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Case Note: Mullaney v. Wilbur - Defendant's Burden to Reduce Homicide to Manslaughter Violates the Due Process Clause

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Defendant's Burden to Reduce Homocide to Manslaughter Violates the Due Process Clause

by Byron Warnken

On June 9, 1975, a unanimous Supreme Court held, in *Mullaney v. Wilbur*, 421 U.S. _____, 95 S.Ct. 1881 (1975), that the law of the State of Maine, which required a murder defendant to prove by a fair preponderance of the evidence that he acted in the heat of passion on sudden provocation, in order to reduce the homocide to manslaughter, violates the requirements of the Due Process Clause of the Fourteenth Amendment.

At the 1966 trial of Stillman E. Wilbur, Jr., the court, in its charge to the jury, instructed "...that 'malice aforethought is an essential and indispensable element of the crime of murder, without which the homocide would be manslaughter. The jury was further instructed, however, that if the prosecution established that the homocide was both intentional and unlawful, malice aforethought was to be conclusively implied unless the defendant proved by a fair preponderance of the evidence that he acted in the heat of passion on sudden provocation,... (and) by proving the latter the defendant would negate the former and reduce the homocide from murder to manslaughter." *Id.* at 1883-84. Upon conviction for murder, Wilbur appealed to the Maine Supreme Judicial Court, contending that he had been denied due process of law as set forth in *In re Winship*, 397 U.S. 358 (1970), which required the prosecution to prove beyond a reasonable doubt every fact necessary to constitute the crime charged. The Maine Supreme Judicial Court affirmed, holding that the *Winship* requirement had been met, and that the burden placed upon the defendant went only to the degree of the crime and sentencing. "(I)n Maine murder and manslaughter are not distinct crimes but rather different degree of the single generic offense of felonious homocide. *State v. Wilbur*, 278 A.2d 139 (1971)." 95 S.Ct. at 1884. The court also referenced over a century of using this presumption of implied malice aforethought and the ensuing defendant's burden. In addition, the court anticipated no retroactivity of *Winship*, a conclusion which was later proven incorrect in *Ivan v. City of New York*, 407 U.S. 203 (1972).

Wilbur then petitioned for a writ of habeas corpus in the U.S. District Court for Maine. *Wilbur v. Robbins*, 349 F. Supp. 149 (1972). The District Court held that (1) murder and manslaughter are distinct offenses under Maine statutes, (2) malice aforethought is the distinguishing element, and (3) *In re Winship* does not permit the prosecution to rely upon a presumption of malice, but requires the prosecution to prove malice aforethough beyond a reasonable doubt. The Court of Appeals for the First Circuit, although acknowledging that the state court must interpret its own laws, affirmed, *Wilbur v. Mullaney*, 473 F.2d 943 (1st Cir. 1973), stating that "...a totally unsupportable construction which leads to an invasion of constitutional due process is a federal matter." *Id.* at 945. When seven months later the Maine Supreme Judicial Court reaffirmed its view and criticized the First Circuit, the U.S. Supreme Court granted certiorari and remanded to the Court of Appeals, 414 U.S. 1139 (1974). The First Circuit again relied on *Winship*, and the Supreme Court again granted certiorari, 419 U.S. 823 (1974), this time affirming.

After tracing the common law development, the court, through Mr. Justice Powell, noted that the presence or absence of the heat of passion on sudden provocation has been the single most important factor in determining the degree of culpability attaching to an unlawful homocide and that the clear trend indicates that a large majority of the States now requires the prosecution to bear the ultimate burden of proving the fact beyond a reasonable doubt. 95 S. Ct. at 1888.

Relying heavily upon *Winship*, the court nullified Maine's argument that the stigma of a felony has already attached and the defendant's burden goes merely to gradation:

> The safeguards of due process are not rendered unavailing simply because a determination may already have been reached that would stigmatize the defendant and that might lead to a significant impairment of personal liberty. The fact remains that the consequences resulting from a verdict of murder, as compared with a verdict of manslaughter, differ significantly.
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> 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. Such a result directly contravenes the principle (that)... 'where one party has at stake an interest of transcending value — as a criminal defendant his liberty — th(e) margin of error is reduced as to him by the process of placing on the (prosecution) the burden...of persuading the factfinder at the conslusion of the trial...' (cites omitted)
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> (T)his is the traditional burden which our system of criminal justice deems essential.
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> . . .
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> (W)e discern no unique hardship on the prosecution that would justify requiring the defendant to carry the burden of proving a fact so critical to criminal culpability. *Id.* at 1889-91.

