states that we've heard about, they've all done it by statutory amendment to their common law rules?

MR. SADD: I think most of those states perhaps changed their viewpoint when this Court came down with its decision in Mullaney back in the nineteen-seventies.

And I think Patterson makes it quite clear, Justice Scalia, that merely because another state chooses to disprove affirmative defenses, that doesn't mean that strikes -- states that strike a different balance are in violation of the Constitution.

And that's our position here, that this is a matter of --

QUESTION: How many states do not require the state to prove the absence of self-defense?

MR. SADD: I really don't know, Justice White. I think there's been some indication -- not of the brief of the petitioner, but a brief of an amicus, claiming something like 46 states. That I cannot

verify.

Because other states are not really important for the consideration of how Ohio treats this. And this is implicitly recognized in Patterson, where the comment by the Patterson Court simply states that merely because other states take on the burden of disproving affirmative defenses, doesn't mean that states that strike a different balance are in violation of the Constitution.

And I think that's clearly the case when we see with the Insanity Reform Act of 1984, and Davis v. United States.

You can recall in Davis v. United States that the burden of disproving insanity was upon the Federal Government. And then later on in 1984, when the insanity defense reform act came down, Congress, in the intent, placed a burden of disproving insanity on the defendant by clear and convincing evidence.

And so I think other states, really, are not the issue in this particular case. The issue, as I frame it, is whether or not Ohio's statute 2901.05 violates the Constitution. And I don't think it does.

QUESTION: But as far as you know, there's only one other state that requires what Ohio does now with regard to proof of self-defense?

MR. SADD: According not to the petitioner, Justice O'Connor, but according to the brief of the amicus filed in this case, that South Carolina is the only other state.

Whether or not this is true, I have no way of garnering that information.

I think that other states place different burdens, burdens of going forward.

QUESTION: Yes, right.

MR. SADD: I think Ohio's burden by placing it by proof beyond a reasonable doubt, affords a defendant even greater protection than other states; and that it gives you a measurable standard upon which your conduct is to be evaluated, and nothing more than that.

QUESTION: Mr. Sadd, at the time that this Court had that Engle v. Isaac case --

MR. SADD: Correct.

QUESTION: -- in 1983, there is language in that opinion referring to some Ohio courts in which we said that it appeared to us, at least, in Ohio that one who kills in self-defense under Ohio case law at that time does so without the mens re that otherwise would render him culpable of homicide.

MR. SADD: I think that language was correct at that time, and I think the qualifying words, Justice

O'Connor, was, at that time. Ohio law has come a long way since Engle v. Isaac.

I also think it --

QUESTION: Which was only a couple years ago, three years ago. But Ohio law has changed since Engle v. Isaac.

MR. SADD: Correct, and I'll get into that in the argument as I show what the elements of Ohio law is with respect to the analysis, which I think the major analysis under Patterson and this Court's decision in Patterson.

But I'd also like to note that Engle v. Isaac, through your opinion, and through, I believe, Justice Stevens' concurring opinion, consistently held that even the statute at that time did not mandate that the State of Ohio disprove the affirmative defense of self-defense. And that's the holding of Engle v. Isaac.

As I was saying, this Court's decision in Leland and Patterson compel the conclusion that the due process clause is not violated when the legislature places the burden of proof on the defendant to establish the affirmative defense by a preponderance of the evidence, especially when the affirmative defenses constitute separate matter; and that there's no direct relationship exists between the elements of the crime

and the affirmative defense.

Chronologically, I'd like to start my analysis with the decision of Leland v. Oregon.

The proposition that the petitioner has raised before this Court is certainly not novel. That same proposition was raised 34 years ago in the Leland case.

There, the individual petitioner contended that to place the burden of proving the defense of -- the affirmative defense of insanity upon that individual by proof beyond a reasonable doubt violated the Fourteenth Amendment.

In rejecting that claim, this Court noted in Leland, and established the broad Constitutional principle, that due process is not violated where Oregon placed the burden of proof on the defendant to establish a -- beyond a reasonable doubt the affirmative defense of insanity.

