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Notes and Comments: State v. Evans — A Frontal Attack on the Common Law of Murder

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STATE v. EVANS[1] — A FRONTAL ATTACK ON THE COMMON LAW OF MURDER

In Mullaney v. Wilbur, *the Supreme Court held the common law presumption of murder operating in homicide cases to be unconstitutional as a denial of due process. This article focuses on the seminal Maryland case under* Mullaney *and surveys the effects of this and other Maryland decisions involving the presumption of murder.*

I. INTRODUCTION

> It was but a matter of time before the common law's crazy quilt of murder and manslaughter — eight hundred years in the making and intricately interweaving Stuart modification of Tudor substance with Victorian adaptation of Georgian procedure — would come under the cold glare of latter-day due process.[2]

Until recently,[3] homicide cases[4] in Maryland were governed by the principle that once a killing had been proved by the prosecution and criminal agency shown, the killing was presumed to be murder in the second degree and the burden placed upon the defendant to prove excuse or mitigation.[5] The prosecution carried the burden of proving those elements which would raise the presumed crime of second degree murder to murder in the first degree.[6]

In *Mullaney v. Wilbur*,[7] a Maine case, the Supreme Court confronted the question of the constitutionality of jury instructions in a homicide case which placed upon the defendant the burden to prove, by a preponderance of the evidence, heat of passion upon legally adequate provocation in order to reduce the presumed crime of murder to manslaughter.[8] The burden placed on the defendant by the jury instruction was held to violate due process of law because it unconstitutionally relieved the State of proving beyond a

1. 278 Md. 197, 362 A.2d 629 (1976).
2. Evans v. State, 28 Md. App. 640, 643–44, 349 A.2d 300, 306 (1975), *aff'd*, 278 Md. 197, 362 A.2d 629 (1976).
3. The Maryland Court of Special Appeals filed its opinion in *Evans v. State* on November 25, 1975; the Maryland Court of Appeals filed its affirming decision in *State v. Evans*, 278 Md. 197, 362 A.2d 629 (1976), on July 15, 1976.
4. In the context of this article, the term "homicide case" refers only to those cases involving a charge of murder in any degree.
5. *See, e.g.*, Chisley v. State, 202 Md. 87, 105, 95 A.2d 577, 585 (1953).
6. *Id.*
7. 421 U.S. 684 (1975).
8. *Id.* at 686. The defendant claimed that he had killed his victim in hot blood upon being provoked by the latter's homosexual advances; the trial court instructed the jury that malice was to be conclusively implied and the defendant found guilty of murder unless the defendant proved, by a preponderance of the evidence, that he had acted in the heat of passion. *Id.* at 685–86.

reasonable doubt the absence of heat of passion on sudden provocation. Under Maine law, absence of heat of passion was not an element of the crime charged, but rather a factor determining the degree of punishment. Nevertheless, the Court reasoned that the State cannot constitutionally require a defendant to prove by a preponderance of the evidence factors necessary to reduce the extent of punishment, since a failure to meet the burden would result in a substantially greater loss of liberty when it was *"as likely as not"* that the defendant deserved a lesser penalty. The Court stated:

> [T]he presence or absence of the heat of passion on sudden provocation . . . has been, almost from the inception of the common law of homicide, the single most important factor in determining the degree of culpability attaching to an unlawful homicide.[9]

Therefore, the defendant was unconstitutionally burdened with proving a factor critical to his criminal culpability.

State v. Evans[10] and its progeny represent Maryland's response to *Mullaney*.[11] These cases place upon the State the burden of proving the absence of excuse, justification and mitigation beyond a reasonable doubt, whenever those defenses are in issue in a case. Although it has not yet been so held, dictum in *Evans v. State*[12] indicates that the burden of negating the presence of *any* affirmative defense will henceforth be placed on the State.[13]

II. DEVELOPMENT OF THE PRESUMPTION OF SECOND DEGREE MURDER

The term "murder" has an ancient and curious history.[14] Following the Norman conquest of England, Normans were commonly slain by the conquered but vengeful Anglo-Saxons. In order to

9. *Id.* at 696.
10. 278 Md. 197, 362 A.2d 629 (1976).
11. Judge Moylan, writing for the court of special appeals in *Evans v. State*, 28 Md. App. 640, 349 A.2d 300 (1975), dealt extensively with the application of *Mullaney* to Maryland law. His opinion outlined the various jury instructions susceptible to attack under *Mullaney* and announced that the *Mullaney* holding was to encompass all affirmative defenses in both homicide and non-homicide cases. The comprehensive opinion, although largely dicta, laid the groundwork for subsequent opinions handed down by the court of special appeals. To date, the court of appeals has decided only three cases in the area — State v. Evans, 278 Md. 197, 362 A.2d 629 (1976); Garland v. State, 278 Md. 212, 362 A.2d 638 (1976); and Dorsey v. State, 278 Md. 221, 362 A.2d 642 (1976). Because there has been little activity by the Maryland Court of Appeals in the area, this article will rely heavily on the decisions of the Maryland Court of Special Appeals.
12. 28 Md. App. 640, 349 A.2d 300 (1975), *aff'd*, 278 Md. 197, 362 A.2d 629 (1976).
13. *Id.* at 713–15, 349 A.2d at 345–46.
14. *See* R. MORELAND, THE LAW OF HOMICIDE 1–9 (1952) [hereinafter cited as R. MORELAND]; 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 485–88 (2d ed. 1898) [hereinafter cited as 2 F. POLLOCK & F. MAITLAND].

