No. 05-7053

IN THE
Supreme Court of the United States

KESHIA CHERIE ASHFORD DIXON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE NATIONAL CLEARINGHOUSE FOR THE DEFENSE OF BATTERED WOMEN AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

The National Association of Criminal Defense Lawyers (NACDL) has more than 12,500 members nationwide, including both public and private defenders, active U.S. military defense counsel, law professors, and judges. With 90 state, local and international affiliate organizations, NACDL speaks for a total membership of some 35,000 in all 50 states. The American Bar Association recognizes NACDL as an affiliate organization and accords it full representation in its House of Delegates. Founded in 1958, NACDL promotes study and research in the field of criminal law and procedure, disseminates and advances legal knowledge in the area of criminal justice and practice, and encourages the integrity, independence and expertise of criminal defense lawyers in the state and federal courts. To promote the proper administration of justice and appropriate measures to safeguard the rights of all persons involved in the criminal justice system, NACDL files approximately 35 *amicus* briefs a year in state and federal appeals courts, including this Court, on a variety of criminal justice issues affecting the vital interests of its members and their clients.

The National Clearinghouse for the Defense of Battered Women (NCDBW), founded in 1987, works to ensure justice for battered women charged with crimes, where a history of abuse is relevant to the woman's legal claim or defense. As a longstanding matter of principle, the National Clearinghouse does not advocate any special legal rules for battered women defendants. The organization is committed to ensuring that battered women charged with crimes, like all defendants, receive

1. No counsel for a party authored this brief in whole or in part. No person or entity other than NACDL or the NCDBW has made a monetary contribution to the preparation or submission of this brief. Petitioner and respondent have consented to the filing of this amicus brief; their letters of consent have been filed with the Clerk of this Court pursuant to Supreme Court Rule 37.3(a).

the full benefit of all rights and protections designed to ensure fair trials, accurate verdicts, and appropriate sentences. To this end, the National Clearinghouse seeks to educate those involved in the criminal justice system about battering and its effects, so that legal decisions affecting battered women defendants are not based on misconceptions. The National Clearinghouse also advocates reforms in existing legal rules and practices, where needed to ensure fairness for all accused persons, but never in such a way that the change would afford battered women different or special rights.

The first and only organization to focus exclusively on battered women defendants, the National Clearinghouse works on a wide variety of cases, including those involving self-defense/defense of others, coercion and duress, crimes of omission (such as allegedly failing to protect one's children from a batterer's violence), and cases where the history and impact of abuse help to explain a defendant's behavior and/or rebut the *mens rea* element of the crime. In recognition of its quality services and national leadership role, the National Clearinghouse was chosen in 1993 to be one of five organizations to receive funds from the U.S. Department of Health and Human Services (HHS) as part of the newly formed Domestic Violence Resource Network. Through a number of continuation grants from HHS, the National Clearinghouse remains an active member of the Domestic Violence Resource Network and an integral part of the national leadership of the battered women's advocacy movement.

The position of the National Clearinghouse is that once a defendant has properly raised the issue of duress, it is the government's burden to disprove that defense, and thus to establish the voluntariness of otherwise criminal acts, beyond a reasonable doubt. Nineteen years of research and counseling experience, involving more than 275 cases where duress issues were raised (about 11% of the cases on which the Clearinghouse

has consulted and for which the records are clear in this respect), have led the National Clearinghouse to the firm belief that unless the government bears that burden, many wrongful convictions will surely result, as the risk of jury error due to misunderstanding of the circumstances is especially high in such cases.

SUMMARY OF ARGUMENT

For well over a century, the federal courts and federal standard jury instructions have placed the burden of persuasion on the government when defenses such as insanity, self-defense, and duress – which bears a strong relationship to both insanity and self-defense – are raised by defendants who satisfy an initial burden of production. There is good reason for doing so. All such defenses wholly negate the foundations of criminal liability, and there is no reason to treat duress differently.

Of late, however, some federal courts have undertaken to parse the elements of particular charged offenses to determine whether duress would "negate" a specific intent element. These courts have created two different duress defenses: one that speaks directly to a particular *mens rea*, and the other that merely "excuses" criminal conduct. Under this theory, the government bears the burden if duress happens to negate the particular *mens rea*, but the defendant bears the burden if it does not, *i.e.*, if duress is only an "excuse." This novel analytical approach cuts the duress defense loose from its historical moorings in this Court's jurisprudence and should be rejected.

