Trial Practice -- Prosecutor's Comments -- Arguing Possibility of Parole or Pardon as Reason for Withholding Recommendation for Life Imprisonment

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that higher prices result from these contracts. Leading counter-arguments will be that this method is the only effective way to protect the good will of the manufacturer, that the dealer takes the goods with the contract attached, and that the prices on non-fair-traded goods have risen more sharply than those on fair-traded commodities.

Future litigation and legislative controversy over resale price maintenance appear to be a certainty. Whether "fair trade" be economically wise or unwise, the trend shows that it is in for some minute examination by the courts and legislative bodies.

KIRBY SULLIVAN.

Trial Practice—Prosecutor’s Comments—Arguing Possibility of Parole or Pardon as Reason for Withholding Recommendation for Life Imprisonment

"Gentlemen, . . . With our system in Georgia, a man is entitled to parole or pardon after seven years, and when his application is put in all the judges or interested parties are usually out of office and no one recalls the facts in the crime. If this jury sentenced this defendant to life imprisonment and he should be given his release on parole in seven

XXXIX Fortune, April 1949, p. 75; XXXIX Fortune, Jan. 1949, p. 85; Shoenfeld, Congress Squares Off for a Scrap on Fair Trade Repeal, 62 SALES MANAGEMENT 81 (June 1, 1949).

Other arguments of those opposed to "fair trade" are:

(1) As the "fair trade" fields become more crowded there will tend to be an elimination of the small retailer since the old-timers will try to restrict the number of new dealers. XXXIX Fortune, April 1949, p. 75, 76. This is claimed to have already happened to some extent in England. XXXIX Fortune, Jan. 1949, p. 70, 166.

(2) The manufacturer can adequately protect his good will by refusing to sell to those who refuse to comply with a resale price agreement. Liquor Store, Inc. v. Continental Distilling Corp., 40 So. 2d 371, 388 (Fla. 1949).

(3) Chain stores reap unnecessarily juicy profits by reason of less expense in marketing "fair-traded" goods, and they often sell similar products under their own brand or trade name at cheaper prices. XXXIX Fortune, April 1949, p. 75; TNEC Investigation of Concentration of Economic Power, Final Report and Recommendations 232, 234-5 (1941).


Griffiths, Further Comments on Fair Trade, 13 JOURNAL OF MARKETING 85 (July 1948).

Other arguments urged in support of "fair trade" are:

(1) The "fair trade" system has been of tremendous benefit to a number of industries. Behoteguy, Resale Price Maintenance in the Tire Industry, 13 JOURNAL OF MARKETING 315, 319 (Jan. 1949).


(3) "Fair trade" is no barrier to competition between rival articles. Callman, "Fair Trade" and Anti-Trust Law, 10 U. of Pitt. L. REV. 443, 452 (1949).

(4) In those states allowing fixed prices, the manufacturer may hold down prices.
years, you would be turning him loose upon society after a few years imprisonment.” Such was the argument of counsel for the state in Bryan v. State.\(^1\) The jury found the defendant guilty of murder in the first degree and withheld a recommendation of mercy. The death sentence automatically followed. In affirming the judgment, the Supreme Court of Georgia held that the refusal of the trial court to declare a mistrial was not error under the rulings in McLendon v. State.\(^2\) One judge dissented. Two concurred specially “for the reason only that this Court is bound by former full-bench decisions.”\(^3\)

The full-bench decisions referred to begin with Lucas v. State,\(^4\) where such an argument was held not improper since the recommendation of mercy was within the discretion of the jury and had nothing to do with the guilt of the accused. Subsequent unanimous decisions,\(^5\) interspersed with “majority-dissent” cases\(^6\) and one which affirms a verdict by an equally divided court,\(^7\) condemn the argument as tending to prejudice the jury against the accused but hold that corrective measures on the part of the trial court will prevent the necessity of declaring a mistrial.\(^8\)

The propriety of such comments on the part of prosecuting attorneys has been most frequently considered in the state of Kentucky. The practice has been repeatedly disapproved and, under special circumstances, has contributed to reversals.\(^9\) However, the Kentucky court has consistently refused to reverse on this point alone,\(^10\) having affirmed