And contrary to the petitioner's argument that insanity and self-defense are different, they really do not differ in that both are separate matters and both constitute conduct which arguably could be lawful.

And I think in Leland we look to the Constitutional principles that this Court sought to pass on to us to this very day.

And one of the first arguments they made was

that the burden of proof was on the state, consistently, to establish the elements of the crime. Number two, that the defendant was presumed innocent and the jury given that instruction. And number three, that insanity was a separate issue which the state could place the burden of proof on the defendant.

And the vitality and the long life of this decision from 34 years ago survives to this very day.

This Court has had an opportunity to revivew Leland in Rivera v. Delaware; it had an opportunity to affirm the Leland principle in Jones v. United States; and more recently, the circuit court of appeal, Federal circuit court of appeals, in United States v. Amos, upheld the 1984 Insanity Defense Act, by placing -- which placed the burden on the defendant, by clear and convincing evidence, to establish the affirmative defense of insanity.

QUESTION: Which court of appeals was that?

QUESTION: Well, Mr. Sadd, your -- go ahead.

QUESTION: Which court of appeals was that?

MR. SADD: I think it was the Federal Sixth Circuit -- Eighth Circuit Court of Appeals. It's a very recent case. I think that came down about three weeks ago.

QUESTION: Your opponent, Mr. Willis,

contends, of course, that self-defense isn't like insanity.

MR. SADD: Well, I know what he's contending, Justice -- Mr. Chief Justice. And I believe that it's really a distinction without a difference.

Because insanity is a separate affirmative defense -- I mean a separate affirmative defense. And self-defense is a separate matter.

QUESTION: But, you know, how much do you say, or how much ground do you really cover, when you say it's a separate matter?

MR. SADD: Your Honor, they're both affirmative defenses. And I think the broad proposition to be established is that simply the due process clause does not require the prosecution to prove a negative; that is, to disprove an affirmative defense beyond a reasonable doubt. And that's the state's position.

QUESTION: Well, of course, in Mullaney, the state had structured the statute correctly, as I recall it. Everything was murder, and all you showed was a homicide. And then everything else was a matter of affirmative defense.

And the Court said, you can't do that under the due process clause. You can't wholly stack the equation on the side of affirmative defenses.k

MR. SADD: There's no question that Mullaney was a proper decision, Mr. Chief Justice. Mullaney involved the crime in Maine being both -- two crimes, murder and manslaughter. And the difference between the two was malice.

But the jury was charged that there was a presumption that malice had to be placed on the defendant to get the benefit. And that was what this Court found to be so reprehensible that the prosecution was relieved of its duty to establish an essential element of the crime.

And that was the damnation, so to speak, of the main statute. Ohio doesn't have this.

QUESTION: Now, wait, you say it's one thing if the element that you're putting the burden on the defendant for knocks it down from murder to manslaughter, but it's different if that element knocks it down from murder to nothing at all?

MR. SADD: No, Justice Scalia, I'm not saying that at all. I'm saying that in Mullaney the defendant was to establish an element of the state's case. Ohio doesn't have this type of presumption. It doesn't have this type of a shifting of a burden. And Mullaney did have that.

Because in Mullaney, to establish the

difference between murder and manslaughter was malice. But malice was presumed, and the jury was instructed that malice was presumed.

And once that presumption came into effect, the defendant, to get the benefit of a reduction, had to establish the absence of malice, which was the state's burden to establish.

And that was really where the statute became unconstitutional, and that's why this Court took the action.

QUESTION: Supposes Ohio passes a law saying that anyone who kills anybody is guilty of murder, period. It is an affirmative defense that you didn't intend to kill anybody; in other words, the whole malice element for murder --

MR. SADD: I don't think a statute like that would, perhaps, pass Constitutional muster.

QUESTION: Why not?

MR. SADD: Well, it could and it could not. It depends on how the elements were framed. Because under this Court's analysis in Patterson, you would have to look at the elements of the state's case, and whether or not there was any direct relationship to the elements of the affirmative defense.

QUESTION: No relationship at all. If you

kill somebody, you're guilty of murder. Affirmative defense, you didn't intend to kill anybody.

