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Criminal Procedure -- Capital Offenses -- Prosecution's Mention of Death Penalty Before Jury as Error

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sumption of statutory compliance that arises when the warrant and supporting affidavit are set out in the record.²² The decision is therefore proper. However, the court in citing the *McLamb* decision and speaking of meeting the requirements of only G.S. § 18-13 could leave the erroneous impression that there is still a distinction between the requirements for obtaining a search warrant for illegally possessed liquor and a search warrant for other statutory contraband. As we have noted, since the enactment of G.S. § 15-27.1, there is no longer any such distinction in the requirements for issuance of search warrants. It is unfortunate that the court did not seize upon this opportunity to take judicial notice of G.S. § 15-27.1, and it is hoped that on the court's next opportunity it will recognize this legislative move toward greater uniformity and thereby clear the muddy waters in this area.

JOHN H. KERR, III

Criminal Procedure—Capital Offenses—Prosecution's Mention of Death Penalty Before Jury as Error

Prior to 1949 a conviction of murder in the first degree in North Carolina carried an automatic death penalty under the former version of G.S. § 14-17.¹ That year the General Assembly added a proviso to the statute which stated that "if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life . . . and the court shall so instruct the jury."²

*State v. McMillan*³ was apparently the first case interpreting this proviso. The trial judge had instructed the jury that they might recommend life imprisonment if they felt justified in doing so under the facts and circumstances of the case. A new trial was granted because the

²² *State v. Rhodes*, 233 N.C. 453, 64 S.E.2d 287 (1951); *State v. Elder*, 217 N.C. 111, 6 S.E.2d 840 (1940); *cf. State v. McMilliam*, 243 N.C. 771, 92 S.E.2d 202 (1956), where the State failed to produce a search warrant or render testimony supporting its existence. The court ruled that the evidence obtained by the search would not be introduced. "It might have been a general warrant, which is 'dangerous to liberty.'" *Id.* at 773, 92 S.E.2d at 204.

¹ "A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death. All other kinds of murder shall be deemed murder in the second degree . . ." N.C. Sess. Laws 1893, chs. 85, 281.

² N.C. GEN. STAT. § 14-17 (1953). For the origin of the proviso see *Report of the Committee for Improvement of Justice, Popular Government*, Jan. 1949, p. 13, col. 3; *Criminal Law, Survey of Statutory Changes*, 27 N.C.L. REV. 449 (1950). Provisos of like effect were also added to N.C. GEN. STAT. § 14-21 (1953) (rape), N.C. GEN. STAT. § 14-52 (1953) (burglary) and N.C. GEN. STAT. § 14-58 (1953) (arson).

³ 233 N.C. 630, 65 S.E.2d 212 (1951).

charge implied restrictions upon the jury's discretion unauthorized by the statute. The court held that the proviso gave the jury an "unbridled discretionary right"⁴ to recommend life imprisonment upon finding the defendant guilty of first degree murder; that the right had no conditions, qualifications or limitations imposed upon it; and that any charge, instruction or suggestion by the court as to causes for which the right should or should not be exercised was reversible error. Subsequent cases were in accord.⁵

In *State v. Dockery*⁶ counsel for the private prosecution argued to the jury: "There is no such thing as life imprisonment in North Carolina today."⁷ Counsel explained that he had reference to the state's liberal parole laws. This was held to be "an appeal calculated and intended to induce members of the jury not to exercise the unbridled discretionary right, given to them by law."⁸ The court also stated that such argument was improper in that it went outside the record. The case left open the question what would be permissible argument addressed to the jury's discretion. The court seemed to imply that the prosecutor in a capital case could not argue that the evidence did not warrant a recommendation of life imprisonment.⁹

*State v. Oakes*¹⁰ and *State v. Pugh*¹¹ seem to strengthen any implication of the *Dockery* case that a solicitor may not argue for the death penalty. In both cases convictions were reversed because the trial judge repeated to the jury the contention of the solicitor that they should return a verdict of guilty of murder in the first degree without a recommendation that the punishment be imprisonment for life. In *Oakes* the judge quoted only the ultimate contention of the State. However, in *Pugh* the judge went further and repeated the reasons the State had given for withholding the recommendation. The charges of both trial judges were held to be erroneous because they infringed on the unbridled discretion of the jury as guaranteed by the proviso of G.S. § 14-17.

