In the

Supreme Court of the United States

GORDON G. PATTERSON, JR.,

APPELLANT,

VS.

PEOPLE OF THE STATE OF NEW YORK

APPELLEE.

No. 75-1861

Washington, D. C.
March 1, 1977

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vs.	:	No. 75-1861
PEOPLE OF THE STATE OF NEW YORK, Appellee.	:	

Washington, D. C.,

Tuesday, March 1, 1977.

The above-entitled matter came on for argument at 1:48 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
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

VICTOR J. RUBINO, ESQ., 280 Park Avenue, 14th Floor West, New York, New York 10017; on behalf of the Appellant.

JOHN M. FINNERTY, ESQ., Steuben County District Attorney, Steuben County Courthouse, Bath, New York 14810; on behalf of the Appellee.

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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 will hear arguments next in 75-1861, Patterson against New York.

Mr. Rubino, you may proceed when you are ready.

ORAL ARGUMENT OF VICTOR J. RUBINO, ESQ.,

ON BEHALF OF THE APPELLANT

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

This is an appeal from a 4-to-3 decision of the New York Court of Appeals affirming appellant's conviction for murder and specifically rejecting his claim that the New York statutes, pursuant to which he was convicted of murder, violated his due process rights under the Fourteenth Amendment, and that the New York statutes required him to bear the persuasion burden at his trial for murder on the issue of provocation, which, in New York, is the model penal code formulation: extreme emotional disturbance.

The issue on this appeal is whether, placing that persuasion burden on appellant at his trial, in order to allow him to exonerate himself of murder and be convicted only of manslaughter, in fact violates his due process rights, specifically in light of this Court's decisions in In Re Winship and Mullaney vs. Wilbur.

It is appellant's contention on this appeal that a reversal of his conviction is required, because there is a

functional identity between the challenged rule here of New York State and the rule invalidated by this Court unanimously in Mullaney.

And, furthermore, that in Mullaney the State of Maine argued that in fact there was only one generic crime: felonious homicide. And that the provocation issue only distinguished two punishment categories called murder and manslaughter.

It is clear in New York there are two distinct crimes of murder and manslaughter, and therefore it is a more clear violation of Winship.

I would like to stress at the outset that this appeal presents a challenge to one rule, the provocation rule, as formulated by the model penal code, extreme emotional disturbance; and I think now it would only affect two States: New York and Connecticut.

In Appendix A to our brief, we have listed the States which have adopted the extreme emotional disturbance defense and shown which States have placed the burden of persuasion on the defendant.

Currently it is only New York and Connecticut. In Connecticut there are now two lower court opinions applying Mullaney, to place the burden on the State. That is, in two trial courts, in two counties out of the six in Connecticut.

So the issue on this appeal is, we argue, very narrow.

On rule arguably affecting two States.

QUESTION: Would you distinguish "extreme emotional disturbance" from the various ranges of mental disease or defect within the spectrum of so-called insanity?

MR. RUBINO: Yes, Your Honor. I think the starting point is to understand that extreme emotional disturbance was a formulation to expand the concept of provocation, and that it carried with it the requirement that there be a reasonable explanation or excuse for the defendant's conduct. I guess the only way I can state the difference is to say it's difficult to imagine that insanity, one would have to not only show a certain state of insanity or certain disease, but then say "I have a reasonable excuse for that."

I think the very concept of insanity leaves aside that kind of objective standard that ultimately anchors each of the two concepts. In other words, provocation must be explained.

It also goes less -- insanity goes to the intellect, and knowing right from wrong, and there is no such question posed in the extreme emotional disturbance.

QUESTION: There is not?

MR. RUBINO: No.

QUESTION: Well, then what is the impact of the extreme emotional disturbance on the volition of the actor, of the defendant?

MR. RUBINO: The impact is that at the time at which

-- he has lost his self control. It doesn't mean he doesn't know right from wrong. It is not a test -- in other words, he need have no disease or defect. In fact, it assumes basically that he's a rational man who has then lost self control, just as provocation was described by this Court in Mullaney.

QUESTION: Would you equate it to the older vernacular of "in the heat of passion"?

MR. RUBINO: I think it's broader, Your Honor. I think, when you say equate, I would equate it only in the sense that it performs the same function. That that function is to distinguish between the crime of murder and the crime of manslaughter.