curb the killings, the Norman King, William the Conqueror, imposed a heavy fine, a "murdrum," upon a local administrative unit, known as a "hundred," when any Norman was found slain.[15] By the mid-fourteenth century, the Normans had become so much a part of the Anglo-Saxon culture that they were no longer looked upon as hated foreigners. The murdrum fine was thus no longer necessary to penalize the unwarranted killing of Normans, and the fine was abolished.[16] The term "murdrum," however, lived on in the form of "murder," and came to signify the most culpable form of homicide.[17]

Common law homicide was classified as justifiable, excusable or felonious.[18] Justifiable homicide included the execution of a lawful death sentence and the slaying of an outlaw resisting capture.[19] Excusable homicide included killings that were accidental, prompted by self-defense or perpetrated by an infant or person of unsound mind.[20] Although criminal, excusable homicide was deserving of a pardon from the king.[21] The third class of homicide, felonious homicide, was divided into two main categories, murder and all other forms of homicide without justification or excuse.[22]

Although the penalty for felonious homicide was death, anyone who could read was entitled to a commutation of the death sentence under the device known as "the benefit of clergy."[23] Because of the obvious inadequacy of reading ability as the sole criterion for determining the degree of punishment, the benefit of clergy was abolished by a series of statutes[24] for those homicides committed

15. R. MORELAND, *supra* note 14, at 9; *see* 2 F. POLLOCK & F. MAITLAND, *supra* note 14, at 487. According to Bracton, the murdrum was originated by the Danish King Cnute to prevent Englishmen from secretly murdering his fellow Danes. William the Conqueror continued the practice to protect the Normans. Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 995 n.75 (1932) [hereinafter cited as Sayre].
16. R. MORELAND, *supra* note 14, at 9; 2 F. POLLOCK & F. MAITLAND, *supra* note 14, at 488. The statute which abolished the murdrum was 14 Edw. 3, St. 1, c.4 (1340).
17. R. MORELAND, *supra* note 14, at 9.
18. *Id.* at 9–10.
19. 2 F. POLLOCK & F. MAITLAND, *supra* note 14, at 478.
20. R. MORELAND, *supra* note 14, at 478.
21. 2 F. POLLOCK & F. MAITLAND, *supra* note 14, at 479. "The man who commits homicide by misadventure or in self-defence deserves but needs a pardon."
22. R. MORELAND, *supra* note 14, at 9–10.
23. A device originally designed to exempt clergymen from punishment for murder at the hands of the secular courts; eventually, the benefit was made available to anyone who could read. F. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 229–30 (1968).
24. 12 Hen. 7, c.7 (1496); 4 Hen. 8, c.2 (1512); 23 Hen. 8, c.1, §§ 3–4 (1531); 1 Edw. 6, c.12, § 10 (1547); Perkins, *A Re-Examination of Malice Aforethought*, 43 YALE L.J. 537, 542 (1934) [hereinafter cited as PERKINS]. Benefit of clergy was not finally abolished from the criminal law of England until 1827 by the statute of 7 & 8 Geo. 4, c.28, § 6 (1827). For a discussion of the ramifications of the abolition of the benefit, see 1 L. RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1850, at 578 (1948).

with malice aforethought. The device was retained, however, for other types of felonious homicides.[25] Thus, the presence or absence of malice aforethought became the criterion for distinguishing murder, or nonclergyable felonious homicide, punishable by death, from felonious homicide subject to the benefit of clergy, later termed manslaughter.[26] The remaining development of common law murder revolves in large part around the evolution of the various meanings of the term "malice aforethought."

"Malice" originally possessed a meaning equivalent to "general malevolence or cold-blooded desire to injure,"[27] and "aforethought" meant premeditation and deliberation.[28] Today, the concept of malice aforethought contains little of its original meaning. Erosion of the concept involved three distinct stages: it began with the emergence of implied malice, continued with the abrogation of the requirement of premeditation and was completed with the widespread use of inferences and presumptions of express malice.

Express malice encompassed intent to kill and intent to do grievous bodily harm,[29] whether or not death was intended. Both species of express malice demonstrated the general malevolence required to find malice under the earlier common law. Homicides occurred, however, in which death was the unintended result of an act not motivated by a desire to do serious injury but of such a grievous and evil nature as to warrant the same punishment as murder. For these acts, the law implied malice. When a person unintentionally caused a death while resisting lawful arrest,[30] or committing a felony,[31] or engaging in conduct in wanton disregard for the safety of others,[32] malice was implied.

The phrase "aforethought," which originally signified something in the nature of our present day premeditation and deliberation, eventually became devoid of all meaning. Today, "aforethought" is a useless appendage to the word "malice."[33]

The final step in the metamorphosis of "malice aforethought" came with the widespread use of inferences and presumptions of express malice. The use of a deadly weapon directed at a vital part of the body gave rise to an inference, or sometimes a presump-

25. Sayre, *supra* note 15, at 996–97.
26. Manslaughter, the lesser degree of felonious homicide, was also termed "chance medley" and was punishable by a year's imprisonment and a branding of the thumb. Perkins, *supra* note 24, at 544 & n.63.
27. Sayre, *supra* note 15, at 997.
28. Perkins, *supra* note 24, at 545.
29. *Id.* at 548–49.
30. R. MORELAND, *supra* note 14, at 13–14.
31. *Id.* at 14.
32. *Id.* at 14–15.
33. Purver, *The Language of Murder*, 14 U.C.L.A.L. REV. 1306, 1309 (1967).

tion, of malice.[34] Eventually, malice was presumed upon a showing that a killing had occurred and that the accused was the homicidal agent. Instead of requiring the prosecution to prove malice as an element of the crime of murder, the burden was placed on the defendant to prove circumstances of mitigation, excuse or justification.[35] Blackstone stated the rule as follows:

> [W]e may take it for a general rule that all homicide is malicious, and of course amounts to murder, unless where justified by command or permission of the law, excused on the account of accident or self preservation, or alleviated into manslaughter. . . . All these circumstances of justification, excuse or alleviation, it is incumbent upon the prisoner to make out, to the satisfaction of the court and jury. . . . For all homicide is presumed to be malicious until the contrary appeareth upon evidence.[36]

