In the

Supreme Court of the United States

GARRELL S. MULLANEY, et al.,

Petitioners,

v. No. 74-13

STILLMAN E. WILBUR, JR.,

Respondent.

Washington, D. C.
January 15, 1975

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Wednesday, January 15, 1975.

The above-entitled matter came on for argument at 1:22 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

VERNON L. AREY, ESQ., Assistant Attorney General of Maine, State House, Augusta, Maine 04330; on behalf of the Petitioners.

PETER J. RUBIN, ESQ., Bernstein, Shur, Sawyer & Nelson, One Monument Square, Portland, Maine 04111; on behalf of the Respondent.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in Mullaney against Wilbur, 74-13.

You may proceed whenever you're ready, Mr. Arey. Do you pronounce it "r-e" or "air-e"?

MR. AREY: "Air-e", Your Honor.

MR. CHIEF JUSTICE BURGER: "Air-e"; all right.

ORAL ARGUMENT OF VERNON I. AREY, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. AREY: Mr. Chief Justice, and may it please the Court:

My name is Vernon Arey, and I represent the petitioners in the instant case: Warden Garrell S. Mullaney of the Maine State Prison, and the State of Maine.

The facts of this case are briefly as follows:

At the trial of the State's case against the respondent in this case -- whom I shall refer to throughout my discussion as the defendant, since he appeared in that posture below, and I refer to him as such in my brief -- the State of Maine alleged that Mr. Wilbur had inflicted such severe injuries upon the victim, Claude Hebert, with his fists and a blunt instrument that Mr. Hebert died shortly after receiving this beating.

The theory of the defense was that though this beating had been inflicted, the actions had been generated

by the heat of passion on sudden provocation, because of an indecent homosexual overture made by Mr. Hebert.

The jury rejected this contention and convicted the defendant of murder.

QUESTION: Well, you can hardly call that a contention in the traditional sense, can you, since he didn't take the stand, and it got into the record sort of backward, didn't it?

MR. AREY: Well, Your Honor, I think that depends upon that tactics of counsel. Counsel, whether wisely or unwisely, apparently made the decision that he did not have to place the defendant on the stand, and chose to do it through failure to object to the entrance into evidence of the statements of the defendant as to what happened at that time, and then relied upon his opening argument to point out to the jury how he had felt he had met his burden as it was imposed by the State of Maine.

After a complex procedural history, which need not concern us here, the defendant in 1971 appealed this case to the Maine Supreme Judicial Court.

Essentially he argued at that time, and in substance, that the Presiding Justice at his trial had committed error when it charged that once the State had proven beyond a reasonable doubt an intentional and an unlawful killing, that malice aforethought would be presumed, and that the burden

would be on the defendant to mitigate the crime thus proved to manslaughter of the voluntary type, unless he, the defendant, established by a preponderance of the evidence that the crime was committed upon heat of passion upon sudden adequate provocation.

This has generated essentially one issue in this case, and that issue is:

Whether, in placing the burden upon the defendant to show, even by a preponderance of the evidence, the absence of malice aforethought, the Court has denied the defendant in this case due process of law under the rationale of In re Winship.

The Maine Court rejected any possible Winship violation on two essential grounds:

First, it recognized that the Maine law establishes as part of its fundamental system the single generic concept of felonious homicide; and that once a felonious homicide is proved, criminality is established.

But more than that in this case, and when I get to the law of felonious homicide I will again be emphasizing this, the Maine law requires not only the mere establishment of a felonious homicide with its constitutent elements to erect the presumption of malice, but a felonious homicide of a particular type. And that is a felonious homicide which is either intentional or which is characterized by acts which,

when objectively evaluated, have a very high death-producing potential.

If those are proved, the State of Maine establishes as its policy, the crime is murder, definitionally proved.

The process by which we define this is called the presumption of malice.

The Maine Court in Wilbur traced the history of the single generic concept of felonious homicide, as it has existed in Maine for a hundred years, and said:

In viewing Winship, we find that the case of In re Winship is confined to its facts, which essentially is talking about elements of criminality. When we are making the decision in the first instant, whether it be to brand a juvenile with the label of delinquent, or a man with the label of criminal, that different factors are involved in making a determination as to what due process means, given that context.

In Maine, we are not doing this in the first instance, we are making a determination as to what the appropriate penalty shall be for a felonious homicide.

QUESTION: Mr. Arey, am I correct, your statute doesn't speak in so many words, "a felonious homicide"?

MR. AREY: That is correct, Your Honor. And, as far as I know, the statutes of Maine have never spoken of felonious homicide.

But tracing through the history of this case, I think it will become clear that this is deemed of no significance by the court, and has been acquiesced in by the First Circuit Court of Appeals in its decision.

The second ground that the Maine Law Court denied the defendant's appeal on was essentially that the case of Winship, even if extended, in the view of the Maine Court, would not be retroactive. And of course it's conceded by all that that is not the case, the case of In re Winship has been made retroactive by Ivan V. v. City of New York.

The defendant in this case then petitioned the District Court for the Southern Division of the District of Maine -- petitioned for a writ of habeas corpus, alleging the same material that he has alleged here, and we are arguing about before this Court, that he argued before the Maine Law court.

Petition was granted with reference to that one issue. The opinion and order of the honorable Justice Gignoux being that there is no such thing in the State of Maine, as the crime of felonious homicide, that the Maine statutes do not speak of the crime of felonious homicide, and that the State of Maine is, in effect, misapplying its own law.

The State timely appealed from that decision of the District Court, and went to the First Circuit Court of Appeals in Boston.

Pending the State's appeal to the First Circuit Court in Boston, the State case of State v. Rollins, which is found at 295 A. 2nd 914, and is cited in the brief, is an important case in establishing what the concept of felonious homicide is in Maine, was decided by the lower court. It fully reaffirms the principles which were announced by Justice Webber in the original decision in Mr. Wilbur's appeal to that Court.

The case was briefed and argued before the First Circuit, and the decision of the District Court was affirmed.

The State of Maine then petitioned this honorable Court for a writ of certiorari. During the pendency of the writ of certiorari, the case of State v. Lafferty was decided by the Maine Law Court.

