

# Supreme Court of the United States

Supreme Court, U. S.  
JAN 29 1970

OCTOBER TERM, 1969

In the Matter of:

Docket No. 778

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 :  
 : IN THE MATTER OF SAMUEL WINSHIP :  
 : :  
 : Appellant :  
 : :  
 : vs. :  
 : :  
 : FAMILY COURT OF THE STATE OF NEW YORK, :  
 : :  
 : Appellee. :  
 : :  
 -----X

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ORAL ARGUMENT OF:

P A G E

Rena K. Uviller, on behalf of Appellant

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Stanley Buchsbaum, Esq., on behalf of the Appellee

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REBUTTAL ARGUMENT OF:

Rena K. Uviller, on behalf of Appellant

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1969

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IN THE MATTER OF SAMUEL WINSHIP, :

Appellant; :

vs. : No. 778

FAMILY COURT OF THE STATE OF NEW YORK, :

Appellee. :

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Washington, D. C.  
January 20, 1970

The above-entitled matter came on for argument at  
10:59 a.m.

BEFORE:

- WARREN E. BURGER, Chief Justice
- HUGO L. BLACK, Associate Justice
- WILLIAM O. DOUGLAS, Associate Justice
- JOHN M. HARLAN, Associate Justice
- WILLIAM J. BRENNAN, JR., Associate Justice
- POTTER STEWART, Associate Justice
- BYRON R. WHITE, Associate Justice
- THURGOOD MARSHALL, Associate Justice

APPEARANCES:

RENA K. UVILLER, Esq.  
New York, New York  
Counsel for Appellant

STANLEY BUCHSBAUM, Esq.  
Assistant Corporation Counsel  
80 Centre Street  
New York, New York 10013  
Counsel for Appellee

1                                   P R O C E E D I N G S

2                   MR. CHIEF JUSTICE BURGER: No. 778 in the matter of  
3 Samuel Winship.

4                                   ARGUMENT OF RENA K. UVILLER

5                                   ON BEHALF OF APPELLANT

6                   MRS. UVILLER: Mr. Chief Justice, and may it please  
7 the Court:

8                   This case presents the first clear opportunity for the  
9 Court to determine one of the implications of the landmark case  
10 inre Gault. It affords on a good record an opportunity which  
11 this Court sought, but was unable to proceed most recently in  
12 the case of DeBaker vs. Brainard an opportunity to determine  
13 whether a juvenile may be found guilty of a law violation and  
14 confined for a number of years unless proved beyond a reasonable  
15 doubt, that is, on proof less than that customarily considered  
16 the highest level of proof in criminal proceedings.

17                   In this case the 12-year-old appellant was found guilty  
18 of an act of larceny in violation of the New York penal law,  
19 and while he could have been confined for a maximum of five years  
20 had he been an adult, he faced a maximum confinement of six  
21 years because he was tried in the New York Family Court.

22                   The determination that he was guilty of this act of  
23 larceny was based expressly on the provision of the New York  
24 statute which provides for such a finding by a mere preponderance  
25 of the evidence.



1           The issue arose briefly in the following context. The  
2 juvenile was tried in a fact-finding hearing in the Family Court  
3 and at that hearing the complainant, a saleslady, testified that  
4 one night she was at work and while the store was open for busi-  
5 ness, she and her co-workers did not believe any other people  
6 were in the premises, that there were no customers present.

7           However, she became alerted at some point that a  
8 lavatory door in the back of the premises was locked and a moment  
9 or two later the door opened and a young boy scooted out the  
10 store and out into the street.

11           The lady testified that she had at the most ten seconds  
12 to observe him in profile as he darted by, and she saw him from  
13 a distance of about 20 feet. She then proceeded into the ---

14           Q     If you see someone that you have known before,  
15 isn't one second sometimes enough?

16           A     Yes, Your Honor, but in this case it really  
17 emerged that she knew this boy previously. Not at that time,  
18 but when she was confronted by him in a one-to-one confrontation  
19 the next night in the police station. There is nothing in this  
20 record which indicates ---

21           Q     What difference does it make which time she drew  
22 those conclusions?

23           A     Well, it is unclear from this record and I would  
24 suggest that the Family Court judge, in finding the boy guilty,  
25 conceded that there was reasonable doubt in this case about --

1 I don't know -- it is unclear what the doubt was about, that the  
2 lady had an opportunity to see him or when she made the determi-  
3 nation that this was someone she had known previously.

4 Q What did she say about having known him pre-  
5 viously?

6 A She said -- after she saw the boy scoot out, she  
7 called the police officer and she was then called to the police  
8 station the next night where she saw the boy, and she testified  
9 in court that she knew this boy very well, and she said that she  
10 had seen him on many previous occasions when he had come to the  
11 store and that she had thrown him out, as a matter of fact.

12 The boy, of course, and his mother and his uncle all  
13 testified that he was home, and could not possibly have been out  
14 of the house that entire evening, and testified to an alibi.  
15 He, of course, also denied that he ever knew this lady before.

16 But I would suggest that it would be inappropriate  
17 here for us again consider what entered into the fact-finder's  
18 mind when he was making this determination. He did assess the  
19 credibility of various witnesses and had before him the fact  
20 that the lady did see him in an inherently suggestive situation  
21 the next night, and determined that he did have a bit of a  
22 doubt about this boy's guilt.

23 This is quite developed in the record and the judge  
24 most candidly noted that he was applying a different standard of  
25 proof than would have applied in an adult situation, and that

1 therefore the finding was not as certain.

2 And I would submit that at this point what we are here  
3 to consider is the appropriateness of the measure of proof that  
4 the fact-finder applied as opposed to what went into his deter-  
5 mination that the child was guilty by the standard that he applied.

6 Q It is not up to us here to say, "Well, we review  
7 the evidence and we think we could have found beyond a reason-  
8 able doubt that this young fellow stole the purse."

9 A That is right, Mr. Justice Steward.

10 Q Do you know of any case in this Court where the  
11 Court has said (inaudible)

12 A Mr. Justice Harlan, there is no express holding  
13 to that effect, but I would suggest that the reason that is so  
14 is that this is so widespread a standard, it has such fundamen-  
15 tal antecedents that holdings to that effect have never been  
16 necessary.

