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Criminal Law -- Improper Court Response to Spontaneous Jury Inquiry as to Pardon and Parole Possibilities

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A program of rehabilitation based on psychiatric treatment could cure the accused in many cases, and by doing this, more serious crimes in the future would be prevented. It is society, not the defendant, which will receive the chief benefits from this rule.

In a dissenting opinion in a case in the United States Circuit Court of Appeals for the Third Circuit, there was a statement suggestive of the North Carolina situation,

> "The rule of M'Naghten's case was created by decision. Perhaps it is not too much to think that it may be altered by the same means."[49]

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Criminal Law—Improper Court Response to Spontaneous Jury Inquiry as to Pardon and Parole Possibilities

Does a jury which has "unbridled discretion" to recommend life imprisonment in a capital case have a right to consider what effect parole and pardon may have upon that sentence? North Carolina first answered this question in *State v. Dockery*,[1] where a private prosecutor referred to parole possibilities in his argument before the jury. In reversing, the North Carolina Supreme Court held that such argument was prejudicial and directly in conflict with the 1949 statutory proviso which granted to juries the right to recommend life imprisonment in capital cases.[2] Recently, in *State v. Conner*,[3] the problem arose in a different manner. Here, the jury spontaneously returned to the court room after having deliberated for some time, and one of the jurors asked the court the following question: "Will the defendant be eligible for parole if given life imprisonment?" The court replied without elaboration, "Gentlemen, I cannot answer that question." The supreme court held that the presiding judge was correct in refraining from commenting on defendant's eligibility for parole, because such matters are deemed in law to be irrelevant to the issues involved in the case and prejudicial to the accused. The court granted a new trial, however, on the ground that once such a question was propounded, it became the duty of the presiding judge to positively charge the jury to put the question and matters relating thereto out of their minds.

The courts have long been divided as to the permissibility of an explanation, in response to queries from the jury, of the possible effect of

[49] United States v. Baldi, 192 F. 2d 540, 568 (3rd Cir. 1951). The dissenting judges were Biggs, McLaughlin, and Staley.

[1] 238 N. C. 222, 77 S. E. 2d 664 (1953).

[2] N. C. GEN. STAT. § 14-17 (1953). The 1949 proviso referred to above by the court was added to this section by the 1949 Session Laws of North Carolina, Chapter 299, section 1.

[3] 241 N. C. 468, 85 S. E. 2d 584 (1955).

pardon and parole upon a sentence. North Carolina's position is that of perhaps a bare majority of jurisdictions,[4] with the exception that few other courts hold the trial court responsible for instructing the jury to dismiss the factor from their minds,[5] once the question has been propounded.

The basic reason for excluding such matters from the jury is that the power of pardon and parole rests with the executive—not the judicial—branch of government, and the jury's discretion should not be influenced by speculation as to what another branch of government may

[4] In addition to North Carolina, the following states hold that such explanation is improper: *Colorado:* Sukle v. People, 107 Colo. 269, 111 P. 2d 233 (1941). *Georgia:* Bland v. State, 211 Ga. 178, 84 S. E. 2d 369 (1954); Strickland v. State, 209 Ga. 65, 70 S. E. 2d 710 (1952); Thompson v. State, 203 Ga. 416, 47 S. E. 2d 54 (1948). In the *Bland* case three justices thought the trial judge's explanation of pardon and parole in response to a jury inquiry was proper. Another concurred on the ground that no objection thereto was timely entered, so the case was affirmed. (The North Carolina court usually grants a new trial in capital cases where there is error, regardless of whether an exception has been timely entered.) See Note, 31 N. C. L. Rev. 300 (1953). *Kentucky:* Houston v. Commonwealth, 270 Ky. 125, 109 S. W. 2d 45 (1937); Gaines v. Commonwealth, 242 Ky. 237, 46 S. W. 2d 75 (1932). *Missouri:* State v. Quilling, 363 Mo. 1016, 256 S. W. 2d 751 (1953). But see also State v. McGee, 361 Mo. 309, 234 S. W. 2d 587 (1950), and State v. Shipman, 354 Mo. 265, 189 S. W. 2d 273 (1945). *Pennsylvania:* Commonwealth v. Carey, 368 Pa. 157, 82 A. 2d 240 (1951); Commonwealth v. Johnson, 368 Pa. 139, 81 A. 2d 569 (1951); Commonwealth v. Mills, 350 Pa. 478, 39 A. 2d 572 (1944). *Tennessee:* Williams v. State, 191 Tenn. 456, 234, S. W. 2d 993 (1950); Porter v. State, 177 Tenn. 515, 151 S. W. 2d 171 (1941). *Texas:* Moore v. State, 152 Tex. Cr. App. 312, 213 S. W. 2d 844 (1948); Prater v. State, 131 Tex. Cr. 35, 95 S. W. 2d 971 (1936). *Virginia:* Jones v. Commonwealth, 194 Va. 273, 72 S. E. 2d 693 (1952).