And State v. Lafferty is found at 309 A.2d 647. And the case of State v. Lafferty expressly rejected the right of either the First Circuit Court of Appeals or of the Federal District Court to indicate and dictate to the State of Maine what its law was, and that the State of Maine was proper in deciding its law; and went on further to reaffirm the principle of the concept of felonious homicide as announced in the original Wilbur decision.

This Court granted petition for writ of certiorari, summarily vacated the First Circuit decision, remanded the case to the First Circuit Court in Boston for a consideration

in light of the case of State v. Lafferty.

Upon reconsideration, we finally were postured with the position of the case, as it is before this honorable Court today. Because on remand the First Circuit acceded to the fact that the law of Maine recognized the concept of a single generic offense within which the penalty category designations of murder and manslaughter operated, not as elements of criminality but as elements of factors bearing upon the punishment of an individual who has had the determination made beyond a reasonable doubt that he is a criminal.

However, the Court went on, despite this fact, the case of In re Winship, as it is announced as a matter of policy, should apply to this situation because of the potential stigma which an individual faces when he is faced with the difference between life imprisonment and twenty years for manslaughter, or the possibility of probation; and the possibility of the man's loss of liberty is as great, in a situation where you are determining punishment as it is when you are making the decision in the first instance of criminality.

The State respectfully suggests that that is an unwarranted extension of the case of In re Winship, beyond the facts and limitations to which it spoke.

The State further suggests that in the instant -- that there are cases in this Court which have indicated,

and which are relied upon by the State of Maine in the original Wilbur decision, that factors bearing upon punishment have been treated differently. And we ask ourselves, why? And as we go through the concept of felonious homicide, I hope that I can explain that to the Court.

It is critical that this Court understand what the State of Maine is talking about when it talks about the concept of a single generic offense, as it is designated in the common law of the State of Maine.

Essentially, the concept is: there is one generic offense: an unlawful or felonious homicide.

And that this unlawful or felonious homicide consists of degrees, and that these degrees consist of murder and manslaughter. Manslaughter being again divided into two degrees: common law manslaughter and voluntary manslaughter.

And these degrees are nothing more, nor less, than punishment categories which society has designated in advance for actions which have certain results attributed to them.

Now, what are the elements of felonious homicide? The elements --

QUESTION: Do you have any other crime in Maine, Mr. Arey, where this is also true?

MR. AREY: The single generic concept, Your Honor? Yes, I believe arguably in the situation of assault, that assault is recognized as the underlying crime, and the element of high/aggravation is recognized as only going to punishment. High/aggravation is not recognized as being a criminal element.

Now, the State of Maine does require that the element of high/aggravation be decided by a jury, and it also requires that it be decided beyond a reasonable doubt.

I am not sure that that decision would come about the same way, nor am I sure that the Ferris case, and that's the case I'm referring to, is analogous to this one.

And why do I say that?

I say that because there is no middle ground in assault by which we're going to put any burden upon the defendant to disprove or prove anything.

There is either simple assault, which is the criminal act in itself, or the element of high in aggravation.

There is no middle ground by which it can drop back into. In other words, if, in the State of Maine, there were only manslaughter and murder, you would have an analogous situation, there would be no reason for a presumption, because there is nothing to mitigate.

You're talking about either criminality or non-criminality, the minute you drop back to the lower designation.

Secondly, I would argue that on the facts of the case, as we posture it, on felonious homicide, punishable as murder, the case is proven beyond a reasonable doubt. Because, unlike the original common law presumption, which required only the showing of an unlawful killing, and which required the defendant to establish factors in excuse and justification, as well as in palliation, the Maine presumption does not arise until the State has proven an intentional and an unlawful killing, and the definition of "unlawful" is a killing which is not justified nor excused. The State bearing the burden upon the factors or criminality, the defendant bearing the burden only upon the elements of palliation.

Now, the elements of felonious homicide in the first instance are that the victim is dead, and it must be proven beyond a reasonable doubt.

Second, that the defendant killed the victim.

Third, that the killing was voluntary; that is, that it was an act of his will.

And lastly, that the killing is unlawful; that is, that it's not justified nor excused.

Felonious homicide, punishable as murder, has precisely the same four elements, with one additional; and that is, that the killing, in addition to all these other things, be intentional.

If that is the case, the law of Maine says that constitutes murder in the law, by definition. The process by which we do this is a presumption, so-called presumption of malice.

Malice --

QUESTION: Mr. Arey, as I understand, one of your opponent's contentions is that taking the Maine Court at its word as to -- and your explanation of how the criminal statute is to be construed, and perhaps conceding, for the sake of argument, that if that had taken place in this case there would be no violation of Winship, that the trial judge did charge the jury at that place, I guess page 40 of the Appendix, where he says:

"The words 'malice aforethought' are most important, because malice aforethought is an essential and indispensable element of the crime of murder."

Is that an inconsistency between the trial judge's treatment of the case the Supreme Court of Maine's treatment?

MR. AREY: To the extent that it says that, I would have to say yes. There is no question, Your Honor, but what this is not the best charge for which -- that we wish to be -- I would point out, however, that when we talk about crimes, even when we are known to be talking about degrees, we sometimes use the word "crime".

For example, we speak about the crime of first-degree

murder, and yet we know that first-degree murder is nothing more than a degree of a crime, to wit: murder.

I would suggest that the language of the Court, if read in context -- the context within which the charge is given, fairly supports the rationale of the Maine Law Court as announced in Wilbur, Rollins, and Lafferty.

I would suggest that you do not start in the middle of the charge, where the judge is talking about palliation and ass-ming that the State has proven an intentional and unlawful killing, but that you start at the beginning of the charge and read it from beginning to end, given all of the assumptions, that must come from what is fairly read in the charge.

I further would cite the fact that not only did the Maine Lawyer Court say precisely that this is what they had done, and, according to the language of Justice Webber in the original Wilbur appeal, the quoted instruction was predicated by the Court -- and this is the instruction about the use of the language to which Your Honor is referring; language which is inconsistent, perhaps, with the position of the Maine Law Court.