One justice concurred in *Pugh*,¹² pointing out that it was his impression that a majority of the court felt that a solicitor had no right

⁴ *Id.* at 633, 65 S.E.2d at 213.

⁵ *State v. Denny*, 249 N.C. 114, 105 S.E.2d 446 (1958); *State v. Cook*, 245 N.C. 610, 96 S.E.2d 842 (1957); *State v. Adams*, 243 N.C. 290, 90 S.E.2d 383 (1955); *State v. Carter*, 243 N.C. 106, 89 S.E.2d 789 (1955); *State v. Connor*, 241 N.C. 468, 85 S.E.2d 584 (1954); *State v. Simmons*, 236 N.C. 340, 72 S.E.2d 743 (1952); *State v. Simmons*, 234 N.C. 290, 66 S.E.2d 897 (1951); *State v. Marsh*, 234 N.C. 101, 66 S.E.2d 684 (1951).

⁶ 238 N.C. 222, 77 S.E.2d 664 (1953).

⁷ *Id.* at 226, 77 S.E.2d at 667.

⁸ *Id.* at 227, 77 S.E.2d at 668.

⁹ *Ibid.* See also *Survey of the Decisions of the North Carolina Supreme Court—Criminal Procedure*, 32 N.C.L. REV. 438 (1954).

¹⁰ 249 N.C. 282, 106 S.E.2d 206 (1958).

¹¹ 250 N.C. 278, 108 S.E.2d 649 (1959).

¹² *Id.* at 280, 108 S.E.2d at 651.

to urge a jury to refuse to exercise their power to recommend life imprisonment in a capital case. This was the first opinion that said directly what *Dockery*, *Oakes* and the majority opinion of *Pugh* seemed to say indirectly, *i.e.*, that the question of punishment could not be argued by the State to the jury.

Two justices joined in a dissent in the *Pugh* case¹³ stating that the jury should be allowed to hear proper argument based on the evidence and a charge of the court fairly reviewing the contentions upon the evidence and *then* should be allowed to exercise their discretion. They pointed out that if, as the majority held, it was error for the judge to review contentions of the State in regard to punishment, it would follow that it would also be error for such contentions to be made by the solicitor. They admitted that the jury had discretion, but contended that the manner of its exercise should be governed by the evidence,¹⁴ not mere whim or fancy. The dissent further stated that *State v. McMillan* was erroneous and that the error should not be perpetuated, thus seeming to assume that the majority holding was a necessary result of the holding in *McMillan*.

*State v. Manning*¹⁵ is the most recent development in the interpretation of G.S. §14-17. On *voir dire* examination the solicitor said: "As far as the state is concerned the sole and only purpose of this trial is to send the defendant . . . to his death in the gas chamber . . ." ¹⁶ The prospective juror to whom the statement was made was discharged upon defendant's motion. However, three other prospective jurors who had heard the statement were seated on the jury after the judge instructed them to "disabuse their minds"¹⁷ of the remark. Defendant's motion to discharge the whole panel was overruled by the trial court. Thereafter the solicitor informed five prospective jurors that the state was asking for the death penalty. Defendant's objections to these statements were overruled. Upon the jury's returning a verdict of guilty of murder in the first degree without a recommendation of life imprisonment, defendant appealed.

¹³ 250 N.C. at 286, 108 S.E.2d at 655.

¹⁴ In *State v. Shackleford*, 232 N.C. 299, 302, 59 S.E.2d 826, 827 (1950) the court said that the proviso in N.C. GEN. STAT. § 14-21 (1953) (rape) gave the jury "the right on the evidence in the case to render a verdict of rape with recommendation of life imprisonment." When placed in context, this statement seems to lend little support to the view of the *Pugh* dissent. The court used the quoted language in affirming the exclusion of evidence that defendant contended had become relevant, because of the proviso, as bearing on punishment. Apparently there have been no rape, arson, or burglary cases that turned on the point of jury discretion.

¹⁵ 251 N.C. 1, 110 S.E.2d 474 (1959).