Explanations by the trial court have been sustained in the following states: *Arkansas:* Glover v. State, 211 Ark. 1002, 204 S. W. 2d 373 (1947). But in a later case it was held error for the trial judge to answer from his personal observations rather than with declarations of law. Bell v. State, 265 S. W. 2d 709 (Ark. 1954). *California:* It is generally held that the jury should not consider the possibility of parole or pardon in determining guilt; however, the jury may consider and the court instruct as to how pardon and parole relates to the punishment. See People v. Barclay, 40 Cal. 2d 146, 252 P. 2d 321 (1953); People v. Chessman, 38 Cal. 2d 166, 238 P. 2d 1001 (1951); People v. Osborn, 37 Cal. 2d 380, 231 P. 2d 850 (1951); People v. Alcade, 24 Cal. 2d 177, 148 P. 2d 627 (1944). Earlier cases clearly held that the proper course was for the trial judge to refuse to discuss parole and pardon in response to queries from the jury. People v. Hoyt, 20 Cal. 2d 306, 125 P. 2d 29 (1942); People v. Ramos, 3 Cal. 2d 269, 44 P. 2d 301 (1935). *Kansas:* State v. Lammers, 171 Kan. 668, 237 P. 2d 410 (1951). *Nebraska:* The court, in the exercise of judicial discretion, may reply or refuse to reply to jury inquiry as to parole eligibility of defendant. Griffith v. State, 157 Neb. 448, 59 N. W. 2d 701 (1953). *New Jersey:* State v. Molnar, 133 N. J. L. 327, 44 A. 2d 197 (1945); State v. Barth, 114 N. J. L. 112, 176 Atl. 183 (1935). *Ohio:* State v. Tudor, 154 Ohio St. 249, 95 N. E. 2d 385 (1950); State v. Evans, 146 Ohio St. 276, 63 N. E. 2d 838 (1945); Liska v. State, 115 Ohio St. 283, 152 N. E. 667 (1926); State v. Schiller, 70 Ohio St. 1, 70 N. E. 505 (1904). *Wyoming:* State v. Carrol, 52 Wyo. 29, 69 P. 2d 542 (1937). However, jury should be told not to speculate on what might happen after verdict.

[5] See Jones v. Commonwealth, 194 Va. 273, 72 S. E. 2d 693 (1952). But note that in Virginia it is the duty of the jury to impose such punishment as they consider to be just under the evidence; whereas, in North Carolina, the jury need not consider the evidence in exercising its "unbridled discretion" to recommend life imprisonment. State v. McMillan, 233 N. C. 630, 65 S. E. 2d 212 (1951).

do in the future.[6] Furthermore, punishment is assessed against a person convicted of crime on the basis of his acts and conduct prior to trial; whereas, parole is determined mainly on the basis of subsequent acts and demeanor.[7] Other less frequently used arguments include the following: parole and pardon rules and regulations may change; hence, the regulations influencing a jury's action might not be the ones the defendant will be subject to at a later time.[8] If jurors impose capital punishment because of the fear that the defendant may be paroled at some future time, they are, in effect, predicting that he will be paroled even though unworthy of it.[9] Moreover, even though an undeserving person may be released, the weakness is one of the parole system and does not necessarily mean that the defendant should be executed.[10]

In cases where the prosecuting counsel argues the possibility of parole or pardon as in the *Dockery* case, the majority of jurisdictions do not regard it as proper;[11] however, many are reluctant to consider this sufficiently prejudicial to warrant reversal.[12] In Kentucky, where the propriety of such argument has been most frequently considered, the

[6] Sukle v. People, 107 Colo. 269, 111 P. 2d 233 (1941); Thompson v. State, 203 Ga. 416, 47 S. E. 2d 53 (1948); State v. Conner, 241 N. C. 468, 85 S. E. 2d 584 (1955); Commonwealth v. Johnson, 368 Pa. 139, 81 A. 2d 569 (1951); Prater v. State, 177 Tenn. 515, 151, S. W. 2d 171 (1941).

[7] State v. Conner, 241 N. C. 468, 469, 85 S. E. 2d 584, 586 (1955).

[8] Broyles v. Commonwealth, 267 S. W. 2d 73 (Ky. 1954).

