In the

Supreme Court of the United States

JOHNNIE B. HENDERSON,

PETITIONER

v.

THE STATE OF NORTH CAROLINA

RESPONDENT

No. 75-6568

Washington, D. C.
February 23, 1977

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Wednesday, February 23, 1977

The above-entitled matter came on for argument at 11:08 o'clock a.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:

LAWRENCE G. DIEDRICK, ESQ., P. O. Box 2626, Rocky Mount, North Carolina 27801
Attorney for Petitioner

CHARLES M. HENSEY, Assistant Attorney General, State of North Carolina, Post Office Box 25201, Raleigh, North Carolina 27611
Attorney for Respondent

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 75-6568, Hankerson v. North Carolina.

Mr. Diedrick, you may proceed whenever you are ready.

ORAL ARGUMENT OF LAWRENCE G. DIEDRICK, ESQ.

On Behalf of Petitioner

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

I am here representing Johnnie Hankerson, who is the Petitioner in this case, to petition this Court for dertiorari from a Supreme Court decision in North Carolina against him.

The question we contend is presented here is whether the Supreme Court of North Carolina erred in not applying Mullaney retroactively since the doctrine of Mullaney, as it relates to Petitioner's case, greatly affected the fact-finding process, or the reliability of the fact-finding process.

The state court held that, by reason of the decision of Mullaney, the due process clause of the Fourteenth Amendment prohibits the use of their long-standing rules in homicide cases, that a Defendant, in order to rebut the presumption of malice, must prove to the satisfaction of the jury that he killed in the heat of sudden passion and to rebut the presumption of unlawfulness, that he killed in

They held that those instructions as they were given in our case, violated the concept of due process announced by this Court in Mullaney. However, they declined without further guidance from this Court to apply it retroactively.

Petitioner contends that the main determination to be made by this Court in whether or not to give Mullaney retroactivity is whether or not the major purpose of the new constitutional doctrine is to overcome an aspect of a criminal trial that substantially impairs its truth-finding function and Petitioner contends that in order to do that, this Court must closely scrutinize the major purpose which it held Mullaney to serve.

This Court, in its opinion on Mullaney, relied heavily on Winship. This Court further, in Ivan held Winship to be retroactive.

However, the Petitioner contends that the Court, in its own language in Mullaney, said that the major purpose of Mullaney was to protect the integrity of the requirements of the burden of proof beyond a reasonable doubt being carried by the prosecution in criminal cases.

It went on further to say that this major purpose to be served by this rule was an even greater purpose than that which was set forth in Winship.

And I quote from Mr. Justice Powell's opinion at

page 700, "Not only are the interests underlying Winship indicated to a greater degree in this case, but in one respect, the protection afforded those interests lives here."

In Winship, the ultimate burden of persuasion remained with the prosecution although the stay order had been reduced to proof by a preponderance of the evidence.

In this case, that is, in the Mullaney case, by contrast, the state has affirmatively shifted the burden of proof to the Defendant. The result in a case such as this one, where the Defendant is required to prove the critical fact in dispute, is to increase further the likelihood of an erroneous murder conviction. Therefore, the Petitioner contends that this Court has already held in its decision in Mullaney, that the major purpose to be served by that rule was to correct an error in the fact-finding process because they have stated it is to do away with the increase of the further likelihood of an erroneous murder conviction.

Now, of necessity, in determining whether or not to apply any of these new constitutional rules retroactively, the Court must look at prior decisions and whether or not they have given those decisions prospective only or retroactive applications.

However, the Petitioner in this case contends that you need only look to Ivan as far as it relates to the case at the Bar because of the fact that Mullaney says that the

interests to be protected in Mullaney itself are greater than those in Winship, that here it is not only proof beyond a reasonable doubt to be protected, but, further, that it places the burden solely on the state to carry that burden.

That is to say, in the Winship case, it was proof by a preponderance of the evidence but at all times that proof rested solely upon the prosecution.

In Mullaney, it removes that burden of proof, or the Maine rule, which was corrected by this Court in Mullaney, removed that burden of proof or shifted that burden of proof to the Defendant.