The minority approach, followed by the court below, is also impractical and potentially confusing for jurors. A defendant, such as petitioner Dixon, who is charged with multiple offenses and asserts duress as her defense, may well be faced with two sets of jury instructions on the burden with respect to the defense – one that places the ultimate burden on her for one count, and a conflicting instruction that places the burden on the

government for another count. Or two defendants who are subjected to exactly the same coercion will have their duress defense subjected to different burdens of proof, depending on whether the crime that they are coerced to commit – or more precisely, the crime that the prosecution chooses to charge – includes an element as to which a court can say that duress would negate the element.

The likelihood of inconsistent and unreliable jury verdicts should persuade the Court to adhere to the established rules of federal criminal practice that have uniformly placed the burden of persuasion on the government when the defendant satisfies the burden of production on a duress defense. Nothing suggests that adherence to this tradition has created any difficulty in the fair enforcement of the criminal laws.

STATEMENT OF THE CASE

The NACDL and the NCDBW adopt the Statement of the Case in petitioner's brief.

ARGUMENT

I. DURESS IS A WELL-ESTABLISHED DEFENSE AS TO WHICH THE GOVERNMENT TRADITIONALLY BEARS THE BURDEN OF PROOF.

Duress "excuse[s] criminal conduct where the actor was under an unlawful threat of imminent death or serious bodily injury, which threat caused the actor to engage in conduct violating the literal terms of the criminal law." *United States v. Bailey*, 444 U.S. 94, 409 (1980). Duress has long been recognized as a defense in the federal courts. S. REP. 96-553, at 105 (1980), citing, *e.g.*, *Kawakita v. United States*, 343 U.S. 717, 735-36 (1952); *United States v. Vigol*, 2 Dall. 346, 28 F. Cas. 376 (C.C.D. Pa. 1795). "At common law, as under Federal law today, duress is recognized as a defense to all crimes except murder and, perhaps, offenses involving an intent to take life

such as attempted murder or assault with intent to kill." S. REP. 96-553, at 105 (footnote omitted).

This Court has remarked that "[t]he doctrines of *actus reus*, *mens rea*, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical and medical views of the nature of man." *Powell v. Texas*, 392 U.S. 514, 536 (1968). And this Court expressly recognized that duress is a defense to federal crimes in *United States v. Bailey*, 444 U.S. at 409. The Court held in *Bailey* that one charged with the statutory crime of escape may assert duress as a defense, upon showing that a threat existed and that, "given the imminence of the threat, . . . [escape] was his only reasonable alternative." 444 U.S. at 410-11 (citations omitted).

The defense may be asserted, the Court held, despite the statute's silence on the availability of common-law defenses and the absence of a required *mens rea* element to which a duress defense would directly speak:

> [W]e are construing an Act of Congress, not drafting it. The statute itself . . . requires no heightened *mens rea* that might be negated by any defense of duress or coercion. We nonetheless recognize that Congress in enacting criminal statutes legislates against a background of Anglo-Saxon common law, and that therefore a defense of duress or coercion may well have been contemplated by Congress when it enacted [the escape statute]. . . .

Bailey, 444 U.S. at 415 n.11. *See Jones v. United States*, 526 U.S. 227, 234 (1999) (statutes are drafted "against a backdrop not merely of structural conventions of varying significance, but of traditional treatment of certain categories of important facts"). In enacting the criminal prohibition, this Court in *Bailey*

reasoned, Congress is deemed (absent clear evidence to the contrary) to have adopted implicitly the body of traditional defenses, which have historically been viewed as negating true culpability. *See also, e.g.*, *United States v. Russell*, 411 U.S. 423, 428-35 (1973); *Sorrells v. United States*, 287 U.S. 435, 446-52 (1932) (same theory elaborated at length and applied to entrapment).

So too, when Congress enacted the Federal Gun Control Act of 1968, it "legislate[d] against a background of Anglo-Saxon common law," such that duress is a defense to the crimes of knowingly making false statements "intended or likely to deceive" in acquiring or attempting to acquire a firearm, 18 U.S.C. §§ 922(a)(6), 924(a)(2), and willful possession of a firearm by one who is under indictment, 18 U.S.C. §§ 922(n), 924(a)(1)(D), the offenses of which petitioner Dixon was convicted.