MR. SADD: That's fine.

QUESTION: That's fine?

MR. SADD: It would be fine.

QUESTION: Counsel, this jury's instructed to acquit unless the state proves beyond a reasonable doubt that there was this intentional, purposeful killing.

MR. SADD: Correct.

QUESTION: But then the jury's told that this self-defense defense must be proved beyond -- by a preponderance of the evidence.

Why shouldn't the instruction be, to the jury, that the defendant proves a claim of self-defense? And if its evidence about self-defense raises a reasonable doubt about whether the defendant killed purposefully, you should acquit?

Doesn't it really water down the reasonable doubt standard to say that before there's a reasonable doubt raised by the defendant's evidence with respect to self-defense, which goes to purposefulness, he's got to prove it beyond a -- by a perponderance of the evidence.

MR. SADD: You're inviting me, Justice, to speculate as to why the Ohio legislature drafted its law.

QUESTION: Well, I know, but I'm just asking

you about what the effect of the instruction is. Because you say, if there's a reasonable doubt about purposefulness, acquit.

MR. SADD: Acquittal.

QUESTION: But nevertheless, if the doubt about -- if the defendant is claiming it's not purposeful because of self-defense, don't acquit unless it's proved beyond -- by a preponderance of the evidence.

MR. SADD: Yes. The burden of proof of the defendant isn't very heavy in the State of Ohio.

QUESTION: Well, it may not be very heavy. But the jury is not told to acquit if there's -- if the defendant's evidence raises only a reasonable doubt about purposefulness.

MR. SADD: That's correct. That's correct.

QUESTION: Now, why isn't that contrary to Mullaney -- I mean, to Winship?

MR. SADD: Winship involved the reasonable doubt standard as to every fact necessary for which the State had to prove.

QUESTION: Well, all right.

MR. SADD: The defense is different. There's no direct relationship to the Winship rationale in your hypothetical. So therefore --

QUESTION: Well, let me -- let's assume the

defendant's -- the defendant simply puts in other evidence about purposefulness. He doesn't claim self-defense, but he puts in some other evidence about purposefulness.

Now, if he raises a reasonable doubt about whether he purposefully killed, he's acquitted.

MR. SADD: Correct.

QUESTION: But with the self-defense defense, that won't do him that much -- he has to do more than that.

MR. SADD: Yes, yes. And the Ohio statute was enacted --

QUESTION: Well, isn't that rather strange?

MR. SADD: Not really.

QUESTION: I guess if it isn't strange, it couldn't be unconstitutional.

MR. SADD: Not really a strained interpretation. But the Ohio statute was enacted approximately 1-1/2 years after this Court's decision in Patterson v. New York. And I think this is the key case, is Patterson.

Again, the issue in Patterson was whether the due process clause required states to assume the burden of disproving affirmative defenses beyond a reasonable doubt.

In rejecting this Constitutional argument, Patterson cited to Leland, and observed the following. Again, that the New York statute in question require that the burden of proof would be on the state to establish its elements of the crime; and second, that the jury was instructed that the defendant was presumed innocent.

Patterson undertook a quite extensive historical approach to the entire question, noting that in common law, affirmative defenses and the burden of proving these defenses, were properly placed on the defendant.

The historical approach further indicated that this was the rule when the Fifth Amendment was adopted and when the Fourteenth Amendment was ratified.

Patterson is literally a gold mine of some of the most beautiful Constitutional quotations ever issued from this Court.

Patterson stresses, for example, that affirmative defenses are matters separate from the elements of the crime. They are matters of exception and not negation.

Secondly, there's an implicit recognition in Patterson that the defendants, not the prosecution, are in the best position to know the defense that these

individuals seek to assert.

And lastly, there was an explicit recognition that the states may define their crimes, regulate their procedures, and also, to regulate the burdens of proof as they see fit.

The conclusion that I'd like to make that Ohio law, like Patterson, contains numerous similarities both to the Patterson decision and the Leland decisionk

For example, the Ohio law explicitly states that the burden of proof for all elements of the crime is on the state. And this was the instruction given to the jury.