I would further say that it is clear, in LaFave and Scott, for instance, they do use the term interchangeably when they speak of heat of passion, they then say extreme emotional disturbance.

QUESTION: Who does? Who says this?

MR. RUBINO: LaFave and Scott, Your Honor, in the section starting at page 572 to 582, in discussing heat of passion doctrines.

It is also interesting to look at those ten pages in LaFave and Scott, and compare them. We have, in Appendix B, put together the comments un the Model Penal Code concerning the revised formulation of heat of passion. And of not only the Model Penal Code but the Revisors in New York, the staff

notes.

And if we compare the various ways in which it was believed extreme emotional disturbance would expand the provocation concept, we can see that it is still anchored in provocation but it simply opens up more situations and I'd like, Your Honor, to go through those.

The point being that in each of the situations that extreme emotional disturbance expands, or so-called expands, the provocation concept of heat of passion, if we examine LaFave and Scott, we see that there are already some States, under the heat of passion concept, that had arrived there. And so that ultimately what we are dealing with, we have a label, the new label entails a more liberal scope of provocation, but it is not different conceptually or functionally.

I may just take one example, because the New York Court of Appeals stressed this particular liberalization in its opinion, and that is cooling time.

Under some heat of passion rules cooling time was fairly restricted, and that the provocation had to spontaneously cause loss of control and lead to the killing, and it was within a very limited timeframe. So that the defendant couldn't have cooled down. In other words, if he was provoked last month by someone, he couldn't go a month later and just shoot him and claim provocation.

The point is that the extreme emotional disturbance formulation allows a longer cooling time, allows, as the Court of Appeals put it, a certain amount of brooding. This is, I think, Professor Wechsler's concept, that in fact heat of passion or provocation and deliberation are not really mutually exclusive, that if you think abut it, you can, by deliberating, get more exercised about something rather than less, and the extreme emotional disturbance concept was to allow for a period of time.

But the point is that now you have a longer cooling time, so to speak, allowed, what does that difference mean constitutionally? Why should that require a less reliable verdict of murder in New York as opposed to Maine?

And if it went to hardship, that might be an argument, but the facts of this case show that a longer cooling time here, as, for instance, in self defense, where you deal with antecedent circumstances, where you claim that the -- you were afraid of the victim and that's why you shot, may go back a year, a year and a half. But the time period is filled with specific tangible facts and events. Nothing special. The facts of this case are not exotic in terms of provocation.

It's a fairly classic provocation situation, in the over-all context. That is, the love triangle and the adultery situation.

So that we have tried to show, in our brief, that

when we say functional identity between the New York and Maine rules, we are saying that these rules exist to distinguish murder from manslaughter, that they are significant punishment differentials. In New York, extreme emotional disturbance distinguishes between murder in the first degree, as well as murder in the second degree, and manslaughter.

And, in fact, in murder in the first degree, the reduction is not to murder in the second degree but to manslaughter, which clearly shows not simply a dropping down when you prove extreme emotional disturbance issue, but shows the distinction clearly between the crime of murder in New York and the crime of manslaughter.

Winship was the germinal case in this area. It explicitly established that the Fourteenth Amendment due process clause requires, and in the words of Winship, proof of every fact which goes to constitute the crime.

I think the problem that Mullaney presented in terms of interpretation was that in fact the State of Maine said we only have the crime of felonious homicide, and we have proved it, we have proved an intentional killing.

The response of this Court was that we will look to the substance of your law, and not to the formal designation which you give. And decide whether the due process clause applies or the reasonable doubt standard applies.

And that has caused some comment that in fact Mullaney

has led to a rather broad view of what is required to be proved by the State, and might possibly lead to striking down a number of affirmative defenses. On this appeal we claim we are within the four corners of Mullaney, in that this does not reach the issue of other affirmative defenses, and only the one before us.

New York, as I said, does not have -- does not present the problem that was presented by the State of Maine. New York clearly has two crimes and clearly the provocation issue, extreme emotional disturbance, here distinguishes them.

Now, what can be the distinctions? The New York Court of Appeals, 4 to 3 decision, really dealt with two separate approaches to distinguishing Patterson from Mullaney.

One is they look to the State law itself, of Maine, and said that Maine, first of all, really didn't require the State to prove intent, and we say that is simply not true, that the opinion of this Court in Mullaney, the State of Maine cases, indeed, the brief of the Attorney General in Maine make it clear that intent has to be proved by the State of Maine.

