St. John's Law Review

Volume 47, December 1972, Number 2 Article 10

Sufficiency of Prosecutor's Evidence (United States v. Taylor)

St. John's Law Review

stringent exhaustion requirement permits only those serving lengthy sentences to qualify for the federal writ.[143] A policy of rigid procedural restraints on the writ seems unsound since it frustrates decisions on the merits of at least some petitions that are, in fact, substantively meritorious. Such a policy, as Justice Douglas has noted, makes a "trap out of the exhaustion doctrine which promises to exhaust the litigant and his resources, not the remedies."[144]

SUFFICIENCY OF PROSECUTOR'S EVIDENCE

United States v. Taylor

The Supreme Court has observed "that proof of a criminal charge beyond a reasonable doubt is constitutionally required."[145] While the concept of "beyond a reasonable doubt" is not synonymous with mathematical certainty,[146] it is more exacting than the burden of proof required in civil actions,[147] with the distinction often expressed in terms of probability of occurrence:

> With respect to a normal issue in a civil case, one party loses if the jury does not believe that existence of the fact is more probable than its nonexistence .... With respect to a normal issue in a criminal case, the state loses if the jury does not believe that existence of the fact is so highly probable "as to dissipate all reasonable doubt."[148]

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case that can frustrate a decision on the merits. If the court wishes to avoid deciding the constitutional issue, it will often be able to say that state remedies have not yet been exhausted. On the other hand, if the court desires to make a constitutional ruling, it is often just as easy for it to say that state remedies have been sufficiently exhausted or that under the circumstances exhaustion will be excused.

Id. at 21.

143 *See* Comment, *Exhaustion of State Remedies Before Bringing Federal Habeas Corpus: A Reappraisal of U.S. Code Section 2254*, 43 NEB. L. REV. 120 (1963).

> It evidently takes so long under the present requirements of Section 2254 to mature a case for federal habeas corpus that the 'lighter' sentences of only a few years are completed and the cases thereby become moot before they can even receive a hearing.

Id. at 132.

144 Picard v. Connor, 404 U.S. at 281 (Douglas, J., dissenting).

145 *In re* Winship, 397 U.S. 358, 362 (1970). This rule is so strong that the Court applied it even to a juvenile proceeding where a 12-year-old was faced with confinement for six years. The Court gave a concise history of the due process requirement that a criminal conviction be based upon proof beyond a reasonable doubt, noting that the standard is applicable to "every fact necessary to constitute the crime with which [one] is charged." *Id.* at 364.

146 Holland v. United States, 348 U.S. 121, 138 (1954). "The government must still prove every element of the offense beyond a reasonable doubt though not to a mathematical certainty." *Id.*

147 The standard of proof in civil cases is a preponderance of the evidence. *See* PRINCE, RICHARDSON ON EVIDENCE § 97 (9th ed. 1964).

148 McNaughton, *Burden of Production of Evidence: A Function of a Burden of*

Although most other circuits have also maintained these separate standards with respect to a trial judge's determination on the question whether the evidence in a given case is sufficient to go to the jury,[149] until recently the "Second Circuit rule" held a single standard of evidence applicable to both civil and criminal cases.[150] Under this rule, the application of the 'reasonable doubt standard' was reserved exclusively for use by the jury in rendering its verdict. The question of the sufficiency of the evidence to warrant submission of a criminal case to the jury was evaluated by the same standard as that applied to civil actions. Thus, whenever a federal trial judge believed that a reasonable jury could find that the prosecution's evidence preponderated, he was required to let the case go to the jury[151] although the jury was, of course, not permitted to use the preponderance standard in its deliberations.

In *United States v. Taylor*,[152] the Second Circuit overruled the "single test" approach and held that it is a function of the court, upon motion for directed verdict, to determine whether the evidence justifies a finding of guilt beyond a reasonable doubt.[153] However, the conviction in *Taylor*, was unaffected by the court's resolution of the issue

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Persuasion, 68 HARV. L. REV. 1382, 1383 (1955) (footnote omitted). In United States v. Masiello, 235 F.2d 279 (2d Cir.), *cert. denied*, 352 U.S. 882 (1956), Judge Frank (concurring) made the following comments on the two standards:

> It has been suggested . . . that the civil standard — "by a preponderance" — means that the inferences from the testimony are such as to persuade that the occurrence of an essential fact was *more likely or probable* than its non-occurrence . . . that the criminal test — "beyond a reasonable doubt" — means that those inferences are such as to convince that the occurrence of an essential fact was *much more likely or probable* than its non-occurrence.

Id. at 286 (footnotes omitted).

149 In United States v. Leitner, 202 F. Supp. 688, 693 n.1 (S.D.N.Y. 1962), *aff'd* 312 F.2d 107 (2d Cir. 1963), the court labeled this approach as the "majority test." *See* 202 F. Supp. at 693 n.2 for a survey of the treatment of the issue in each of the circuits.

