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 KENNEDY, concurring.

No one disputes that, subject to constitutional constraints, Congress has the authority to determine the content of a duress defense with respect to federal crimes and to direct whether the burden of proof rests with the defense or the prosecution. The question here is how to proceed when Congress has enacted a criminal statute, the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 197 *et seq*. (hereinafter Safe Streets Act), without explicit instructions regarding the duress defense or its burden of proof. See *ante,* at 10.

When issues of congressional intent with respect to the nature, extent, and definition of federal crimes arise, we assume Congress acted against certain background understandings set forth in judicial decisions in the Anglo-American legal tradition. See *United States* v. *Bailey,* 444 U. S. 394, 415, n. 11 (1980). Those decisions, in turn, consult sources such as legal treatises and the American Legal Institute's Model Penal Code. See, *e.g., United States* v. *Jimenez Recio,* 537 U. S. 270, 275–276 (2003); *Salinas* v. *United States,* 522 U. S. 52, 64–65 (1997). All of these sources rely upon the insight gained over time as the legal process continues. Absent some contrary indication in the statute, we can assume that Congress would not want to foreclose the courts from consulting these newer

sources and considering innovative arguments in resolving issues not confronted in the statute and not within the likely purview of Congress when it enacted the criminal prohibition applicable in the particular case.

While the Court looks to the state of the law at the time the statute was enacted, see *ante,* at 12, the better reading of the Court's opinion is that isolated authorities or writings do not control unless they were indicative of guiding principles upon which Congress likely would have relied. Otherwise, it seems altogether a fiction to attribute to Congress any intent one way or the other in assigning the burden of proof. It seems unlikely, moreover, that Congress would have wanted the burden of proof for duress to vary from statute to statute depending upon the date of enactment. Consistent with these propositions, the Court looks not only to our precedents and common-law traditions, but also to the treatment of the insanity defense in a 1984 statute and a proposal of the National Commission on Reform of Federal Criminal Laws, even though they both postdated the passage of the Safe Streets Act. See *ante,* at 10, 13.

As there is no reason to suppose that Congress wanted to depart from the traditional principles for allocating the burden of proof, the proper approach is simply to apply these principles to the context of duress. See, *e.g., Schaffer* v. *Weast,* 546 U. S. ___, ___ (2005) (slip op., at 6–7) (where the plain text of the statute is "silent on the allocation of the burden of persuasion," we proceed to consider the "ordinary default rule" and its exceptions). The facts needed to prove or disprove the defense "lie peculiarly in the knowledge of" the defendant. 2 K. Broun, McCormick on Evidence §337, p. 475 (6th ed. 2006); see *ante,* at 6. The claim of duress in most instances depends upon conduct that takes place before the criminal act; and, as the person who allegedly coerced the defendant is often unwilling to come forward and testify, the prosecution

may be without any practical means of disproving the defendant's allegations. There is good reason, then, to maintain the usual rule of placing the burden of production and persuasion together on the party raising the issue. See 2 Broun, *supra,* §337; *ante*, at 6. The analysis may come to a different result, of course, for other defenses.

With these observations, I join the Court's opinion.