17 Q Is it a standard in the 50 states?

18 A Yes, it is.

19 I would like to say at the outset that to seek a  
20 denomination of the proceeding here involved as civil or criminal  
21 would be futile and would merely only obscure the question that  
22 we have to deal with, because it is our basic contention that  
23 whatever we call these proceedings, juvenile proceedings, to find  
24 a child guilty of law violation and to incarcerate him for a  
25 substantial period of time, unless circumstance prove which are

1 known to our law, is a violation of due process,

2           And it is a violation of due process, I would submit,  
3 however that concept may be defined. Whether it is, as in Mr.  
4 Justice Black's view, the law of the land where an adult is  
5 accused of a crime and confined or whether it is considered the  
6 fundamental fairness of the proceedings. And although much has  
7 been said by this Court and other courts about the fairness of  
8 this standard where liberty is at stake for law violation, I  
9 would just like to reiterate a couple of considerations, And  
10 that is, the standard after all expresses an attempt to reduce  
11 the chance of risk that an innocent person is going to be con-  
12 victed.

13           It is a flat, as it were, the fact-finder that he must  
14 be very, very certain that this is the person that did the act  
15 and, in fact, as this Court noted in Kaufman against the United  
16 States many years ago, it is really a fact corollary to the  
17 presumption of innocence, and I would doubt that anyone would  
18 suggest that that is a most fundamental presumption, should not  
19 attach to somebody accused merely because of his age.

20           And of course the reason ---

21           Q     Is that the only reason for it, merely because  
22 of his age? Or is it because whether misguided or well advised,  
23 a system of juvenile courts was set up to take people under a  
24 different age out of the criminal process and away from the  
25 stream of criminal proceedings and to protect them? Isn't that



1 the background?

2 A Mr. Chief Justice, yes, precisely, and we make  
3 no challenge to the policy of the legislators, which seem to be  
4 uniform throughout the country, to establish separate courts  
5 apart from the criminal process to try and deal with young  
6 offenders. We don't challenge the legislative assumptions on  
7 which that policy is based.

8 Q In New York is there a judgment of guilt on a  
9 criminal act in this kind of proceeding?

10 A He is found guilty of a law violation. My only  
11 contention is that within these specialized courts designed, as  
12 you suggest, to save youngsters before they become perhaps non-  
13 rehabilitatable, if there is such a word, to offer them special  
14 kinds of services, but we only ask that within these special  
15 courts that limitations of the Constitution apply so that funda-  
16 mental fairness is recognizes.

17 Q That is really a defense for the best of both  
18 worlds, isn't it?

19 A Yes, and I think a young offender is entitled to  
20 that.

21 I would like to just for a moment deal with one of the  
22 contentions that the city has raised about this confinement proce-  
23 dure. The City of New York has suggested, well, there are other  
24 kinds of confinement that are based upon a preponderance of the  
25 evidence and suggest this does not differ from those kinds of

1 confinement. And the city cites such things as the confinement  
2 of mentally ill people, alcoholics and narcotics addicts.

3 I would say that it really strains the analogy to  
4 compare this kind of a case with that kind of a case. In those  
5 cases we are dealing essentially with distillation of medical  
6 testimony relating to a physical or mental condition, expert  
7 opinions subject to very honest differences of opinion of what  
8 is an alcoholic or how sick is this person.

9 But here we are talking about did Johnny Jones do X  
10 on Y night?

11 Q Well, let's assume you may be right with respect  
12 to commitment of incompetents or narcotics addicts or alcoholics  
13 and so on, but coming closer to home, right here in New York,  
14 as I understand the city's arguments that children may be con-  
15 fined and may be confined in substantially or exactly the same  
16 place as this young man was confined after a finding that there  
17 are persons in need of supervision. And I would gather that  
18 doesn't need all sort of expert testimony.

19 Would you concede that in order to support a finding  
20 that a young person is in need of supervision, that a preponder-  
21 ance of the evidence is all that is required?

22 A Well, Mr. Justice Stewart, I would say that of  
23 course there is some distinction, because in case we are talking  
24 about a law violation and in another case not, but ---

25 Q But doesn't the young person -- isn't it evidently

1 possible that he is going to end up in the same institution?

2           A     It is very likely that he will. I would say,  
3 however, that the way the statute reads in New York, there is  
4 some question. It is rather broadly defined. However, as a  
5 practical matter, in New York the courts have required that when  
6 someone is charged with being a person in need of supervision  
7 and that he is incorrigible, that one may not merely accuse him  
8 of being incorrigible. One must charge a specific act of mis-  
9 conduct.

10           One must show that Johnny Jones was out away from home  
11 for two weeks from such and such a date to another date, that  
12 he has been drinking intoxicating beverages, that he is asso-  
13 ciating with bad company, namely, Sam Smith, et cetera, et cetera,  
14 and that must be proved.

15           Q     But none of these things so far that you have  
16 mentioned -- and I suppose truancy would be another -- would be  
17 a criminal offense if committed by an adult?

18           A     No, it would not, but I suggest that the only  
19 implication of the case today is that perhaps opinions cases,  
20 as they are called, should also be proved beyond a reasonable  
21 doubt.

22           Q     Yes, a person in these ---

23           A     And the reason I suggest that is that again, although  
24 it has no corollary in criminal law, it is an allegation of mis-  
25 conduct and it would seem intolerable for two boys to be in

1 precisely the same institution, one on a higher standard of  
2 proof, one on a lower standard of proof, both having been found  
3 guilty of misconduct.

4 And I would think that perhaps ---

5 Q So this arguendo you can see the city is right  
6 to that extent in the what-are-we-coming-to argument?

7 A Well, only to that extent. The city has suggested  
8 in its brief, well, if Court finds today that a finding of  
9 wrong-doing must meet high standards of reliability, that means  
10 this whole panoply of criminal procedures will apply. That means  
11 it will be jury trials and every other protection.

12 I maintain that is absolutely not so. This is an  
13 entirely separable issue. It is perfectly possible for this  
14 Court to find that it is required as a matter of fundamental  
15 fairness, that the fact-finder is very certain of the child's  
16 guilt and not accord or determine any of these other protections.

17 It may well be that this Court will at some time deter-  
18 mine that these other things are necessary, but certainly not as  
19 a result of this case.

