

# The Burger Court Opinion Writing Database

*Lego v. Twomey*

404 U.S. 477 (1972)

Paul J. Wahlbeck, George Washington University

James F. Spriggs, II, Washington University

Forrest Maltzman, George Washington University



Supreme Court of the United States  
Washington, D. C. 20543  
December 22, 1971

CHAMBERS OF  
THE CHIEF JUSTICE

No. 70-5037 -- Lego v. Twomey

Dear Byron:

I agree with the proposed opinion that the trial judge need only find a confession voluntary by a preponderance of the evidence, and that there is no constitutional requirement that the jury be instructed that it may review the finding of voluntariness. However, there is language in the opinion intimating a restriction on the jury's role which I find troublesome. The opinion states,

A defendant has been as free since Jackson as he was before to familiarize a jury with circumstances which attend the taking of his confession, including facts bearing upon its voluntariness, when such circumstances are relevant to truth or falsity. (emphasis added).

I presume this means that there are some circumstances bearing on voluntariness which have no relevance to the truth or falsity of the recitals, and which can thus be excluded from jury consideration. I question this. In Rogers v. Richmond, 365 U.S. 534 (1961), the Court held that the determination as to the admissibility of a confession is not to be influenced by its probable truth or falsity.

Nothing in Rogers or subsequent cases stands for the converse proposition, that a jury's consideration of the truth or falsity of a confession is not to be influenced by its voluntariness. The Court has never retreated from the premise that there is a relationship between voluntariness and truth or falsity; it has simply refused to allow that relationship to inform the admissibility determination.

However, petitioner has not claimed that he was prevented from introducing evidence bearing on voluntariness in his attempt to undermine the weight to be given his confession. Therefore, I agree that the judgment should be affirmed.

There is yet another factor that I confess I had not considered and which was not referred to in briefs or arguments. Title 18 § 3501(a) provides

" . . . . If the trial judge determines that the confession was voluntarily made, it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances."

This statute probably needs some consideration even though it is not now before us, even if only to exhibit our awareness of its contents.

Regards,

W.E.B

Mr. Justice White

cc: The Conference

(6)

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

January 11, 1972

No. 70-5037 -- Lego v. Twomey

Dear Byron:

Please join me, subject of course to possibly  
setting this case for reargument if that is desired.

Regards,

W. B.

Mr. Justice White

Copies to the Conference

I realize this is set to  
come down this week  
but if anyone wants  
reargument, I'll so vote.

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM O. DOUGLAS

December 14, 1971

Dear Bill:

Please join me in your  
dissenting opinion in No. 70-5037 -  
Lego v. Twomey.

W  
W  
J  
William O. Douglas

Mr. Justice Brennan  
CC: The Conference

6  
27

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR. December 3, 1971

Memorandum to the Conference

No. 70-5037 - Lego v. Twomey

I shall prepare a dissent in the above  
for circulation in due course.

W. J. B. Jr.

✓  
F.M.  
Judge腿 had not  
acted on this. P.S. 60  
joined B.R.W. open.

Planned for 12/14/71

✓  
Mr. Justice Blackmun  
Mr. Justice Douglas  
Mr. Justice Harlan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Mr. Justice Brennan, J.

Argued Dec. 12-14-71

No. 70-5037

Don Richard Lego,  
Petitioner, } On Writ of Certiorari to the  
v. } United States Court of Appeals  
John Twomey, Warden. } for the Seventh Circuit.

[December —, 1971]

MR. JUSTICE BRENNAN, dissenting.

When the prosecution, state or federal, seeks to put in evidence an allegedly involuntary confession, its admissibility is determined by the command of the Fifth Amendment that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.” *Davis v. North Carolina*, 384 U. S. 737, 740 (1966); *Malloy v. Hogan*, 378 U. S. 1, 7-8 (1964); *Bram v. United States*, 168 U. S. 532, 542-543 (1897). This privilege against compulsory self-incrimination is the “essential mainstay” of our system of criminal prosecution. *Malloy v. Hogan*, *supra*, at 7, “a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth.” *Rogers v. Richmond*, 365 U. S. 534, 541 (1961). What is thereby protected from governmental invasion is, quite simply, “the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will.” *Malloy v. Hogan*, *supra*, at 8. Hence, a confession is involuntary and inadmissible unless it is “the product of a rational intellect and a free will.” *Blackburn v. Alabama*, 361 U. S. 199, 208 (1960); see *Reck v. Pate*, 367 U. S. 433, 440 (1961).

Ideally, of course, a defendant’s compelled utterance would never be admitted into evidence against him. As

3rd DRAFT

SUPREME COURT OF THE UNITED STATES.

No. 70-5037

To: The Chief Justice  
Mr. Justice Black  
Mr. Justice Douglas  
Mr. Justice Harlan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall ✓  
Mr. Justice Blackmun

Don Richard Lego,  
Petitioner.  
v.  
John Twomey, Warden.

From: Brennan, J.  
On Writ of Certiorari to the  
United States Court of Appeals  
for the Seventh Circuit.

[December —, 1971]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, dissenting.

