

A state statute provides as follows: "In all criminal cases, whenever the U.S. Constitution permits, the burden of proof as to a defense claimed by the defendant shall rest on the defendant, and the magnitude of the burden shall be as great as the Constitution permits."

The same state defines the crime of forcible rape as follows: "Forcible rape consists of sexual penetration inflicted on an unconsenting person by means of force or violence. Consent of the victim is a complete defense to a charge of rape."

At a defendant's trial for forcible rape, he testified that the alleged victim had consented to having sexual intercourse with him.

How should the trial judge instruct the jury regarding the burden of proof on the issue of consent?

- A. The defendant must prove by a preponderance of the evidence that the victim consented.
- B. The defendant must prove by clear and convincing evidence that the victim consented.
- C. The defendant must prove beyond a reasonable doubt that the victim consented.
- D. The prosecution must prove beyond a reasonable doubt that the victim did not consent.

### **Explanation:**

**Due process** requires that the **government prove every element** of a criminal offense **beyond a reasonable doubt**. Therefore, even when the defendant asserts a **defense that negates an element** of the crime (eg, lack of intent, alibi), the **burden of proof must remain on the prosecution** to prove that element—it cannot be placed on the defendant. Since a jury instruction must reflect this constitutional requirement, an instruction violates due process if it places the burden on the defendant to prove any element of the crime.

In this state, forcible rape requires proof that: (1) sexual penetration occurred, (2) the victim did not consent, and (3) the defendant used force or violence. Since the defendant testified that the alleged victim consented to having sexual intercourse, he is asserting a defense (consent) that negates the second element of the crime (no consent). Therefore, to comply with due process, the judge should instruct the jury that the prosecution must prove beyond a reasonable doubt that the victim did not consent.

**(Choices A, B, & C)** Since consent is a defense that challenges an element of the crime, the prosecution must bear the burden of proving that element (and disproving that defense) beyond a reasonable doubt. But had the defendant raised an *affirmative defense*—ie, a defense that justifies or excuses criminal conduct but does not negate an element of the crime—he could have been required to prove that defense under any evidentiary standard (eg, preponderance of the evidence, clear and convincing evidence, beyond a reasonable doubt).

### **Educational objective:**

Due process requires that the prosecution prove every element of a criminal offense beyond a reasonable doubt to convict a defendant—even when the defendant asserts a defense that negates an element of the crime.

### **References**

U.S. Const. amend. XIV § 1 (due process clause applied to the states).

*Patterson v. New York*, 432 U.S. 197, 210 (1977) (explaining that the prosecution must prove every element of a crime beyond a reasonable doubt).

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## Burden of proof hierarchy