Duress has been analogized to insanity, as to which this Court has long held that the government bears the ultimate burden of persuasion once the accused has offered some evidence to overcome the presumption of sanity. *See Davis v. United States*, 160 U.S. 469, 488 (1895). Both defenses speak to the accused's mental state, as well as to her blameworthiness. Scott E. Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 HASTINGS L.J. 457, 483 n.112 (1989) (hereinafter *Reasonable Doubt*) ("[d]efendants who act out of duress**,** necessity, or insanity can argue that their acts were involuntary because they lacked either the capacity or the chance to choose a lawful alternative"). As the Ninth Circuit confirmed in an oft-cited case:

> A defendant who, without opportunity to escape, has a well grounded fear of imminent death or serious injury unless he complies with his captor's wrongful commands entertains a mental state recognized as

> exculpatory with respect to most crimes. Compulsion or duress producing this state of mind is a defense to most criminal accusations.
>
> * * * *
>
> We indulge in the assumption that every defendant is sane, and it is not incumbent upon the prosecution to prove sanity until the defense presents evidence to the contrary. "But once substantial evidence of insanity is received in evidence, the presumption of sanity disappears. The burden is then placed upon the prosecution to prove legal sanity beyond a reasonable doubt, as in the case of any essential element of the crime charged." The same considerations apply to the even rarer defense of duress. . . .

United States v. Hearst, 563 F.2d 1331, 1335-36 nn.1 & 2 (9th Cir. 1977) (*per curiam*) (citations omitted).

Duress is also closely related to self-defense. *E.g.*, *United States v. Perez*, 86 F.3d 735, 736 (7th Cir. 1996). "The two defenses are similar in that they require a defendant to demonstrate that she acted reasonably in response to a reasonable fear of death or bodily injury." *United States v. Marenghi*, 893 F. Supp. 85, 95 (D. Me. 1995). When self-defense is raised in a federal criminal trial, it is also well-settled that the government bears the burden of persuasion to disprove that defense beyond a reasonable doubt. *E.g.*, *United States v. Alvarez*, 755 F.2d 830, 842-43 (11th Cir. 1985) (citing cases spanning more than half a century). *See also Mullaney v. Wilbur*, 421 U.S. 684, 702 n.30 (1975) (acknowledging this as "the 'majority rule'" for self-defense).

And this is so despite the constitutional minimum standard preserved in such cases arising in the state courts as *Patterson*

v. New York, 432 U.S. 197 (1977), and *Martin v. Ohio*, 480 U.S. 228 (1987). While "the absence of self-defense is not an element of the crime" and the defendant properly bears the burden of production, "[i]n a federal prosecution … once the defendant has met the burden of production, the government must satisfy the burden of persuasion and must negate self-defense beyond a reasonable doubt." *Alvarez*, 755 F.2d at 842 n.12 (citation omitted). In the Model Penal Code, which the Court found useful when addressing duress in *Bailey*, 444 U.S. at 403-04, 410, the American Law Institute recommended adoption of the federal rule for burdens of proof on defenses:

> The initial evidential burden is thus placed on the defendant. The defense is not in issue in the case without supporting evidence. But when there is such evidence (whether adduced by the prosecution or defendant) the prosecution must discharge its normal burden, disproving the defense beyond a reasonable doubt.
>
> Affirmative defenses in this sense have been and are extremely common in the penal law. Typical illustrations are: self-defense and similar claims of justification for conduct that would otherwise be criminal; necessity, duress and claim of right ….

AMERICAN LAW INSTITUTE, VOL. 1, MODEL PENAL CODE & COMMENTARIES: OFFICIAL DRAFT AND REVISED COMMENTS 192-93 (1985) (footnotes omitted). "[I]t seems inconsistent to demand as to some elements of guilt, such as an act of killing, that the jury be convinced beyond a reasonable doubt, and as to others, such as duress or capacity to know right from wrong, the jury may convict though they have such doubt." *Id.* at 197 (quoting

C. McCormick, HANDBOOK OF THE LAW OF EVIDENCE § 321, at 684 (1954)).[2]

So it is that "[o]nce the defendant has placed before the court evidence sufficient to raise the issue, the government must rebut the defense beyond a reasonable doubt." 1A K. O'Malley, J. Grenig & W. Lee, FED. JURY PRAC. & INSTR. § 19.02, at 746 (5th ed. 2000) (citation omitted). This may be accomplished by disproof of "at least [one] element of that defense beyond a reasonable doubt." *Id.* (citation omitted). Similarly, the report of the Judicial Conference Subcommittee on Pattern Jury Instructions placed the burden of persuasion on the government to disprove duress beyond a reasonable doubt. FEDERAL JUDICIAL CENTER, PATTERN CRIMINAL JURY INSTRUCTIONS, instr. no. 56, at 68 (1987).[3]