20 Q Just so I understand it, I understood that you  
21 would say that logic would compel the result that if a standard  
22 of proof of guilt beyond a reasonable doubt is required here,  
23 then the same standard would be required under the New York  
24 system to prove that a young person was a person in need of  
25 supervision?



1 A Precisely, yes, sir.

2 Q You have to go no further in this case to prevail  
3 and to say that where the charge against the delinquent is a  
4 criminal charge, a charge of an act which if committed by another  
5 would be a crime, and under no circumstances do you have to prove  
6 beyond a reasonable doubt, or whatever label you put on it, is  
7 required. You don't have to go any further than that, do you?

8 A I would say ---

9 Q You might want to, but you don't have to?

10 A You don't have to, right.

11 Q Do you want all these children put right into the  
12 criminal court system, tried under full-scale criminal standards?

13 A No, Your Honor. I think, if I may say -- I think  
14 that the intention of the reformers when the juvenile system  
15 began in this country at the turn of the century was to try to  
16 bring to bear upon the young offender whatever notions of psy-  
17 chology, sociology, rehabilitation and early training that were  
18 possible and deemed it advisable to do these in separate courts  
19 with different procedures.

20 I am not quarreling with that. I think that is per-  
21 fectly appropriate. But I think maybe at this point it is  
22 important to note that that hope of the reformers will not be  
23 affected by a finding that the fact-finder be very sure that the  
24 child has demonstrated a need for those rehabilitative services  
25 and perhaps describing the New York system would best explain

1 how this works and why the holding that we urge today will not  
2 detract what you conceive of as the efforts of the juvenile sys-  
3 tem to rehabilitate youngsters.

4 Q Aren't you moving every point in your case toward  
5 a criminal proceeding?

6 A No, Mr. Chief Justice, I would say that this what  
7 we are urging today is even more fundamental than the rights  
8 afforded to children in Gault. I would say to ask the fact-finder  
9 to be very sure the child who has committed the act really needs  
10 rehabilitation, that he be very certain of that, will change  
11 the court in its everyday functioning much less than, for example,  
12 according a child the privilege against self-incrimination.

13 That goes much closer to changing the posture of the  
14 court, perhaps not in New York, but elsewhere, than a simple  
15 requirement that before you give the child these services --  
16 and there is some debate as to how effective they are -- you must  
17 be very sure that he really needs them, that he has committed  
18 that robbery, that shows that he needs help.

19 In New York, for example, if I may explain for a moment,  
20 the hearing is a bifurcated one. It is a two-stage proceeding.

21 The child is brought to the fact-finding hearing.  
22 There he is given the petition that has the charge in it, and  
23 the judge hears the facts. He may only consider competent,  
24 relevant and material evidence. No social history is permitted  
25 the judge at that time by New York statutes. They could have a

1 thick case folder on the family's problems and the boy's psy-  
2 chiatric history, but the judge may not see it. He must make  
3 an independent determination whether the boy committed this act  
4 or not.

5           Once that finding of guilt is made, the child must  
6 attend what is known as a dispositional hearing.

7           Q     It is not, however, a finding of guilt as such?

8           A     It would be a euphemism to call it anything else.

9           Q     Well, explain the New York system. What does  
10 New York call it?

11          A     It is called a fact-finding.

12          Q     Isn't that the predicate of the whole system.  
13 Didn't the reformers who set up the system which the courts are  
14 now dismantling piece by piece originally say that no lawyers  
15 could be there? The judge wouldn't have a robe. There couldn't  
16 be any newspaper reporters there and no one could mention his  
17 name.

18                Weren't all these steps done to protect the child from  
19 the traumatic experience of a criminal court setting?

20          A     Well, Mr. Chief Justice, there were, but I think  
21 Gault quite documented the fact that the hopes that the child  
22 would stand to benefit from these procedures has not been real-  
23 ized, and I don't think here it would be appropriate to go into a  
24 reevaluation of how successful the system has been in New York.

25          Q     The Court has started to do it.

1           A     Well, I would like to say in that respect that  
2 the Court of Appeals in New York expressed the benefits to the  
3 juveniles of ---

4           Q     I am speaking of this Court plus the fact that  
5 it can evaluate the unwisdom of the system.

6           A     It has made that evaluation and, therefore, I ---

7           Q     A very sound legislative evaluation probably.

8           A     A sound legislative evaluation to that extent ---

9           Q     That the system is working very well. Is it up  
10 to us to be amending it or up to the people who made it to be  
11 amending it?

12          A     Well, I think we are not asking this court to  
13 amend it. We are only saying that within the legislative struc-  
14 ture the elements of fair play prevail. It is simply that.

15          Q     Is it your position that the only thing you are  
16 complaining about is the standard?

17          A     Yes.

18          Q     You don't complain about the judge, how he acts,  
19 where the trial is, what the proceeding is, what the rules are?  
20 All you want is that ---

21          A     That is precisely right, Mr. Justice.

22          Q     You don't want to give up any other benefits.

23          A     That's right. We want, Mr. Justice, as has been  
24 said, the best of both worlds.

25          Q     And your rule was the rule when this case was



1 tried, this fellow would have been turned loose?

2 A That's right.

3 Q Under the judge's own statement?

4 A That is right.

5 I think a word should be said.

6 Q Who was the judge?

7 A Pardon me.

8 Q Who was the trial judge?

9 A It was a judge of the Family Court, Judge Midon-  
10 ick.

11 Q How did the Court of Appeals split -- Judge  
12 Keating and somebody else?

13 A Judge (inaudible), Judge Keating, Judge Burke,  
14 I believe.

15 I would like to make just one point about the alleged  
16 that the Court of Appeals stressed in its opinion. The Court  
17 of Appeals in discussing the advantages to the child of this  
18 so-called secrecy and non-stigma of the proceedings neglected,  
19 of course, to underscore the harsh reality that when a child is  
20 found guilty in this Court, he is subjected to substantial con-  
21 finement in facilities which even in New York are subject to a  
22 great deal of criticism.