¹⁶ *Id.* at 2, 110 S.E.2d at 475.

¹⁷ *Ibid.*

The controlling opinion in *Manning*¹⁸ held that the trial court had committed three reversible errors. *First*, the trial judge erred in failing to sustain the defendant's motion to dismiss the panel of jurors. The statement by the solicitor that the only reason for the trial was to send defendant to the gas chamber was held to violate the proviso in G.S. § 14-17 and to be so prejudicial to the defendant that merely telling the panel to dismiss the remark from their minds could not remove the prejudice. *Second*, the trial judge erred when he failed to sustain an objection to the solicitor's statements to the five prospective jurors that the State was asking for the death penalty. It was held, without explanation, that to allow the statements would be "a manifest violation of the proviso in G.S. § 14-17."¹⁹ The only authority cited was *State v. Carter*²⁰ which had held that a defendant indicted for drunken driving was entitled to an impartial judge and jury and a fair trial in an "atmosphere of judicial calm."²¹ *Third*, the controlling opinion held that it was error to refuse a manslaughter charge on the evidence in the case.

The concurring opinion in *Manning*²² stated that the remark that the only purpose of the trial was to send defendant to the gas chamber was error because it implied erroneously that defendant had tendered a plea of guilty (which, if accepted, would call for life imprisonment under G.S. § 15-162.1) and that it had been refused by the court. While the opinion made no mention of whether the statement violated the proviso in G.S. § 14-17, it agreed with the controlling opinion that the statement was such that an instruction by the judge could not cure its prejudicial effect. The concurring justices also agreed with the controlling opinion that failure to give the requested manslaughter charge was reversible error.

The remainder of the concurring opinion was devoted, in effect, to dissenting from the view of the controlling justices that it was error for the solicitor to be allowed to tell prospective jurors that the State was seeking the death penalty. The concurring justices indicated in positive language that in their opinion it would be permissible for a solicitor to make such statements. They also pointed out that they thought "it permissible for the court to state *the ultimate contentions* of the State and of the defendant, namely, the simple statement that the State contends the jury should not, and the defendant contends the jury should, recommend life imprisonment, but that it is not permissible for

¹⁸ In *Manning* there was no opinion in which a majority of the justices joined. Three justices joined in the leading opinion, two concurred on grounds other than the one here under discussion, one dissented, and one did not sit. Therefore, the writer has used the term "controlling opinion" in lieu of "majority opinion."

¹⁹ 251 N.C. at 5, 110 S.E.2d at 477.

²⁰ 233 N.C. 581, 65 S.E.2d 9 (1951).

²¹ *Id.* at 583, 65 S.E.2d at 10.

²² 251 N.C. at 6, 110 S.E.2d at 477.

the court to discuss or review the various reasons or arguments submitted by the State's counsel or by the defendant's counsel in support of their respective ultimate contentions."²³ The concurring opinion thereby expressly disapproved the result reached in *Oakes*, although it did not go so far as to disapprove that reached in *Pugh*. Furthermore, the opinion stated that while the jury's discretion is absolute or unbridled in the sense that there is no rule of law by which the jury is to be guided in making its decision, "it does not follow that the State's counsel and the defense counsel may not submit their respective contentions for jury consideration."²⁴

The *Manning* dissent²⁵ did not consider the initial statement made by the solicitor nor did it mention the judge's refusal to give a manslaughter charge. As to the statements of the solicitor upon *voir dire*, that the State was asking for the death penalty it expressed substantially the same view as the concurring opinion, stressing that the proviso of G.S. § 14-17 does not warrant the holding that a solicitor could not so argue.²⁶ The dissent also indicated that the proviso would not prohibit argument for the death penalty. The dissenting justice warns that the "erroneous interpretation of the meaning of the proviso in G.S. 14-17"²⁷ in the principal case and in *Oakes* and *Pugh* has the effect of abolishing capital punishment to a large extent, if not completely, in North Carolina.