The quoted instruction was predicated by the Court upon the assumption that the jury had first been satisfied -- and Your Honors will find this language on page 85 of the printed Appendix; and I'm sorry I didn't direct your attention

to that --"that the jury had first been satisfied that the State had proven a voluntary and an intentional killing beyond a reasonable doubt."

That is the assumption that has been throughout this case at the time that the judge is talking about mitigation. It's not only the assumption of the Maine Law Court, it's the assumption of the Federal District Court in its opinion, first opinion, and it's the decision of the First Circuit after the remand of State v. Lafferty: that the jury had first been instructed that there was an intentional and an unlawful killing proved beyond a reasonable doubt before the presumption arose.

Now, malice aforethought, as Maine views it, as I have indicated, is nothing more than a term of art, having no independent meaning of viability apart from the context out of which it arose, and that is that felonious homicides which are intentional shall have attributed to them the highest degree of blame when it's for punishment purposes. For, in the game, we call this policy the so-called presumption of malice.

Now, what is voluntary manslaughter within the concept of felonious homicide?

The punishment category of voluntary manslaughter has precisely the same elements that murder does, an intentional and unlawful killing; but the unlawful killing

must have been generated by heat of passion on sudden, adequate provocation.

It constitutes nothing more than a mitigating factor to the charge of felonious homicide punishable as murder.

To explain this further, in a charge for manslaughter, the State would not necessarily bear the burden on the issue of heat of passion on sudden, adequate provocation.

QUESTION: Well, I take it that it can't be both, that if there is premediated -- if there is provocation, it can't be murder?

MR. AREY: That's correct. And the reason it cannot be, Your Honor, is because --

QUESTION: And so that -- so that if there is provocation, you cannot find a felonious -- a murder, you can't find murder?

MR. AREY: You cannot find a murder.

QUESTION: You cannot find whatever element it is that makes it murder. What is it?

MR. AREY: That is the --

QUESTION: Malice aforethought.

MR. AREY: -- aspect of the maliciousness, yes. To that extent, what we are talking is merely a matter of mitigation. We're saying, as a matter of policy we're going to say that this particular crime will be punished. How

will it be punished? It will be punished by whatever the penalty is for murder, but if you can convince us that, in spite of the fact that it is intentional and in spite of the fact that it's unlawful, it should be punished as manslaughter, by establishing --

QUESTION: Well, let's assume you as a juryman, sitting in the jury, and you thought the evidence on provocation was absolutely evenly balanced, and you thought that, Well, I've been instructed not to find this man guilty of murder, except beyond a reasonable doubt, unless I'm convinced beyond a reasonable doubt. But under these instructions, apparently I can't let this evenly balanced evidence on provocation create a reasonable doubt in my mind, because the defendant has the burden of proof to convince me by a preponderance.

MR. AREY: That's correct. That's precisely the way it works.

QUESTION: Well, --

MR. AREY: And the reason we say that that is --

QUESTION: Well, isn't that a fairly -- isn't arguably that's an -- isn't that an invasion of the reasonable doubt standard? Wouldn't you say that if the evidence is evenly balanced on provocation, but if it were proved beyond -- by a preponderance, that he wouldn't be guilty of murder?

Wouldn't you say evenly balanced evidence would create

a reasonable -- should create a reasonable doubt?

MR. AREY: I would say no to that -- I'd say yes, evenly balanced evidence creates a reasonable doubt. But when you're talking within the concept of a punishment category, instead of the concept as to whether or not the verdict is going to be guilty or not guilty --

QUESTION: No, but you still have to find him guilty of murder.

MR. AREY: And you do that quite apart from the fact that he still has to fashion --

QUESTION: Yes, but the jury still brings in a verdict: guilty of murder.

MR. AREY: That's correct.

QUESTION: But -- and the juryman says to himself, though, "If I could have let this evidence on provocation, which was evenly balanced, create a reasonable doubt, I would have found him innocent."

MR. AREY: Would have --

QUESTION: Of murder; of murder.

MR. AREY: Okay. He would not have punished it as murder. So there isn't --

QUESTION: Well, he would have found him innocent -- he would have found him innocent of murder.

What does a jury -- what does the verdict look like when it comes in, if the jury accepts the -- and finds him

guilty of a -- of a -- of a homicide --

MR. AREY: Of manslaughter?

QUESTION: Of manslaughter.

MR. AREY: It's "guilty of manslaughter".

QUESTION: And what about -- is it "not guilty of murder" or not?

MR. AREY: No. It's just "guilty of manslaughter".

QUESTION: But I suppose you could never try him for murder again?

MR. AREY: Pardon?

QUESTION: I suppose you could never try him for murder again?

MR. AREY: No, you could not.

QUESTION: So it's implied that they found him innocent of murder?

MR. AREY: As far as double jeopardy provisions are concerned, yes.

QUESTION: What do they give them? Three forms of verdict: guilty of murder; guilty of manslaughter; and not guilty?

MR. AREY: Depends upon what the evidence in the case shows. If the -- if, in fact, the issue of voluntary manslaughter is in the case, the verdict form would be: guilty of murder; guilty of manslaughter; not guilty.

QUESTION: What about this case? Were there three

forms submitted?

MR. AREY: That's correct: murder; manslaughter; not guilty.

Now, it must be remembered that again that we're talking about an intention and an unlawful killing. And therefore the only branch of felonious homicide punishable as manslaughter which was given to the jury was voluntary manslaughter. There does exist a felonious homicide which is involuntary manslaughter, and that is essentially, speaking in terms of what it takes to arrive at criminality, bears the same elements as we have in discussing what a felonious homicide is in the first instance.

If the State proves a mere unlawful homicide, and does not carry the burden of proof beyond a reasonable doubt as to intent, then the verdict could very properly be guilty of involuntary manslaughter.

QUESTION: Which is simply an unlawful killing?

MR. AREY: An unlawful killing.

QUESTION: Right.

MR. AREY: Nothing more.

QUESTION: But the jury is never given a verdict form that talks about felonious homicide, is it? In any case.

