The Burger Court Opinion Writing Database

Mullaney v. Wilbur

421 U.S. 684 (1975)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 22, 1975

PERSONAL

Re: 74-13 - Mullaney v. Wilbur

Dear Lewis:

My "hangup" in this case arises out of the fact that inevitably it will operate to undermine Leland v. Oregon. The major vice that produced disaster for a number of years under the Durham rule in the CADC derived from the Davis cases in 1897 under which (in federal court) as soon as any evidence of mental disturbance appeared, the burden shifted to the prosecution to prove, beyond reasonable doubt, that the defendant had no mental disease. That imposed a functionally impossible burden to prove a negative, which as Earl Warren said in the Kennedy Assassination Report is a virtual impossibility. To prove a negative beyond reasonable doubt is a total impossibility.

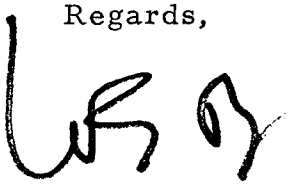
It is for this reason that Leland is a large factor in the whole enforcement of criminal law even though it rarely need be cited. An affirmative defense ought not be subject to a requirement that the prosecution negate it beyond a reasonable doubt. It simply can't be done. Only the good sense of juries has saved us from the consequences of a good deal of judicial folly, like Durham, in this area of proof burden. Even at that, hosts of plainly guilty got verdicts of not guilty by reason of insanity, and went to St. Elizabeth's for a few months and were out on the street again.

You indicated that you intended no denigration of Leland. (That means you lack mens rea! So your "offense" can be only manslaughter of Leland but murder or manslaughter kills with equal finality !!)

The "defense" of insanity is, as of now at least, not a mitigating factor since it does not open the way for a verdict on a lesser included offense, but for an entirely non-criminal verdict. The prosecution should not rationally be required to negate that or any other "yes but" or affirmative defenses -- that is for the defendant who asserts the claim.

If you really do not wish to "do in" the Leland rule, I'd like to discuss this further.

Regards,



Mr. Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 14, 1975

PERSONAL

Re: No. 74-13 - Mullaney v. Wilbur

Dear Lewis:

I have not had a chance to discuss your April 23 response to my memorandum. I have not persuaded you that your opinion, as it stands, is the demise of Leland. I lived with this problem for 13 years and Leland's interaction with the Davis cases is the crucial factor. That we do not see this in the same light is suggested by your comment that "few juries pay much attention to an insanity defense." Possibly so in Virginia, but not everywhere, and surely not true at all in federal courts bound by Davis. If Leland goes, the Davis rule of burden of proof will be the law, and there is the risk that the D.C. Circuit's nightmare with Durham could be repeated. Happily, Durham is dead, buried and unmourned, but literally dozens of cases each year went for defendants under it, and they were out of St. Elizabeth's after a brief sojourn -- with few exceptions.

I'd like to go over this with you and I wish, at this hard time of the year, I had the "gall" to ask you to read the attached.

Regards,

WEB

Mr. Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 5, 1975

Re: 74-13 - Mullaney v. Wilbur

Dear Bill:

Please show me as joining your concurrence.

Regards,

WEB

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 10, 1975

RE: No. 74-13 Mullaney v. Wilbur

Dear Lewis:

I agree.

Sincerely,

Bill

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 21, 1975

Dear Chief:

Bill Douglas called me at home Saturday night to ask that I add him to my dissent in No. 73-1765, Meek v. Pittenger, and that Lewis join him in his opinion for the Court in No. 74-13 - Mullaney v. Wilbur. He also stated that he would be here for the Fowler argument today.

Sincerely,

Bill

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

March 10, 1975

No. 74-13 - Mullaney v. Wilbur

Dear Lewis,

I am glad to join your opinion for the Court in this case.

Sincerely yours,

P.S.

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 13, 1975

Re: No. 74-13 - Mullaney v. Wilbur

Dear Lewis:

Please join me.

Sincerely,

Mr. Justice Powell

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 10, 1975

Re: No. 74-13 -- Garrell S. Mullaney et al. v.
Stillman E. Wilbur, Jr.

Dear Lewis:

Please join me.

Sincerely,

T.M.

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 10, 1975

Re: No. 74-13 - Mullaney v. Wilbur

Dear Lewis:

Please join me.

Sincerely,

Harry

Mr. Justice Powell

cc: The Conference

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist

From: Powell, J.

Circulated: 3-7-75

Recirculated:

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74–13

Garrell S. Mullaney et al., Petitioners, *v.* Stillman E. Wilbur, Jr. } On Writ of Certiorari to the United States Court of Appeals for the First Circuit.

[March —, 1975]

MR. JUSTICE POWELL delivered the opinion of the Court.

The State of Maine requires a defendant charged with murder to prove that he acted "in the heat of passion on sudden provocation" in order to reduce the homicide to manslaughter. We must decide whether this rule comports with the due process requirement, as defined in *In re Winship,* 397 U. S. 358, 364 (1970), that the prosecution prove beyond a reasonable doubt every fact necessary to constitute the crime charged.

I

In June 1966 a jury found respondent Stillman E. Wilbur, Jr., guilty of murder. The case against him rested on his own pretrial statement and on circumstantial evidence showing that he fatally assaulted Claude Hebert in the latter's hotel room. Respondent's statement, introduced by the prosecution, claimed that he had attacked Hebert in a frenzy provoked by Hebert's homosexual advance. The defense offered no evidence, but argued that the homicide was not unlawful since respondent lacked criminal intent. Alternatively, Wilbur's counsel asserted that at most the homicide was man-

pp 10-12, 17, 19

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist

From: Powell, J.