It is precisely this rule, outlined by Blackstone and imported into the common law of Maryland, which has now been declared violative of due process of law.[37]

III. THE *EVANS* CASE

Testimony at the trial of Edward Evans for the murder of Alonzo Counts established that Evans met Counts early on the day of the homicide and demanded payment of a debt. The deceased refused payment and a fight ensued, resulting in Evans' loss of the contest and hasty retreat.[38] Later that day, during a subsequent encounter, Evans stabbed and killed Alonzo Counts. Eyewitness testimony indicated that the deceased was the aggressor in the second confrontation and that he had advanced upon Evans while swinging a metal pipe.[39] The evidence was sufficient to support either a finding that the defendant had acted in hot-blooded response to legally adequate provocation or that he had acted in self-defense.[40]

The following jury instructions were given by the court and challenged for the first time on appeal:

> 'The Defendant has the burden of showing the elements which would reduce the crime to manslaughter. . . .'[41]

34. *See* R. MORELAND, *supra* note 14, at 21.
35. *Id.* at 11–12, 21–24.
36. J. EHRLICH, EHRLICH'S BLACKSTONE 845 (1959).
37. State v. Evans, 278 Md. 197, 362 A.2d 629 (1976).
38. Brief for Appellee at 3–4, 6–7, State v. Evans, 278 Md. 197, 362 A.2d 629 (1976).
39. *Id.* at 4.
40. State v. Evans, 278 Md. 197, 199, 362 A.2d 629, 630–31 (1976).
41. Reply Brief for Appellant at 4, Evans v. State, 28 Md. App. 640, 349 A.2d 300 (1975).

> 'The Defendant has the burden of showing elements which would . . . make the homicide justifiable and excusable.'[42]
>
> 'The use of a deadly weapon directed at a vital part of the body gives rise to the presumption that malice existed. Since malice can be inferred from the act of directing a deadly weapon at a vital part of the body, the State was required to show nothing more to present a jury question as to murder in the second degree.'[43]

On appeal to the Maryland Court of Special Appeals, the defendant contended that these jury instructions unconstitutionally relieved the State of its burden to prove every element of the crime of murder beyond a reasonable doubt, in violation of the principle set forth in *In re Winship*,[44] as applied in *Mullaney*.[45]

The defendant advanced two specific contentions with respect to the instructions:[46] (1) the instructions which allowed a presumption or inference of malice from the use of a deadly weapon directed at a vital part of the body unconstitutionally relieved the

42. Brief for Appellee at 31, State v. Evans, 278 Md. 197, 362 A.2d 629 (1976).
43. Reply Brief for Appellant at 4, Evans v. State, 28 Md. App. 640, 349 A.2d 300 (1975) (record references omitted).
44. 397 U.S. 358 (1970). *In re Winship* was the first Supreme Court decision "explicitly [holding] that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.* at 364.
45. Reply Brief for Appellant at 4–5, Evans v. State, 28 Md. App. 640, 349 A.2d 300 (1975).
46. Before considering these contentions, the court was forced to face the "preliminary hurdle of plain error." Evans v. State, 28 Md. App. 640, 650, 349 A.2d 300, 309 (1975). The general rule is that a party assigning error in jury instructions may not do so as of right unless the party lodged the objection at trial. Ordinarily, the failure to make objection will preclude review of the instruction on appeal. Parker v. State, 4 Md. App. 62, 66–67, 241 A.2d 185, 187–88 (1968); Hicks v. State, 3 Md. App. 225, 231, 238 A.2d 577, 580 (1968). However, the courts are permitted to "take cognizance of and correct any plain error in instructions, material to the rights of the accused even though such error was not objected to. . . ." Md. Rule 756(g). Noting that the jury instructions contained irremediable errors of commission material to the rights of the accused and that the defendant and his attorney could not have anticipated *Mullaney* and its effect on Maryland law, the court of special appeals deemed a prompt review of the case necessary. 28 Md. App. at 650, 349 A.2d at 309.

    Prior to deciding the merits of the case, the court also dealt with the retroactive application of *Mullaney*. Although Evans' trial took place prior to the Supreme Court's decision in *Mullaney*, the court accorded the *Mullaney* decision full retroactive effect because of its reliance on *Winship*, which itself had been applied retroactively. Evans v. State, 28 Md. App. 640, 651–54, 349 A.2d 300, 310–12 (1975); Ivan v. City of New York, 407 U.S. 203, 204–05 (1972).

    However, it is especially important to note that the Maryland Court of Special Appeals in *Squire v. State*, 32 Md. App. 307, 309–10, 360 A.2d 443, 444–45 (1976), declined review of jury instructions, to which no objection at trial was entered. The court reasoned that defendants, whose court proceedings occurred subsequent to the Supreme Court's decision in *Mullaney*, were on notice of that decision. The Maryland Court of Appeals granted certiorari in *Squire* on October 27, 1976, Docket No. 113.