Now, in the Maine case, or the Mullaney case, this Court stated that in Maine itself, the prosecution was required to prove the absence of self-defense beyond a reasonable doubt.

Now, in North Carolina until the Hankerson decision, that is, the case which is at the Bar, the Defendant himself had to satisfy the jury that he did act in self-defense.

That is to say that the burden of proof was shifted from the state to the Defendant to come forward and satisfy the jury of the four things necessary for them to return a verdict of acquittal on the grounds of self-defense.

So the Petitioner earnestly contends that while a review of all the other cases involving retroactivity being applied prospectively is important, this Court need look no

further than the language of Mullaney in applying it with Ivan and Winship.

QUESTION: In this case, under the prior North Carolina law, until changed by the Supreme Court in this case, there were two separate matters in which the proof or persuasion, at least, was shifted to the Defendant.

First, the absence of malice, which would reduce the homicide to manslaughter. Is that correct?

MR. DIEDRICK: From second degree murder to manslaughter, that is correct.

QUESTION: And second, the question of self-defense which, if proved -- or if the jury was satisfied by the Defendant, would wholly acquit the Defendant. Is that correct?

MR. DIEDRICK: Yes, Your Honor.

QUESTION: And the North Carolina Supreme Court has treated them both alike and both as covered by Mullaney, did it not?

MR. DIEDRICK: Yes, it did.

QUESTION: And both were involved in this particular case, weren't they?

MR. DIEDRICK: That is correct, Your Honor.

QUESTION: And yet, Mullaney did not involve any matter that would have been a complete defense to any charge of homicide, did it?

MR. DIEDRICK: It did not, but I would argue that it would address itself to that.

QUESTION: That is self-defense, as in this case, or insanity, as in the Leland case, or so on.

MR. DIEDRICK: It did not directly, but I would argue that it did direct itself to that by stating that Maine had already had the rule which required the state to prove beyond a reasonable doubt the absence of self-defense.

QUESTION: But it did not say that that rule was constitutionally required, did it?

MR. DIEDRICK: It did not, but it analogized it to the rule of proving heat of passion and held that to be, the way Maine had it, constitutionally prohibitive.

QUESTION: One involves elements of the offense that the state has to prove and the other involves an affirmative defense to the commission of any crime, and that would be duress or insanity or self-defense, depending on the crime.

MR. DIEDRICK: I would argue differently, Your Honor. I would tell the Court that one of the necessary --

QUESTION: Well, as a matter of fact, that is correct, isn't it? One does involve mitigation of the degree of the homicide and the other does involve a complete exoneration of any criminal offense. That is correct, is it not?

MR. DIEDRICK: That is correct, Your Honor, but they both require the absence of elements in order to rebut the presumption of unlawfulness and unlawfulness is an element of homicide in North Carolina.

QUESTION: But unlawfulness is an element of manslaughter.

MR. DIEDRICK: That is correct, Your Honor.

QUESTION: There is no unlawfulness if it is self-defense. There is no unlawfulness if it is a killing in the course of warfare or a legal execution or by somebody who is insane. There is just no unlawfulness, correct?

MR. DIEDRICK: That is correct, but by statutory and by case law definition of homicide in North Carolina, an element of it is not the lack of insanity, whereas, an element of the offense in North Carolina is unlawfulness.

Therefore, I would argue to you that a judgment of acquittal by virtue of a plea of self-defense is a negative of a necessary element. That is, the elements are both malice and unlawfulness, not the lack of insanity. That is not an element and both of these address themselves to defenses involving these elements and I would argue to you that the North Carolina court, in adopting Mullaney and making it applicable to our law, properly did so because it says that this element of unlawfulness used to be -- it used to not be inferred but it was actually presumed, the use of a

deadly weapon, and it was up to the defendant to rebut that presumption through self-defense and that the element of malice was actually presumed from the use of a deadly weapon and that this had to be rebutted by the defendant through the use of his defense of heat of sudden passion.

QUESTION: Do you think the sudden passion point is here at all?

MR. DIEDRICK: Do I believe it was properly raised by the facts?

QUESTION: As I understand your Supreme Court on that particular point, the Court said as a matter of state law there wasn't any evidence at all of the heat of passion and so the issue wasn't even before them.