QUESTION: How about malice?

MR. RUBINO: Malice had to be proved by the defendant, Your Honor.

QUESTION: Well -- yet it was an element of the crime.

MR. RUBINO: Your Honor, as I understand Mullaney --

QUESTION: And the State never had to prove it, never had to prove it, it was presumed.

MR. RUBINO: Yes. That is true. This Court, in Mr. Justice Powell's opinion, dealt with the concept of malice, and said that it has two meanings in law. One is it can be a substantive element of intent, and really just stand in the place of the word "intent" and be proved by the State. The other is -- the term was used, "policy presumption", Perkins, who was cited at that point, describes malice in some cases as really being a hollow concept, that really it's defined by what it is not rather than what it is.

And one of the things it is not is provocation. And the Maine courts themselves said that malice and provocation are indistinguishable, they are not separate issues. We have described this as being two sides of the same coin.

The Attorney general, in his brief in Mullaney, argued that in fact all malice did was to, in essence, trigger the provocation issue to be proved by the defendant.

QUESTION: But the fact is -- wasn't it the fact that malice was an element of the crime but the State would never have to prove it?

Let's assume the defendant put on no evidence whatsoever, and was found guilty by the jury.

MR. RUBINO: If the defendant put no evidence in, or

if evidence of provocation didn't arise in the course of the prosecution's case, then there would be no instruction at all concerning provocation or the ability to reduce to manslaughter the crime.

QUESTION: But, nevertheless, the malice would have been presumed?

MR. RUBINO: Only because, if we're dealing with burden of proof, malice is only relevant to the proof by the State of intent, nothing else. It simply -- it was described aptly by this Court in two footnotes. One, as wholly unnecessary; and secondly, as surplus in the law. Because, what I've just said about the distinctions in the way malice is used as a term, that it can actually stand for something to be proved, or it can be merely a policy presumption that flows from proof of intent by the State.

And the -- as I said, the attorney general argued this, that malice itself had no separate meaning in terms of proof. We've described this in terms of proving malice. In Maine it's a vestigal organ, it simply is there. It was described, as I said, as wholly unnecessary and surplus. And provocation is the other side of malice.

This Court, in Mullaney, said it would look to the substance of the law, not the form.

In New York and in Maine, intentional killing is murder unless provocation is proved by a persuasion burden,

preponderance of the evidence by the defendant. And it is this that is the crucial distinction, and it is this that goes to the violation of the defendant's due process rights, Your Honor.

QUESTION: Mr. Rubino, may I ask you a question there? You've suggested in your argument that Mullaney might -- even if Mullaney is read quite narrowly, you come within it, because you come within the category of provocation, your --

MR. RUBINO: Yes, Your Honor.

QUESTION: Would the same argument apply to self defense? Would that be a form of provocation which logically Mullaney must apply to if it applies toyour case?

MR. RUBINO: It could be. I would -- yes is the answer. I would argue separately on that. I would argue that self defense negates unlawfulness, which is an element of the crime.

Also, it's a question of what the other side of malice is. Perkins goes back and talks about malice as being things that are defined by what it is not: not justification, mitigation or excuse.

Now, it's possible to go back to that view of malice and say that in fact where you have justification defense, self defense, that whether or not the statute talks about it, that what in effect you are asking the defendant to do is to negate malice in essence.

So, on self defense, I -- my answers are twofold. I think, arguably, it can come specifically within Mullaney. Furthermore, I think it might be a stronger case under Winship, without necessary regard to Mullaney, because it really goes to unlawfulness.

QUESTION: So you're suggesting that probably -- although I realize that we need not necessarily -- but probably the same rule would apply to both kinds of provocation, even though we don't have to do that to decide your case?

MR. RUBINO: I believe -- at least with respect to self defense, I would argue that, yes.

QUESTION: Yes.

MR. RUBINO: Yes, Your Honor.

QUESTION: Thank you.

MR. RUBINO: Finally, the New York Court of Appeals, in addition to saying that, well, in Maine, all that had to be -- the State didn't have to prove intent, we've said that that is just not so, and that we've dealt with malice. The Court of Appeals also said, Well, extreme emotional disturbance is really only mitigation.