State of its burden of proving the element of malice beyond a reasonable doubt; and (2) the instructions which placed the burden upon the defendant to show circumstances which would reduce the presumed crime of second degree murder to manslaughter and the instruction which placed the burden upon the defendant to prove self-defense, unconstitutionally shifted the burden of persuasion from the State to the defendant.[47]

The court accepted the defendant's first contention.[48] In an attempt to clarify the meaning of the nebulous term "malice," the court held that malice encompassed three distinct components: "1) the intention of doing a particular act; 2) the absence of justification or excuse; and 3) the absence of mitigating circumstances."[49] Although an inference of the "intent" component of malice is proper from the use of deadly force, an inference of malice was held constitutional error, since the use of deadly force does not negate the presence of excuse, justification or mitigating circumstances.[50]

In the instructions burdening the defendant with proof of mitigation and self-defense, the court found reversible constitutional error.[51] The State must prove lack of mitigation and absence of excuse beyond a reasonable doubt since both are components of malice, an essential element of the crime charged. The presumption embodied in the instructions imposing on the defendant the burden of showing mitigation or excuse was held to violate due process because it relieved the State of its burden of proving every element of the offense as required by *In re Winship*.[52]

The court limited its holding to instances in which mitigation, justification or excuse had been put in issue:

> When a defendant has then no right even to take an issue before the jury, any instruction on such an issue (erroneous or not) is more than he is entitled to. When any consideration of an issue by the fact finder (court or jury) would properly be totally foreclosed, the defendant cannot complain that the issue was submitted under an unduly heavy burden upon him, since he has, even in that event, received more than he deserved. To carry an undue burden of persuasion may be a critical handicap to one legitimately in a race; it is no handicap at all when one is not entitled to run in the race.[53]

47. Brief for Appellee at 28–34, State v. Evans, 278 Md. 197, 362 A.2d 629 (1976).
48. Evans v. State, 28 Md. App. 640, 662–63, 349 A.2d 300, 316–17 (1975).
49. *Id.* at 705, 349 A.2d at 340.
50. *Id.*
51. *Id.* at 730–31, 349 A.2d at 354.
52. *Id.* at 662, 349 A.2d at 316–17.
53. *Id.* at 668, 349 A.2d at 319.

Therefore, before an erroneous allocation of the burden of persuasion on excuse, justification or mitigation is reversible error, the evidence presented must raise an issue with respect to one of those defenses.[54] To this limited extent, then, the defendant must work under an adverse presumption:[55] the defendant has the burden to produce evidence sufficient to generate an issue of excuse, justification or mitigation or must rely upon evidence produced by the State. Once the burden of production has been met, the presumption disappears and the jury receives the issue with an instruction that the burden of proof is on the State. The jury has no need to know that such a burden ever existed. If the evidence fails to generate an issue, there should be no instruction at all with respect to that issue.[56] However, if the court gives an instruction in this regard, the erroneous instruction will be held harmless.[57] Therefore, the defendant bears only "the risk of non-production."[58]

The conclusion of the Maryland Court of Special Appeals was that *Mullaney* "dooms as unconstitutional any procedural device which 1) imposes upon a defendant a burden of proving, by any standard, his innocence as to any element of a crime or 2) relieves the State of its burden of ultimate persuasion beyond a reasonable doubt as to any issue fairly in the case."[59]

In affirming the court of special appeals,[60] the Maryland Court of Appeals endorsed the broad interpretation given *Mullaney*. Noting that *Mullaney* dealt only with jury instructions on the allocation of the burden of proof on the limited defense of heat of passion upon adequate provocation, the court quoted with approval the

54. *Id.* at 665–69, 349 A.2d at 318–20.

55. The court divided true presumptions into two types: (1) a presumption in the Morgan tradition, which stands until sufficient evidence is produced, by the party laboring under the presumption, to rebut it, thereby shifting the burden of persuasion on the issue, and (2) a presumption in the Thayer-Wigmore tradition, which places upon the party burdened with the presumption the obligation of producing sufficient evidence contrary to the fact presumed to raise an issue in the case; once this burden has been met the presumption totally disappears. It is this latter form of presumption with which a defendant in a homicide case may be properly said to be burdened in respect to mitigation, excuse or justification. Evans v. State, 28 Md. App. 640, 706–13, 349 A.2d 300, 341–45 (1975). *See* Morgan, *Presumptions,* 12 WASH. L. REV. 255 (1937); J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW (1898); 4 J. WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2491 (1st ed. 1905).

56. Evans v. State, 28 Md. App. 640, 722–23, 729–30, 349 A.2d 300, 350, 354–55 (1975).

57. *Id.* at 665–69, 349 A.2d at 318–20.

58. *Id.* at 669, 349 A.2d at 320.

59. *Id.* at 654, 349 A.2d at 312.

60. The court of appeals approved the retroactive application of *Mullaney* and held that a finding of "plain error" under Maryland Rule 756(g) did not represent an abuse of discretion. State v. Evans, 278 Md. 197, 210–12, 362 A.2d 629, 637–38 (1976).

court of special appeals' opinion with respect to the scope of *Mullaney*:

> '. . . that what is involved is the broader question of the allocation of the burden of persuasion where a wrongful allocation of that burden will operate to relieve the State of its obligation under the Due Process Clause, as interpreted by *Winship*, to prove each and every element of a criminal offense beyond a reasonable doubt. This goes beyond the limited defense of mitigation and it goes beyond the limited confines of jury instructions.'[61]

The *Evans* decision lays to rest the common law presumption of second degree murder arising from the mere fact of homicide and a showing of criminal agency which had previously permeated Maryland homicide law.

IV. EFFECTS OF *EVANS*

A survey of subsequent decisions employing the *Evans* rationale illustrates the extensive impact of the case upon Maryland criminal law. Cases assigning *Evans*-type error may be divided into five categories:

1) Decisions involving mitigation when the issue was presented and the verdict was for second degree murder;

2) Decisions involving excuse or justification, when either issue was presented and the verdict was for any degree of felonious homicide;

3) Decisions involving mitigation when the issue was presented and the verdict was for manslaughter or murder in the first degree;

4) Decisions involving mitigation, justification or excuse, when such questions were not issues;[62]

5) Decisions involving an erroneous allocation of burdens of proof in non-homicide cases.