That burden placement is well supported in the case law concerning duress. *United States v. Arthurs*, 73 F.3d 444, 448 (1st Cir. 1996) ("[w]hen a predicate warranting a duress instruction has been laid, the government is saddled with the additional burden of showing beyond a reasonable doubt that a defendant's criminal acts were not the product of duress") (citation omitted); *United States v. Simpson*, 979 F.2d 1282, 1287 (8th Cir. 1992) ("[o]nce the defendant introduces evidence sufficient to submit the defense of coercion to the jury, the

2. This Court has previously looked to the Model Penal Code for guidance when Congress has been silent on a substantive question of basic criminal law. *United States v. Gypsum Co.*, 438 U.S. 422, 437-38 (1978); *Barnes v. United States*, 412 U.S. 837, 845 (1973); *Turner v. United States*, 396 U.S. 398, 416 & n. 29 (1970); *Leary v. United States*, 395 U.S. 6, 46 n.93 (1969).

3. The pattern instructions in the various Circuits do not speak with a single voice, but many follow the Federal Judicial Center's lead in placing the burden of persuasion on the government when duress is properly raised by a defendant. *United States v. Dodd*, 225 F.3d 340, 349 n.8 (3d Cir. 2000) (survey of Circuit pattern instructions).

government must prove beyond a reasonable doubt that the defendant's acts were not coerced") (citation omitted); *United States v. Santos*, 932 F.2d 244, 249 (3d Cir. 1991) (accepting government's concession that prosecution "should from the outset bear the burden of disproving duress beyond a reasonable doubt once the defendant has introduced sufficient evidence concerning each element of the defense")*; United States v. Mitchell*, 725 F.2d 832, 836 (2d Cir. 1983) ("in federal criminal trials the Government's burden in disproving at least one element of duress should be proof beyond a reasonable doubt"); *United States v. Campbell*, 675 F.2d 815, 821 (6th Cir. 1982) ("[d]efendant's burden of going forward to introduce sufficient facts to support an instruction on a coercion defense in no way altered the government's obligation to prove willfulness beyond a reasonable doubt"; "the prosecution must rebut the issues of coercion beyond a reasonable doubt") (citations omitted); *United States v. Campbell*, 609 F.2d 922, 925 (8th Cir. 1979) (once defendant presents evidence of coercion in escape case, "the prosecution must rebut the issues of coercion beyond a reasonable doubt"); *United States v. Hearst*, 563 F.2d at 1336 & n.2 (once duress is raised and supported by evidence, government bears the burden of persuasion to negate defense). *See also United States v. Talbott*, 78 F.3d 1183, 1186 (7th Cir. 1996) (because justification is not defined in the federal criminal code as a defense to possession of a firearm by a convicted felon, the courts may not allocate to defendant the burden of proof on that defense). The military courts apply the same rule, placing the burden on the prosecution to disprove duress beyond a reasonable doubt. *United States v. Barnes*, 60 M.J. 950, 955 (N.M. Ct. Crim. App. 2005) ("[w]hen there is some evidence that the accused acted under duress, the prosecution has the burden of proving beyond a reasonable doubt that the affirmative defense of duress does not exist") (citation omitted).

As the Second Circuit observed in *Mitchell*, placing the burden of persuasion on the government makes eminent good sense, even "[a]part from constitutional concerns":

> [A] reasonable doubt standard for duress will lessen the risk that a jury will convict solely because of failure of a defense, a consideration we have previously stressed in formulating federal rules of practice for jury instructions. We are not persuaded that juror confusion may be avoided simply by adding an admonition that, regardless of whether the jury disbelieves the duress evidence, the burden remains on the Government to establish every element of the crime beyond a reasonable doubt.
>
> Furthermore, we see no reason peculiar to the duress defense warranting departure from the general federal practice that once a criminal defendant satisfies an initial burden of producing sufficient evidence to warrant submission of a substantive defense to the jury, the prosecution must disprove at least an element of that defense beyond a reasonable doubt.