Conceding that the correct interpretation of the proviso in G.S. § 14-17 is that it gives the jury "unbridled discretion" in recommending the life sentence, it does not seem to follow that urging the death penalty places a "bridle" on the jury's discretion. If permitted, a solicitor could make a very convincing argument in favor of the death penalty, but the jury would not be bound thereby to bring in a verdict of guilty with no recommendation. If the court were to tell the jury that it must consider certain factors as conclusive in deciding whether to make the recommendation or not, it would seem that then and only then would their discretion be restricted in a legal sense. Even in the latter instance the jury would not be bound to bring in a verdict without recommendation, because the death penalty can never be mandatory in North Caro-

²³ *Id.* at 7, 110 S.E.2d at 478.

²⁴ *Ibid.*

²⁵ *Id.* at 8, 110 S.E.2d at 478.

²⁶ The reader will recall that the dissent in *Pugh* stated that an erroneous decision in *McMillan* was responsible for the result reached by the majority in *Pugh*. Text accompanying note 14 *supra*. In *Manning*, however, the dissenter (who joined in the *Pugh* dissent) seems to have reasoned that *McMillan* does not require the result reached by the controlling opinion. *Quaere* whether the inconsistency reflects an acquiescence in *McMillan* on its facts by the dissenter since his dissent in *Pugh*.

²⁷ 251 N.C. at 10, 110 S.E.2d at 480.

lina except when the jury in its discretion fails to recommend life imprisonment.

An argument can be made to the effect that since capital punishment is still sanctioned in this state, it would seem to follow that the State is entitled to a jury that would have no objection to capital punishment under certain circumstances. If this be true, then it would seem to follow that a solicitor should be allowed to examine prospective jurors in order to determine whether or not they have any conscientious objections to inflicting capital punishment, in order to insure that the State obtains such a jury. To the extent that *Manning* implies that the State is not entitled to so question prospective jurors, it is submitted that the case is inconsistent with North Carolina's provision for capital punishment. Carrying this argument to its logical conclusion one reasons that if the solicitor is permitted to so question prospective jurors, he is at the same time clearly implying that the State desires the jurors to bring back a verdict requiring that the defendant be punished by death. If it would be permissible for the solicitor to imply that the State desires that the accused be so punished, it would seem anomalous to disallow a direct statement to that effect.

Until 1949 the right of the prosecution to make inquiry on *voir dire* as to a prospective juror's views on capital punishment was well established by North Carolina case law.²⁸ No case since the proviso was added to G.S. § 14-17 has held or intimated that the challenge because of objection to capital punishment is no longer available to the State, unless it be *Manning*. As late as 1954 the court gave tacit approval to the use of the challenge.²⁹ The overwhelming weight of authority in this country holds that it is proper to ask a prospective juror if he would have any conscientious scruples against capital punishment.³⁰

The argument of the concurring and dissenting opinions of the *Manning* case seems to be bolstered by the failure of the controlling opinion to explain how words spoken by counsel can restrict jury discretion. Although authority from other jurisdictions with statutes similar to G.S. § 14-17 has not been cited by the court, the weight of

²⁸ See *State v. Vick*, 132 N.C. 995, 43 S.E. 626 (1903); *State v. Bowman*, 80 N.C. 432 (1879).

²⁹ *State v. Canipe*, 240 N.C. 60, 81 S.E.2d 173 (1954).

³⁰ See *Johnson v. State*, 203 Ala. 30, 81 So. 820 (1919); *Bell v. State*, 102 Ark. 530, 180 S.W. 186 (1915); *People v. Kynette*, 15 Cal. 2d 731, 104 P.2d 794 (1940); *Swain v. State*, 162 Ga. 777, 135 S.E. 186 (1926); *People v. Winchester*, 352 Ill. 237, 185 N.E. 580 (1933); *Stephenson v. State*, 110 Ind. 358, 11 N.E. 360 (1886); *Corens v. State*, 185 Md. 561, 45 A.2d 340 (1945); *Spain v. State*, 59 Miss. 19 (1881); *State v. Comery*, 78 N.H. 6, 95 Atl. 670 (1915); *Commonwealth v. Pasco*, 332 Pa. 439, 2 A.2d 736 (1938); *State v. Condit*, 101 Utah 558, 125 P.2d 801 (1942); *State v. Aragon*, 41 Wyo. 308, 285 Pac. 803 (1930).

authority³¹ allows the State to seek and argue for the death penalty, sometimes even in a seemingly unfair manner.³²

From the standpoint of pure justice, the result produced by the controlling opinion in *Manning* may be justified under the present method of handling capital cases. Under G.S. § 14-17 guilt and punishment are determined in the same verdict. There is the possibility that if the State seeks to enforce the law in its most extreme form, argument that would not prejudice the defendant on the question of punishment could be given too much weight in the determination of the initial question of guilt.