[9] Knowlton, *Problems of Jury Discretion in Capital Cases,* 101 U. OF PA. L. REV. 1009, 1118 (1953).

[10] *Ibid.*

[11] *Alabama:* Cobb v. State, 248 Ala. 548, 28 So. 2d 713 (1947); Oliver v. State, 232 Ala. 5, 166 So. 615 (1936). *California:* People v. Byrd, 42 Cal. 2d 200, 266 P. 2d 505 (1954). *Illinois:* People v. Burgard, 377 Ill. 322, 36 N. E. 2d 558 (1941); People v. Klapperich, 370 Ill. 588, 19 N. E. 2d 579 (1939); People v. Kircher, 333 Ill. 200, 164 N. E. 150 (1928). *Indiana:* Pollard v. State, 201 Ind. 180, 166 N. E. 654 (1929). *Kentucky:* Broyles v. Commonwealth, 267 S. W. 2d 73 (Ky. 1954); Howard v. Commonwealth, 313 Ky. 667, 233 S. W. 2d 282 (1950); Bass v. Commonwealth, 296 Ky. 426, 177 S.W. 2d 282 (1944); Powell v. Commonwealth, 276 Ky. 234, 123 S. W. 2d 279 (1938); Lee v. Commonwealth, 262 Ky. 15, 89 S. W. 2d 316 (1935); Tiernay v. Commonwealth, 241 Ky. 201, 43 S. W. 2d 661 (1931); Hall v. Commonwealth, 207 Ky. 718, 270 S. W. 5 (1925); Bolin v. Commonwealth, 206 Ky. 608, 268 S. W. 306 (1925); Chappel v. Commonwealth, 200 Ky. 429, 255 S. W. 90 (1923). *Louisiana:* State v. Henry, 196 La. 217, 198 So. 910 (1940); State v. Johnson, 151 La. 625, 92 So. 139 (1922). *Mississippi:* Augustine v. State, 201 Miss. 731, 28 So. 2d 243 (1946). *Pennsylvania:* Commonwealth v. Earnest, 342 Pa. 544, 21 A. 2d 38 (1941). *Texas:* Pena v. State, 137 Tex. Cr. 311, 129 S. W. 2d 667 (1939). *Virginia:* Dingus v. Commonwealth, 194 Va. 273, 149 S. E. 414 (1929).

The following states have held such arguments by prosecutors not to be improper: *Arizona:* State v. Macias, 60 Ariz. 93, 131 P. 2d 810 (1942); Sullivan v. State, 47 Ariz. 224, 55 P. 2d 312 (1936). *Arkansas:* House v. State, 122 Ark. 476, 92 S. W. 2d 868 (1936). *Georgia:* Fields v. State, 88 Ga. App. 1, 75 S. E. 2d 839 (1953); McLendon v. State, 205 Ga. 55, 52 S. E. 2d 294 (1949); Bryan v. State, 206 Ga. 73, 55 S. E. 2d 574 (1949); Hyde v. State, 196 Ga. 475, 26 S. E. 2d 744 (1943); Lucas v. State, 146 Ga. 315, 91 S. E. 72 (1916). *Washington:* State v. Buttry, 199 Wash. 228, 90 P. 2d 1026 (1939); State v. Talbott, 199 Wash. 431, 91 P. 2d 1020 (1939).

[12] See Note, 28 N. C. L. REV. 342 (1949).

court formerly took such a position.[13] Recently, however, the Kentucky court granted a new trial on the ground that such argument was prejudicial.[14] Apparently, the court was influenced by the fact that prosecutors persisted in talking about parole and pardon, though the court had for thirty years consistently condemned such argument as improper.

Paradoxically, the Georgia court does not regard argument of parole and pardon possibilities by the prosecutor as improper, although it has held instruction by the trial court in response to jury questions about such matter to be reversible error.[15] One distinction offered is that when the prosecutor refers to the possibility of a pardon or parole, it does not bind the jury but is merely a matter of argument; whereas, when the court speaks, the jury receives it as solemn verity.[16] However, a review of the language used by some of the Georgia proscutors immediately raises the issue as to which is more prejudicial, a fair and accurate instruction on the part of the court, or a zealous and impassioned argument by the prosecutor.[17]

There is substantial authority holding that it is not improper for a jury to consider parole and pardon possibilities.[18] One line of reasoning is that the fact that a person sentenced to life imprisonment may be paroled is universal knowledge among intelligent citizens, and the jury is entitled to consider the effect parole will have upon the sentence which it imposes.[19] Also, it is maintained that society is entitled to have the jury know the true meaning of their verdict,[20] namely, life imprisonment provided the defendant is not paroled or pardoned.