Now, this Court, in Mullaney, dealt with that, in Mr. Justice Powell's opinion at pages 697 and 698, said that the label was not dispositive, and that the degree of criminal culpability in Maine, as elsewhere, at least where murder and manslaughter are involved, at least in that

situation, there's a protected interest. So we are talking also about degree of culpability, involved in Mullaney and involved here in Patterson.

The other approach of the Court of Appeals was one I discuss in answer to a question. I will just label it here. And that is that the fact that the formulation of New York's provocation rule was broader, and we say it is broader, requires a distinction from Mullaney.

And we've argued that, first of all, why it is broader, that is, per se, no reason to allow less reliable verdict, because the reasonable doubt standard is a procedural vehicle which goes to reliability. It is not a reason to allow a less reliable verdict of murder in New York than in Maine.

Also, that the differences, if we look at liberal rules under the heat of passion concept, and what the Model Penal Code revisors, or what the Model Penal Code was trying to do, and what New York was trying to do, did not make that great a distinction, and the distinctions don't create an unnecessary or unique hardship. And that if they do, there's a less onerous means of dealing with a hardship question. And that is to put the production burden on the defendant.

In this case the defendant clearly met a production burden, the issue was as fairly in the case as stated in Mullaney. In fact, in Mullaney, the defendant didn't take the

stand or present any witnesses. The issue was raised in his statement to the police.

So that the production burden is a less onerous means of dealing with possible hardship if, indeed, that is a relevant criteria.

And, finally, I would like to say that Chief Judge Breitel, in a separate concurring opinion, did, in a more general way, react to Mullaney, and what he was saying is that where we have newer defenses and more ameliorative defenses, we ought to possibly allow the Legislature to compromise a little bit. And, in order to get a new defense in, or a new rule in, they should be allowed some leeway.

And our answer is the same: that, in fact, when we are dealing with a procedural vehicle, a neutral principle that goes to reliability, that is, the reasonable doubt standard, that we really shouldn't look to the substance of the State law, that the State should work it out. And that they can work it out, we've shown in our Appendix, that this has been no bar at all to the adoption of extreme emotional distress view of provocation; in Appendix A we show the States that have done it, we show that today only New York and Connecticut require the burden on the defendant. And, in fact, on two of the six counties in Connecticut, that's -- at least at the trial court; it hasn't reached the appellate court -- no longer true.

So I would just stress that we do try to narrow the issue to provocation, and that we stress that we're talking about a procedural vehicle, a neutral principle that doesn't ask about something about extreme emotional disturbance: is it good or is it bad, is it old or new, is it more liberal or more conservative? We just say: should we have to reliably have it proved? Because, otherwise, we will have murder convictions in the State of New York that are less reliable and less reliable than in Maine.

Your Honor, I would like to reserve whatever time I have for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Finnerty.

ORAL ARGUMENT OF JOHN M. FINNERTY, ESQ.,

ON BEHALF OF THE APPELLEE

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

I would, at the outset, like to point out that in the State of New York, provocation does not have the connotation that counsel has given it.

I would like to return to that, and also point out factually that this was not, by any stretch of the imagination, a classic love triangle situation. The parties had been separated some five to six months before this crime occurred. The wife had started an action for divorce in the State of

New York at that time. They had what were called a conciliation proceeding. A conciliator met with the parties, decided there was no further necessity of those proceedings. The defendant himself had brought out a counterclaim for divorce.

Their attorneys were really, at that point, negotiating a property settlement.

In October, some -- over two months before the crime occurred, the wife, Roberta, had told the defendant that she was going to marry the deceased after their divorce became final. He knew they were together. He lived some 200 miles away, himself; he had seen them together earlier in December, and, in fact, had assaulted both the deceased and his wife and, on another occasion, her father.

Now, on the day of the murder, he came these over-200 miles, stopping along the way to see a friend and borrowed a gun, and the friend's car. That was about 25 miles away from the village of Bath, where this occurred.

He came to Bath, attempted to borrow another gun, the first gun being a .22 weapon, introduced as the murder weapon. He attempted to borrow a shotgun in Bath. Having borrowed that, he went out five miles to his wife's parents' house, drove by there a quarter of a mile. On December 27th, it was dark out, he saw the deceased's car there. He walked back, loaded the gun on the way, then looked in, came through the back door, shot the deceased twice in the head, attempted

to choke his wife, did choke her, released her before she lost consciousness, forced the wife, without a coat, to take her child, her infant, from the house and accompany him to the car.