\(^1\) 206 Ga. 73, 55 S. E. 2d 574 (1949).
\(^2\) 205 Ga. 55, 52 S. E. 2d 294 (1949).
\(^3\) One of these concurring judges (Wyatt, J.) wrote the opinion in McLendon v. State, supra note 2, wherein he expressed the same personal dissatisfaction, saying that such argument was improper and should result in a mistrial unless the trial court (1) acted promptly to prevent it and (2) instructed the jury to disregard. “Full-bench,” as here used, seems to indicate unanimity of opinion as well as perfection of attendance.
\(^4\) 146 Ga. 315, 91 S. E. 72 (1916).
\(^7\) Biggers v. State, 171 Ga. 596, 156 S. E. 201 (1930).
\(^8\) From its continued use, it is apparent that Georgia prosecutors believe the argument to be effective notwithstanding instructions to the jury to disregard. On the other hand, the repeated expressions of dissatisfaction emanating from the Georgia court apparently encourage defense counsel to argue the point on appeal in the hope that the court will eventually reverse itself.
\(^9\) Crawford v. Commonwealth, 264 Ky. 498, 95 S. W. 2d 12 (1936) (youthful defendant convicted on questionable evidence); Berry v. Commonwealth, 227 Ky. 528, 13 S. W. 2d 521 (1929) (abundant evidence of insanity); Estepp v. Commonwealth, 185 Ky. 156, 214 S. W. 891 (1919) (other errors). The Berry case was expressly overruled in Powell v. Commonwealth, 276 Ky. 234, 123 S. W. 2d 279 (1938).
\(^10\) Bass v. Commonwealth, 296 Ky. 426, 177 S. W. 2d 386 (1944); Powell v. Commonwealth, 276 Ky. 234, 123 S. W. 2d 279 (1938); Underwood v. Commonwealth, 266 Ky. 613, 99 S. W. 2d 467 (1936); Lee v. Commonwealth, 262 Ky. 15, 89 S. W. 2d 316 (1935); Lotheridge v. Commonwealth, 260 Ky. 500, 86 S. W. 2d
judgments imposing the death penalty where objections to such remarks were overruled by the trial court.\(^{11}\) This court has at times marvelled that prosecutors continue to use the argument in the face of its disapproval,\(^{12}\) but has since seemed content to hold it not prejudicial to the “substantial rights of the accused.”\(^{13}\)

What are the substantial rights of the accused, and have they been prejudiced? In most jurisdictions where the jury has power to reduce the penalty in capital cases by recommendation, it is discretionary;\(^{14}\) and a few of these courts hold that the jury may properly consider the effect of a possible pardon or parole in determining whether to qualify their verdict.\(^{15}\)

Theoretically, at least, the measure of punishment becomes important only after the guilt of the accused has been ascertained. It may then be argued that, being guilty of a capital offense, the criminal can demand, as a matter of right, nothing more than that his execution proceed according to law. On the other hand, whether guilty or innocent, the accused has a right of trial by an *impartial* jury,\(^{16}\) and the

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\(^{11}\) Seymour v. Commonwealth, 220 Ky. 348, 354, 295 S. W. 142, 145 (1927). Again in Lee v. Commonwealth, 262 Ky. 15, 19, 89 S. W. 2d 316, 317 (1935): “Time after time we have condemned the use of such arguments by attorneys for the commonwealth, and why they will persist in the use of it we cannot understand; but in only one case have we reversed a judgment on that account....”

\(^{12}\) “We are loath to believe that such action on their [the prosecutors’] part is encouraged because these arguments, although condemned, have under the particular facts in the cases involved been held by us not so prejudicial as to warrant a reversal.” Seymour v. Commonwealth, 220 Ky. 348, 354, 295 S. W. 142, 145 (1927). Again in Lee v. Commonwealth, 262 Ky. 15, 19, 89 S. W. 2d 316, 317 (1935): “Time after time we have condemned the use of such arguments by attorneys for the commonwealth, and why they will persist in the use of it we cannot understand; but in only one case have we reversed a judgment on that account....”