MR. DIEDRICK: I didn't understand it to be that way, Your Honor. I thought they held that --

QUESTION: It says as a matter of state law, "We note that there is no evidence in this case of a killing in the heat of passion on sudden provocation, therefore, this issue is not properly presented as it was in Mullaney. There could not consequently be any Mullaney error prejudicial to the defendant on this aspect of the case."

MR. DIEDRICK: Well, I would --

QUESTION: Do you say that it is unconstitutional for a court to demand at least that the defendant present some evidence, at least present the issue?

MR. DIEDRICK: Well, I am arguing that there was that issue presented by the facts in this case.

QUESTION: Well, I know, but they ruled that they weren't. Now, that is just -- what I am really asking you is, suppose the Court was right here that the defendant had not presented any evidence of it but that he had to or his heat of passion defense would not be any good. Would that be constitutional?

MR. DIEDRICK: I think it was. I think the Mullaney decision said when you properly present it. It has to be facts.

QUESTION: Now, you are on the heat of passion point. The only way it could properly be here is if we disagreed with your Supreme Court on the facts.

MR. DIEDRICK: That is correct, Your Honor. But I would argue to the Court that that defense certainly should be available or, actually not the defense, the lack of it should be available when a knife is put at somebody's throat. That certainly should be fact sufficient from which heat of passion could arise.

QUESTION: Well, your Supreme Court did not think so.

MR. DIEDRICK: Well, I would disagree with the Supreme Court, Your Honor.

QUESTION: Are you saying that the defendant does

not have to present any evidence of any kind with respect to the heat of passion issue?

MR. DIEDRICK: I would say that, if the state's evidence in itself would present facts from which this could arise. Here, the main thrust of the state case was exculpatory statements. That is, statements made by the defendant himself. His confession, his statement of how the incident occurred and his own statements brought forward, I would argue the defense was self-defense and the absence or the presence of a heat of passion, therefore, the absence of malice which would require these to be properly submitted to the jury.

Now, to answer your question, certainly there could be instances, and there are many instances in which these two things are not really at issue, that the facts don't properly raise but certainly the state's evidence, not only in this case, but in many cases, bring those forward.

QUESTION: So you rely on the state's evidence, not on any facts introduced on behalf of the defense?

MR. DIEDRICK: I would rely on both but I would say that the state's evidence in this case properly brought forward both those issues.

QUESTION: And you disagree with the finding of the North Carolina court, as pointed out by Justice White.

MR. DIEDRICK: Yes, I disagree because I think that,

as I answered Justice White, that any time you have a factual situation that shows a knife being put at somebody's throat, certainly the offense of heat of passion could properly be raised.

QUESTION: If we should agree with the finding of the North Carolina Supreme Court, would the retroactivity issue still remain in this case?

MR. DIEDRICK: I would argue that it would because of the self-defense.

QUESTION: But we never held that Mullaney, certainly up until now, applied to self-defense.

MR. DIEDRICK: I would say the language is the same, if it please the Court. It is the negating of a necessary element and in Mullaney itself, they spoke of the fact that Maine had in the past placed the burden on the state to prove the absence of self-defense from the evidence of beyond a reasonable doubt of saying that the absence of the heat of passion would be no greater burden.

QUESTION: So your view is that the retroactivity issue remains in any event?

MR. DIEDRICK: Yes, Your Honor.

I think the main thing that I am trying to point out is that when you talk about insanity or alibi or anything like that, you are not talking of elements. You are not speaking of elements of the offense, both malice and

unlawfulness are elements of the offense of homocide which the state, by its charge in this case, placed the burden on the defendant to satisfy the jury of the absence of and that is why we would argue it was constitutionally prohibitive and it would, of necessity, in light of Ivan and Winship, have to substantially affect the fact-finding process and therefore, should be given full retroactivity.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Hensey.

ORAL ARGUMENT OF CHARLES M. HENSEY, ESQ.

ON BEHALF OF RESPONDENT

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

The State of North Carolina, of course, is quite concerned over the reach and scope of your decision in the Mullaney case. The State of North Carolina feels that its Supreme Court was essentially correct in its ruling on the retroactivity portion of the Mullaney opinion. That is, the state feels that the Mullaney opinion should not be applied retroactively by this Court.