MR. AREY: No, it is not, Your Honor. No, it is not. That is not to say the jury could not be, it is simply to say that --

QUESTION: It's not the practice.

MR. AREY: And I think the reason for it is because it's easier to talk to a jury and have them comprehend in traditional terms, such as you and I talk about the crime, perhaps, of first-degree murder, knowing full well that murder is divided into first and second degree is really one crime: murder.

QUESTION: But in those traditional terms, coming down to that common-sense language, this charge put upon the defendant the burden of proof.

MR. AREY: We maintain that it did not. We maintain it put the burden of proof upon him to reduce the crime from murder to manslaughter. And we say that because the presence or absence of heat of passion on sudden, adequate provocation is irrelevant to an establishment of murder, either as a punishment category -- as a punishment category, and it's also irrelevant to the establishment of a crime.

Whether heat of passion is present or absent in the case has no bearing whatsoever on whether the crime is lawful or unlawful in the first instance, and whether it will be punished as murder or manslaughter in the first instance when the jury is viewing the evidence that has been presented by the State's case.

QUESTION: Mr. Arey, I could understand that better if this were a bifurgated trial, but this is all one trial.

MR. AREY: That's correct.

QUESTION: And the judge had to sort all of this out.

MR. AREY: That's correct, Your Honor. Much the same as they have to sort out the dimension of --

QUESTION: And in the sorting out, in a criminal trial, there is a burden of preponderance of evidence.

MR. AREY: That's correct, Your Honor.

QUESTION: And that doesn't get you in any trouble?

MR. AREY: We say no. And we say no, first of all, because the case of In re Winship has been defined, as we see it, as bearing upon punishment elements; and, second, even if the same crimes could be said to accrue, at the time that the jury is considering the question as to whether or not to mitigate the homicide we are no longer dealing with a man who is innocent in the eyes of the law, and who is no longer shielded and protected by the presumption of innocence, because we have a man whom the jury had to find, by definttion, committed an intentional and an unlawful killing of another human being, in a State which has defined those actions as constituting murder.

QUESTION: You're saying, then, in effect, this element is like the defense of insanity in Leland v. Oregon, where it --

MR. AREY: Precisely. That the same analysis could apply.

And that we're dealing with the matter of definition of the State's internal law, as to what does or what does not constitute a crime, and that the facts of this case, as it is viewed by the Maine Law Court, does not come out -- that due process is not violated.

We are not saying that fairness doesn't apply, we're not saying that some of the same harms may not flow; but we're saying you view due process differently when you're dealing with a man who is guilty and who has been found to be guilty beyond a reasonable doubt, than you do a man with whom you are taking in and trying to make a determination in the first instance, that --

QUESTION: The jury is doing all of this at one time!

MR. AREY: Yes, Your Honor, and the jury --

QUESTION: In one room, and you think that the jury first goes through this part about he's guilty of a felonious murder, and then will get to the sentencing part.

I submit that you don't know what that jury does.

MR. AREY: Well, we --

QUESTION: And that jury could very well be all fouled up between where we use preponderance and where we use reasonable doubt.

MR. AREY: That was discussed in Leland --

QUESTION: And they certainly will get confused.

MR. AREY: That was discussed in Leland vs. Oregon, Your Honor, and I think the assumption has to be that juries follow the instructions that we give them, that juries have been given conflicting burdens in criminal cases for years, and have managed to --

QUESTION: Well, I was talking about preponderance as a reasonable doubt. Those are so far apart. And when I, as a juror, am thinking: Well, I don't know whether I'm thinking of preponderance or reasonable doubt on this; I don't know.

MR. AREY: Well, that -- the determination of what proof was beyond a reasonable doubt is defined. The burden that deals with the preponderance of the evidence is defined. And when we tell the jury that he has to bear the burden of the defense, in some States, of insanity, or the defense, in some States, of what constitutes self-defense by a preponderance; we have different burdens given on different issues in jury trials all the time.

QUESTION: But then you don't even infer that he's innocent of murder, though. I mean, that --

MR. AREY: Not after we've proven an intention or an unlawful killing, --

QUESTION: Yeah, --

MR. AREY: -- because that, definitionally, is --

QUESTION: -- but I would have supposed -- I suppose you really ought to answer that the jury, when it finds a defendant guilty of manslaughter, doesn't not find him innocent of murder?

Or that they find --

MR. AREY: They do not find him innocent in the criminal sense, Your Honor. He has committed exactly the same acts.

QUESTION: And I would think you should say he could be put back on trial for the --

MR. AREY: Because as a matter of --

QUESTION: -- for the same offense.

MR. AREY: The fact that we say that if the jury in fact finds him guilty of manslaughter, that the State, as a matter of simple -- call it procedural fairness of due process, without any reference to double jeopardy concepts, will not allow the State to retry him for murder.

And that analysis would follow.

Now, this is not a unique --

QUESTION: Well, if the jury finds him -- would you -- the two elements of murder, the way you say, are just an intentional killing, a death --

MR. AREY: Unlawful.

QUESTION: -- an intentional.

MR. AREY: Right.

QUESTION: Now, when the jury finds -- in a trial like this, finds him guilty of manslaughter.

MR. AREY: Intentionality remains, --

QUESTION: Yes.

MR. AREY: -- unlawfulness remains, everything remains under the law --

QUESTION: So you say the jury has found him guilty of --

MR. AREY: Everything --

QUESTION: -- those two elements beyond a reasonable doubt?

MR. AREY: Right. That's correct. Everything necessary to convict him for murder.

But the law, as a matter of policy, will say --

QUESTION: Well, then you ought to be able to try him again for it. If it were reversed on appeal, for some error.

MR. AREY: Well, that may be so. But I would maintain that we probably could not, under the Maine law. Because we could say as a matter of fairness, it's --

QUESTION: Do you really, under Maine law?

MR. AREY: -- it's not fair for the State --

QUESTION: Under the Maine law of double jeopardy?

MR. AREY: Under the Maine law of what constitutes

fairness.

Now, the issue has never been presented.

QUESTION: Well, that would only be because they found him innocent once of murder.