A. Mitigation in Issue and Verdict for Second Degree Murder

In a case in which mitigation is an issue and a jury instruction is given that all homicide is presumed to be murder in the second degree or that the burden is on the accused to show mitigation to reduce the offense to manslaughter, and a verdict is returned for

61. 278 Md. at 206, 362 A.2d at 634.
62. The foregoing categories are adapted from the court of special appeals' opinion in *Evans v. State*, 28 Md. App. 640, 654–69, 349 A.2d 300, at 312–20.

murder in the second degree, a reversal is required.[63] A presumption of malice or an instruction placing the burden on the defendant to show mitigation allows the State to obtain a conviction without shouldering its burden of proving every element of the crime of murder.[64]

Wentworth v. State[65] and *Shuck v. State*,[66] were homicide cases which, like *Evans*, involved evidence of mitigating circumstances. In both cases, convictions of second degree murder were reversed because jury instructions in each cast the burden upon the defendant to prove mitigating circumstances. In cases of this nature the constitutional error and injury to the defendant are obvious; the presumption of malice relieves the State of its burden of proving that element of the offense beyond a reasonable doubt and thus enables the State to secure an easy conviction.

Mitigation is not limited, however, to the *Evans* defense of heat of passion upon legally adequate provocation. In *Wentworth*, the defendant contended that she acted under duress or coercion in participating in the homicide. While noting that the defense of duress does not extend to the taking of another's life,[67] the court of special appeals nevertheless held that the evidence produced a jury question of mitigation since an imperfect defense of duress may reduce murder to manslaughter.[68] In *Shuck*, the court held that evidence of excessive force used in self-defense, while barring an issue on excuse or justification, did raise an issue with respect to the defense of mitigation by way of an imperfect defense of self-defense.[69]

63. *E.g.*, Wentworth v. State, 29 Md. App. 110, 349 A.2d 421 (1975); Shuck v. State, 29 Md. App. 33, 349 A.2d 378 (1975).

64. The components common to both express and implied malice are an absence of excuse, justification and mitigating circumstances. The intent required in express malice is an intent to kill. An intent to do grievous bodily harm has variously been classified as express malice or implied malice. R. MORELAND, *supra* note 14, at 17–19. An intent to commit felony, to do an act in wanton disregard for the lives of others or to resist arrest, which felony or wanton act or resistance results in the death of a human being, constitutes implied malice. Evans v. State, 28 Md. App. 640, 697, 349 A.2d 200, 336 (1975), *aff'd*, 278 Md. 197, 362 A.2d 629 (1976).

It is plain that mitigation may be an issue in either the intent to kill type of malice or the intent to cause grievous bodily harm type of malice and an erroneous instruction may relieve the state of its burden. However, it is difficult to conceive of mitigating circumstances being present where a killing is committed during the course of a felony, during the performance of an act in wanton disregard for the lives of others or while resisting arrest. Thus, an erroneous allocation of the burden of proof on the issue of mitigation will most frequently affect murder convictions based on the former two types of malice.

65. 29 Md. App. 110, 349 A.2d 421 (1975).

66. 29 Md. App. 33, 349 A.2d 378 (1975).

67. 29 Md. App. 110, 118–19, 349 A.2d 421, 426–27 (1975).

68. *Id.* at 119–21, 349 A.2d at 427–28.

69. 29 Md. App. 33, 41–43, 349 A.2d 378, 383–84 (1975).

Although *Mullaney* errors most frequently will be detected in jury trials, the rationale of *Mullaney* and *State v. Evans* applies with equal force to court trials.[70] In *Law v. State*,[71] a verdict of second degree murder rendered by the court was reversed because the judge, in the course of his opinion, referred to a presumption of malice and his belief that the burden was on the defendant to prove mitigation. This reliance on the now unconstitutional presumption of malice required the verdict to be reversed.[72]

State v. Garland,[73] a companion case in the court of appeals to *State v. Evans*, makes clear that the *Evans* doctrine is not without limitations. Mitigation was an issue in the *Garland* trial which ended in a second degree murder conviction. The jury was instructed that "in dealing with *murder*, the presumption is that it is murder in the second degree."[74] The court of special appeals held that the instruction was technically correct because all *murder* is presumed to be the lesser degree of murder, that is, second degree murder, until the State proves circumstances raising the crime to murder in the first degree. However, the court held that in this context, the instruction was a careless way of phrasing the more common instruction that " ' all *homicide* is presumed to be murder in the second degree.' "[75] The possibility that the jury may have so understood the instruction was enough to constitute reversible error.[76] Moreover, the court indicated that a jury instruction on the components of malice which neglected to include the absence of mitigating circumstances also constituted reversible error.[77]

In reversing, the court of appeals held that jury instructions which contained a correct statement of the law, whether or not the result of a trial judge's carelessness, could not provide a basis for reversing a conviction.[78] The court further held that the failure of the instruction to include absence of mitigation as a component of malice did not constitute reversible error in this specific situa-

70. Evans v. State, 28 Md. App. 640, 663–65, 349 A.2d 300, 317 (1975) (dictum): "It is, of course, the ultimate fact of allocation and not merely the means of the allocation which is critical on the question of due process of law." *Id.* at 662 n.6, 349 A.2d 317 n.6.
71. 29 Md. App. 457, 349 A.2d at 295 (1975).
72. *Id.* at 460–66, 349 A.2d at 297–300. *Law* was decided before the court of appeals rendered its decision in *State v. Evans*, 278 Md. 197, 362 A.2d 629 (1976), the holding of which applied explicitly to jury trials. *Law* has neither been affirmed nor reversed by the court of appeals.
73. 278 Md. 212, 362 A.2d 638 (1976).
74. *Id.* at 215, 362 A.2d at 639 (emphasis supplied).
75. Garland v. State, 29 Md. App. 27, 30, 349 A.2d 374, 376 (1975) (emphasis supplied).
76. *Id.*
77. *Id.* at 32, 349 A.2d at 377.
78. State v. Garland, 278 Md. 212, 218–20, 362 A.2d 638, 641–42 (1976).