725 F.2d at 836 (citations and footnote omitted).[4]

4. The court noted that several states imposed the burden of persuasion on the government (although others did not). *Id.* at 836 n.7 (collecting cases). That remains so today. Numerous state courts rely on constitutional, statutory, and common-law bases to hold that the prosecution bears the burden of persuasion once the defendant goes forward with a duress defense. *State v. Rouleau*, 204 Conn. 240, 252-53, 528 A.2d 343, 349-50 (1987) (state constitutionally must disprove duress beyond a reasonable doubt); *State v. Glidden*, 487 A.2d 642, 644 (1985) (prosecution "bear[s] the ultimate burden" if defendant produces evidence to support a duress defense under allocation statute); *People v. Terry*, 224 Mich.App. 447, 453-54, 569 N.W.2d 641, 645 (1997)

(Cont'd)

On this issue, concerns about the reliability of criminal verdicts support the traditional federal rule. The government, not the defendant, must bear the burden of proof on the duress defense.[5]

(Cont'd)
("[o]nce a defendant successfully raises the defense, the prosecution has the burden of showing, beyond a reasonable doubt, that the defendant did not act under duress") (citation omitted); *State v. Romano*, 355 N.J.Super. 21, 35-36, 809 A.2d 158, 166-67 (2002) (statutory allocation of burdens requires prosecution to disprove duress beyond a reasonable doubt); *Commonwealth v. Morningwake*, 407 Pa.Super. 129, 139-40, 595 A.2d 158, 163 (1991) (prosecution must disprove duress beyond a reasonable doubt); *Moes v. State*, 91 Wis.2d 756, 767-68, 284 N.W.2d 66, 70-72 (1979) (state common law requires prosecution to disprove duress beyond a reasonable doubt). *Contra*, *e.g.*, *State v. Jeffrey*, 203 Ariz. 111, 114, 50 P.3d 861, 864 (2002) (prosecution need not disprove duress beyond a reasonable doubt). The Model Penal Code comments counted as evenly split (9-8) in 1985 the states that had addressed the issue by statute. AMERICAN LAW INSTITUTE, *supra*, at 384 nn.66-67.

5. One aspect of petitioner Dixon's trial that, while not before the Court on certiorari, was central to the fairness of her trial, highlights the reliability concerns in this case: Ms. Dixon was not allowed to introduce expert testimony about her experiences of abuse at the hands of her "boyfriend." Without an expert to provide needed context about what the social sciences have to teach about battering and its effects, many abused women are misunderstood and perceived as responsible for their own victimization. Such misconceptions often interfere with the ability of both judges and juries to give battered women the full and fair benefit of legal rules and doctrines applicable to all defendants. Without expert testimony providing this needed context, a battered woman's failure to leave her batterer at some earlier time can wrongly imply that she *voluntarily participated* and unreasonably, recklessly (or even willfully) assumed the risk of any subsequent duress imposed upon her to commit a crime for the benefit of the batterer. U.S. Dept of Justice (Office of Justice Programs, Nat'l Inst. of Justice),
(Cont'd)

II. THE PRACTICAL CONSIDERATIONS UPON WHICH THE FIFTH AND NINTH CIRCUITS HAVE RELIED DO NOT JUSTIFY DEPARTING FROM THE TRADITIONAL RULE THAT THE GOVERNMENT BEARS THE BURDEN OF PROOF.

The Fifth Circuit's decision in *United States v. Willis*, 38 F.3d 170 (5th Cir. 1994), upon which that court relied to reject petitioner Dixon's instruction claim, departed from the settled federal rule. Instead, it adopted the approach first promulgated in *United States v. Dominguez-Mestas*, 929 F.2d 1379, 1384 (9th Cir. 1991) (*per curiam*). "Since a justification defense such as duress is an affirmative defense, the burden of proof is on the defendant" and the defendant must therefore prove "each element of the defense by a preponderance of the evidence." *Willis*, 38 F.3d at 179 & n.12 (citation omitted).[6]

(Cont'd)

et al., The Validity and Use of Evidence Concerning Battering and its Effects in Criminal Trials: Report Responding to Section 40507 of the Violence Against Women Act, NCJ 160972 (May 1996), reprinting Gordon & Dutton, Validity of 'Battered Woman Syndrome' in Criminal Cases Involving Battered Women 20-22 & n.90; and Parrish, Trend Analysis: Expert Testimony on Battering and Its Effects in Criminal Cases 27, 29-30 (surveying use of experts in such cases by prosecution and defense to "dispel myths and misconceptions"), available at *www.ncjrs.org/pdffiles/batter.pdf*. Against that background – which by itself generated a significant risk of juror confusion – the Fifth Circuit's refusal to hold the government to its burden of proof rendered even more acute the potential for a wrongful conviction.