MR. AREY: If it could not be.

Now, this is not a unique approach. I would invite the Court's attention to the statutory scheme of the States of Oregon, Louisiana, the proposed Criminal Code in Michigan, and,most notably, the State of New York, which, to our view, treats the proposition exactly the same as we do. They define and take the concept of a single generic offense, they define what they mean by murder and manslaughter, and they say specifically, in talking about murder, that when a person causes the death of another with the intent to cause the death of another person, but he maintains that he does not commit murder because he acted under the influence of extreme emotional disturbance, this constitutes a mitigating circumstance reducing murder to manslaughter in the first degree.

However, this need not be proved by the prosecution, initiated by the prosecution in any prosecution initiated under the manslaughter provision.

QUESTION: Well, this is still different from Maine. New York had Murder I, Murder II -- you have about four of them up there.

MR. AREY: I mean, I'm just citing that for the proposition that the concept of felonious homicide and of voluntary manslaughter as being only a mitigating factor, it's not unique.

Thank you.

QUESTION: The other States were Oregon, Louisiana, and proposed in Michigan; is that it?

MR. AREY: I believe they are proposed in Michigan, the ALI Model Penal Code; they're all in my brief, Your Honor.

QUESTION: Right.

QUESTION: Well, don't almost -- don't a large majority of the States, when you're talking not about mitigation but about self-defense, put the burden on the defendant to prove justification in that sense?

MR. AREY: A great number do, but Maine does not, and that's why we say we're consistent with the theory, because self-defense goes to criminality. We require the State to negative.

Thank you.

QUESTION: In all States it's an affirmative offense.

MR. AREY: I'm not sure it's in most, but I know in a great many, Your Honor.

QUESTION: Which just goes, again, to the question of guilt or innocence.

MR. AREY: That's correct, Your Honor.

As they view it. We don't view it -- we don't view heat of passion on sudden provocation is going to guilt or innocence; we do self-defense.

QUESTION: Unh-hunh.

QUESTION: But your point on that is that this Court has approved,Oregon specifically, submitting to the jury two different elements of the case, I won't say of the crime, of the case; two different standards: one, beyond a reasonable doubt; and one by preponderance of the evidence.

MR. AREY: No, I can't say that. I wouldn't -- Oregon has not done that. Leland -- the problem in Leland was that the defendant had to bear the burden beyond a reasonable doubt.

QUESTION: Well, but they changed the statute right after Leland.

MR. AREY: Subsequently, yes.

QUESTION: Yes. The statute today in Oregon is exactly the way you postulate the Maine law, they must treat it as --

MR. AREY: Right. I;m not sure that their analysis is the same, Your Honor; but clearly the burdens are.

QUESTION: I suppose you -- you really should, I would think, say that Maine could also put the burden on the prosecution to prove the absence of provocation by a preponder-

ance of the evidence?

MR. AREY: I suppose that under the theory the State could do that. Because the absence -- presence or absence of heat of passion is not an element of anything.

QUESTION: Except for -- just for penalty, you say?

MR. AREY: For penalty.

QUESTION: Yeah. Unh-hunh.

MR. AREY: Thank you.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Arey.

Mr. Rubin.

ORAL ARGUMENT OF PETER J. RUBIN, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. RUBIN: Mr. Chief Justice, and may it please the Court:

My name is Peter Rubin, and I represent the respondent in this matter.

The first issue which I would like to discuss relates to the history in Maine of this concept of felonious homicide.

As Mr. Arey pointed out, the District Court did reject that concept, and the First Circuit Court of Appeals, in its first decision, also rejected that concept; the Maine Court then came forward with some subsequent decisions in which it delineated the rationale behind that particular concept.

However, I would submit to this Court that the concept has no basis in the history of Maine, that the -- in Maine, the crimes have always been murder and manslaughter. The cases support it, the State refers to one case, State v. Conley, which talks about, in terms of double jeopardy, the underlying felony being the same.

But even in the context of that case, the Court refers to the crime of murder and the crime of manslaughter, the statutes refer to murder and manslaughter, they don't refer to felonious homicide. And although, perhaps ordinarily, it is true that a federal court is bound to accept the law of the State as it is enunciated by that State, I think that this interpretation -- and perhaps one reason that the charge here is so much in conflict with the concept of felonious homicide is that the charge itself does reflect accurately the law in Maine as it had been given by numerous judges in the past; and then the Maine Law Court came forward with its new concept of felonious homicide, and that's why the conflicts appear, I believe, between the trial judge's charge and the concepts in Lafferty and Rollins.

I think a review of the common law of other States also will show that there is no other State which has ever developed this concept of felonious homicide being the underlying single crime at common law.

And that other States recognize the crime of murder

and manslaughter to be separate and distinct crimes.

QUESTION: Well, are you saying that the State of Maine cannot construe its own law in that way?

MR. RUBIN: I -- certainly the State of Maine could construe its law that way, I think, perhaps prospectively. I'm not sure that in the context of this case, where, I believe, historically the law of Maine was never -- never utilized this concept of felonious homicide, that it would be proper to do it in the context of this case and cases prior to this case.

No, I don't take the position that the State of Maine couldn't do it for the future.

I just don't think there's any support in the Maine law for it. I think that on that basis the First Circuit and Judge Gignoux were correct, First Circuit the first time around, and Judge Gignoux in his opinion, that a federal court should not be bound to accept the law of Maine in this context, but should be free to examine the law itself and to come to a conclusion that malice aforethought is an essential element of the crime.

State v. Merry, in 1936, said that malice aforethought is an essential element, and that it's a fact.

But getting to --

QUESTION: Well, the courts you won in below have really repudiated that type of analysis now, haven't they?

MR. RUBIN: Judge Gignoux never has, because he's probably never been given the opportunity to.

QUESTION: Never had a chance, did he!

MR. RUBIN: The First Circuit, yes, but I don't read anything in that second decision, which says: we now agree with the Maine court if we were free to interpret the law. I think the First Circuit came to the conclusion, after the remand by this Court, that it should accept the Maine law as enunciated, and go from there to the merits of the issue.