Secondly, the Ohio statute has a built-in factor that every person is presumed innocent. And we would have it no other way.

Third, that self-defense was a separate issue under Ohio law, and a recognition that it was a common law approach.

And fourth, that the Ohio statute, and the elements of the crime, bear no direct relationship to the elements of the affirmative defense.

Patterson is significant because it stresses that in determining what facts must be proved beyond a reasonable doubt, the state legislature's definition of the elements of the defense is usually dispositive.

Consequently, Patterson establishes a bright line standard to be applied, and it's a twofold test. Number one, first you look to the determination of the elements of the crime for which the petitioner was convicted.

Aggravated murder in Ohio consists of three elements, and that's coming from State v. Martin: It's purposeful, which is the criminal intent portion of the statute, which means a specific intention to kill; prior calculation and design; and lastly, causing the death of another.

QUESTION: (Inaudible) defense reads on those elements, or at least some of them?

MR. SADD: No, you can have situations where --

QUESTION: I didn't say -- do you think it ever does?

MR. SADD: No.

QUESTION: You don't think self-defense goes to purposefulness at all?

MR. SADD: Yes. When a person says that I killed, he admits an act. So he does admit doing an act purposefully. But it's not a negation of purposefulness. So there's no direct relationship between the two.

QUESTION: Well, but he says, I had no prior

purpose at all to kill this person.

MR. SADD: I think you have to look to the facts --

QUESTION: I didn't want to kill them at all.

MR. SADD: I think you have to look to the facts in this particular situation. Here's a 73-year-old --

QUESTION: Well, my question is, does it go to purposefulness or doesn't it?

MR. SADD: It goes to purposefulness in the sense that a person who admits that he acted in self-defense admits that he did an act.

QUESTION: Well, why shouldn't his burden in establishing his so-called defense be no more than evidence enough to raise a reasonable doubt about purposefulness?

MR. SADD: Well, it's a legislative statute --

QUESTION: Well, I know, but there's a challenge, a Constitutional challenge, to that statute.

MR. SADD: I understand that, Justice White, but I don't see that there is a direct relationship.

QUESTION: Mr. Sadd, on this general subject, with respect to aggravated murder, prior to the amendment of your statute, was it necessary in Ohio to prove that the same three elements of the crime --

MR. SADD: At what time?

QUESTION: Prior to the enactment of the statute that placed affirmatively the burden of proof of self-defense --

MR. SADD: No, I think prior to the enactment of this statute, Ohio recognized a murder in the first degree statute similar to the one statute that was placed in Oregon. And the state had to prove premeditation, deliberation, and intent.

QUESTION: But the statute that was applied in this case was enacted subsequently to --

MR. SADD: It was changed, I believe, in 1974.

QUESTION: 1974?

MR. SADD: 1974.

QUESTION: Was that the statute that included the three elements that you mentioned just now?

MR. SADD: Yes. And that's the three elements that are gleaned --

QUESTION: Well, now, prior to the statute that relates to the proof of self-defense, what would a defendant have to prove if the state carried the burden of proving beyond a reasonable doubt that the crime was committed purposely and with specific intent? What did the defendant have to prove then?

MR. SADD: What -- I didn't get your question?

QUESTION: What did the defendant have to prove then, if the state carried its --

MR. SADD: He would, again, have to prove the elements of self-defense, which are three factors: that he was not the aggressor; number two, that he had an imminent danger of death or great bodily harm, an honest belief that it would happen, and that the only method of escaping from that danger was the use of force; and lastly, that he had not violated any duty to retreat or escape the danger.

QUESTION: And when did Ohio adopt the statute that --

MR. SADD: In 1974.

QUESTION: I'm thinking at the moment about the statute with respect to self-defense.

MR. SADD: I'm sorry.

QUESTION: You have a statute that --

MR. SADD: Oh, the current statute now has been enacted in 1978, a year and a half after this Court's decision in Patterson.

QUESTION: And did that change the law in Ohio?