23 Now, the city in its brief has compounded this omission  
24 by the Court of Appeals by again stressing the benefits of the  
25 New York system and suggests that the problems with the institutions

1 have never been shown to be relevant to New York. And the Attor-  
2 ney General in his amicus brief doubly compounds this by actually  
3 suggesting that this is a summer camp and that children just can't  
4 wait to go to the training school.

5 I would say here that we would insist that the standard  
6 of proof be high, even if these were model institutions. But I  
7 cannot let the suggestion of the Attorney General go uncontra-  
8 dicted at this point.

9 A recent study by the New York Community Services  
10 Society, one of the oldest private service organizations in New  
11 York, has issued a report indicating that the facilities in New  
12 York are very poor indeed, that rehabilitation and counselling  
13 range from token to nonexistent, that there are inadequate pro-  
14 visions not only for vocational training, but even ordinary  
15 schooling.

16 Q Aren't these propositions that should be addressed  
17 to the Legislature and not to this Court?

18 A I only raised them here, Your Honor, because it  
19 has been suggested by my adversary that all of these criticisms  
20 that would make it a question of fundamental fairness to have a  
21 high standard of proof are not relevant to New York because  
22 New York's institutions are so "marvelous." And I would just  
23 suggest that this is totally contrary to the fact, and that there  
24 are, in short, ample basis for the conclusion of the Community  
25 Services Society that the children in these institutions validly

1 view their stay as "doing time."

2 Q Well, am I not correct that pins people end up  
3 there, too?

4 A Yes, they do.

5 Q People in need of supervision?

6 A Yes, they do, indeed. I would say roughly half  
7 of not quite half of the children, I believe, in these institu-  
8 tions are there as persons in need of supervision.

9 Q And they are in need of supervision, as to whom  
10 there has been no finding probably that they have performed  
11 any act that, if performed by an adult, would be considered a  
12 criminal offense?

13 A That's right.

14 Q And no judgment that they are delinquents?

15 A And no judgment that they are delinquents.

16 Q And they are in need of supervision.

17 Q What happens to neglected children or defective  
18 children or dependent children in New York?

19 A Neglected children are sent to completely separate  
20 institutions and, I am sure, there is again always room for  
21 improvements in these facilities, they are not locked shelters.  
22 In finding that a child has committed a violation of law also  
23 subjects him to a temporary detention.

24 There are statistics to the effect that some 35 percent  
25 of the children who are found guilty of law violations spend some

1 time in a temporary detention facility, and of those, some 40  
2 percent, I believe, are there beyond 30 days.

3 Now it takes just one visit to that detention facility  
4 in New York to convince one that we are not talking about an open  
5 and free shelter for little children. It is a facility where  
6 you cannot walk 30 feet but the custodian doesn't have to unlock  
7 the door to let you go through the corridor, and children are  
8 locked into their rooms at night.

9 Now there are various branches. There are some facilities  
10 ties that are somewhat more open for the younger children, but  
11 the central facility in Bronx County is the kind that I described.

12 Q Well, you would be making the same argument, I am  
13 sure, wouldn't you, if it was agreed on both sides that the  
14 physical facilities in these institutions are imperfect.

15 A I would. I would, Mr. Justice Harlan. I would  
16 say that the high -- we want without arguing, although I have  
17 been arguing about the inadequacy of the facilities, but even  
18 assuming they were models, ---

19 Q Well, I think your argument necessarily depends  
20 on, does it not, on persuading the Court that it is punishment?

21 A Well, it helps it.

22 Q It is necessary to the argument, isn't it?

23 A Yes.

24 Q I understood that the only question you brought  
25 up, the only question you raised, the only question the Court



1 decided was whether or not an infant could be found guilty of an  
2 offense on proof of a mere preponderance of evidence or whether  
3 he had to prove it beyond a reasonable doubt?

4 A Yes, Mr. Justice Black. I am only trying to some-  
5 what ---

6 Q Isn't that the only question before us?

7 A Yes, it is.

8 Q And whether the Constitution requires it be beyond  
9 a reasonable doubt?

10 A That's right.

11 Q Do you know of any constitutional prohibition  
12 against this Court deciding that the preponderance of evidence  
13 should be the rule in all the full-scale criminal hearings in  
14 all the states and in the Federal Courts? What in the Constitu-  
15 tion would prohibit that?

16 A Nothing would prohibit it. I would think we are  
17 determining what is a concept of a fair trial.

18 Q I am not in favor of it, you understand. I am  
19 just asking whether we have the power to do it.

20 A Yes, you do, I would think.

21 Q You are relying on the due process laws?

22 A Yes, I am.

23 Q And the idea of a fair trial fundamental?

24 A Yes.

25 Q What happens in your Family Court when there is a

1 fact-finding and then the question of whether he is a delinquent  
2 comes up, doesn't it?

3 A There is a fact-finding and then he goes to dis-  
4 position.

5 Q But there is no conclusion of delinquency at the  
6 fact-finding?

7 A I would say that even if it is assumed at the  
8 dispositional hearing that he does not require the supervision  
9 of the Court and he is dismissed therefore, there is still a  
10 finding of guilt against him, and that finding of guilt carries  
11 with it the same ---

12 Q How is that expressed? Under the law he is either  
13 a delinquent or he isn't, isn't he?

14 A Well, it is expressed that he has been found  
15 guilty of a certain criminal act or an act which would be a  
16 crime. However, we do not adjudicate him a delinquent because  
17 he has not demonstrated a need for confinement to supervision.  
18 However, the effect ---

19 Q And then what happens in that case perhaps, pro-  
20 bation?

21 A No, he might -- it is like a suspended judgment.  
22 I would suggest it is like a suspended sentence. The child is  
23 determined to have committed the act, but it is dismissed, so-  
24 called, because he does not require probation. However, in future  
25 years when these records become pertinent in his life, as in the

1 military -- and schools have a record of these proceedings --  
2 they will check and they will know ---

3 Q You would say that even if the fact-finding is  
4 followed by no conclusion about delinquency, no commitment, that  
5 fact-finding must be beyond a reasonable doubt?

6 A Yes, I would say so. And I would say, Your Honor,  
7 it is very analogous to the Patterson kind of cases where the  
8 Court is required to hold a separate hearing to determine whether  
9 the individual will have a certain special kind of sentence  
10 imposed upon him. But this does not reduce the state's burden  
11 to provide the -- to prove the underlying law violation by  
12 proof beyond a reasonable doubt, and the suggestion by the city  
13 that this two-stage proceeding somehow relieves the state of  
14 proving the underlying act by a higher standard of proof is  
15 really essentially an unsound one.