Now, I submit to you that the provocation aspect, if it depends on this being the classic love triangle of the situation which appeared to him at that time, was not in the case, the jury could not have found it because the defendant knew [illegible] anything he might have seen through that window.

Now, in Patterson, the Court of Appeals basically said: As long as the prosecution must prove every element of the defendant's guilt beyond a reasonable doubt, specifically that he intended to kill the victim beyond a reasonable doubt, it's not a violation of due process to require or permit, may I say, the defendant to establish that he formed that intent under the influence of extreme emotional disturbance.

We do know that in New York the common law developed differently, and in New York heat of passion, those words, was an affirmative element of a form of manslaughter, rather than a mitigating factor to a charge of murder.

And I think importantly, in any analysis of Mullaney, is to understand that in New York, since 1829, as Judge Jasen stated, New York has not allowed malice to be implied merely from the fact of a killing.

Now, this Court, in Mullaney, said that malice aforethought and heat of passion in the Maine statute were mutually

inconsistent. Therefore, I would submit, if malice is conclusively presumed, which the STate of Maine allowed, there could be no heat of passion.

This presumption means that the prosecution does not have to prove an element of that crime beyond a reasonable doubt, and this Court in Mullaney, by requiring the prosecution to prove that, really -- prove the absence of heat of passion, is really requiring the prosecution to prove the presence of malice, which could no longer be implied.

Thus, Winship -- or Mullaney was a clear case for the application of Winship.

In New York, as the Court of Appeals pointed out, extreme emotional disturbance comes into the case only after all of the elements of the crime have been proved.

Specifically, they talked at great length about the intent to kill, rather than a situation -- pointed out that having proved, let us say, in Maine, conduct sufficient to cause serious physical injury. I believe there was a charge of that in the Mullaney case. That would amount to manslaughter in New York, but in the STate of Maine, given the benefit of the presumption, that would rise to the level of murder.

In New York, the defendant is permitted to avail himself of extreme emotional disturbance only after all of the elements, that is, the intent to cause the death and the causing of death, have been found.

In a footnote in Mullaney, this Court speculated that since the elements -- excuse me, the facts of intent are not general elements to the crime of felonious homicide, that one generic category; instead they bear only on the appropriate punishment category.

Under petitioner's argument, that being the State of Maine, a sentence, life sentence for any felonious homicide could have been imposed unless the defendant was able to prove that his act was not intentional or criminally reckless.

I think very importantly, and not as has been argued by appellant here, Judge Jasen defined, rather than the Model Penal Code or the drafters, he defined what extreme emotional disturbance is in New York. And he said specifically that the purpose is to permit the defendant to show that his actions were caused by a mental infirmity, not rising to the level of insanity.

And he continued speculating that there may have been a significant mental trauma which has affected the defendant's mind for a substantial period of time, simmering in the unknowing subconscious and then coming to the fore.

Well, provocation is not in that statute. Provocation, I would submit, at the same time this statute was drafted, came into the self defense statute, which the people are required to disprove, as they are insanity in the State of New York.

Finally -- excuse me?

QUESTION: In this case, it was incumbent upon the prosecution to prove intent.

MR. FINNERTY: Yes.

QUESTION: Even if the affirmative defense had been sustained, the jury would still have -- it would have to have found intent to convict even of manslaughter; is that correct?

MR. FINNERTY: Yes, --

QUESTION: That's the way I read it, --

MR. FINNERTY: -- the charge to the jury specifically stated that, --

QUESTION: -- Judge Jasen's statement.

MR. FINNERTY: -- that they were not to consider it unless they had found, first of all, that the defendant had intended to cause the death of John Northrup and --

QUESTION: An intent to cause death is what I mean.

MR. FINNERTY: Yes. Yes.

QUESTION: And not to maim.

MR. FINNERTY: Not intentionally firing a weapon or something like that, but the intent to cause death.

QUESTION: And that duty on the prosecution remained, even if the jury had found that the defendant was under the influence of extreme emotional disturbance.

MR. FINNERTY: I believe the words of the charge were, and certainly the words in the Court of Appeals opinion

was that his intention was formed under the influence --

QUESTION: Right.

MR. FINNERTY: -- of extreme emotional disturbance.

QUESTION: But there still had to exist, that intention to cause death.

MR. FINNERTY: That had to be there first.