But I don't read anything in the second First Circuit decision, which says: In re-reading Maine law, we now agree that the Maine Court's interpretation is correct, if we were free to interpret the law ourself.

QUESTION: Do you read anything in the remand of this Court?

MR. RUBIN: Well, I took the position with the First Circuit that all the remand said was reconsideration -- I'm sorry, further consideration. It did not say reconsideration.

And I took the position that there was a distinction there, that this Court was remanding it because an intervening case had come down, and that it wanted to give the First Circuit an opportunity to review its decision in light of that intervening decision.

Obviously the First Circuit did not accept that

argument, and went on to decide the case on the merits rather than sticking to its original decision, as to its obligation to accept the law of Maine as enunciated by the Maine Court.

The concept of malice aforethought itself, let's assume for a moment there is -- there was and always has been a concept of felonious homicide in Maine; there is absolutely no support for the proposition that malice aforethought is not a fact. Even in State v. Conley, which is again the case, the major case, on which the State relies, the Court said: the State must affirmatively show malice aforethought.

It talks about it as if it were a fact.

So that if, even accepting the concept of felonious homicide, malice aforethought itself is not a public policy statement; never has been in Maine, it's always been a fact which the State -- which has been one of the elements for the State to prove, which they have traditionally proved by a presumption.

I think there's ample evidence here, historically in the law of Maine, which is directly inconsistent with this concept. I don't believe that a federal court should be foreclosed from protecting the Federal Constitution in a case, merely because a State Court comes up with an interpretation which is new and sudden. And I recognize that this is not identical to the Bouie case, in terms of the situation

there, in that there was prejudice to the defendant when he went into the -- and sat down at the counter, he wasn't -- didn't have notice of the charges.

But, nevertheless, if, in this charge, the whole trial proceeded on the basis of malice aforethought was an essential element and was a fact, and then the Maine Court came forward with its interpretation which removes that.

QUESTION: Not as a fact, Mr. Rubin, as an essential element?

MR. RUBIN: Yes.

QUESTION: Yes.

MR. RUBIN: Yes. And the Maine Court then removes that constitutional issue by the way it defines its law, and then if this Court is foreclosed from -- or has to accept that interpretation, we have -- or Mr. Wilbur has been deprived of his right by fiat, almost, in terms of the interpretation.

QUESTION: In response to a question from Mr. Justice White, Mr. Arey said that if there was provocation shown, then there could never be a murder. At least that's the way I understood him.

Now, does Maine law not recognize that there can be what we call an over-reaction, that is, that the response to the provocation was more than an unjustified, more than necessary, and unjustified?

MR. RUBIN: It has to be -- yes, I think it has to be a reasonable response to the provocation.

QUESTION: Suppose there was a provocation, and the man provoked, who is on trial, is shown then to have gone back into his house and got a shotgun and come outand shot the provoking party dead?

Now, could that not be murder in Maine?

MR. RUBIN: I believe, on the facts, that it could be.

QUESTION: On that, the ones I've postulated?

MR. RUBIN: Yes. I would --

QUESTION: So the fact he wasn't -- you may clear that up later. I certainly would think that that would not be manslaughter any longer.

MR. RUBIN: Right.

QUESTION: And you agree?

MR. RUBIN: I agree with that, yes.

QUESTION: Unh-hunh.

MR. RUBIN: So that I've come to the conclusion that, in reviewing Maine law, that this interpretation of felonious homicide has never been the law of Maine, and shouldn't -- this Court should not be bound. And if this Court isn't bound, then I think it's quite clear that the trial judge did accurately state the law as it has always been in Maine, that malice aforethought is an essential

element and is a fact, that is, factual in nature.

Really, otherwise there would have been no reason for malice aforethought to ever have been developed, because the court, in its charge, could have just said: Once the State has proved an intentional and unlawful killing, there arises a presumption of murder. You wouldn't have to get into this concept of presumption of malice aforethought if it's not a fact, if it's only a public policy statement.

QUESTION: Mr. Rubin, on your thesis, do you think the trial tactics would have been any different had the defense known of the development of this felonious homicide concept?

MR. RUBIN: I'm not sure. I did not represent the respondent at the trial level. That's the item I tried to think about, to make it analogous to the Bouie case, in terms of actual prejudice to the defendant during the trial stage, whereas similarly in Bouie there was prejudice to the defendant when he walked into the restaurant.

I don't know. I think perhaps it could, but I'm not sure that I can exactly articulate the thought processes that perhaps a defense attorney would go through in that situation, in terms of the burden of proof. Certainly if the State had the burden of proving malice aforethought and disproving the provocation, showing that there was no adequate provocation, maybe defense counsel in that case would have objected to the introduction of the statements, rather than

making a decision to rely on those statements as the method of proving his defense.

QUESTION: But the Court of Appeals finally got around to accepting the law of Maine the way the Supreme Court of Maine interpreted it.

MR. RUBIN: Again, I don't know if I'm making a distinction without a difference; but I would submit that the First Circuit merely said, We understand that we are obligated to accept that law, but we do not necessarily agree that that would be our interpretation of it if we were free to do so.

QUESTION: Well, we -- but you're suggesting that we should take a different view of the Maine law?

MR. RUBIN: Yes, that's right.

QUESTION: But neither the Supreme Court of Maine nor the Court of Appeals --

MR. RUBIN: No, I would suggest that the first decision by the First Circuit Court of Appeals is the correct one on this particular issue.

QUESTION: Well, I know, but that's different from the Supreme Court of Maine.

MR. RUBIN: Yes, that's right.

QUESTION: About Maine law.

MR. RUBIN: Yes, that's correct.

QUESTION: Well now, let's assume that the Maine --

that we accept the Maine law as the Supreme Court of Maine ultimately found it to be, and that the Court of Appeals recognized, then what fault do you find with the Court of Appeals?

MR. RUBIN: I find no fault with the Court of Appeals on -- if -- excepting that.

However, I do think there's a --

QUESTION: Well, I don't -- well, let me ask you this, then: Suppose that Maine, in order to implement this view of a single -- of a single crime but with different punishments for different degrees, had a separate penalty trial. And at the first trial it was simply an issue of finding guilty or not of felonious homicide.