\(^{13}\) Bass v. Commonwealth, 296 Ky. 426, 177 S. W. 2d 386 (1944); cf. Long v. Commonwealth, 288 Ky. 83, 155 S. W. 2d 246 (1941).

\(^{14}\) Winston v. United States, 172 U. S. 303 (1899) (federal statute). “They may do so with or without a reason, and they may decline to do so with or without a reason. They may do so as a matter of public policy, or out of mere sympathy for the prisoner, or they may decline to do so for reasons of public policy, or on account of absence of sympathy for the accused.” Lucas v. State, 146 Ga. 315, 326, 91 S. E. 72, 77 (1916). From the absolute discretion here depicted by the Georgia court, the power of the jury runs through varying degrees of restriction depending on the offense and the jurisdiction. An extensive treatment of this point may be found in 17 A. L. R. 1117 (1922) and Supplements, 87 A. L. R. 1362 (1933); 138 A. L. R. 1230 (1942).

\(^{15}\) Sullivan v. State, 47 Ariz. 224, 55 P. 2d 312 (1936); House v. State, 192 Ark. 476, 92 S. W. 2d 868 (1936); Watts v. State, 82 N. E. 2d 846 (Ind. 1948); Massa v. State, 37 Ohio App. 532, 175 N. E. 219 (1930); State v. Carroll, 52 Wyo. 29, 69 P. 2d 542 (1937). See Notes, 51 HARV. L. REV. 353 (1937); 90 U. PA. L. REV. 221 (1941). One court adheres to this view under a statute providing for a recommendation by the jury “...upon and after the consideration by the jury...” N. J. STAT. ANN. §2:138-4 (1939), State v. Molnar, 133 N. J. L. 327, 44 A. 2d 197 (1945). The quoted provision was added by Pub. Laws 1919, c. 134, §1 after the court had construed the power of recommendation to be within the unlimited discretion of the jury. State v. Martin, 92 N. J. L. 436, 106 Atl. 385 (1919).

\(^{16}\) Compare U. S. CONST. AMEND. VI (“impartial jury”), with N. C. CONST. Art. I, §13 (“good and lawful men”).
legislative delegation of the power to reduce the penalty to that same body would seem to evince an intent that the power be exercised with impartiality. Equality under the law is not to be attained by permitting the prosecuting attorney to prevail upon the jury to forego what may be an otherwise satisfactory course of action in order to preclude the future application of that which he considers bad parole law administered by irresponsible officials.\(^7\) Here, under the cloak of "due process," is something savoring of mob rule.

At any rate, the great majority of courts denounce the argument as improper in that it interferes with the discretion of the jury\(^8\) or presents a possibility of prejudice,\(^9\) or because the granting or withholding of pardons and paroles is not a jury function.\(^10\) Yet, no case has been found in which the mere injection of the argument, without aggravating circumstances, has been held so prejudicial as to require a reversal of a judgment imposing the death penalty. The usual test for prejudice has been its positive appearance\(^21\) and, since the penalty imposed is discretionary, only the evidence supporting that portion of the verdict determining the defendant's guilt is considered reviewable.\(^22\)

\(^{17}\) "If prosecuting officers have any complaint to make because of the exercise of certain powers that are conferred by law upon another tribunal, they should make such complaints at a proper time and place, and not seek to influence a jury to do something to prevent such other tribunal from passing judgment upon the case upon its merits, when it is actually brought before it. Neither the prosecutor nor the jury are or can be held responsible for the acts of the 'power' whose duty it may become to pass upon the question whether a sentence shall be commuted or not." State v. Thorne, 41 Utah 414, 431, 126 Pac. 286, 293 (1912).

\(^{18}\) "No self-respecting judge would permit a prosecuting officer to lecture him as to his right to fix the punishment within lawful limits, and in the present instance the trial judge should have interposed to protect the jury and the defendant from the attorney's assumption of privilige the law gives to the jury alone." Jacobs v. State, 103 Miss. 622, 627, 60 So. 723, 724 (1913).