Now, the state recognizes, of course, the rule that when the primary purpose of the new constitutional doctrine is to substantially improve the reliability of the fact-finding process, that more often than not, you have held that type of decision to be retroactive.

However, the State of North Carolina would argue in this case that your Mullaney decision, because it was, as we say, on the fringes more or less, of the question of how much proof is required in a criminal case and who has the burden of persuasion and whatnot, that this decision and the changes that it made in the rules relating to burden of proof on affirmative defenses, has not wrought such a dramatic improvement in the fact-finding process so as to require the automatic retroactivity of this decision.

The state, of course, has cited the Court to certain psychological studies in its brief concerning jury perceptions in criminal cases and where, in many, many instances, the juries have been quite reluctant to convict and have a much higher standard of beyond a reasonable doubt and have a much higher standard where self-defense is raised.

And of course, as this Court pointed out not too long ago, in the death penalty cases, that jury nullification of death penalties or cases involving the death penalty in many instances have brought about the change that society recognizes now in the imposition of the death penalty.

The point I am trying to make, of course, is that juries are very knowledgeable and very sensitive and are quite perceptive and the state feels that the changing of the rules on the burden of persuasion by the Mullaney case has not significantly improved the fact-finding process.

Therefore, the state feels that this Court can quite legitimately and properly consider the other two factors of justified reliance on the part of the state and that an impact that retroactivity would have on both the State of North Carolina and on other states similarly situated.

Of course, the State of North Carolina feels that a retroactive application of Mullaney would have an almost disastrous impact on North Carolina.

There are something over 1,000 people currently in the North Carolina prisons involving murder-type prosecutions. While perhaps not all of them would ultimately prevail, nevertheless surely petitions would have to be heard, either of a post-conviction type or a federal habeas corpus type.

The expense in both dollars and cents and prosecutorial time in dredging up old cases that everybody thought had long been reposed, some 15 or 20 years old, the difficulty of finding the transcripts of the cases that perhaps were not appealed. Does the court reporter still have the records? If she or he has died, have the records been preserved?

How in the world -- I suppose it can be done but it would be an extremely difficult, costly and time-consuming process.

QUESTION: This would involve all who were

convicted of second-degree murder and even all who were convicted of manslaughter if a defense of self-defense had been interposed.

MR. HENSEY: That is my understanding, assuming that this Court does not go off on the distinction that you were making earlier about whether this was properly presented.

But assuming you adopt the North Carolina Court's analysis --

QUESTION: Right.

MR. HENSEY: -- yes. Now, as I understand it, probably the first degree murder conviction would survive because you have to prove the element of premeditation and deliberation or the felony or whatnot beyond a reasonable doubt but in the second degree case where either an involuntary manslaughter issue was presented or a self-defense issue was presented and possibly if this Court should go so far as to extend this doctrine into other areas such as entrapment or whatnot, you know, and that type of defense was raised, then possibly even there.

QUESTION: Well, just within the meets and bounds of the Supreme Court decision of North Carolina.

MR. HENSEY: Right. Right.

QUESTION: It would be every second degree murder conviction in which an involuntary manslaughter defense or mitigation was in issue.

MR. HENSEY: Right, right.

QUESTION: And also even every manslaughter conviction in which it is self-defense.

MR. HENSEY: It is self-defense -- was an issue.

QUESTION: Was an issue. How many --

MR. HENSEY: Sir, there is no way to identify these numbers. The statistics kept by the prison department and the records kept by the prison department simply do not permit identification of this. They have, in the records, what is known as the prisoner's version of what happened but, of course, this is not a transcript of the trial and the only way I know of would be to get a transcript of every one of those trials and see what issues were presented.

QUESTION: How many gross numbers are involved?

MR. HENSEY: Well, we are talking about around 1,000 total.

QUESTION: That is second-degree and manslaughter convictions.

MR. HENSEY: No, my recollection is that we are talking around about 700 second-degree type, or below. Now, of course, some of these people might be out on parole, obviously.