The *Mullaney* decision has direct and immediate implications for Maryland, which has previously placed a burden upon the defendant similar to that imposed by Maine. In *Burko v. State*, 19 Md. App. 645 (1974), *cert. denied*, 271 Md. 732 (1974), the appellant, convicted of second degree murder and armed robbery, claimed a denial of due process in an instruction that advised the jury that in Maryland there exists a presumption that all homocides are committed with malice and constitute second degree murder, thus placing a burden on the defendant to establish by "...a fair preponderance of the evidence that the killing happened under certain circumstances to reduce the homocide to manslaughter." *Id.* at 659. In affirming the conviction, the Court of Special Appeals noted the the appellant's reliance upon *Winship* and the *Mullaney* decisions of the U.S. District Court and the U.S. Circuit Court of Appeals. The opin-

CONTINUED ON PAGE 23

First, the client will benefit from a much more personalized and human treatment of his problem and secondly, the members of the profession of law will have a much healthier attitude towards dealing with their own lives.

Defendant's Burden To Reduce Homocide To Manslaughter Violates The Due Process Clause

ion acknowledged that *Winship* has long been the rule in Maryland, but nevertheless held that the "...Maine statute...is dissimilar to the Maryland statutes concerned with the crime of murder." *Id.* at 660-61. The Supreme Court disagreed. One week after *Mullaney*, the high court, in *Burko v. Maryland*, ——— U.S. ———, 95 S. Ct. 2624 (1975), vacated the judgement and the case was remanded to the Court of Appeals of Maryland for further consideration in light of *Mullaney v. Wilbur*.

A unamimous Supreme Court has told those states which have failed to join the majority in eliminating the homocide defendant's burden of reducing the crime to manslaughter that they have been violating the constitutional rights of due process of law guaranteed by the Fourteenth Amendment. As for the possibility of retroactive application of *Mullaney*, when one considers the depandence of *Mullaney* on the *Winship* holding, itself retroactively applied, combined with the due process aspects, retroactively will almost certainly be an issue litigated in the near future.

AN ARTIC HIGH

Fortunately, we did not experience a "blow".

The terrain is very barren. Seeing moss, grass, or dwarf willow trees (forty years' old, but one inch in height) became a big thing with us. But as desolate as the land is, it has a stark beauty that you develop an appreciation of. In time I became very territorial. One day I discovered an area about ten miles from our campsite that had been tested for oil drilling. How disturbing it was to me to see the mark of man's corporate exploitation in an environment previously unmarked by man. Coke and whiskey bottles had made it to Bathurst Island.

We also developed an appreciation and respect for snimal life that is able to survive in an environment with such a limited food supply. The highlight of our trip was discovering a herd of ten musk oxen. I crawled to within sixty-five yards of them and was able to take some great pictures. The many skeletons of musk oxen that we found on the tundra were proof of their constant fight for survival. The arctic wolves are their predators. The musk oxen must stay strong and healthy because the wolf flourishes on the weak.

We saw many ring seals; they are very alert and always mindful of the possible presence of a polar bear and his clandestine technique of covering his black nose with his white paw. There were Peary caribou, a variety of caribou quite small in stature. The mating season brought an abundance of birds including snow geese, snowy owls, king eiders, ptarmigans, arctic terns, knots, arctic loons, red phalaropes, sanderlings, artic gulls, and snow buntings. The arctic tern lives at the South Pole and commutes annually over twenty-two thousand miles to the North Pole in order to breed. The knowledge that no settlement has ever existed on Bathurst Island must give the birds some incentive to breed there.

Personally, such an experience allowed me much time to think about life and man's position on this earth without man-imposed distractions or limitations. It made me realize how mundane my daily "problems" truly are. Studying law and seeing the many conflicts man imposes upon himself (either individually or collectively through government), further reinforced within my own mind that man's selfish desires create his own inner-struggle and emotional trauma. Our society has so much materially, but we have accomplished so little in developing man's inter-personal relationships and in developing a fine sense of environmental appreciation. Never before did I feel so peaceful in mind and so close to nature.

When asked if I will go back to the Arctic, my answer is, "But of course." My wife and I are already planning a two week trip for next August to observe a large caribou migration and to catch Arctic Char.