16 In sum, we are merely suggesting that let these state  
17 services, whether they are good or bad, be reserved for children  
18 against whom it has been demonstrated that really require them  
19 by having proved the acts that require such rehabilitation.

20 I will reserve the rest of my time. Thank you.

21 MR. CHIEF JUSTICE BURGER: Mr. Buchsbaum?

22 ARGUMENT OF STANLEY BUCHSBAUM, ESQ.

23 ON BEHALF OF THE APPELLEE

24 MR. BUCHSBAUM: Mr. Chief Justice, may it please the  
25 Court:

1           At the outset I want to take a moment on the findings  
2 by the Court below. I think it may be a little misleading to  
3 suggest that the judge in the Family Court said that if the  
4 standard of proof was proved beyond a reasonable doubt, he would  
5 have reached a different result.

6           And earlier in my brief I dussed this in quotes from  
7 the appendix as to what happened at that point, and if this  
8 becomes an element in the case, which I rather doubt, I think  
9 the Court should look at what happened, because the judge made  
10 his finding in accordance with the law, and then counsel for  
11 the child started what ended up as a philosophic discussion about  
12 the various standards of proof. And the judge then made some  
13 remarks which in the appellant's brief have all been telescoped,  
14 even though they are a page apart, and gives the feeling that  
15 he is talking about this particular case, when apparently he is  
16 talking about determinations in general.

17           Now let me turn to the central issue. The question is  
18 whether the Constitution requires that in proceedings of this kind  
19 there must be proof beyond a reasonable doubt and that the pre-  
20 ponderance of evidence standard is inadequate.

21           Now there is no specific constitutional provision, so  
22 the question comes down to whether due process requires it. And  
23 as I see it, that either must go along one of two paths: Either  
24 that in a criminal case, you must have such proof -- and this  
25 is a criminal case -- or, two, the nature of what happens after

1 this proceeding, the loss of liberty, the incarceration, the  
2 possibility of that, is of such a nature that due process  
3 required that standard of proof.

4           Aside from those two paths, I cannot see how this can  
5 be decided as a constitutional question. Now much of the dis-  
6 cussion we have had in this field, and I have seen it in some  
7 opinions and articles, discuss this without referring to the  
8 Constitution, the assumption that due process is what I think  
9 is wise and if I think this is wise, the Constitution requires  
10 it.

11           Obviously this Court does not approach this problem  
12 that way.

13           Now, let's see whether this is a criminal proceeding  
14 and here I suggest that Mr. Justice Fortas, in the Gault opinion,  
15 was writing far ranging. He was writing about the entire juve-  
16 nile system and he was dealing with a case which at least to me  
17 seemed quite horrendous. And what he did was, from all the  
18 writings, studies, very often students at law school who proba-  
19 bly had never seen a juvenile court, what they wrote.

20           He was picking out all the things that went wrong.  
21 Something went wrong Oregon which didn't go wrong in any other  
22 state, it was listed.

23           Now, it seems to me we are dealing with the question  
24 of whether the Court is the equivalent of a criminal court. We  
25 must deal in this case with the New York Court.



1 Q Let me ask you a question. Supposing you say  
2 there is no due process question here. Supposing New York passed  
3 a law saying our juvenile calendar load is very, very heavy,  
4 and we will amend our laws so that these children, who may be  
5 in trouble and need supervision or something, they can be found  
6 juvenile delinquents upon the judge finding that there is proba-  
7 ble cause to believe they are. Would you think that would raise  
8 a question under the due process law?

9 A I would think it would.

10 Q You would think it would.

11 A What I understand "probable cause" is is a  
12 probability, not a ---

13 Q Probable cause in the sense of getting a search  
14 warrant. The judge has a smell for it and he thinks the chance  
15 is pretty good that this younster is a juvenile delinquent,  
16 and that that would be enough under the hypothetical statute  
17 I am talking about.

18 A I would think that almost anything which depends  
19 upon someone saying I think this may be so and therefore finality  
20 results from it. Whether you are dealing with something alto-  
21 gether different from the juvenile delinquency would raise the  
22 due process question.

23 Q You think it would?

24 A I think in a purely civil case.

25 Q There is nothing in the Constitution that says

1 it does, except the due process clause.

2 A No, but I think due process does require there  
3 must be some element of logic in reaching a conclusion, and  
4 there is something lacking in logic if you say something must  
5 happen, the finality in the case, any type of case. Simply  
6 because someone thinks it might have happened, no conclusion  
7 as to this happened or this didn't happen.

8 I think that would raise the due process question.

9 Q I suppose it would follow, of course in your  
10 eyes, that if New York had a rule that when some juvenile was  
11 charged without more, the Court would incarcerate them. So that  
12 what you are saying is this is a spectrum and under the due  
13 process clause it is a question of degree if it is a due process  
14 question at all?

15 A Yes, I think that is true, but I think if you  
16 are going to cull out from your cases those to which you must  
17 apply the standard of proof beyond a reasonable doubt, I only  
18 see two bases for selecting the juvenile delinquency proceeding  
19 falling into that category: One, either that it is so akin to  
20 a criminal case it requires it, or, two, that it is a proceeding  
21 which may lead to loss of liberty and, therefore, requires it.

22 Q What do you call the charge is a 12-year-old  
23 broke into a house and stole a television set? Is that anything  
24 other than a crime?

25 A That depends on whether you are going to say that

7  
1 any attempt to make reform -- you just look through it. We had  
2 a Rhode Island judge who reached the conclusion that the appel-  
3 lant seeks, and in his opinion he said, "Murder is murder.  
4 Burglary is burglary, and we must recognize it."

5 But that is exactly what the juvenile court system was  
6 aimed to prevent.

7 Q Well, what was he charged with in the juvenile  
8 court, what act?

9 A There is no question that under the New York law  
10 to start a juvenile delinquency proceeding, you must charge  
11 someone with an act which, if committed by an adult, would con-  
12 stitute a crime.