6. By contrast to the long-established and well-articulated traditional rule, the Fifth Circuit rule applied below is only thinly rationalized and of uncertain origin. In *Willis*, the defendant made a plain-error argument on appeal that the duress instruction "was erroneous because it did not state that the burden of proof on the defendant was a preponderance of the evidence" and could have suggested to the jury

(Cont'd)

Dominguez-Mestas arose from a conviction for heroin importation. 929 F.2d at 1380. The defendant, a Mexican national, asserted that he had brought the heroin into the United States because he and his sister had been threatened with death. *Id*. at 1380-81. After holding that due process, *e.g.*, *Mullaney v. Wilbur*, 421 U.S. 684 (1975), does not require the government to bear the burden of persuasion on a duress defense because duress does not negate an element, *see, e.g.*, *Patterson v. New York*, 432 U.S. 197, 205-06 (1977), the Ninth Circuit distanced itself from its earlier *Hearst* decision and held that the defendant should be required to carry the ultimate burden. 929 F.2d at 1382-84. The court's rationale was:

> To require the government to prove beyond a reasonable doubt the absence of duress would create a standard that would be nearly impossible to satisfy. In many cases, as in the case before us, the sole evidence of duress is the testimony offered by the defendant. Often, as here, those to whom the defendant refers either cannot be located or are outside the United States and not subject to subpoena power. In such cases, the government cannot possibly meet its burden of proving the absence of duress beyond a reasonable doubt. . . .

(Cont'd)

that he was required to prove duress beyond a reasonable doubt. 38 F.3d at 179. The court first held that "[s]ince a justification defense such as duress is an affirmative defense, the burden of proof is on the defendant," *id.*, citing *United States v. Gant*, 691 F.2d 1159, 1165 (5th Cir. 1982). But *Gant* holds only, and uncontroversially, that the defendant bears the initial burden of production. (In addition, most scholars categorize duress as an "excuse," because it affects volition, not as a "justification.") The second sentence of the two-sentence *Willis* holding is: "To succeed, the defendant must prove each element of the defense by a preponderance of the evidence." 38 F.3d at 179. No direct authority is cited for this proposition at all. In a footnote, the court cited *Dominguez-Mestas*, apparently with approval, but did not expressly adopt the Ninth Circuit's formulation.

> Finally, requiring the government to prove the absence of duress beyond a reasonable doubt would create a potential for abuse. Because it is extremely difficult for the government to prove the absence of duress beyond a reasonable doubt, a burden which is heightened in the context of border cases, the standard invites a defendant to tell a tale of duress, thereby placing a nearly insurmountable burden on the government. . . .

Id. at 1384.

The Ninth Circuit's justification for imposing the burden of proof on the defendant in a duress case fails to acknowledge that much of that justification – excepting perhaps cross-border issues – could be said, for example, of self-defense. That is, the defendant is usually the primary, if not the only, witness to testify to a reasonable fear of injury or death, and the government must make use of cross-examination or other evidence to refute such testimony. Yet, since the advent of this Court's 1895 decision in *Davis v. United States*, "federal prosecutors have borne the burden of persuasion with respect to factors like insanity, self-defense, and malice or provocation, once the defendant has carried this burden of production," without there being any "noticeable handicap to effective law enforcement." *Patterson v. New York*, 432 U.S. at 231-32 (citations omitted) (Powell, J., dissenting). The same kind of appeal to "mere convenience" was rejected by this Court in *Sorrells* in 1932. *See* 287 U.S. at 451. Instead, declared Chief Justice Hughes's majority opinion, "the essential demands of justice" must prevail. *Id*.

Moreover, shifting the burden of persuasion to the defendant is a classic instance of overreacting to a perceived problem. All of the factors cited by the Fifth and Ninth Circuits to justify shifting the burden – most notably that a defendant who was allegedly coerced by shady characters in another country, whom

he cannot produce and whom the government obviously could not locate and compel to be present – are fertile fields to be plowed on cross-examination. *See California v. Green*, 399 U.S. 149, 158 (1970) (cross-examination is the "greatest legal engine ever invented for the discovery of truth") (quoting 5 Wigmore, EVIDENCE § 1367 (1940 ed.)). The mythical defendant created by the court in *Dominguez-Mestas* would likely be skewered on cross-examination with the very concerns that led the court to shift the burden, and juries who are familiar with local issues, such as cross-border crimes, are most unlikely to be fooled by a defendant who invokes phantom threats. The abusive "boyfriend" in petitioner Dixon's case, by way of contrast, was very real, and could be called as a witness by ether side, as were the sellers of various firearms who observed Ms. Dixon's demeanor.