\(^{20}\) Lovely v. United States, 169 F. 2d 386 (4th Cir. 1948); Farrell v. People, 133 Ill. 244, 24 N. E. 423 (1890); Pena v. State, 137 Tex. Crim. Rep. 311, 129 S. W. 2d 667 (1939); State v. Thorne, 41 Utah 414, 126 Pac. 286 (1912).

\(^{21}\) As explained by the Kentucky court, "...whether the error thereby committed [by the argument] would be sufficiently prejudicial in all cases to authorize a reversal of a conviction would necessarily depend upon the particular facts of the case; i.e., whether the error in the light of the proven facts was calculated to produce such a prejudicial effect on the verdict of the jury as to entitle the convicted defendant to a new trial, or whether, under the facts, the argument, though improper, could not possibly produce such a prejudicial effect and was therefore immaterial." Tiernay v. Commonwealth, 241 Ky. 201, 204, 43 S. W. 2d 661, 663 (1931).

\(^{22}\) But see Dent, J., dissenting in State v. Shawen, 40 W. Va. 1, 12, 20 S. E. 873, 877 (1894): "Granting that the prisoner was guilty of murder in the first degree, ... the law, in tender consideration of human frailties, seeks to distinguish
Prior to 1941, a conviction of any of the four capital crimes\textsuperscript{28} in North Carolina carried the mandatory death penalty and a recommendation of mercy contained in a jury's verdict was treated as surplusage.\textsuperscript{24} In that year the jury was authorized to reduce the penalty for burglary and arson to life imprisonment by appending a recommendation to their verdict;\textsuperscript{25} but the question here under discussion seems not to have arisen. In March, 1949, however, all four sections were rewritten to permit such a recommendation, apparently to be discretionary.\textsuperscript{26} The pertinent North Carolina parole statute\textsuperscript{27} provides that all prisoners serving a life sentence shall become entitled to a hearing on an application for parole after a minimum service of ten years.

Under this state of the law, it would seem but a matter of time until the propriety of arguing parole law in urging the jury to withhold a recommendation of mercy comes before the Supreme Court of North Carolina. This Court has previously decided, in cases not involving the jury's power to recommend mercy, that reference to the right of appeal or the possibility of executive clemency if the defendant should be convicted constitutes reversible error.\textsuperscript{28} These cases may indicate that the similar practice here considered will likewise be condemned. But the similarity is deceiving. Whereas the one assumes a verdict and attempts to prevent a discretionary qualification, the other seeks to influence the jury in arriving at the verdict itself.\textsuperscript{29}

between the different degrees of depravity entering into each particular commission of the highest of crimes. . . . The intemperate and unjustifiable language used by the prosecutor was to inflame the minds of the jury, and prevent this discrimination on their part. He accomplished his purpose [the death penalty], which is the best evidence possible that the prisoner was prejudiced by his conduct.\textsuperscript{30} N. C. Code Ann. (Michie, 1939) §4200 (first degree murder), §4204 (rape), §4233 (first degree burglary), §4238 (arson).


\textsuperscript{25} N. C. Pub. L. 1941, c. 215, §§ 1, 2.

\textsuperscript{26} " . . . shall suffer death, provided, if the jury, at the time of rendering the verdict in open court, shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury." N. C. Sess. L. 1949, c. 299, §§1-4; 27 N. C. L. Rev. 449 (1949). N. C. Gen. Stat. §14-20 (1943) (killing adversary in a duel) and id. §14-278 (malicious train-wrecking resulting in a homicide) which also impose the death penalty were not mentioned. The question arises whether they must also be deemed amended since their validity under N. C. Const. Art. XI, §2, which restricts the death penalty to the four named crimes, depends upon their being treated as statutory specifications of situations constituting first degree murder wherein deliberation and premeditation are conclusively presumed.


\textsuperscript{28} State v. Hawley, 229 N. C. 167, 48 S. E. 2d 35 (1948); State v. Little, 228 N. C. 417, 45 S. E. 2d 542 (1947).