13 Now, I am going to suggest that this constitutional  
14 question cannot depend on that, because suppose New York passes  
15 a law next year, lumps persons in need of supervision and the  
16 present juvenile proceeding under a title "deviant conduct" and  
17 says that you can bring this proceeding and show that the child's  
18 conduct deviates from what is regarded as a desirable norm, and  
19 then proceed.

20 I don't think that that change would make something  
21 constitutional, which ---

22 Q I don't think it will be any problem with it.

23 A Even though the deviation ---

24 Q I don't see any difference in what you label it.  
25 He is charged with breaking and entry and taking something that

1 belongs to somebody else for the purpose of depriving that per-  
2 son of the use thereof. And to me that sounds very much like a  
3 crime.

4 That one point is in this case.

5 A I can see that. There is no question about that.  
6 I just think ---

7 Q But you don't need reasonable doubt to find out  
8 that he, in fact, was the one who did it. You don't need reason-  
9 able doubt as a standard solely because he is 12 years old.

10 A Not solely because he was 12 years old, but because  
11 being 12 years old, this is not regarded as a crime and he is not  
12 being treated as a criminal.

13 Q What you are saying, as I understand it, is New  
14 York has the right, if it wants to, to pass a law that says that  
15 a person 12 years of age shall not be charged with or tried or  
16 convicted of any crime?

17 A That's right. And in this proceeding the things  
18 that occur in this proceeding are not to be distorted as the  
19 equivalent of his having been charged with a crime or having  
20 been found guilty of a crime. And that is why it is labeled a  
21 "fact-finding examination."

22 And then you have a dispositional hearing, which is  
23 not a suspended sentence, no matter what the child did, no matter  
24 how serious a crime it would have been considered if committed  
25 by an adult, a clear-cut evidence the child did it. If they

1 find that this child does not need confinement or supervision,  
2 to avoid this happening again or avoid similar conduct happening  
3 again, he is not found to be a juvenile delinquent and it is as  
4 though the case had been dismissed.

5 Q Counsel, do you say that New York has passed such  
6 a law, as I mentioned, that no child of 12 shall be charged with  
7 or convicted of a crime?

8 A That's right, Your Honor, and there is no such  
9 thing as waiving to the criminal court in New York. No such thing  
10 at all as long as the child ---

11 Q You say that law has been construed as meaning  
12 that a child of 12 shall not be convicted or charged with a  
13 crime?

14 A That's right, Your Honor.

15 Q But he can be put in a prison for six years?

16 A He can be confined in an appropriate institution  
17 for a limited period, which after being reviewed may be extended  
18 to a longer period where, if the child is 12, could possibly be  
19 extended at various times to six years.

20 Q And precisely the same thing can happen to a  
21 child found to be in need of supervision?

22 A Exactly.

23 Q Or insane?

24 A Or insane. You can also be confined ---

25 Q Or had the smallpox or some other thing?



1           A     But also, just to point out that that is the  
2 distinction, a civil commitment -- at least in New York and I  
3 think in many other states -- does not require proof beyond a  
4 reasonable doubt.

5           Now New York limits civil commitments generally, but  
6 other states do not limit the period of time as much as New York.

7           Q     Is the child required to respond to questions  
8 in the New York proceeding?

9           A     The answer is "no." Everything that was found to  
10 be wrong in the Gault case in New York by statute had been cured  
11 long before the Gault case. I will not attempt ---

12          Q     The Gault case didn't say anything about the  
13 Fifth Amendment? Did it?

14          A     It said that the child could remain silent.

15          Q     What?

16          A     It said that the child could remain silent. That  
17 was the one aspect in which the Gault case did touch upon this  
18 as though it was an issue of due process. As to all other aspects  
19 in civil or criminal cases require certain things. In this  
20 respect it said this analogous to a criminal case, although it  
21 went on immediately after and showed that that remark was unneces-  
22 sary, because in Arizona the child still could have been waived  
23 in a criminal court and tried on a criminal basis.

24          Now, what I suggest, and I am not going to attempt to  
25 cover all of the various aspects in which this juvenile court in

1 New York differs from a criminal court, but there are these  
2 differences.

3           There is not this finding of guilt as we are told. And  
4 while the places of confinement may not be ideal, much can be  
5 done to improve it, we do find in New York there is a constant  
6 restudy of this field. There is a constant attempt to improve.  
7 Far too slow and often inadequate, but there are constant changes.  
8 While I hesitated to speak of the manner of confinement, without  
9 knowing precisely and it wasn't evidenced from the record, the  
10 brief of the Attorney General submitted does point out -- and I  
11 am not saying that anyone is willing to go to these places --  
12 that the training schools operate under a college unit system,  
13 which generally is made up of semi-independent groups, many of  
14 which are limited to 20 young people.

15           They are in an open setting without the restraint of  
16 locks or bars, that house parents live on the premises and act  
17 as guides and mentors as well as supervisors, that home visits  
18 are made by the boys and girls on a regular basis, and vocational  
19 and academic features are provided.

20           Perhaps this is the ideal that they aim at and don't  
21 perhaps always comply, but this is what they are trying to do.

22           Q     As suggested by this Chief Justice, and Mrs.  
23 Uviller directed herself to this, this really doesn't have much  
24 to do with the issue before us, does it, except insofar as it  
25 may go to whether or not what happened here was equivalent of

2  
1 the finding of guilt and the imposition of punishment. And if  
2 it is tantamount to that and if the Constitution requires that  
3 in a criminal case where the issue is the determination of guilt  
4 and the imposition of punishment of due process or some other  
5 provision of the Constitution requires proof beyond a reasonable  
6 doubt, then Mrs. Uviller is correct.

7           But whether or not these are well or badly run insti-  
8 tutions or how many housemothers they have and how big the cot-  
9 tages are and so on, except insofar as it goes to your submis-  
10 sion maybe that this is not the equivalent of guilt and punish-  
11 ment, those issues are really for the New York State Legisla-  
12 ture?

13           A. Exactly. Now Justice Marshall has suggested that  
14 the mere fact that this starts off was an act that would a  
15 crime, and everything flows QED, I think that suggestion -- and  
16 it must be treated as a crime and all these trimmings that you  
17 are putting on it, all you have got is a criminal court trying  
18 a criminal case, which somebody -- as you do in a criminal court.