QUESTION: Right.

MR. FINNERTY: Or there was a finding of not guilty.

QUESTION: Right.

MR. FINNERTY: Not in the Maine situation, let us say, showing an intent to cause serious physical injury, or, in Maine, it was "greaty bodily harm". In Maine, I submit that that would have been sufficient for the prosecution to convict of murder.

Here it would only be --

QUESTION: Since malice was presumed.

MR. FINNERTY: Since malice was presumed.

That would only be proof sufficient for manslaughter in the State of New York, not with relation to extreme emotional disturbance, but intending to cause the deceased serious physical injury, and death results, rather than an intent to kill.

So, as conceded, there is separate criminal structure all the way down for different crimes in the State of New York.

In --

QUESTION: Do you think -- in New York, does extreme emotional distress -- do judges instruct on what bearing it does have on intent? If any.

MR. FINNERTY: I think, as Judge McDowell did in this case, if the instruction is given it must properly be given, that the intent to kill, if you find it, was formed while under the influence of extreme emotional distress, as it was charged in this case.

QUESTION: But is the effect of proving extreme emotional distress to destroy the necessary intent element?

MR. FINNERTY: Not at all, in New York.

QUESTION: I see.

MR. FINNERTY: And I believe the statute and certainly the majority in Patterson in the Court of Appeals in the State of New York specifically stated it is not, intention carries all the way through, intention to cause death.

This Court has not held that Winship requires that any shifting of the burden of proof violates due process. Basically from the Leland v. Oregon cited in the concurring opinion of Mullaney and, indeed, in Rivera v. Delaware decided recently, where the State of Delaware does require the defendant to bear the burden of proof in an insanity case.

QUESTION: But Leland v. Oregon was cited in the Court's opinion in Mullaney --

MR. FINNERTY: It was cited in a footnote in

Mullaney.

QUESTION: -- without any indication that it was being undermined.

MR. FINNERTY: And specifically it was stated in the concurring opinion that it was not. So, therefore, if the appellant's argument is that Winship requires any concept of shifting -- and I would note that some of the lower courts, at least in New York, before the Patterson opinion, rather than going further and in an analysis did decide that, that any shifting violates due process, that is just what Winship was trying to avoid, I submit, a triumph of form over substance.

Because it looked the same, therefore a shifting, and Winship controls.

QUESTION: Well, you're just saying that as long as the shift doesn't take place, if a defendant can exonerate himself by proving some facts, that doesn't violate Winship?

MR. FINNERTY: Precisely. The mere fact of a shift does not violate Winship.

QUESTION: But if you can reduce the degree of the crime or exonerate yourself entirely by proving a fact, why isn't the absence of that fact, operatively and funtionally, the same as making it an element of the crime?

MR. FINNERTY: Because, I think perhaps referring to a question you asked earlier, intent to cause death and extreme emotional disturbance are not mutually consistent

factors, inconsistent factors.

QUESTION: Well, that may be so, but, nevertheless, the State says if you can prove X, the degree of crime is going to be reduced, or you're going to be found innocent, be necessarily found innocent. And therefore, why, functionally, isn't that the same as saying -- why shouldn't the State have to prove the absence of X, why doesn't that make the absence of X an element of the crime?

MR. FINNERTY: The absence of X is not the element of the crime, but the addition of X changes the crime of which the proof originally sustained.

I see what you're talking about, what we're into: if any fact is involved in a crime, the State must prove or disprove it to sustain the conviction of any crime. But, as Judge Breital pointed out, this -- because of the advances in psychiatric findings and testimony -- gives a benefit to a defendant; and since this is, as the Court of Appeals said, a mental infirmity not rising to the level of insanity, the facts of that are not related to provocation, they are not objective things that a jury can look at, what happened at the time, they are really something that is in the defendant's mind.

Since Winship does not require due process violated every time there's a shifting, I would submit to you that mitigation itself, that concept, is not constitutionally required. And Judge Breitel spoke to this in his concurring

opinion.

The example might be: what reaction would a State Legislature have to make if it were faced with a choice between requiring the prosecution to prove beyond a reasonable doubt a fact which is not required by due process, or eliminating that defense altogether?

I think the aspects of the affirmative defense statutes in New York, and there are several of them appended to our brief, show that in many cases the defendant possesses unique knowledge which the State has decided to allow him to use in mitigation of his -- in mitigation of the charge for which the evidence would convict him.