150 United States v. Taylor, 464 F.2d 240, 242 (2d Cir. 1972).

151 United States v. Masiello, 235 F.2d 279, 287 (2d Cir.), *cert. denied*, 352 U.S. 882 (1956) (concurring opinion). In the *Taylor* case, 464 F.2d at 244, the court noted that in determining sufficiency of the evidence, the "reasonable doubt standard" will apply to the evidence in totality, and not to each element. *See* Holland v. United States, 348 U.S. 121 (1954).

152 464 F.2d 240 (2d Cir. 1972).

153 *Id.* at 243, Friendly, C.J. writing for the court, affirmed the *"Curley* test":

> The true rule, therefore, is that a trial judge, in passing upon motion for directed verdict of acquittal, must determine whether, upon the evidence, giving full play to the right of the jury to determine credibility, weight the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such doubt in a reasonable mind, he must grant the motion; or, to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt, the motion must be granted.

See Curley v. United States, 160 F.2d 229, 232-33 (D.C. Cir.), *cert. denied*, 331 U.S. 837 (1947).

since denial of the motion was found sustainable under either standard of evidence.[154]

The "single test" or "Second Circuit rule" originated in *United States v. Feinberg*.[155] In *Feinberg*, Judge Learned Hand challenged the 'reasonable doubt standard' for its impracticability, commenting that such a distinction was too tenuous "for day to day use."[156] However, Judge Hand did recognize that "[e]vidence . . . which merely preponderates is indeed different from evidence which excludes all doubt . . . ."[157]

Although findings of fact have traditionally been within the province of the jury, the "*Feinberg* rule" seemed to demean the role of the judge in his supervisory capacity.[158] Also, the *Taylor* court noted a

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154 The facts of the case are as follows: Defendant Taylor and another were driving from Canada into this country in a car given to Taylor by one Rudderow. Taylor was stopped for "routine questioning" by a customs agent at a New York border crossing. Taylor had no proof of ownership and, during an investigation of the vehicle, "thirty-four counterfeit $20 Federal Reserve notes fell from a magazine which was on the back seat. Forty-four $20 notes were subsequently found in . . . road maps . . . ." Taylor later admitted ownership of the magazine. Rudderow disclaimed the presence of the notes in the car at the time it was given to Taylor. 464 F.2d at 245. Taylor was convicted of possession of counterfeit bills with intent to defraud in violation of 18 U.S.C. § 472.

155 140 F.2d 592, 594 (2d Cir.), *cert. denied*, 322 U.S. 726 (1944). As suggested in United States v. Leitner, 202 F. Supp. 688, 693 n.1 (S.D.N.Y. 1962), *aff'd* 312 F.2d 107 (2d Cir. 1963), a reading of the early case of Fraina v. United States, 255 F. 28, 35 (2d Cir. 1918), would seem to indicate that, prior to the "*Feinberg* rule," this circuit used the "majority test".

156 140 F.2d at 594.

157 *Id.* Judge Hand also implied that, due to the "gravity of the consequences" in a criminal trial, it is possible that the courts are "more exacting" regardless of what standard is applied in submission of the case to the jury. *Id.*

158 *See* United States v. Masiello, 235 F.2d 279, 286-87 (2d Cir. 1956) (concurring opinion), in which Judge Frank found that, although it is not the judge's function to "decide whether the defendant is guilty beyond a reasonable doubt," many courts have held that it is a function of the court to direct a verdict of acquittal "if the judge reasonably thinks that a reasonable jury could not find guilt proved beyond a reasonable doubt" from the evidence presented. *Id.* at 286.

In analyzing the *Feinberg* rule, Judge Frank found that this aspect of the Court's role in a criminal action was circumvented:

> To put it succinctly, even if the judge has no doubt that the jury cannot reasonably comply with his admonition that it must acquit unless it finds the accused guilty beyond a reasonable doubt — *i.e.*, if he has no doubt that a reasonable jury could find guilt by no more than a preponderance of the evidence — nevertheless the judge must let the jury return a verdict, and if that verdict is adverse to the accused, the judge may not properly set aside the verdict and enter a judgment of acquittal.
>
> Thus in this circuit the reasonable doubt standard has no significance whatever for the judge; its sole function is as a part of the instructions to the jury.

Id. at 287.

See Curley v. United States, 160 F.2d 229, 232 (D.C. Cir. 1947): "It is the function of the judge to deny the jury an opportunity to operate beyond its province." *See also* Capital Traction Co. v. Hof, 174 U.S. 1, 13-14 (1899):

> "Trial by jury" . . . is a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law

basic inconsistency in requiring a higher standard of proof for a verdict and a lower standard for the evidence upon which such a verdict may rest.[159] The growing dissatisfaction with the rule within the Second Circuit[160] was clearly expressed by Judge Frank in the 1956 case of *United States v. Masiello*.[161] While concurring in the result reached by the court, he cautioned that the "Second Circuit rule" would allow a criminal conviction to stand where only the civil burden of proof had been met and would thus run afoul of the constitutional guarantee of proof of guilt beyond a reasonable doubt.[162]

In rebutting Judge Hand's finding of impractibility in the application of varying measures of proof, the *Taylor* court noted the existence of an intermediate standard — "clear and convincing evidence."[163] Chief Judge Friendly then asserted that this array of burdens of proof must be considered in determining whether a question for the jury existed.[164]

A further reason given for the *Taylor* decision was that, in prac-

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and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence.