Now, query whether or not they would have a right to raise this point.

What we are saying, though, is that it is going to

be a very expensive, difficult and time-consuming matter that would have a devastating impact on the administration of justice in the State of North Carolina.

QUESTION: Your brief states that 722 inmates, as of June 10, 1975, had been convicted of second-degree murder.

MR. HENSEY: Yes, Your Honor.

QUESTION: And you cite a North Carolina case.

MR. HENSEY: Correct. Well, that is what the North Carolina Supreme Court in Hankerson identified. Those were the numbers that they identified.

QUESTION: That is in addition to 269 inmates convicted of first-degree murder.

MR. HENSEY: First degree, right.

QUESTION: They wouldn't be a problem here.

MR. HENSEY: Right. I don't think we will have any problems with the first degree people. We are going to have a lot of problems with the second-degree people and any time a self-defense gets into the thing.

QUESTION: Mr. Hensey, the state did not cross-petition here, I take it.

MR. HENSEY: No, sir, we did not. We thought about it and finally decided --

QUESTION: I take it, then, the question of whether Mullaney reaches self-defense just is not open here.

MR. HENSEY: Well, I did not think it was open,

Justice White, until I heard the questions this morning.

QUESTION: Well, you mean you didn't think you ought -- you must have thought Mullaney covered it?

MR. HENSEY: Well --

QUESTION: I am talking about a matter of jurisdiction and a matter of whether we may properly decide in this case.

MR. HENSEY: Are you talking about the fact that voluntary manslaughter was not properly presented?

QUESTION: No, I am not talking about that. I am talking about the fact that your Supreme Court said that Mullaney applied to self-defense.

MR. HENSEY: Yes, sir.

QUESTION: And you did not cross-petition challenging that.

MR. HENSEY: No, I didn't because first of all, I was under the impression that I was bound by the interpretation of my court. My court --

QUESTION: You mean, it is a matter of whether you have the authority to attack your court?

MR. HENSEY: Well, certainly our court held, as a matter of state law that there was absolutely no distinction between the burden of proof required for voluntary manslaughter and the burden of proof required for self-defense and in --

QUESTION: Well, I can understand why you might not have, but the fact -- it seems to me that the question of whether Mullaney covers self-defense in North Carolina, that issue just is not here. You didn't petition raising it and certainly your colleague did not.

MR. HENSEY: No, it --

QUESTION: And to support the judgment, you are not entitled to present it, either, because that would give you a bigger judgment than you get.

MR. HENSEY: That is right. And, quite frankly, I just did not perceive this to be a problem until this morning and I thought that by the interpretation of our state court and, secondly, in the trial of Hankerson, a manslaughter issue was presented to the jury.

QUESTION: Yes.

MR. HENSEY: A manslaughter issue was presented, a self-defense issue was presented. Therefore, I thought, by having both issues presented to the jury, by the Supreme Court of North Carolina saying they are all the same and --

QUESTION: The applicability of Mullaney to self-defense may vary, depending on the state.

MR. HENSEY: It may very well.

QUESTION: And you say here, the reason you thought it was a closed issue was that your court ruled that self-defense and provocation should be treated the same.

MR. HENSEY: Precisely.

QUESTION: In terms of the burden of proof.

MR. HENSEY: Precisely. The standard in North Carolina, which is proof to the satisfaction of the jury, is the same in both of these matters and our state court has so held and as I understood, the major question, of course, was retroactivity. The ancillary question that I had raised in my brief is that perhaps the Mullaney rules do not even apply to North Carolina at all, that perhaps the satisfaction of the jury test means something less than the preponderance of the evidence test.

QUESTION: Mr. Hensey, on that point, weren't you arguing the same thing that the concurring opinion argued at length?

MR. HENSEY: That is correct.

QUESTION: And don't we have to interpret the majority as having rejected that?

MR. HENSEY: Yes, sir. And, of course, I recognize that in my brief that I may very well be foreclosed from this argument.

QUESTION: Because that is a North Carolina law question.

MR. HENSEY: Yes.

QUESTION: Well, the North Carolina Supreme Court, the majority, was holding what it understood the Federal

Constitution to require under the Mullaney case.