The notion that maintaining the burden on the government is unfair because the prosecution will be hard pressed to negate the defendant's proffered state of mind at the time of the crime was rejected in *Mullaney*. The Court noted that requiring the prosecution to prove an "absence of passion" in a murder conviction, after the defendant had raised that defense and satisfied the burden of production, is no more unfair than requiring the prosecution to prove the absence of self-defense. 421 U.S. at 701-02. "Satisfying this burden imposes an obligation that, in all practical effect, is identical to the burden involved in negating the heat of passion on sudden provocation," the Court added. *Id.* Thus, the Court "discern[ed] no unique hardship on the prosecution that would justify requiring the defendant to carry the burden of proving a fact so critical to criminal culpability." *Id. See also id.* at 702 n.31 (discussing *Davis*).

The concerns expressed in *Dominguez-Mestas* are more ephemeral than real. As one commentator has observed in addressing the district court's decision in that case:

> If the government were required to prove the lack of duress solely from its own direct evidence, the court's reasoning would be valid. The effect of requiring the defendant to bring some evidence forward to meet the burden of production coupled with the jury's critical eye, however, makes the government's task far from "impossible." The government through cross-examination and analysis of the evidence, circumstantial evidence, and logical inferences still has ample opportunity to show that no reasonable doubt exists based on the totality of the evidence presented. The real question at issue is not an evidentiary problem unique to duress, but the question inherent to the presumption of innocence: given that facts often cannot be conclusively proved, who should bear the risk of an erroneous finding.

Reasonable Doubt, *supra*, at 501 n.166. *See also Ratzlaf v. United States*, 510 U.S. 135, 149 n.19 (1994) (rejecting similar argument with respect to difficulty of proving defendant's knowledge).

In short, the only rationale offered in the cases relied upon by the Fifth Circuit for shifting the burden to the defendant is convenience to the prosecution. That justification not only is insubstantial but also has long been rejected by this Court.

III. THERE IS NO JUSTIFICATION FOR ASSIGNING THE BURDEN OF PROOF ON THE BASIS OF WHETHER DURESS "NEGATES" A SPECIFIC INTENT ELEMENT AND DOING SO LEADS TO ARBITRARY AND ILLOGICAL RESULTS.

Despite their logical and historical weaknesses, *Dominguez-Mestas* and *Willis* have engendered a series of decisions in which certain courts have engaged in increasingly intricate analyses of given statutes to determine the appropriate burden placement in particular cases. There is suddenly "a quite divided jurisprudence" in the federal courts and no "clear default rule as to how affirmative defenses generally should be treated." *Dodd*, 225 F.3d at 348. Many of these cases confuse the *mens rea* elements of offenses with traditional defenses in the nature of excuses or justifications.

For example, invoking "practical considerations" similar to those set forth in *Dominguez-Mestas*, the Eleventh Circuit has recently held that a defendant who raises a "justification" defense to a charge of possession of a firearm by a convicted felon bears the burden of persuasion. *United States v. Deleveaux*, 205 F.3d 1292, 1299-1301 (11th Cir. 2000); *accord*, *Dodd*, 225 F.3d at 347-48; *United States v. Newcomb*, 6 F.3d 1129, 1133 (6th Cir. 1993). The Ninth Circuit, addressing a charge of attempted transportation of undocumented aliens, acknowledged that an attempt charge requires specific intent to commit the underlying crime (and that the underlying crime also required specific intent), but nonetheless held that the defendant bore the burden of persuasion on his duress defense because duress would not rebut the *particular* intent elements supposedly implicated in that case. *United States v. Hernandez-Franco*, 189 F.3d 1151, 1158 (9th Cir. 1999) ("[i]n order to determine whether there has been an impermissible shifting of the burden of persuasion . . . we must decide 'whether proof of duress necessarily entails disproof' of the mens rea required" for the

charged offense). And the Ninth Circuit, addressing a duress defense raised by a defendant charged with attempted illegal entry, which is a specific intent crime, in another recent decision, similarly parsed the crime's elements to determine whether duress "negated the specific intent element of attempted illegal reentry . . . or whether it could only be offered to excuse his criminal conduct"; the court there held that duress "could only be offered to excuse the offense," and therefore placed the burden of persuasion on the defendant. *United States v. Leal-Cruz*, 431 F.3d 667, 671-73 (9th Cir. 2005).

