SUPREME COURT OF THE UNITED STATES

No. 05–7053

KESHIA CHERIE ASHFORD DIXON, PETITIONER *v.* UNITED STATES

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

[June 22, 2006]

JUSTICE ALITO, with whom JUSTICE SCALIA joins, concurring.

I join the opinion of the Court with the understanding that it does not hold that the allocation of the burden of persuasion on the defense of duress may vary from one federal criminal statute to another.

Duress was an established defense at common law. See 4 W. Blackstone, Commentaries on the Laws of England 30 (1769). When Congress began to enact federal criminal statutes, it presumptively intended for those offenses to be subject to this defense. Moreover, Congress presumptively intended for the burdens of production and persuasion to be placed, as they were at common law, on the defendant. Although Congress is certainly free to alter this pattern and place one or both burdens on the prosecution, either for all or selected federal crimes, Congress has not done so but instead has continued to revise the federal criminal laws and to create new federal crimes without addressing the issue of duress. Under these circumstances, I believe that the burdens remain where they were when Congress began enacting federal criminal statutes.

I do not assume that Congress makes a new, implicit judgment about the allocation of these burdens whenever it creates a new federal crime or, for that matter, whenever it substantially revises an existing criminal statute.

It is unrealistic to assume that on every such occasion Congress surveys the allocation of the burdens of proof on duress under the existing federal case law and under the law of the States and tacitly adopts whatever the predominant position happens to be at the time. Such a methodology would create serious problems for the district courts and the courts of appeals when they are required to decide where the burden of persuasion should be allocated for federal crimes enacted on different dates. If the allocation differed for different offenses, there might be federal criminal cases in which the trial judge would be forced to instruct the jury that the defendant bears the burden of persuasion on this defense for some of the offenses charged in the indictment and that the prosecution bears the burden on others.

I would also not assume, as JUSTICE BREYER does, see *post*, at 2–3, that Congress has implicitly delegated to the federal courts the task of deciding in the manner of a common-law court where the burden of persuasion should be allocated. The allocation of this burden is a debatable policy question with an important empirical component. In the absence of specific direction from Congress, cf. Fed. Rule Evid. 501, I would not assume that Congress has conferred this authority on the Judiciary.