If mitigation is not constitutionally required, then, rather than violating the due process clause, New York has merely gone beyond the Constitution, beyond what is required of the State to do.

It strikes me that the appellant's argument is to require -- is to ask this Court to hold that Winship requires any shifting violates due process. If that is the case, we are then into the situation of what type of scheme: Is it that heat of passion on sudden provocation, which was not known in New York, the penal law in New York developed entirely differently, or is it extreme emotional disturbance in some other form than a mental infirmity not rising to the level of insanity?

And New York has the persuasion burden, but what is then the burden of production or a persuasion burden? Appellant is really asking the Court to redraft the mitigation concept which I believe the State of New York has tried to do so to grant benefits to persons who would otherwise stand convicted of criminal offenses.

Very briefly, the points made in appellant's argument, which I would disagree with:

No. 1 is that these two defenses are functionally the same; they are not.

And provocation now being a part of self defense in New York is not the question here; the question is, does Winship require that shifting violates due process, and does Winship require that the defendant have no benefit from mitigation or that the State can require him to bear a rather unique burden of proof here.

Thank you.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Rubino?

REBUTTAL ARGUMENT OF VICTOR J. RUBINO, ESQ.,

ON BEHALF OF THE APPELLANT

MR. RUBINO: Yes.

I would like to point out, on this business of intent in New York and Maine, it operates the same. In New York you must prove intent, and in Maine the district attorney must prove

intent.

That provocation factor does not negate intent, neither in New York nor Maine.

I find it ironic, if you look at the briefs in Mullaney, it was the State arguing that malice was really of no meaning in that that provocation distinguished punishment categories. The State said that malice operated solely to trigger the provocation issue.

The brief of the Attorney General in Maine just says very clearly that a specific subjective intent to kill is required. And so that there are no differences in the way that the cases of murder have to be proved in either New York or Maine.

Finally, I'd like to stress that we are not talking about the substance of State laws, that we are not saying that Mullaney or Winship require the State to make any particular facts germane. Just as in Leland, one other issue was not to make the irresistible impulse test a test of insanity.

We are not trying to argue that a State must make a particular factor germane, but if it does make that factor germane to a distinction between murder and manslaughter, with significant -- significant penalty differentials, and significant differential of stigma that was discussed in Mullaney, then it must prove that fact.

QUESTION: Would you say the same is true about any

fact that determines whether there is any crime at all or not?

MR. RUBINO: I don't think Mullaney reaches that, Your Honor. I would say that an argument --

QUESTION: But you seem to. I mean, you --

MR. RUBINO: I believe that, yes.

QUESTION: Your approach seems to encompass that.

MR. RUBINO: If my approach encompasses it, it's because I believe that Mullaney encompasses it, Your Honor. All I'm saying is that for the provocation issue, particularly, we don't have to decide whether Mullaney goes beyond; it might. I feel it does in certain defenses.

I think, however, that each defense and each factor must be looked at independently, just as the question was asked about self defense. There are an enormous number of issues -- this case, in preparing for it, is a course in criminal law. And one must examine each concept for its effect on stigma, on sentencing differential, and on peculiar, let's say, hardship of proof, and whether or not it's really a policy defense, like the minority view of entrapment is, and whether, if it's simply a policy that we're talking about, whether that would have to be proved by the State.

QUESTION: Well, every -- all criminal law represents State policy, doesn't it? It's all policy, in every State.

MR. RUBINO: What I meant -- let me just distinguish.

QUESTION: A State can decide, I suppose, not to

have any criminal law. It's just policy.

MR. RUBINO: Yes, I believe that's true.

When I said "policy" I mean -- I'll give an example: In entrapment, a minority view says that we're only looking to police conduct, and that, therefore, it really does not go to the defendant's -- whether the defendant was predisposed, it doesn't go to whether the defendant intentionally committed the crime; it's a policy that we have superimposed, and that need not be dealt with in the trial phase at all. It could be a pretrial hearing.

That's what I meant by the term "policy". There is also an abandonment. Possibly a policy that really what we want to do is encourage abandonment, that it's really not excusing the defendant, and that you might make a distinction, depending on what the State itself said about abandonment, not what this Court would in any way tell the State what to do.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:30 o'clock, p.m., the case in the above-entitled matter was submitted.]

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