19           And therefore, at least in approach -- in answer to  
20 that approach, I think it is important to consider every element  
21 from the intake procedure where even though the petition is  
22 drawn up which says that the child committed an act, which would  
23 be a crime by an adult, and a substantial portion of the case  
24 is they review this and never reach the fact-finding stage and  
25 they decide even though the evidence was there, this doesn't

1 call for a juvenile delinquency proceeding for this child.

2 Through the dispositional hearing whereafter the evi-  
 3 dence may be proved on a basis which goes far beyond the unrea-  
 4 sonable doubt and absolute certainty, nevertheless there is no  
 5 finding of juvenile delinquency, that the child doesn't need  
 6 confinement or supervision.

7 Q Well, then the problem doesn't arise that this  
 8 case presents?

9 A Yes, but I am suggesting that all these elements  
 10 should be considered in deciding whether this is really a crimi-  
 11 nal proceeding. Now if ---

12 Q Aren't you really arguing that because of the  
 13 protection put around a juvenile in this special court proceed-  
 14 ings and all, that is balanced off as an excuse for not using  
 15 reasonable doubt as a standard? Is that what you are arguing?

16 A I can only respond this way. That when this  
 17 started off, Judge Julian Mack, Roscoe Pound and others who  
 18 were the strong proponents of the Childrens Court certainly did  
 19 not think that they had found a way of evading the constitutional  
 20 requirements with respect to criminal law, and I respectfully  
 21 submit ---

22 Q I am just asking about your position. I am not  
 23 interested in these other people. I am asking, is that what you  
 24 are arguing?

25 A Why, I hardly thought so until Your Honor suggested

1 it.

2 Q As I understand it, the petitioner's only point  
3 is the denial of the standard of reasonable doubt -- the only  
4 point. They want to keep all of the other parts, all of the good  
5 parts.

6 A What I thought I was trying to do was to try  
7 to analyze whether there is a constitutional requirement that  
8 in this type of proceeding there must be proof beyond a reason-  
9 able doubt. I didn't think I was trying to distort the nature  
10 of the proceeding. I thought I was trying to analyze it as to  
11 whether a juvenile delinquency court, a juvenile proceeding as  
12 designed by its original proponents as revised over the years,  
13 was an attempt to have due process requirement, is subject to a  
14 further constitutional requirement, then you must prove the  
15 wrong-doing beyond a reasonable doubt or the improper conduct.

16 Q May I ask you one or two questions?

17 Suppose this child has not been a child, but had been  
18 25 years old and charged with a crime. Do you think the Consti-  
19 tution requires the proof to convict -- constitutionally, now I  
20 am not talking about anything but the Constitution -- requires  
21 the proof to be shown beyond a reasonable doubt of his guilt?

22 A Put as Your Honor put it, do you think -- charged  
23 with a crime ---

24 Q Charged with a crime. Do you think that the  
25 Constitution requires that his proof of guilt be shown beyond a



1 reasonable doubt, or that it could be satisfied by showing that  
2 he is guilty by a preponderance of the evidence?

3 A I have found no case that decides that issue.  
4 I would be inclined to think that this Court probably, if faced  
5 with that issue, would reach the conclusion that there must be  
6 proof beyond a reasonable doubt.

7 I think it would say that ---

8 Q They would have to do that on the basis of a  
9 criterion that I don't agree to, of course, which is a question  
10 of stance. If we have a right to decide what is fair and if  
11 we decide it is not fair, it is unconstitutional.

12 Q Not necessarily, because just recently Judge Full  
13 in New York, in his defense in this case he would say -- or  
14 could argue, at least, that the requirement of a finding of  
15 beyond a reasonable doubt was necessary to maintain the integrity  
16 of the Fifth Amendment, unless a juvenile is not a person within  
17 the meaning of the Fifth Amendment. And that was his argument,  
18 wasn't it?

19 A Perhaps I misread it. I didn't quite read it  
20 that way. I thought he was saying that a requirement that it  
21 had become so habitual in this country that it was necessary,  
22 but perhaps I ---

23 Q He ties it to the Fifth Amendment. I don't know  
24 if that is his argument, but the Fifth Amendment uses the words  
25 "shall be compelled in any criminal case" and the Sixth Amendment

1 uses the phrase "in all criminal prosecutions."

2 So the question really is whether assuming the reason-  
3 able doubt standard is applicable, whether this is a criminal  
4 case or whether it is a criminal prosecution.

5 A I am afraid I am a little dull on that, because  
6 there is no claim here that the child is required to give any  
7 evidence against himself. Now what ---

8 Q I am not saying that he was. I am just saying  
9 in terms of what you call the proceeding, a criminal proceeding,  
10 the Constitution calls a criminal case or criminal prosecution,  
11 whether or not those standards would come in on this kind of a  
12 proceeding.

13 A Well, that is the essence of the question, and  
14 that is why I keep speaking about whether this is truly a crimi-  
15 nal proceeding and why I suggest that you can't decide it is a  
16 criminal proceeding just because the trigger that starts it off  
17 is an act which, if done by an adult, would be crime.

18 Q Isn't the corollary to that statement, if done  
19 by an adult would be a crime, that if it is not done by an adult  
20 it is not a crime?

21 A Certainly that is the intent of the New York law.

22 Q I should think it would be the only logical  
23 corollary.

24 A Well, I think in justice to the other side, if  
25 that were a deliberate intent to mislead -- well even if it were

1 not deliberate. In fact, what you really had was a criminal  
2 case, then just labeling it as not being a criminal case would  
3 not get by.

4 But it is not merely the label, it is not merely call-  
5 ing it a civil proceeding that makes it any less criminal in  
6 this case. The question is, looking at the thing as a whole  
7 from beginning to end in every feature of it, is this a criminal  
8 proceeding? And I submit that while you may find that a juvenile  
9 court setup in some states, you would reach the conclusion this  
10 is nothing but a criminal proceeding and that you cannot so find  
11 in New York.

12 It has also been suggested that -- certainly my argu-  
13 ment -- if you reach this conclusion, then you must end up with  
14 a jury trial in juvenile court. And if you reach it on the basis  
15 of this being a criminal proceeding, my suggestion is that if  
16 you base it on loss of liberty, that this may have an impact  
17 on the insanity proceedings and the narcotic addict proceedings  
18 and the civil contempt proceedings are not the issues before  
19 this Court.