tion.[79] The jury had been advised twice that the burden is on the State to prove the defendant guilty beyond a reasonable doubt, thus informing the jury that the burden to prove innocence never shifts to the defendant. The jury was also instructed that if it found circumstances of mitigation, the crime would be manslaughter. In the context of the overall charge, therefore, the court held that the instructions did not unconstitutionally relieve the State of its burden to prove a critical component of malice.[80] In reviewing instructions for *Mullaney* errors, the court of appeals stated, "attention should not be focused on a particular portion lifted out of context, but rather their adequacy must be determined by viewing them as an entirety."[81]

B. Excuse or Justification in Issue and Verdict for Any Degree of Felonious Homicide

Proof of justification or excuse renders a homicide defendant entirely blameless rather than guilty to a lesser degree, as does proof of mitigation.[82] An instruction requiring a defendant to prove excuse or justification or one relying on a presumption of murder from the fact of homicide constitutes irreparable injury to a defendant who has presented evidence with respect to excuse or justification.[83] Such evidence may raise a reasonable doubt whether the killing was unjustified and unexcused yet be insufficient to prove excuse or justification by a preponderance of the evidence or to overcome the presumption of second degree murder. Under such an instruction, then, the State could obtain a conviction when a reasonable doubt still existed as to guilt. Today, in order to obtain a conviction for any degree of felonious homicide, the State must

79. *Id.* at 219-20, 362 A.2d at 642.
80. *Id.*
81. *Id.* at 220, 362 A.2d at 642.
82. Evans v. State, 28 Md. App. 640, 664, 349 A.2d 300, 317 (1975).
83. Stambaugh v. State, 30 Md. App. 707, 353 A.2d 638 (1976) (second degree murder); Law v. State, 29 Md. App. 457, 349 A.2d 295 (1975) (second degree murder and assault with intent to murder); Wright v. State, 29 Md. App. 57, 349 A.2d 391 (1975) (manslaughter); *see* Milhouse v. State, 31 Md. App. 571, 358 A.2d 262 (1976) (second degree murder) (dictum). *But cf.* Newkirk v. State, 32 Md. App. 621, 363 A.2d 637 (1976), in which the defendant claimed the killing was accidental but was convicted of first degree murder. The court of special appeals held that the jury "did not rely upon the erroneous instruction presuming all felonious homicides to constitute second degree murder; instead it concluded that the State had sustained the burden properly placed upon it by the instructions of proving, beyond a reasonable doubt, that the killing was willful, deliberate, and premeditated and hence not unintentional or accidental. . . ." 32 Md. App. at 628, 363 A.2d at 641.

prove beyond a reasonable doubt the absence of justification or excuse, when either is an issue in the case.[84]

In *Wright v. State*,[85] evidence of self-defense was produced by the defendant and the jury was instructed that the defendant had the burden to prove such self-defense by a preponderance of the evidence. The defendant was convicted of voluntary manslaughter. The court of special appeals held that since self-defense would relieve a defendant of guilt for manslaughter, the allocation of the burden of proof to the defendant on the issue of self-defense was reversible error.[86]

Law v. State[87] and *Stambaugh v. State*[88] involved the issue of whether a death was an accidental homicide. In *Law*, a court trial resulting in a verdict of second degree murder, the trial judge indicated that he had placed the burden of proving accidental homicide upon the defendant.[89] In *Stambaugh*, which also resulted in a second degree murder conviction, jury instructions provided that all homicide was presumed to be murder in the second degree and that the burden was on the defendant to prove excuse or justification.[90] The convictions in both cases were reversed because the erroneous allocation of the burden of proof in each allowed the State to obtain a conviction when the verdict might have been "not guilty" if the State had properly been required to prove the absence of accidental homicide.

C. *Mitigation in Issue and Verdict for Manslaughter or First Degree Murder*

When the evidence generates an issue of mitigation and there is an erroneous allocation of the burden of proof with respect thereto, a verdict of manslaughter cures the error and reversal is not required.[91] The accused will be put to the unconstitutional task of proving that he acted under mitigating circumstances. When he shoulders that burden successfully, however, the error in the instruction is cured, since the defendant has "received everything

84. Law v. State, 29 Md. App. 457, 466, 349 A.2d 295, 300 (1975). The court of special appeals had held even before its decision in *Evans* that when there is evidence tending to show that the killing was accidental, the burden of proof is on the State to show beyond a reasonable doubt that it was intentional. Wilson v. State, 28 Md. App. 168, 178, 343 A.2d 537, 542 (1975). Although *Wilson* was decided after *Mullaney*, it did not mention *Mullaney*.
85. 29 Md. App. 57, 349 A.2d 391 (1975).
86. *Id.* at 61, 349 A.2d at 393.
87. 29 Md. App. 457, 349 A.2d 295 (1975).
88. 30 Md. App. 707, 353 A.2d 638 (1976).
89. 29 Md. App. 457, 465, 349 A.2d 295, 300 (1975).
90. 30 Md. App. 707, 710, 353 A.2d 638, 640 (1976).
91. Wright v. State, 29 Md. App. 57, 60–61, 349 A.2d 391, 393 (1975).

for which he was contending and to which he may arguably have been entitled."[92]

In *Wright v. State*,[93] the court of special appeals reviewed jury instructions that placed an affirmative burden on the defendant to prove mitigating circumstances and self-defense. A verdict for manslaughter was returned. Although the conviction was reversed because of an erroneous allocation of the burden of proof with respect to self-defense,[94] the court indicated that had mitigation been the only issue generated by the evidence, the erroneous instruction would have been harmless.[95]