When the prosecution, state or federal, seeks to put in evidence an allegedly involuntary confession, its admissibility is determined by the command of the Fifth Amendment that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.” *Davis v. North Carolina*, 384 U. S. 737, 740 (1966); *Malloy v. Hogan*, 378 U. S. 1, 7-8 (1964); *Bram v. United States*, 168 U. S. 532, 542-543 (1897). This privilege against compulsory self-incrimination is the “essential mainstay” of our system of criminal prosecution, *Malloy v. Hogan*, *supra*, at 7, “a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth,” *Rogers v. Richmond*, 365 U. S. 534, 541 (1961). What is thereby protected from governmental invasion is, quite simply, “the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will.” *Malloy v. Hogan*, *supra*, at 8. Hence, a confession is involuntary and inadmissible unless it is “the product of a rational intellect and a free will.” *Blackburn v. Alabama*, 361 U. S. 199, 208 (1960); see *Reck v. Pate*, 367 U. S. 433, 440 (1961).

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E

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

December 7, 1971

7  
No. 70-5038 - Lego v. Twomey  
✓ 5037

Dear Byron,

I am glad to join your opinion for  
the Court in this case.

Sincerely yours,

P.S.

Mr. Justice White

Copies to the Conference

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To: The Chief Justice  
Mr. Justice Black  
Mr. Justice Douglas  
Mr. Justice Harlan  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice Marshall  
Mr. Justice Blackmun

From: White, J.

1st DRAFT

Circulated: 12-2-71

SUPREME COURT OF THE UNITED STATES

Re-circulated: \_\_\_\_\_

No. 70-5037

Don Richard Lego,  
Petitioner, } On Writ of Certiorari to the  
v. United States Court of Appeals for the Seventh Circuit.  
John Twomey, Warden.

[December —, 1971]

MR. JUSTICE WHITE delivered the opinion of the Court.

In 1964, this Court held that a criminal defendant who challenges the voluntariness of a confession made to officials and sought to be used against him at his trial has a due process right to a reliable determination that the confession was in fact voluntarily given and not the outcome of coercion which the Constitution forbids. *Jackson v. Denno*, 378 U. S. 386 (1964). While our decision made plain that only voluntary confessions may be admitted at the trial of guilt or innocence, we did not then announce, or even suggest, that the factfinder at a coercion hearing need judge voluntariness with reference to an especially severe standard of proof. Nevertheless, since *Jackson*, state and federal courts have addressed themselves to the issue with a considerable variety of opinions.<sup>1</sup> We granted certiorari in this case to resolve the question. 401 U. S. 992 (1971).

<sup>1</sup> State courts which have considered the question since *Jackson* have adopted a variety of standards, most of them founded upon state law. Many have sanctioned a standard of proof less strict than beyond a reasonable doubt, including proof of voluntariness by a preponderance of the evidence or to the satisfaction of the court or proof of voluntariness in fact. *E. g., Duncan v. Alabama*, 278 Ala. 145, 176 So. 2d 840 (Ala. 1965); *State v. Dillon*, 93 Idaho 698, 471 P. 2d 533 (1970), cert. denied, 401 U. S. 942 (1971);

To: The Chief Justice  
Mr. Justice Black  
Mr. Justice Douglas  
Mr. Justice Harlan  
Mr. Justice Brennan  
Mr. Justice Stewart  
~~Mr. Justice Marshall~~  
Mr. Justice Blackmun

From: White, J.

2nd DRAFT

Circulated: \_\_\_\_\_

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SUPREME COURT OF THE UNITED STATES

No. 70-5037

Don Richard Lego,  
Petitioner,  
v.  
John Twomey, Warden. } On Writ of Certiorari to the  
United States Court of Appeals for the Seventh Circuit.

[December —, 1971]

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To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
~~Mr. Justice Marshall~~  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

From: White, J.

3rd DRAFT

Circulated:

Recirculated: 12-27-1

No. 70-5037

Don Richard Lego,  
Petitioner,  
v.  
John Twomey, Warden. } On Writ of Certiorari to the  
United States Court of Appeals for the Seventh Circuit.

[December —, 1971]

MR. JUSTICE WHITE delivered the opinion of the Court.

In 1964, this Court held that a criminal defendant who challenges the voluntariness of a confession made to officials and sought to be used against him at his trial has a due process right to a reliable determination that the confession was in fact voluntarily given and not the outcome of coercion which the Constitution forbids. *Jackson v. Denno*, 378 U. S. 368 (1964). While our decision made plain that only voluntary confessions may be admitted at the trial of guilt or innocence, we did not then announce, or even suggest, that the factfinder at a coercion hearing need judge voluntariness with reference to an especially severe standard of proof. Nevertheless, since *Jackson*, state and federal courts have addressed themselves to the issue with a considerable variety of opinions.<sup>1</sup> We granted certiorari in this case to resolve the question. 401 U. S. 992 (1971).

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

January 20, 1972

MEMORANDUM TO THE CONFERENCE

Re: No. 70-5072 - Harper & Holmes v. Illinois

This case was held for No. 70-5037,  
Lego v. Twomey. Insofar as the Lego issue is  
implicated, I would deny.

B.R.W.

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

December 14, 1971

Re: No. 70-5037 - *Lego v. Twomey*

Dear Bill:

Please join me in  
your dissent.

Sincerely,

  
T.M.

Mr. Justice Brennan

cc: The Conference

③ 11  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

December 15, 1971

Re: No. 70-5037 - Lego v. Twomey, Warden

Dear Byron:

Please join me.

Sincerely,

H. A. B.

Mr. Justice White

cc: The Conference