Circulated: MAR 13 1975

Recirculated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74–13

Garrell S. Mullaney et al., Petitioners, *v.* Stillman E. Wilbur, Jr. } On Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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p. 20

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist

From: Powell, J.

Circulated: _____

Recirculated: APR 14 1975

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-13

Garrell S. Mullaney et al., Petitioners, *v.* Stillman E. Wilbur, Jr. } On Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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April 23, 1975

No. 74-13 Mullaney v. Wilbur

Dear Chief:

Thank you for yours of April 22.

I was aware, in writing the above case, of the Leland problem. In view of divergent views among members of the Court, it seemed prudent to steer a middle course and avoid reference to Leland.

My own view is that Leland is distinguishable from Mullaney. The historical development of the two lines of cases has been quite different. The State of Maine is one of the few states that has adhered to the original York case (decided by the Massachusetts Supreme Judicial Court in 1845). Although initially followed, the trend for many years has been away from York. Indeed, Massachusetts itself has abandoned York, and I think only some half-dozen states continue to place on the defendant the burden of proving "heat of passion on sudden provocation". In contrast, there has been no such historical development or trend with respect to the defense of insanity. Although I have not made a "head count", my understanding is that at least half of the states place the insanity burden on the defendant.

Moreover, there are significant differences in the nature of these two affirmative defenses. Requiring the prosecution to negate "heat of passion" will not normally be a difficult burden for the state to carry since that element is usually susceptible of proof from the circumstances of the homicide. For example, in Fowler (argued Monday) the state would have had no difficulty proving

absence of heat of passion (had the defense been raised) from the circumstances in which Fowler - long after his fight with Griffin - drove to Griffin's residence and gunned him down in the presence of his two small children. It would, however, have been more difficult for the state to carry the burden of proving Fowler's insanity. One's mental condition often is entirely subjective and also can be feigned. Indeed, without the defendant's cooperation - e.g., submitting honestly to psychiatric examinations - it may be difficult if not impossible in some cases for the state to rebut a plea of insanity. I must say, however, that my observation has been that few juries pay much attention to an insanity defense.

In sum, I do not consider that my opinion in Mullaney forecloses a different decision if Leland should be reexamined by this Court. I tried to write Mullaney strictly in accord with the Conference vote which was, as I understood it, that Winship foreshadowed and controlled our decision here.

Sincerely,

The Chief Justice

lfp/ss

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

Supreme Court of the United States
Washington, D. C. 20543

June 10, 1975

Cases Held for No. 74-13 MULLANEY v. WILBUR

MEMORANDUM TO THE CONFERENCE:

1. No. 73-6761 Burko v. Maryland.

Petitioner was convicted of second degree murder. He seeks a writ of certiorari. His primary contention is that the trial court committed constitutional error when, over petitioner's objection, it instructed the jury pursuant to settled state law that

> If you should find that there was an unlawful homicide, then the burden rests upon the defendant not to satisfy you beyond a reasonable doubt but to a fair preponderance of the evidence that the killing happened under certain circumstances [i.e., without malice] to reduce the homicide [from second degree murder] to manslaughter.

It would appear that petitioner's claim is meritorious under Mullaney. Since it is difficult to ascertain the precise contours of Maryland homicide law, I would suggest vacating the judgment of the Maryland Court of Special Appeals and remanding for further consideration in light of Mullaney.

Petitioner also raises two additional claims: (1) that a Maryland statute providing that "[i]n the trial of all criminal cases, the jury shall be the Judge

Wm. Pagh

6.7.75

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

1st

January 20, 1975

Re: Mullaney v. Wilbur - No. 74-13

Dear Chief:

At Conference Friday I voted to affirm in this case, announcing my disagreement with Harry's observation that we ought not to rest on the jury instruction. I have since had opportunity to reflect; and after reading what we said last Term in Cupp v. Naughten about taking jury instructions as a whole, I find myself now in agreement with Harry on this point. For me this change of heart brings me all the way over to the "reverse", column where I guess I am now a minority of one.

Sincerely,

WER

The Chief Justice

cc: The Conference

To: The C
Mr. Jus
Mr. Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell

From: Rehnquist, J.

Circulated: 3-13-75

1st DRAFT circulated:

SUPREME COURT OF THE UNITED STATES

No. 74–13

Garrell S. Mullaney et al., Petitioners, *v.* Stillman E. Wilbur, Jr. } On Writ of Certiorari to the United States Court of Appeals for the First Circuit.

[March —, 1975]

MR. JUSTICE REHNQUIST, concurring.

While I join in the Court's opinion, the somewhat peculiar posture of the case as it comes to us leads me to add these observations.

Respondent made no objection to the trial court's instruction respecting the burden of proof on the issue of whether he had acted in the heat of passion on sudden provocation. Nonetheless, on his appeal to the Supreme Judicial Court of Maine, that court considered his objection to the charge on its merits and held the charge to be a correct statement of Maine law. It neither made any point of respondent's failure to object to the instruction in the trial court,* nor did it give any consideration to the doctrine long approved by this Court that the

*While *Fay* v. *Noia*, 372 U. S. 391 (1963), holds that a failure to appeal through the state court system from a constitutionally infirm judgment of conviction does not bar subsequent relief in federal habeas corpus, failure to object to a proposed instruction should stand on a different footing. It is one thing to fail to utilize the appeal process to cure a defect which already inheres in a judgment of conviction, but it is quite another to forego making an objection or exception which might prevent the error from ever occurring. But if the highest court of the state chooses to attach no significance to the failure to object when it considers the case on direct appeal, there is probably no reason for the federal habeas court to be more Roman than the Romans. Cf. *Davis* v. *United States*, 411 U. S. 233 (1973).

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74–13

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