And then, with a separate jury, you tried the, what degree it was, which really determined the punishment, and you put the burden on the defendant to prove provocation by a preonderance of the evidence.

Now, would you -- would you object to that?

MR. RUBIN: Yes, I would. And I think the --

QUESTION: Well then, I would think you would find it --

MR. RUBIN: I believe the First Circuit said that that is impermissible, at least in the context of a single trial, and I would expect the rationale of the First Circuit would apply equally to a separate bifurgated trial on that

issue. I believe --

QUESTION: And that takes away some of the reason for having bifurgated trials, doesn't it?

MR. RUBIN: I'm not sure I understand.

QUESTION: Well, if you must do it exactly the same way on the second, on the penalty trial as you do in the trial on the issue of guilt, then --

MR. RUBIN: Well, certainly there are other reasons, for instance, in the insanity area, to have a bifurgated trial, other than merely the questions of burden of proof.

In this context it seems to me that really gets into the third issue on the merits in this case, as I see it, which is: does In re Winship, the rationale of In re Winship apply to penalty categorizations?

If I could hold that in abeyance just for a minute, I will respond to it.

I think there's an intermediate issue which is much narrower, and which I think it's important for this Court to consider.

And that is that if you review the charge in this case, it is quite clear that the judge did not charge that the jury had to prove an intentional and unlawful killing, he only charged that the State must prove an unlawful killing, and then malice aforethought is presumed.

And if you look at the Court's definition of malice aforethought, it is quite clear that that definition comprises the concept of intentional.

So what the trial judge was saying to the jury was: once the State proves an unlawful killing, which, in essence, was that the defendant killed the victim, there arises a presumption of malice aforethought, presumption of intent, either a subjective intent to kill or the implied malice, and then the burden of proof shifts to the defendant to disprove the intent.

And I would refer to -- it's interesting to note that the jury did come back for further instructions, and at that time the trial judge says: All unlawful killings are presumed to be with malice aforethought.

QUESTION: What page is that?

MR. RUBIN: It's page 61, Your Honor, and also on page 62; he also says:

"When the jury is satisfied that the killing was an unlawful killing, then the defendant in such a case has the burden of satisfying the jury by a fair preponderance of the evidence that the killing was not with malice aforethought."

What did he mean by malice aforethought?

He meant that it was not intentional.

So that I think there's an intermediate issue in this case, which is much narrower than the third issue to

which Mr. Justice White referred, which is that under -- clearly under In re Winship the State has to prove that it was intentional, and notwithstanding the fact that the law of Maine requires the State to prove intent, in fact in this case the judge erroneously charged the jury that malice aforethought, i.e., intent, was to be presumed until the defendant came forward with evidence, by a preponderance of the evidence, and disproved intent.

I think that's a fairly -- at one point in the beginning of the charge he says the State must prove intent -- that the killing was intentional.

He then says, "And I will be back to that element at a further time."

I submit that in reading the charge as a whole, when he came back to the element of intent, he is saying to the jury that the State satisfies that burden by a presumption; it satisfies its burden as to intent by the presumption of malice aforethought.

QUESTION: Of course, there's something to what your opposing counsel says, that you don't simply seize one instruction out of context, and the question is whether the instruction as a whole fairly charged the jury.

MR. RUBIN: And I wholeheartedly agree with that, and I believe that in reviewing the charge there is only one instance, right at the very beginning, on page 20, I

believe, of the Appendix -- 19 and 20, where the Court -- no, I'm sorry.

Where the Court refers to proving that the State has the obligation to prove intent, and then, from that point onward, throughout the rest of the trial, he talks about malice aforethought, and the presumption of malice aforethought, defines malice aforethought to include intent --

QUESTION: Was exception taken?

MR. RUBIN: I don't believe that there was.

I'm sorry, it's pages 37 and 38, where the judge, for the first time, refers to the element of intent; then on the top of page 38 of the Appendix, he says, "I am going to leave for now my suggestion -- my language concerning what the jury finding of what the defendant intended."

Then, I would submit, from that point on there was never a reference again to the fact that the defendant -- the State must prove intent beyond a reasonable doubt. It was always in terms of the presumption of malice aforethought, the presumption of intent, once the State had proved an unlawfull killing; and the defendant must disprove intent.

So that I think even reading the charge in its entirety, it's quite clear that the judge proceeded on the basis that the State satisfies its burden of proof on intent by a presumption of intent, after it has proven certain other facts.

QUESTION: Well, you're saying that it's conflicting, that the charge says one thing at one point and another thing at another point.

MR. RUBIN: Well, I'm saying that it says -- no, I -- well, yes, in one sense. It says one thing at one point, and then many other times it says the completely opposite thing, so that --

QUESTION: But isn't there some obligation on the defendant to except, if he feels that way about the charge?

MR. RUBIN: The Maine Law Court accepted this issue under Maine law, even though there was no -- I don't believe there was an exception, because it presented a serious issue, and under the Maine rules, the court itself could recognize and decide an issue which it felt raised serious constitutional questions, even though objection had not been raised. And I think it did so in this case, so I would submit that perhaps -- yes, there is an ordinary obligation.

But the Maine rules provide for a consideration of issues such as this, when they are -- the court considers them to be very important; and they did so in this case.

QUESTION: Well, and then too, isn't it true that as of the time of this trial, there really wasn't much to except, no basis on which to except?

MR. RUBIN: That's correct also, Your Honor, yes.

I'd now like to move on to the third issue to which Mr. Justice White referred, and I would submit that the rationale, the underlying rationale of In re Winship applies equally, even when you're considering factual matters which go to punishment.

Clearly, if you accept the concept of felonious homicide as enunciated by the Maine Court, then heat of passion on sudden provocation, which relates to voluntary manslaughter, is a fact which merely distinguishes punishment categories.

Certainly, though, in the context of Winship, the difference between life imprisonment and a maximum of twenty years is quite substantial.