Where, as in North Carolina, there are no conditions attached to, and no qualifications or limitations imposed upon, the right of the jury to recommend life imprisonment,[21] there would seem to be several reasons

[13] See Kentucky cases cited in note 11 *supra*, which were decided prior to 1954.
[14] Broyles v. Commonwealth, 267 S. W. 2d 73 (Ky. 1954).
[15] Compare Georgia cases cited in note 11 *supra*, with those cited in note 4 *supra*.
[16] Bland v. State, 211 Ga. 178, 84 S. E. 2d 369, 371 (1954). (concurring opinion).
[17] "If you give the defendant a life sentence his lawyers and some politicians will get him out of jail and have him walking the streets in a few years." McLendon v. State, 205 Ga. 55, 63, 52 S. E. 2d 294, 299 (1949). In White v. State, 177 Ga. 115, 125, 169 S. E. 499, 504 (1933), the judge instructed the jury not to consider the following language; however, no mistrial was declared and the case was affirmed on appeal: "The jury has it in their power to recommend imprisonment for life. Now what does that mean? It means that after three years this defendent has a right to ask for a parole by going over with a sob sister from the Interracial Commission."
[18] State v. Macias, 60 Ariz. 93, 131 P. 2d 810 (1942); Sullivan v. State, 47 Ariz. 224, 55 P. 2d 312 (1936); see also other cases in second paragraph, note 11 *supra*.
[19] State v. Molnar, 133 N. J. L. 327, 44 A. 2d 197 (1945); State v. Shawen, 40 W. Va. 1, 8, 20 S. E. 873, 875 (1894). In the latter case it is said: "The jury was the sole judge as to whether prisoner should die or suffer lifelong imprisonment—and cannot the jury consider whether the circumstances of the crime show its perpetrator to be a desperate man and an enemy of society, and dangerous, should he escape or be pardoned?"
[20] Bland v. State, 211 Ga. 178, 84 S. E. 2d 369 (1954).
[21] State v. McMillan, 233 N. C. 630, 65 S. E. 2d 212 (1951).

for allowing the jury to consider the possibility of defendant's subsequent release in arriving at its decision.[22]

In the first place, if the basic philosophy upon which a jury seeks to arrive at its decision is one based upon the idea of punishment, it would seem proper that they consider parole and pardon possibilities, because such factors bear directly on the quantum of the punishment.

Secondly, if the sentence is imposed as a deterrent to future crimes, should the jury not be allowed to consider whether a life sentence with a possibility of parole will be a sufficient deterrent? Also, if the sentence is based upon the idea of protecting society through the rehabilitation of the defendant, the jury must necessarily decide whether the defendant is beyond rehabilitation. If they decide he is, should they be forbidden to consider the possibility that he may be released in the future if given a life sentence?

At any rate, it is reasonable to assume that most intelligent jurors are aware that there is a fair possibility that a convicted person will not serve the full sentence imposed. It is equally reasonable to assume that they often consider this possibility in deliberating on questions of punishment in capital cases. Even if the correctness of the North Carolina court in holding such considerations to be prejudicial and improper be conceded, the present approach of the court affords theoretical protection only in those cases where the issue of parol or pardon is openly raised by the prosecutor or jury. In other cases, the jury is left free to apply its own knowledge of the laws relating to parole and pardon, if it chooses to do so.[23]

As long as we are to follow the present North Carolina view as to the total irrelevancy of parole and pardon, it is submitted that a better approach would be to allow the trial court to inform the jury in its charge that they are to consider no matters relating to pardon or parole in withholding a recommendation of life imprisonment. This would prevent the problem of a later request by the jury for information as to the possibility of parole or pardon. But perhaps even more important, it would discourage the jury from being influenced by any misconceived ideas individual jurors might have as to defendant's parole and pardon eligibilty.

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[22] "The court has said the jurors have the right in their unbridled discretion to recommend life imprisonment. The right to refuse to make such a recommendation is equally unbridled. For the judge to have told the jury that the question of parole was no concern of theirs and that they should not consider it tends to put a bridle on discretion." Higgins, J., dissenting in Conner v. State, 241 N. C. 468, 472, 473, 85 S. E. 2d 584, 588 (1955).

[23] In any event, it is doubtful whether the defendant's interests are served by leaving the jury to apply its own limited knowledge of parole laws, and the fact of this common knowledge cannot be overlooked." Note, 90 U. OF PA. L. REV. 221, 222 (1941).