\textsuperscript{29} Care should be exercised to distinguish between the two separate purposes, depending on the situation at trial, which may be subserved by informing the jury of possible leniency to be extended the prisoner by some other agency of government:

(1) Where there is a reasonable doubt as to the guilt of the accused, the possibilities of executive clemency or appellate reversal for error may be advanced as an invitation to the jury to assume the psychological position of a small cog in the machinery of justice and thus shed the responsibility for their verdict. E.g.,
It is believed, however, that in order to avoid the dilemma existing in Georgia and Kentucky, a definite stand should be taken either for or against the use of the argument. Of these two positions, it is submitted that the injection of this line of argument into the proceedings of a capital case should be held to result in a mistrial since (1) it cannot be said with certainty that the impression thereby created can be erased from the minds of the jurors, (2) the parole statutes pertain to a dis- 

Goff v. Commonwealth, 241 Ky. 428, 44 S. W. 2d 306 (1931); State v. Little, supra note 28; Commonwealth v. Balles, 160 Pa. Super. 146, 50 A. 2d 729 (1946). As this tends directly to alter the weight of evidence necessary to a conviction, it is generally held highly prejudicial and doubt has been expressed whether its evil effect can be eradicated by action of the trial court. See State v. Hawley, supra note 28. (2) Where the guilt of the accused is all but conceded and the statute permits the jury to assess the punishment, this becoming the principal issue involved, the jury may be asked to avoid the effect of a future pardon or parole. The argument seeks to impose upon the jury the responsibility for the inadequate punishment and prospective crimes of the defendant by depicting the paroling authority as irresponsible or the existing penal law as a farce. See, e.g. Bolin v. Commonwealth, 206 Ky. 608, 268 S. W. 306 (1925) ("weak-kneed governors and parole commissioners"); Cobb v. State, 251 Ala. 505, 38 So. 2d 279 (1949) ("rotten" penal system). Here, the prejudice, if any, is not so apparent, for assuming that the jury has acted directly upon the suggestion, it remains to be determined whether any rights of the accused have been violated.

Tacit recognition of this distinction may be implied from State v. Howard, 222 N. C. 291, 22 S. E. 2d 917 (1942) where, after a review of the cases involving parole arguments designed to prevent a recommendation of mercy, the court decided that a prosecutor's reference to paroles was not so prejudicial as to warrant a reversal of a conviction of embezzlement.

Due to local variations in the wording of the statutes, the vigilance of the trial judges, the respect accorded to and the degree of control exercised by the appellate courts, the results of any holding cannot be conclusively predicted for any given jurisdiction. But with the situations in Georgia and Kentucky, compare those in the following states where the question is apparently settled:

(1) Arizona: Argument held proper in Sullivan v. State, 47 Ariz. 224, 55 P. 2d 312 (1936). The only subsequent case found involving the point followed the former without comment. State v. Macias, 60 Ariz. 93, 131 P. 2d 810 (1942).
(3) Illinois: Overruling of objection to similar argument held reversible error in Farrell v. People, 133 Ill. 244, 24 N. E. 423 (1890). The only subsequent case found is People v. Murphy, 276 Ill. 304, 114 N. E. 609 (1916) wherein the overruling of an objection was held error but in as much as the argument was directed toward two defendants, one of whom received a sentence of 99 years, the court saw no apparent effect on the verdict.
(4) Louisiana: Overruling of objection to the argument held reversible error in State v. Johnson, 151 La. 625, 92 So. 139 (1922) and where objection was sustained, the argument itself contributed to a reversal in State v. Henry, 196 La. 217, 198 So. 910 (1940). The only other cases found are State v. Edwards, 155 La. 305, 99 So. 229 (1923) in which the argument appeared ineffective in that the death penalty was not imposed, and State v. Burks, 196 La. 374, 199 So. 220 (1940) where the effect of the argument was held eradicated by the trial court's instructions.
tinct phase of our penal and correctional system with which the jury, as such, has no concern, and (3) to supply the deficiencies in existing penal law is not the responsibility of the jury in the individual case.

If, on the other hand, it be decided that matters of policy should be left to the individual jury, such should be placed squarely before them in the unbiased instructions of the trial judge rather than by an impassioned plea of the prosecuting attorney.

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31 Lovely v. United States, 169 F. 2d 386 (4th Cir. 1948).
32 See note 17 supra.