Certainly, also, the difference between a conviction of murder and manslaughter in terms of the stigma that's attached, is quite different. I think in Lafferty the Maine Court recognizes that murder has this high degree of blameworthiness, whereas manslaughter is mitigated and isn't considered quite so blameworthy.

QUESTION: Of course in Leland v. Oregon, it's the difference between guilty and not guilty. How do you distinguish Leland?

MR. RUBIN: Well, I think that gets into the third consideration for the Court, which is whether or not there are any counterbalancing factors which do not warrant shifting the

burden of proof, or putting the burden of proof on the State.

I would say that in this situation, when you're talking about heat of passion on sudden provocation, the facts which prove the killing by the State, which the State obviously has to prove, also go a long ways to resolving the factual issue of heat of passion on sudden provocation. It will show, perhaps, the difference in time, that between the provocation, if there was some, and the killing, it will show just how the killing occurred, perhaps. These are objective factors which I think are equally available to the State as they are to the defendant.

Whereas, when you're talking about insanity, I think you're much more severely limited to a state of mind which is not shown by objective factors, it's shown by subjective -- more by subjective factors; perhaps it's more difficult in that situation for the State to come up with evidence, and that would be a reason, when you're balancing the difficulties of proof in this situation, to say, to distinguish the question of insanity from the question of -- present in this case -- of heat of passion on sudden provocation.

I think that clearly there is much evidence that's equally available to the State as to the defendant.

Furthermore, I think the issue in Winship revolves around whether or not, when the Court said at the beginning of

the, of its holding, that the State must prove every factor essential to the crime, whether -- when referring to crime, the Court was really focusing in on the word "crime" or the word, the facts that are essential to the over-all determination of what the defendant is guilty of; whether it's, whether you're talking about the crime or you're talking about the punishment category.

Certainly, the facts of that case, in a strict legal sense, were not criminal; they were a juvenile delinquency case.

Furthermore, at the end of the case, there's a reference and an adoption of language by Justice Fuld of the New York Court, where he talked about proving the case against the defendant, rather than the crime.

I think it's so important -- one of the other underlying factors in Winship was the intent to minimize the chances of error in a criminal trial, because of the fact that a defendant could be -- lose his liberty, and because of the stigma that attaches to a defendant.

Certainly that has application, whether you're talking about an element of the crime or whether you're talking about something so important, even though it only goes to punishment, which distinguishes between the ultimate categorization of what the defendant will be punished for. And here in this case the sole distinguishing factor between

assume there probably are some States which continue to place the burden of proof on the defendant.

QUESTION: Do you think those rules are all invalidated by Winship?

MR. RUBIN: I think that certainly the question of self-defense, a holding in this case that Winship is applicable to the question of heat of passion on sudden provocation, certainly would have applicability to the rule of self-defense.

QUESTION: But isn't self-defense the type of thing, just like you say insanity is, that the defendant is much more capable of coming up with evidence of than the State?

MR. RUBIN: No, because I think self-defense is again a question where there are objective facts. Because if you -- for instance, you may have the victim charging at the defendant, and self-defense is not --

QUESTION: Well, the victim isn't there to testify.

MR. RUBIN: No, but if there are other witnesses. So the State certainly has the burden of showing that the defendant killed the victim, and, in the process of doing so, would presumably show some of the facts that surround it.

I think that there is more apt to be objective facts available on the question of self-defense and heat of passion than there are when you're talking about the question of insanity.

There may be cases, very truly, that the State has

no facts, which it could introduce; but I would submit that probably in a great majority of cases the State has ample evidence available to it, objective evidence, so that --

QUESTION: Then, in your view, a defendant in every criminal case is entitled to a charge from the trial judge that unless the State has proved the absence of self-defense beyond a reasonable doubt, he's entitled to a judgment of acquittal?

MR. RUBIN: Only if there has been some evidence introduced into the case which raises the issue of self-defense.

Certainly, if there's no evidence in the case which would raise that issue, no, I don't think that the State has to disprove it.

But once either the State or the defendant has introduced some evidence of that, then I think that a decision, applying Winship to the facts of this case, could very easily --

QUESTION: Well, but then you don't treat self-defense exactly as you do the proof of the killing, where, presumably, you don't say that -- you say the State has to prove the evidence of the killing beyond a reasonable doubt, not -- if there's some evidence of a killing, the State has to go ahead and prove it beyond a reasonable doubt.

MR. RUBIN: I think that's true. But I believe that

the question of self-defense can very easily go to one of the elements of the crime, in terms of the intent, the unlawfulness of the killing.

One of the definitions of "unlawful" is that it's not excusable or justifiable; and the definition, in Maine anyway, of -- I'm not sure I'm getting the right one -- of "justifiable", I guess it would be, is that it was done in self-defense.

So that it seems to me that if that, the question of self-defense does go to an element of the crime, i.e., that the killing was unlawful, and once there's some evidence into the case of self-defense, there's a question of whether or not the killing was unlawful. And it would seem to me that it would be the obligation of the State, at that point, to prove beyond a reasonable doubt that it was unlawful, i.e., that it was not in self-defense.

So that I think that it could very well go strictly to the element of the crime of unlawfulness of the killing.

I think, though, that the Court could avoid all those issues, and avoid all the issues of the applicability of Winship to in heat of passion on sudden provocation by deciding this case on the intermediary or second issue which I discussed, which is that the State, in this case, or the trial judge in this case placed the burden of proof as to intent on the defendant, to disprove intent once the State had

proved an unlawful killing.

And, as such, the -- it seems to me that everybody agrees that intent is an element of the crime of felonious homicide; if that's the crime, it's an element of the crime of murder; if murder is the crime; and I believe that the defendant was required to disprove it. I believe that that would fall right squarely within Winship without any extension of Winship or elaboration on it.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Rubin.

Thank you, gentlemen.

Mr. Rubin, you acted at the Court's request and by the Court's appointment here, and we thank you for your assistance to the Court and of course your assistance to the gentleman you represented.

MR. RUBIN: It was my pleasure.

[Whereupon, at 2:22 o'clock, p.m., the case in the above-entitled matter was submitted.]

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