MR. HENSEY: Yes, sir.

QUESTION: It wasn't construing state law, was it?

MR. HENSEY: Well --

QUESTION: It was a Federal Constitutional decision.

MR. HENSEY: This would be my distinction. That they interpreted the North Carolina standard in view of what you gentlemen had said the Constitution meant.

QUESTION: It was construing what the due process laws and the Fourteenth Amendment required in the light of the Mullaney case.

MR. HENSEY: Precisely.

QUESTION: It was not deciding North Carolina law.

MR. HENSEY: It was not deciding a question of what satisfaction of the jury means in terms of North Carolina law.

QUESTION: And, since it affirmed the conviction in this case, you are entitled to make any argument you want in upholding that decision to affirm this conviction.

MR. HENSEY: Well, that was my feeling, Justice Brennan and that is why I made the argument, of course.

QUESTION: You are flattering me and elevating me.

MR. HENSEY: Oh, excuse me. I apologize, sir. Well, this is my first time here and my little list slipped

down.

QUESTION: Mr. Hensey, could you refine that just a little bit? Is it not correct that the Court decided a federal question as to what Mullaney requires for the future and then, in deciding whether or not to affirm this conviction, they had to decide as a matter of North Carolina law what the instruction to the jury on satisfaction properly meant.

MR. HENSEY: Yes.

QUESTION: And that was a North Carolina question.

MR. HENSEY: That was a North Carolina --

QUESTION: That differed from the federal requirement.

MR. HENSEY: Quite a bit.

QUESTION: Yes.

MR. HENSEY: Because, of course, in Mullaney, you-all were construing a rule of law in Maine that, as I understand it, had already been construed by the Maine Supreme Court and of course, as I have attempted to argue in my brief, the North Carolina rules are quite a bit different from the rules in Maine.

We don't have this conclusive presumption of malice in -- I guess it is the Morgan tradition, that, really, what North Carolina has is more of an evidentiary inference of malice, that when certain things are shown, you know, then

the inference of malice arises and the protection burden then is shifted on the defendant to come forward and present evidence.

QUESTION: General Hensey, let me ask you one other question. Do you agree with your opponent that the heat of passion element is, in fact presented by this record under the manslaughter part of it as opposed to the self-defense issue?

MR. HENSEY: Well, certainly, up until about 15 or 20 minutes ago, that was my understanding of the posture of the case.

QUESTION: And that the evidence of the knife at the throat would be sufficient to raise that phase of the case as well as the self-defense.

MR. HENSEY: Yes, certainly it is my feeling that there was some evidence in the case and of course, North Carolina does require that there be evidence in the case before the judge instruct.

QUESTION: Well, what do you do with what your Supreme Court says?

MR. HENSEY: That it was not properly presented?

QUESTION: When there wasn't any evidence. You heard the passage I read.

MR. HENSEY: Yes. Yes. Well, I don't know quite what I would do with it but it is my feeling that the issue

is here, that, as I pointed out earlier, that similarity, nay, the identity of the rules of law and the standards and the burdens in North Carolina, I feel like get this issue up here.

Certainly, the trial judge thought it was there. He instructed that jury and I take it that jury could have returned a verdict of voluntary manslaughter under the instructions in this case.

QUESTION: What page of the Appendix are we talking about, that the North Carolina Supreme Court said it was, 33?

MR. HENSEY: Thirty-three, I believe.

QUESTION: Thirty-three, the first full paragraph.

While Mr. Justice Stewart is looking at the Appendix, how do you make the judgment disagree with your court on this issue and accept the judgment of your court on other issues?

MR. HENSEY: Well, for one thing, on this issue that I am disagreeing with, it seemed like to me that the court was applying a federal principle that only you could ultimately decide the scope of.

QUESTION: May I interrupt you right there?

MR. HENSEY: Yes, sir.

QUESTION: The sentence Mr. Justice White read to you said, "We note there is no evidence in this case of a killing in the heat of passion." That is hardly a federal

question, is it?

MR. HENSEY: No, it is not and it is there and the only thing I can tell you is --

QUESTION: That you disagree with it.

MR. HENSEY: That I disagree with it.