MR. SADD: Yes, it did. Because in 1974, Ohio did assume the burden for a two-year period of disproving the affirmative defense.

And then Ohio changed it approximately a year

and a half later, after this Court's decision in Patterson.

QUESTION: Mr. Sadd, can I go back --

MR. SADD: Yes.

QUESTION: -- to Justice White's question a moment ago?

He asked you if the evidence at the conclusion of the trial showed a reasonable doubt with regard to the issue of whether the defendant had a purpose to kill, just the evidence was strong enough to raise a reasonable doubt, is it not correct that under Ohio law the jury would then be under a duty to acquit, because there's a reasonable doubt on one of the elements?

MR. SADD: Yes, yes, there would be. But you calculate into this case, even they denied -- even if the defendant in this particular case denied that her purpose was to kill, the state's evidence established that she shot her husband six times while he was talking on the phone.

QUESTION: Well, I understand. But if she convinced the jury that there was reasonable doubt with regard to her purpose, she's entitled to an acquittal?

MR. SADD: Yes.

QUESTION: And part of that showing could be the fact that he had been the aggressor and she was

acting in self-defense trying to protect her life?

In other words, you can get some elements of self-defense into the defense of no intent to kill, couldn't you?

MR. SADD: You probably could, Justice Scalia. But in this particular case, the evidence showed that the self-defense claim was bogus, that she had --

QUESTION: No, I understand that. But my only point is that Ohio is not writing out -- is not really casting on the defendant all burden on the issue of self-defense.

To the extent that acting in self-defense causes you not to intend to kill somebody, so that you're just trying to fend them off, and you don't affirmatively intend to kill them, you can introduce all of that evidence --

MR. SADD: Sure.

QUESTION: -- in rebuttal of the state's burden which it has to demonstrate clearly an convincingly that you intended to kill.

MR. SADD: Absolutely.

QUESTION: But only after the state shows that you intended to kill, then you have the affirmative defense to say, I did intend to kill, but I intended to

kill --

MR. SADD: That's a correct interpretation.

QUESTION: -- it's the only way to stop.

QUESTION: (Inaudible) on his side of the case, he's going to have to prove beyond -- by a preponderance of the evidence?

MR. SADD: Yes. I don't think having is anything laborious, as I think Mr. Chief Justice has once said, and I think it was in Mullaney, he said that individuals at time do have to carry a laborious oar, and have to peddle this laborious oar, and that laborious oar is a burden.

QUESTION: Well, of course, the state has to get by -- get by a motion to acquit on its side of the case. But then you're going to put in on your side -- you certainly aren't going to put in -- the defendant isn't going to put in all of his self-defense evidence on cross-examination, is he?

MR. SADD: No, no. He would put that in on his case in chief.

QUESTION: And Ohio says that once the state has made out its case and survived the motion for acquittal, it has proved purpose --

MR. SADD: Purposefulness.

QUESTION: -- it has proved purposefulness

enough that unless the defendant, by a preponderance of evidence, didn't have a purpose --

MR. SADD: You're not negating purpose with this. I think that's where we're having a disagreement.

QUESTION: Well, I know, but to the extent that self-defense goes to purposefulness or prior design, you have to -- the defendant has a substantial burden of proof, not just raising a reasonable doubt.

MR. SADD: Let me give you the following hypothetical, which may clarify matters.

Suppose an individual went into a bar. And while he was inside this bar, the victim spilled a drink on his coat, and the defendant then said to customers inside the bar, that this guy tried to kill me and I'm going to -- I mean, this guy spilled a drink on me; I'm going to kill him. Goes outside to his car, pulls out a gun, comes back in. The witnesses see this, and even the victim sees him with a gun. And the victim charges him, and the defendant then shoots and kills him.

It could be said under that hypothetical that a person could have acted with prior calculation and design and purposefulness, as well as acting in self-defense.

It becomes a jury question, how to resolve the qustion.

QUESTION: But the jury is told how to measure the evidence, what consequence to attach to the defendant's evidence.

MR. SADD: Yes, I would submit that the elements of self-defense, in this particular case, do not conflict with the elements of aggravated murder in this particular case under Ohio law.