Another possibility of prejudice to defendant on the issue of guilt arises because the State's argument against the jury's recommending life imprisonment would seem to force defendant to argue in the alternative that he is not guilty, but that if he is found guilty the jury should recommend life imprisonment. This objection is subject to the attack that in many cases a party may be required to offer alternative arguments. It might be pointed out, however, that in those cases the party's life is not at stake. The North Carolina Supreme Court has held that the gravity of death cases requires that they receive special treatment on review.³³ It would seem that if capital defendants are entitled to special considerations on appeal they also ought to be relieved of the task of arguing these alternatives in the lower court.

In the opinion of the writer the statute cannot properly be interpreted to deny argument by the State for the death penalty. Conceding that such argument is permissible, the problem then is that the argument concerning punishment may be prejudicial on the issue of guilt. A system of double hearings was adopted in California³⁴ where a statute similar to G.S. § 14-17 had been in effect. Under the system adopted,

³¹ See *Burgunder v. State*, 55 Ariz. 411, 103 P.2d 256 (1940); *House v. State*, 192 Ark. 476, 92 S.W.2d 868 (1936); *People v. Goodwin*, 9 Cal. 2d 711, 72 P.2d 551 (1937); *Biggers v. State*, 171 Ga. 596, 156 S.E. 201 (1930); *Howell v. State*, 102 Ohio St. 411, 131 N.E. 706 (1912); *Acros v. State*, 120 Tex. Crim. 315, 29 S.W.2d 395 (1930).

³² In *Powell v. Commonwealth*, 276 Ky. 234, 123 S.W.2d 279 (1938), and *State v. Shawen*, 40 W. Va. 1, 20 S.E. 873 (1894), solicitors were allowed to argue the possibility of parole as a reason for inflicting the death penalty. In *State v. Buttry*, 199 Wash. 228, 90 P.2d 1026 (1938), the argument that if defendant were not put to death he might escape and "get even" with State's witnesses was allowed.

³³ In *State v. Dockery*, 238 N.C. 222, 228, 77 S.E.2d 664, 668 (1953), Denny, J., speaking for the court, said: "Except in death cases, however, a new trial will not be granted because of improper argument of counsel, unless an exception thereto has been timely entered and duly preserved."

³⁴ CAL. PEN. CODE § 190.1 provides that "Evidence may be presented at the further proceedings on the issue of penalty, of the circumstances surrounding the crime, of the defendant's background and history, and of any facts in aggravation or mitigation of the penalty. The determination of the penalty of life imprisonment or death shall be in the discretion of the court or jury trying the issue of fact on the evidence presented, and the penalty fixed shall be expressly stated in the decision or verdict."

the second hearing was held after a verdict of guilty had been returned, to hear evidence bearing on what punishment the defendant should receive. Before this system was adopted, the California court had held that mitigating evidence was inadmissible as not pertaining to the issue of guilt;³⁵ however, the court, in other cases,³⁶ had approved instructions that the jury must find some mitigating circumstance in order to recommend that the sentence be only life imprisonment. Obviously the double hearing system eliminated the injustice to capital defendants resulting from the combined effect of these decisions.

Though North Carolina has not experienced the same problem that California faced, the adoption of a similar statute would eliminate the possibility of argument for the death penalty prejudicing the defendant on the issue of guilt. Under such a system defendant would no longer have to present the inconsistent arguments that he is not guilty, but that if he is found guilty a life sentence should be recommended. Under this system counsel for both sides should be held rigidly to evidence and argument thereon pertaining to the issue of guilt in the first phase of trial. If defendant is found guilty of a capital offense, then there should be a second hearing before the same jury on the question of punishment. Evidence and argument could then be presented as to the character and previous record of defendant, and facts and circumstances in aggravation or mitigation of the crime could be shown.³⁷ The double hearing concept seems to assume that the jury should be charged to consider the evidence and to exercise their discretion thereon in determining whether to inflict the death penalty or recommend life imprisonment. Jury discretion would still be present, but hearing evidence solely in regard to the penalty, coupled with a charge from the judge to consider the evidence, would tend to give the jury something more than mere whim as a criterion for exercise of that discretion.³⁸

³⁵ *People v. Witt*, 170 Cal. 104, 148 Pac. 928 (1915).