QUESTION: You are representing the state.

MR. HENSEY: Yes, sir, and I feel like that I have to make the best argument that I can.

QUESTION: Well, you are entitled to that.

MR. HENSEY: To conclude and summarize: The state is most concerned about the potential retroactive application of your Mullaney case. This is what we are most gravely concerned about and if this Court could somehow find its way clear to limit the retroactivity of Mullaney, the State of North Carolina would be very, very happy because, by Hankerson, hopefully, we have cleaned up whatever Federal Constitutional error might have been present in our rules before.

QUESTION: But you draw the line.

MR. HENSEY: On what, sir, retroactivity?

QUESTION: Retroactivity.

MR. HENSEY: Of course, I would draw the line as of the date the decision was handed down and I realize this is a source of great controversy and if you draw the line at varying dates, I would say that any case that was tried to a

conclusion prior to the date of Mullaney should be allowed to remain.

QUESTION: I would think that North Carolina would even be happier and would be more interested in urging that Mullaney didn't apply at all in this case.

MR. HENSEY: Well, this was going to be my next argument and by way of summary that, obviously, the millenium as far as I would be concerned here today would be for you-all to hold that Mullaney never applied to North Carolina.

QUESTION: But when you take that position without a cross-petition --

MR. HENSEY: Yes, sir, without a cross-petition.

QUESTION: You can take it, you think.

MR. HENSEY: Well --

QUESTION: You are arguing to the Court of the affirmance of this conviction, aren't you?

MR. HENSEY: That is exactly what I am arguing.

QUESTION: No, you are attacking the holding of your court.

MR. HENSEY: Well, the only thing --

QUESTION: You are not trying to support the judgment, you are attacking it.

MR. HENSEY: Well, all I am saying is that the Court may very well have misperceived and construed the sweep of your opinion in Mullaney, Mr. Justice Blackmun and I

understand it only you can say with finality that the sweep of your opinion -- it possibly may apply to North Carolina.

As a representative of the state, I feel like it did not. I feel like our Court painted with too broad a brush with your Mullaney decision and I feel like this is something that is legitimate that this Court should consider when it decides this particular case.

QUESTION: General Hensey, what really is the difference between -- as a matter of legal principle -- between the heat of passion argument and the self-defense argument? What is the argument you are making for us to draw a distinction, if we do reach it?

MR. HENSEY: I can't see that there is any distinction myself.

QUESTION: You really aren't making a very powerful argument.

MR. HENSEY: I'm sorry, sir, I misunderstood your question.

QUESTION: The question is, if you were permitted to argue that there should be a distinction drawn between self-defense and heat of passion for Mullaney purposes, then I would say, well, what is the argument, and I thought you said, "I don't have an argument."

MR. HENSEY: Well, I'm sorry, sir. I thought you were talking about in terms of state law concerning the

burden of proof on those two affirmative defenses. As I understand it as a matter of state law, there is no difference between the two insofar as the burden of proof.

QUESTION: But what is the difference as a matter of Federal Constitutional law that you would urge us to consider?

MR. HENSEY: Between self-defense and heat of passion.

QUESTION: When the burden as a matter of state law is identical with respect to both of those matters.

MR. HENSEY: Well, I would argue that insofar as North Carolina is concerned, where the burden is to the satisfaction of the jury on both of those affirmative defenses, that satisfying the jury does not mean convincing by a preponderance of the evidence.

QUESTION: I understand, but that argument applies equally to heat of passion and to self-defense.

MR. HENSEY: Yes, sir.

QUESTION: Is there any principal reason for distinguishing between heat of passion and self-defense as a matter of Federal Constitutional law?

The North Carolina Supreme Court saw none and Mr. Justice Wright, in effect, has raised the question, well, maybe there is one that we have not discussed.

MR. HENSEY: And that is what I thought you were

asking awhile ago, sir, and my answer is tht I don't see any distinction, either.

QUESTION: That is what I thought you said.

QUESTION: Well, what is the difference between self-defense and insanity as an affirmative defense?

MR. HENSEY: Well, of course, self-defense goes to the unlawfulness issue.

QUESTION: It goes to whether or not a criminal homicide has been committed at all.