And I would like to save the remaining portion of my argument to simply state that, in rejecting the due process argument, Patterson explicitly states that the proof of nonexistence of all affirmative defenses has never been Constitutionally required, and we perceive no reason to fashion such a rule in this case and apply it to the statutory defense at issue here.

Finally, I think this Court has recognized both in Patterson, and more recently in McMillian v. Pennsylvania, that states enjoy wide latitude in the definition of their crimes, the regulation of their procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion.

This is so, because as McMillian recognizes, the prerventing and dealing with crime is much more the business of the states than the Federal Government.

Ohio submits that it may constitutionally

impose the burden of proof on the defendant for a variety of reasons. Number one, the defendant is in the best position, superior to the prosecutor, to know and prove the defense that they assert.

Number two, Ohio has chosen to place a higher burden of criminal responsibility on those who wish to establish affirmative defenses.

And lastly, to make it more difficult and to eliminate false claims of self-defense.

We would conclude that the due process clause does not mandate that the prosecution disprove affirmative defenses beyond a reasonable doubt.

This is the more reasonable approach, rather than requiring the states to disprove negatives.

I thank you very, very much.

QUESTION: Excuse me, may I just add one point to say, the facts are peculiarly in the knowledge of the defendant -- aren't all the facts peculiarly in his -- why not make him prove the whole crime?

MR. SADD: I'm sorry, Justice --

QUESTION: You say that the burden is place on the defendant --

MR. SADD: Correct.

QUESTION: -- to show self-defense because he has the best knowledge of the crime.

MR. SADD: Correct.

QUESTION: He also has the best knowledge of whether it's murder or not?

MR. SADD: Well, I think, the state has not proved anybody -- the defendant in the State of Ohio's scheme is not to prove themselves innocent. They interpose a defense. And that defense is recognized in 2901.05, which reads, an affirmative defense is a defense involving an excuse or a justification within the knowledge of the accused in which he can fairly be required to adduce supporting evidence.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Sadd.

Mr. Willis, do you have something more?

REBUTTAL ARGUMENT OF JAMES R. WILLIS, ESQ.,
ON BEHALF OF THE PETITIONER

MR. WILLIS: Yes, thank you Mr. Chief Justice.

First of all, Ohio's self-defense law has not changed since 1870-something. They did change the homicide law.

There is no statutory enactment, never has been a statutory enactment whereby self-defense is defined.

The definition of self-defense in Ohio comes from the Supreme Court of Ohio in its opinions in

Silvers, Abner and as late as Melchiar.

The other interesting aspect of the prosecutor's argument is when he analogizes -- I'm sorry, Leland v. Oregon, the insanity case, to the facts here. In an insanity case, the jury's verdict is, not guilty by reason of insanity, or guilty, but mentally ill.

A defendant in an insanity case commits a crime which, if committed by a sane person, would be, indeed, a crime.

He's claiming that he is not blameworthy because he lacked the -- because he lacked the appropriate mens re because of his lack of mental competency.

I think it's also significant with reference to the hypoethetical that Mr. Sadd gave us. Under that hypothetical, in Ohio, he wouldn't be entitled to an instruction on self-defense. Because he would not have done anything he could do to avoid the danger.

When the man says, he's going out to get a gun, under Ohio law, he has a duty to retreat. He's got to leave that bar. He's got to call the police. He's got to barricade himself somewhere.

So under that hypothetical, he would not be entitled to a defense.

Self-defense and prior calculation and design simply cannot coexist. And to the extent that self-defense operates in counterdistinction to prior calculation and design, it's an element.

And to that extent, in Ohio, we feel that the law is wrong on self-defense.

There are three points with reference to our position:

Self-defense negates the element of criminal purpose. Certainly, the state in this instance, has exceeded those constitutional limits this Court spoke about in Speiser. And what the defendant engaged in in this case was truly lawful conduct.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Willis.

The case is submitted.

(Whereupon, at 2:50 p.m., the case in the above-entitled matter was submitted.)

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BY Paul A. Richardson

(REPORTER)