When an issue of mitigation is present and there is an erroneous allocation of the burden of proof with respect thereto, a verdict of murder in the first degree (based on proof of wilfulness, deliberation and premeditation) will cure the error and reversal is not required.[96] In Maryland, it is well settled that a first degree murder conviction requires proof beyond a reasonable doubt that the killing was wilful, deliberate and premeditated.[97] A first degree murder conviction based upon proof beyond a reasonable doubt of these three elements necessarily negates *beyond a reasonable doubt* the presence of mitigating circumstances.[98] The impossibility of mitigating circumstances coexisting with the elements of wilfulness, deliberation and premeditation is demonstrated by the definition of these elements under Maryland law:

> "Premeditated" means that the killing must have been meditated, planned in the mind, beforehand; that the design to kill must have preceded the killing by an appreciable length of time, time enough to deliberate; and in order to justify a conviction of first degree murder, the trier of facts must find the actual intent (wilfulness), the fully formed purpose to kill (deliberation), with enough time for deliberation and premeditation to convince the trier of facts that this purpose is not the immediate offspring of rashness and impetuous temper (lack of deliberation and pre-

92. Evans v. State, 28 Md. App. 640, 655, 349 A.2d 300, 312 (1975), *aff'd*, 278 Md. 197, 362 A.2d 629 (1976).
93. 29 Md. App. 57, 349 A.2d 391 (1975).
94. *Id.* at 61, 349 A.2d at 393. See section IV, B, *supra*, for an explanation of the reversal.
95. 29 Md. App. 57, 60-61, 349 A.2d 391, 393 (1975).
96. *E.g.*, Wilkins v. State, 402 F. Supp. 76 (D. Md. 1975); Dorsey v. State, 278 Md. 221, 362 A.2d 642 (1976); Edwards v. State, 31 Md. App. 562, 358 A.2d 590 (1976); Glazier v. State, 30 Md. App. 647, 353 A.2d 674 (1976) (*semble*); Brown v. State, 29 Md. App. 1, 349 A.2d 359 (1975) (*semble*).
97. *E.g.*, Chisley v. State, 202 Md. 87, 105, 95 A.2d 577, 585 (1953).
98. Dorsey v. State, 278 Md. 221, 362 A.2d 642 (1976); *see also* Evans v. State, 28 Md. App. 640, 658, 349 A.2d 300, 314 (1975), *aff'd*, 278 Md. 197, 362 A.2d 629 (1976).

> meditation), but that the mind has become fully conscious of its own design.[99]

A first degree murder verdict cures an erroneous allocation of the burden of proof on the issue of mitigation, if the court has accurately apprised the jury of the State's burden of proving wilfulness, deliberation and premeditation beyond a reasonable doubt.

D. Mitigation, Justification or Excuse Not in Issue

If excuse, justification and mitigation are not at issue, and the jury is instructed that all homicide is presumed to be murder in the second degree, or that the burden is on the accused to prove excuse, justification or mitigation, the instruction, though erroneous, will not require reversal.[100]

> When a defendant has . . . no right even to take an issue before the jury, any instruction on such an issue (erroneous or not) is more than he is entitled to.[101]

In *Brown v. State*,[102] the court of special appeals reviewed similar circumstances with respect to mitigation and concluded:

> The net result, in such cases, of incorrect instruction where mitigation or "hot blood" is not an issue fairly in the case, is that the instruction, at worse, is harmless error beyond a reasonable doubt . . . and at best, a gratuity given for the benefit of the accused and to which he was unentitled.[103]

An erroneous allocation of the burden of persuasion on the question of self-defense was held to be harmless in *Thomas v. State*[104] since the evidence did not present a jury question on self-defense.

In *Newborn v. State*,[105] the defendant admitted that neither the State's evidence nor the defendant's evidence generated a fair jury issue with respect to justification, excuse or mitigation. The de-

99. Hyde v. State, 228 Md. 209, 215, 179 A.2d 421, 424 (1962).
100. *E.g.*, McDowell v. State, 31 Md. App. 652, 358 A.2d 624 (1976) (*semble*); Glazier v. State, 30 Md. App. 647, 353 A.2d 674 (1976) (*semble*); Warren v. State, 29 Md. App. 560, 350 A.2d 173 (1976); Blake v. State, 29 Md. App. 124, 349 A.2d 429 (1975); Newborn v. State, 29 Md. App. 85, 349 A.2d 407 (1975); Thomas v. State, 29 Md. App. 45, 349 A.2d 384 (1975); Burko v. State, 28 Md. App. 732, 349 A.2d 355 (1975).
101. Evans v. State, 28 Md. App. 640, 668, 349 A.2d 300, 319 (1975) (dictum), *aff'd*, 278 Md. 197, 362 A.2d 639 (1976).
102. 29 Md. App. 1, 349 A.2d 359 (1975).
103. *Id.* at 19–20, 349 A.2d at 370–71. *Brown* was decided partly upon the curative effect of a conviction of first degree murder when erroneous instructions had been given on the burden of proving mitigation.
104. 29 Md. App. 45, 349 A.2d 384 (1975).
105. 29 Md. App. 85, 349 A.2d 407 (1975).

fendant, however, contended that a reference made by the assistant state's attorney to the crime of manslaughter in both his opening and closing statement was sufficient to raise an issue of mitigation. Rejecting the defendant's argument, the court of special appeals held that "a fair jury question can only be generated by *evidence* and not be [sic] pleadings, courtroom allegations or arguments unsupported by evidence."[106]