MR. HENSEY: It goes to the Mandrea? element or to the malice element.

QUESTION: Well, each one of them goes to the basic question of whether or not a criminal homicide has been committed, does it not, at all?

MR. HENSEY: Yes, sir, it does. It does.

One excuses because of the mental condition. The other excuses because of the threat to the bodily harm.

QUESTION: Well, it is a justification.

MR. HENSEY: Well, it is a justification but it is not unlawful, is what you are saying, when it is self-defense.

I, quite frankly, can see no distinction but you do have, of course, your Leland case which was a strange procedural animal in that the state had to find the man guilty beyond a reasonable doubt and then he had to come in and prove himself insane beyond a reasonable doubt and, of

course, as I recall the opinion, you said that was all right under those circimstances and of course, Oregon has long since done away with that procedure, to my knowledge.

QUESTION: But there are many, many cases -- states in which insanity remains an affirmative offense to be pleaded and proved by the defendant.

MR. HENSEY: Right. One problem is, of course, looking at the text writers, is that there seems to be some question, number one, as to what an affirmative defense is, what do you categorize as that?

And then, of course, there are all grades and shades of proof once you decide the thing is an affirmative defense and I can't give you a rational distinction between, let us say, the insanity problem and the heat of passion or self-defense problem except to say that it is there and apparently this Court at one time or another has made those distinctions.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Very well.

Do you have anything further, Mr. Diedrick?

REBUTTAL ARGUMENT OF LAWRENCE G. DIEDRICK, ESQ.

MR. DIEDRICK: If it please the Court:

I just wanted to reply in rebuttal to his argument with reference to the severe impact that it would have on the administration of justice.

Now, I do not have available to me any statistics of any state except for North Carolina, which are present in his brief and which our Court addressed itself to.

However, I think these statistics are unmeaningful without some type of guidance as to the number of those which are pleas, the number of those which are pleas of not guilty, the number of those which are actually first-degree convictions, which are second-degree convictions, which are manslaughter convictions because --

QUESTION: Well, he has separated the first-degree, I thought, from the second-degree and the manslaughter.

MR. DIEDRICK: I'm not -- I understood that he had but I was saying that I think that before you can answer that question, you have to make that determination, having all of that criteria available to you and, most importantly, which ones were upon please of not guilty and which ones were pleas of guilty.

QUESTION: Well, somebody who pleaded guilty would have pleaded guilty with the knowledge and/or the advice of his lawyer as to what the then-state of the North Carolina law was and he could certainly collaterally attack that guilty plea, couldn't he, if this were made retroactive?

Because now the law has been changed and he might well -- well, he could probably say he would never have pleaded guilty if it had been incumbent upon the state to

prove these things rather than upon himself.

MR. DIEDRICK: But if that defense of self-defense was available to him, I would argue to you that whether under the state law it was then affirmative defense with the burden upon him or whether it was not an affirmative defense, that, yes, he would have had to consult with counsel and made the determination of whether or not that defense was available to him but I would argue to you that the plea of guilty was a waiver of that.

QUESTION: Well, that is undoubtedly what the state would argue, but there is certainly an argument on the other side, isn't there?

MR. DIEDRICK: There could be, yes, Your Honor.

QUESTION: Even attacking a guilty plea.

MR. DIEDRICK: There could be. But the thing I really would argue is this, if you take a factual situation like my case, the case at the Bar, in which all of the evidence is primarily exculpatory evidence which is statements of the defendant wherein he clearly brought forward lack of malice on his part, I would argue, in which he clearly brought forward lack of unlawfulness because of the defense of self-defense.

Reviewing all of the facts and circumstances in the case and weighing everything equally, I certainly argue to the Court that the charge of the Court in this case

substantially affected the fact-finding process and if there are these 728 other cases, three or four or ten which would have properly brought this forward, then it makes no difference how severe an impact it would have on the administration of justice, it should be done because I would argue to you, these people were unconstitutionally convicted, that they did not receive a fair trial, that they were placed where they had a constitutionally prohibitive burden placed upon them and regardless of the severe impact, it should be made available to them.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:50 o'clock a.m., the case was submitted.]