20 But I submit that in this case the Court will decide  
21 which path will be taken down a certain hill, and it is hard for  
22 me to conceive ever going back up that hill.

23 Q What is New York's standards for civil commitment  
24 proceedings because of mental disorder?

25 A As I understand it, it is a preponderance of

1 evidence, as in the other proceeding.

2 Q And you are suggesting there is no difference in  
3 these two? Just the situation? That if you can put a man in a  
4 mental institution for perhaps five or ten years by preponderance,  
5 you can do the same with a juvenile in a noncriminal proceeding?

6 A Also I might mention at this point there has been  
7 a good deal of emphasis on, well, this child might have been  
8 confined for six years, and if he were an adult, it would be  
9 only five years.

10 This is mere happenstance, because the adult who might  
11 have been confined for life, the child does the same act and he  
12 is 14 years old, can at most be confined for four years. He is

13 Q While you are on that subject, I think I saw in  
14 the brief that this person has now been released. Is that cor-  
15 rect or not?

16 A That is as far as we can determine from the court  
17 records.

18 Q Is there any question of mootness here?

19 A I would hesitate to suggest that there is mootness.  
20 At least I think if it were moot, it would come under the rule  
21 that it is a recurring problem that should be disposed of -- a  
22 recurring problem of public importance.

23 Secondly, the suggestion is made by the appellant that  
24 even though there is all this confidentiality, somehow and some  
25 way it may leak out, and this casts a reflection on the child,

1 which argument, if accepted, might pull it out of the mootness  
2 area.

3 Q Is the same risk of publicity and the record and  
4 so on being made available to employers and the military and to  
5 sentencing judges in criminal cases when a person becomes an  
6 adult and so on, is that same risk present with respect to a  
7 child that has been found to be a person i need of supervision  
8 or not?

9 A I can't even speak about the first risk. That  
10 is one of the difficulties in these cases.

11 Q Now let's see. It is represented that there is  
12 some risk.

13 A Yes, but I don't know how they know. Somebody  
14 found out in the District of Columbia that there is such a risk,  
15 and there seems to be an assumption that there is such a risk  
16 in New York.

17 Q Well, as I remember the brief, it was represented  
18 that as a matter of fact and perhaps of law if this person later  
19 as an adult commits a criminal offense, is found guilty of a  
20 criminal offense, then his juvenile record is made available to  
21 the sentencing judge. Is that correct?

22 A The sentencing judge, yes.

23 Q Is that correct?

24 A That is correct.

25 Q And is that true also with respect to a person who



0  
1 as a juvenile has been found to be a person in need of supervi-  
2 sion? That is my question.

3 A I am afraid I don't know the answer.

4 Q What happens with a prospective employer if he  
5 wants to know if this child or this ---

6 A Well, from all I can hear, he is not given any  
7 such information.

8 Q Even on request?

9 A Even on request. I just don't know about the  
10 military and I hesitated to ask, because there was no one I  
11 could ask who could give me an answer that I would feel assured  
12 of as a certainty.

13 So if I got the answer that would be favorable to my  
14 position, I might be misleading the Court if I gave the answer.  
15 I do ---

16 Q Do I understand you to say definitely that this  
17 person has been discharged on this particular case?

18 A Yes.

19 Q How was he discharged?

20 A Here is what happened. He went away and after he  
21 was away for ten months, he was allowed to live with his parents.  
22 Then apparently, as they put it in the docket, he absconded from  
23 his parents' home and was picked up on the direction that he be  
24 sent away for a year. That year period has passed and there is  
25 nothing on the record to indicate that anything further has been

1 done, any other attempt to confine him.

2 Q He is not under confinement now under this charge?

3 A Under this charge or any other charge, as far as  
4 we can find from the record.

5 I gather my time is up.

6 MR. CHIEF JUSTICE BURGER: Your time is exhausted,  
7 Mrs. Uviller, but if there are any questions from the Court, you  
8 may respond to them in three minutes.

9 REBUTTAL ARGUMENT OF RENA K. UVILLER

10 ON BEHALF OF APPELLANT

11 Q I have one question, Mr. Chief Justice, I would  
12 like to ask her.

13 Who handles these cases, the advisor or the judge,  
14 the representative of the District Attorney's office or what?

15 A No, Your Honor, where the petitioner or the com-  
16 plainant is a police officer, a representative of the Legal  
17 Bureau of the Police Department of the City of New York has been  
18 serving as prosecuting attorney.

19 If there are any questions about this, I would ---

20 Q Mrs. Uviller, I am interested in the mootness  
21 question, if you would.

22 A Well, I would like to say that when notice of  
23 appeal was filed to this Court, this child was under confinement  
24 and he was discharged from confinement, I believe, ten days or  
25 two weeks before this Court noted probable jurisdiction, which

1 was some seven months, I believe, after notice of appeal was  
2 filed in this Court.

3 Q He had been released before we noted probable  
4 jurisdiction?

5 A He was released two weeks before you noted  
6 probable jurisdiction, but seven months after the notice of  
7 appeal was filed to this Court. And as far as the mootness ques-  
8 tion is concerned in dealing with the Cibron criteria, I would  
9 say that the military does know about these things, does have an  
10 effect.

11 One need only go into the Family Court. I have seen  
12 the stack of requisitions from the military which have requested  
13 information because the child is asked to disclose it or other-  
14 wise he doesn't qualify.

15 Q Is that a violation of the law in New York?

16 A It is not a violation because the law only says  
17 the record shall not be open to indiscriminate public review,  
18 but the court in its discretion may reveal it to anybody, and it  
19 is done both in Civil Service and in the military situation.

20 Q But it is clear and you don't dispute that this  
21 appellant has been released from custody and was released from  
22 custody, indeed, before we noted probable jurisdiction?

23 A Yes, but I would say that the stigma of ---

24 Q Yes, I understand.

25 A Thank you.

1 MR. CHIEF JUSTICE BURGER: The case is submitted.

2 Thank you for your submission.

3 (Whereupon, at 12 o'clock noon the argument in the  
4 above-entitled matter was concluded.)

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