159 464 F.2d at 242.

160 *See, e.g.*, United States v. Glasser, 443 F.2d 994 (2d Cir.), *cert. denied*, 404 U.S. 854 (1971), where the court specifically rejected the *Feinberg* rule in favor of the majority test applied by the Supreme Court in American Tobacco v. United States, 328 U.S. 781, 887 (1946); United States v. Lefkowitz, 284 F.2d 310 (2d Cir. 1960) in which the court relied upon an earlier Fifth Circuit opinion in stating the applicable rule.

In other cases the court was more casual in its departure from the *Feinberg* rule, apparently feeling more confident in taking such a step. *See, e.g.*, United States v. Brown, 456 F.2d 293 (2d Cir. 1972); United States v. Kahaner, 317 F.2d 459 (2d Cir.), *cert. denied*, 375 U.S. 835 (1963); United States v. Robertson, 298 F.2d 739 (2d Cir. 1962).

161 235 F.2d 279, 285 (2d Cir. 1956) (concurring opinion).

162 This "Second Circuit doctrine," I think erroneous. It reduces the criminal standard to little more than a verbal ritual, a ceremonial set of words included in the judge's charge. . . .

[I]f, for the judge, the beyond-a-reasonable-doubt test, can have no "quantitative value" greater than the "preponderance" test, he may not use the criminal test as either a pre-verdict or post-verdict check on the jury. . . . In short, according to this doctrine, a criminal conviction does not necessarily mean an adjudication of guilt beyond a reasonable doubt, but may well mean adjudication of guilt which can reasonably be by a preponderance only.

235 F.2d at 288 (footnote omitted).

163 464 F.2d at 243, *citing* Chaunt v. United States, 364 U.S. 350, 353-54 (1960); Woodby v. INS, 385 U.S. 276, 285-86 (1966).

In denaturalization cases the Court has required the Government to establish its allegations by clear, unequivocal, and convincing evidence. The same burden has been imposed in expatriation cases. That standard of proof is no stranger to the civil law.

385 U.S. at 285 (footnotes omitted).

164 Progressing from *Chaunt* and *Woodby* (*see* note 163 *supra*), Chief Judge Friendly observed:

Implicit in the Court's recognition of varying burdens of proof is a concomitant duty on the judge to consider the applicable burden when deciding whether to send a case to the jury.

464 F.2d at 243.

tice, the "*Feinberg* rule" was no longer followed by the courts within the Second Circuit.[165] However, an examination of recent decisions within the circuit reveals a more clouded picture. Earlier this year, in *United States v. Coblentz*,[166] the court reiterated the single preponderance of evidence standard as controlling within the circuit and refused to apply any other test for the submission of a case to the jury. However, many Second Circuit cases do reflect an abandonment of the single test and an adoption of the majority rule,[167] while other decisions express doubt as to which standard should govern and, therefore, have applied both.[168]

The effect of *Taylor* will be to clear up the confusion within this circuit as to the standard of evidence necessary for submission of a criminal case to a jury. While it has been stated that proof of a defendant's guilt beyond a reasonable doubt is a basic proposition of our law, the evidentiary rule within this circuit has been clearly inconsistent with that concept.

> Leaving *Feinberg* on the books thus creates a trap for district judges, a paper sword for prosecutors, and an *unwarranted burden upon criminal defendants*.[169]

Having squarely confronted the problem, the *Taylor* court has removed the trap.

AIRPORT SEARCHES

United States v. Bell

In *United States v. Bell*[170] the Second Circuit faced the task of balancing the public danger posed by the current wave of airport hi-

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165 *Id.* at 244.

166 453 F.2d 503 (2d Cir.), *cert. denied*, 406 U.S. 917 (1972).

167 *See* note 160 *supra*. These cases suggest that a complete abandonment of the *Feinberg* rule had already been effected within this circuit. *Contra*, United States v. Coblentz, 453 F.2d 503 (2d Cir. 1972).

168 *See* United States v. Leitner, 202 F. Supp. 688 (S.D.N.Y. 1962), where the court found that "[the] test of sufficiency of the evidence for the jury in a criminal prosecution currently applicable within this circuit is not entirely free from doubt." *Id.* at 693. After a discussion of the authority in support of each rule, the court found its decision sustainable under either approach. In both United States v. Monica, 295 F.2d 400, 401 (2d Cir. 1961), *cert. denied*, 368 U.S. 953 (1962), and United States v. Iannelli, 461 F.2d 483, 486 n.4, (2d Cir. 1972), the court declined to decide which of the two standards to apply and proceeded to apply both.

Finding the level of proof established by the prosecution in these cases to be sufficient for the majority test enabled the courts to avoid the problem tackled in *Taylor*. However, the effect of these decisions was to invoke the majority approach without expressly overruling *Feinberg* since, in order to sustain a decision under both standards, the stricter majority test would have to be met. Having passed this test, approval under the *Feinberg* test would, of course, be automatic.

169 464 F.2d at 244 (emphasis added).

170 464 F.2d 667 (2d Cir. 1972).