³⁶ *E.g.*, *People v. Koles*, 23 Cal. 2d 670, 145 P.2d 580 (1944).

³⁷ Although there is no jury in a court martial, military procedure provides that "after the court has announced findings of guilty, the prosecution and defense may present appropriate matter to aid the court in determining the kind and amount of punishment to be imposed." *MANUAL FOR COURTS-MARTIAL, UNITED STATES*, 119 (1951). Note that the military system of double hearings is not limited to capital cases.

³⁸ Knowlton, *Problems of Jury Discretion in Capital Cases*, 101 U. PA. L. REV. 1099 (1953).

Note that the California statute, discussed *supra* note 35, assumes that existing law would allow defendant to waive a jury in a capital case. Clearly no such waiver could be made under existing North Carolina law. The California statute further assumes an existing murder statute which specifies that the trier of fact may recommend the alternative penalties of death or life imprisonment. In North Carolina the jury, by the terms of G.S. § 14-17, is only permitted to recommend life imprisonment. The absence of a recommendation by the jury requires the judge to enter a death sentence. The proviso in G.S. § 14-17 requires the recommendation to be made at the same time the verdict of guilty is rendered.

A system of double hearings would seem to accomplish the purposes outlined

Regardless of the suggested legislation, it is submitted that the three-justice controlling opinion in the *Manning* case should not be accepted as definitive of the law in regard to the solicitor's telling prospective jurors that the State will seek the death penalty. The other three justices said that as long as North Carolina law permits capital punishment the State is entitled to seek the death penalty. The seventh member of the court expressed a similar view in his dissent in *State v. Pugh*,³⁹ where he stated his opposition to a holding "that counsel must not contaminate the jury with any argument as to the bearing the evidence should have on the recommendation."⁴⁰ Thus it would appear that in a case squarely presenting the question four members of the court would uphold the right of the State to ask the jury not to recommend life imprisonment and to argue on this point to some extent. Such a holding would be more in keeping with the present law that a defendant found guilty of a capital crime must die unless the jury recommends otherwise. On the other hand, the fact that in *Manning* five justices held it error for the solicitor to say that the only reason for having the trial was to put defendant to death demonstrates that, regardless of their views as to whether G.S. § 14-17 would permit the State to argue for death, a majority of the court would reverse where such argument becomes prejudicial *per se*.⁴¹

ROBERT L. LINDSEY

Trial Practice—Damages—Pain and Suffering—Per Diem Argument to the Jury

In *Ratner v. Arrington*¹ a Florida Court of Appeals held that the trial judge in a personal injury action had not abused his discretion in allowing the use of the per diem argument as a measurement of pain and suffering damages. The plaintiff's counsel had been permitted, over objection, to use a placard in his closing argument on which were listed various elements of plaintiff's damages, including an amount for pain and suffering calculated at fifteen dollars per day for the length of his life

in the text whether defendant is allowed to waive the jury or not. However, since G.S. § 14-17 seems to contemplate but one hearing, it would appear that the adoption of the suggested system would require that G.S. § 14-17 be repealed and that it be replaced with a statute allowing the jury to recommend alternative punishments. The new murder statute could provide for double hearings, or a separate section could be enacted to accomplish the purpose.

³⁹ 250 N.C. at 286, 108 S.E.2d at 655.

⁴⁰ 250 N.C. at 289, 108 S.E.2d at 657.

⁴¹ "Prejudicial *per se*" is used in the text to distinguish between the types of prejudice that the court has traditionally recognized as grounds for a new trial, and the "possibility of prejudice" suggested by the writer as inherent in the present single-hearing system of trial in capital cases.

¹ 111 So. 2d 82 (Fla. Dist. Ct. App. 1959).