In *Warren v. State*,[107] the defendant appealed a first degree murder conviction rendered under jury instructions that malice is presumed and that the defendant has the burden of proof on excuse, justification and mitigation. The killing had occurred during the course of an attempted robbery and the first degree murder conviction had been obtained under Article 27, § 410 of the Maryland Code, providing in pertinent part: "*murder* which shall be committed in the perpetration of, or attempt to perpetrate, any . . . robbery . . . shall be murder in the first degree."[108] The defendant contended that the statute does not raise murder to the first degree until the State proves the elements of second degree murder, that is, an unlawful killing of a human being with malice, and that the presumption of malice unconstitutionally relieved the State of its burden of proof. Noting first that the underlying intent to commit the felony was proved beyond a reasonable doubt and that this proof supplied the intent component of malice,[109] the court held that the absence of a genuine issue of mitigation, excuse or justification rendered the erroneous instruction immaterial.[110]

E. Non-homicide Cases

In Maryland, an individual may not be convicted of assault with intent to murder unless the defendant would be guilty of murder if his victim had died.[111] Thus, a necessary element of the offense is the malicious state of mind required for a murder con-

106. *Id.* at 89, 349 A.2d at 410.
107. 29 Md. App. 560, 350 A.2d 173 (1976).
108. MD. ANN. CODE art. 27, § 407 (1976) (emphasis supplied). Section 407 provides in full:

> All murder which shall be perpetrated by means of poison, or lying in wait, or by any kind of wilful, deliberate and premeditated killing shall be murder in the first degree.
>
> All murders committed in the perpetration or attempted perpetration of an arson, MD. ANN. CODE art. 27, § 408 (1976), in the burning or attempted burning of a barn, stable, etc., MD. ANN. CODE art. 27, § 409 (1976), or in the perpetration or attempted perpetration of rape, sodomy, mayhem, robbery, burglary, kidnapping, storehouse breaking, daytime housebreaking or escape, MD. ANN. CODE art. 27, § 410 (1976), are murder in the first degree.

109. *See* note 64 *supra*.
110. Warren v. State, 29 Md. App. 560, 567–68, 350 A.2d 173, 178–79 (1976).
111. *E.g.*, Tate v. State, 236 Md. 312, 317, 203 A.2d 882, 884 (1964).

viction. Instructions are required on the elements of this state of mind, on the relevant defenses (justification, excuse or mitigation) and on the burdens of proof with respect thereto.[112] Therefore, the *Evans* rationale applies to cases involving assault with intent to murder.[113]

Several decisions indicate that the *Evans* rationale applies to cases involving the defense of alibi.[114] In *State v. Grady*,[115] the defendant was convicted of committing unnatural and perverted sex practices upon three young girls. The judge instructed the jury as follows with respect to the defendant's alibi defense:

> [I]n order to prove an alibi conclusively, the testimony must cover the whole time in which the crime by any possibility might have been committed, and it should be subjected to rigid scrutiny.[116]

This instruction, the court held, could reasonably have been construed by the jury as placing the burden on the defendant to prove the alibi defense conclusively. Because of the possibility of such an interpretation of the instruction, the conviction was reversed. The court held that the only purpose of alibi evidence, like any other defense evidence, was to erode the State's proof to a point where the jury could not find guilt beyond a reasonable doubt. In *Beckette v. State*,[117] a similar case, the court concluded that there was no burden upon the defendant to prove his alibi. Alibi evidence, according to the court, should affect the case like any other defense evidence, that is, it should be considered in conjunction with all of the evidence in determining whether or not a reasonable doubt as to guilt exists.[118]

Dinkins v. State[119] and *Horn v. State*[120] represent attempts to extend the *Evans* rationale to cases which involved permissive inferences. *Dinkins* and *Horn* challenged the constitutionality of the widely used inference of theft from proof of the unexplained and exclusive possession of recently stolen goods. In considering the question whether the permissive inference operated in accord with due process, the court of special appeals in *Dinkins* pointed out that the inference did not shift an affirmative burden of proof to the defendant. Hence, the inference of theft did not come under

112. Shuck v. State, 29 Md. App. 33, 36, 349 A.2d 378, 380 (1975).
113. *Id.*
114. State v. Grady, 276 Md. 178, 345 A.2d 436 (1975); Beckette v. State, 31 Md. App. 85, 355 A.2d 515 (1976).
115. 276 Md. 178, 345 A.2d 436 (1975).
116. *Id.* at 181, 345 A.2d at 438.
117. 31 Md. App. 85, 355 A.2d 515 (1976).
118. *Id.* at 97–98, 355 A.2d at 523.
119. 29 Md. App. 577, 349 A.2d 676, *aff'd mem.*, ___ Md. ___, 362 A.2d 91 (1976).
120. 29 Md. App. 23, 349 A.2d 372 (1975).

the scrutiny of *Evans* in that regard. If the inference was unfair, however, that is, if there was no rational connection between the facts established and the fact inferred, the inference would operate to relieve the State of its burden to prove the fact of theft beyond a reasonable doubt.[121] In examining the connection between the facts established and the fact inferred, the court emphasized that the inference of theft was only permitted upon a showing by the State that the possession of goods was both unexplained and exclusive and that the goods had been recently stolen. The court found that proof of these circumstances was sufficient evidence upon which a rational juror could find the inferred fact of theft beyond a reasonable doubt. The court stressed that the jurors were not bound to make the inference, but instead were required to weigh all of the evidence to determine whether or not there was a reasonable doubt with respect to guilt. Therefore, the court concluded that an instruction on the inference did not offend due process, and the conviction was affirmed.[122]

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121. This conclusion of the court indicates that all permissive inferences are suspect to the extent that the inferred fact does not reasonably flow from the fact proved. Dinkins v. State, 29 Md. App. 577, 579–82, 349 A.2d 676, 678–80, *aff'd mem.*, ___ Md. ___, 362 A.2d 91 (1976).

122. *Id.* at 580–83, 349 A.2d at 679–81.