The mechanical focus on elements to determine the burden of proof on a duress defense complicates and confuses what had been reasonably well settled, skews the defense, and leads to the risk of unreliable jury verdicts. The same threatening and abusive conduct that causes a defendant to commit a crime will lead to disparate results, depending on the fortuity of whether the coerced criminal act violates a statute that a court ultimately determines includes an element that is "negated" by duress. That is, if a woman, such as petitioner Dixon, were to be threatened in precisely the manner that she asserts she was, but was forced instead to commit what is clearly a specific intent crime, such as bank robbery, 18 U.S.C. § 2113, the government would have the burden of persuasion on duress, even in the Fifth Circuit.[7] But, if the same threatening conduct forces a person to commit a crime that is determined to require a mental state that is not "negated" by duress, such as the knowledge that is typical of "general intent," the *defendant* must bear the burden of persuasion. And, if the evidence is in equipoise in both instances, the first defendant would be acquitted and the second would be

7. Of course, if the theory were correct that duress negates *scienter* in crimes of specific intent, then "duress" in such cases would not be classifiable as an affirmative defense at all. The "rule" announced in those cases really says only that when the defendant offers evidence relevant to intent, the burden of proof remains on the government.

convicted – when the quantum of evidence showing that they both were coerced was exactly the same. That sort of disparate treatment simply makes no sense.

Indeed, an even more bizarre scenario unfolds when a defendant is charged with two (or more) offenses in the same indictment and the burden of persuasion varies as to different charges. This case presents just such a possibility: the charge of possessing a firearm while under indictment requires that the act be performed "willfully," 18 U.S.C. § 922(n); 18 U.S.C. § 924(a)(1)(D); but the charge of making false statements requires only that she did so "knowingly." 18 U.S.C. § 922(a)(6); 18 U.S.C. § 924(a)(2). *See generally Bryan v. United States*, 524 U.S. 184 (1998) (discussing varying scienter elements under Gun Control Act, as amended). In this instance, under the approach taken by some courts, the jury would presumably have to be instructed that the government bears the burden of persuasion on the one charge, and the defendant on the others. The potential for jurors to be confused is self-evident.

This Court observed in *Mullaney* that "[t]he result, . . . where the defendant is required to prove the critical fact in dispute, is to increase further the likelihood of an erroneous . . . conviction." 421 U.S. at 701. Quoting from *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958), the Court continued:

> [W]here one party has at stake an interest of transcending value – as a criminal defendant his liberty – th[e] margin of error is reduced as to him by the process of placing on the [prosecution] the burden . . . of persuading the factfinder at the conclusion of the trial.

421 U.S. at 701 (brackets in original).

Under federal civil statutes that fail to clarify the allocation of burden, this Court has applied a "default rule," *Schaffer ex*

rel. Schaffer v. Weast, 546 U.S. —, 126 S. Ct. 528, 534 (2005), subject to exceptions based on "policy considerations, convenience, and fairness," *id.* at 537 (Stevens, J., concurring), 537-38 (Ginsburg, J., dissenting) (quoting 2 J. Strong, McCormick on Evidence § 337, at 415 (5th ed. 1999) and 9 J. Wigmore, Evidence § 2486, at 291 (J. Chadbourn rev. ed. 1981)). As the Court recognized, however, "special concerns attend" the allocation of burdens in criminal cases. *Schaffer*, 126 S. Ct. at 535 (quoting *Lavine v. Milne*, 424 U.S. 577, 585 (1976)). With "convenience" discounted, as already discussed in Point II, "policy considerations" and "fairness" as applied to the criminal law defense of duress likewise favor the traditional uniform federal rule, which *always* places the ultimate burden on the prosecution beyond a reasonable doubt.

The reasonable-doubt standard "is a prime instrument for reducing the risk of convictions resting on factual error." *In re Winship*, 397 U.S. 358, 362 (1970). The traditional approach of the federal courts to the burden of persuasion when duress and similar defenses are raised by a defendant pays heed to that concern, constitutional issues aside. The element-by-element approach propounded by the Ninth Circuit and adopted recently in several other circuits is rife with the potential for hopeless confusion, leading to unreliable and unfairly disparate jury determinations. The correct rule is simple, clear and applies to all cases.

This Court recognized in *Bailey* that the common-law duress defense is woven into federal criminal statutes. The Fifth Circuit's rule thwarts that Congressional intent by stripping the defense of its vitality and burdening it with confusion and inconsistency. The NACDL and NCDBW urge the Court to reverse the Fifth Circuit's decision and reaffirm the ultimate burden of proof beyond a reasonable doubt to the proof of all issues attending culpability in federal criminal cases.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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