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Criminal Procedure -- Capital Sentencing by a Standardless Jury

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Criminal Procedure—Capital Sentencing by a Standardless Jury

Since 1967 there have been no executions in the United States.[1] Hundreds of men languish on death row awaiting the final decision by the Supreme Court as to the constitutionality of the death penalty.[2] Although the Court has not yet decided that issue,[3] it recently repelled a constitutional attack on the trial procedures employed by most states in capital cases. In *McGautha v. California*[4] the Court rejected defense contentions that the practice of allowing capital juries absolute discretion, uncontrolled by any standards, violated the due process clause of the fourteenth amendment.[5]

On the night of February 14, 1967, William McGautha and an accomplice robbed and murdered the proprietor of a small market in Los Angeles, California. McGautha was arrested, tried, and convicted of murder in the first degree.[6] In accordance with the California bifurcated trial procedure for capital cases, McGautha's sentence of death was determined in a separate jury proceeding subsequent to trial on the issue of guilt.[7] In the penalty phase of his trial, the jury was given no guidelines for selecting a proper sentence; instead, it was instructed that the "whole matter of determining . . . the penalty . . . shall be fixed to the judgment, conscience, and absolute discretion of the jury."[8]

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[1]U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1970, at 161 (91st ed.).

[2]As of December 31, 1969, 609 men were awaiting execution. *Id.* at 159.

[3]The Court has agreed to hear arguments this term on whether the death penalty constitutes cruel and unusual punishment. *E.g.*, Aikens v. California, 403 U.S. 952 (1971).

[4]402 U.S. 183 (1971).

[5]The Court also upheld the constitutionality of a single-verdict procedure in a capital trial, which requires a jury to determine guilt and punishment simultaneously and thus compels a defendant to choose between the exercise of his privilege against self incrimination and the presentation of his own testimony relevant to the issue of sentencing. 402 U.S. at 208-20.

[6]McGautha's accomplice, William Wilkinson, was tried with him and found guilty of first degree murder. In the penalty proceeding the jury set Wilkinson's sentence at life imprisonment. *Id.* at 186-91.

[7]*Id.* at 187-91. CAL. PENAL CODE § 190.1 (West 1970) provides that the trier of fact in a capital case shall fix the penalty to be imposed on a convicted defendant in a proceeding separate from and subsequent to trial on the issue of guilt. In the penalty trial evidence may be presented 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 choice of penalty—life imprisonment or death—is left to the absolute discretion of the trier of fact.

[8]402 U.S. at 190. The California Supreme Court, ruling on the scope of permissible instructions to a jury in the penalty phase of a capital trial, has stated:

> [T]he jury must not be misled into thinking . . . that their discretion in the selection of a penalty, as between either of the two alternatives, is in any way limited or circumscribed by law. Their discretion within that area is absolute and they should be so informed.

People v. Friend, 47 Cal. 2d 749, 765, 306 P.2d 463, 473 (1957).

James Crampton was convicted and sentenced to death by an Ohio jury for the slaying of his wife. Unlike McGautha, Crampton was sentenced to death in a single trial procedure in which the issues of guilt and punishment were simultaneously decided by the jury.[9] The Ohio jury, like most capital juries in the United States, received no guidelines from the court as to the proper factors to be considered in arriving at a sentence but was simply instructed "to arrive at a just verdict."[10]

McGautha and Crampton both argued to the Supreme Court that the practice of allowing a jury in a capital case unbridled discretion to decide between life imprisonment and the death penalty violates the due process clause of the fourteenth amendment. They contended that a lay jury, unguided by any standards and unfamiliar with the rationale of the sentencing process, can only guess at the relevant criteria to be considered in deciding on an appropriate sentence. Such a jury, argued the petitioners, is most likely to base its decision on constitutionally impermissible factors such as impulse, prejudice, or emotional feelings toward the defendant. In rejecting these contentions, the Supreme Court stressed the continued efforts of authorities throughout history, "uniformly unsuccessful, to identify before the fact those homicides for which the slayer should die."[11] The Court noted that most American jurisdictions in response to the seemingly impossible task of defining capital crimes eliminated the category of crimes for which the death penalty was mandatory and in its place substituted the practice of granting juries the option of specifying capital punishment or life imprisonment.[12] The Court argued that such a change in favor of leniency can hardly be said to prejudice a defendant. "In light of history, experience, and present limitations of human knowledge," the *McGautha* Court concluded, "it

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[9]402 U.S. at 192.

[10]Brief for Appellant (Crampton) at 6, McGautha v. California, 402 U.S. 183 (1971). The jury was charged, however, to "[c]onsider all the evidence and make your finding with intelligence and impartiality, and without bias, sympathy, or prejudice so that the state of Ohio and the defendant will feel that their case was fairly and impartially tried." 402 U.S. at 195.

The Supreme Court of Ohio has stated that "whether or not a recommendation of mercy shall be made upon finding an accused guilty of murder in the first degree is a matter vested fully and exclusively in the discretion of the jury." State v. Ellis, 98 Ohio 21, 120 N.E. 218 (1918).

[11]402 U.S. at 197.

[12]*Id.* at 199. Tennessee in 1837 became the first American jurisdiction to give juries sentencing discretion in capital cases. Ch. 29, § 1, [1837] Tenn. Acts 55. California conferred this power on its juries in murder cases in 1874. Ch. 508, § 1, [1874] Cal. Amendatory Acts 457. Ohio enacted a similar provision in 1898. Senate Bill 504, § 1, [1898] Ohio Laws 223. The federal government followed suit in 1897. 18 U.S.C. § 1111 (1970) (originally enacted as Act of Jan. 15, 1897, ch. 29, § 1, 29 Stat. 487).

is quite impossible to say that committing to the untramelled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution."[13]

In *Winston v. United States*[14] the Supreme Court was called upon to interpret a federal murder statute which provided no guidelines for the jury to consider in selecting the applicable sentence.[15] The trial judge had instructed the jury that if they found the defendant guilty, they must also find the existence of mitigating circumstances before returning a verdict of life imprisonment. In finding such instructions to be erroneous, the Court declared:

> The act does not itself prescribe, nor authorize the court to prescribe, any rule defining or circumscribing the exercise of this right; but commits the whole matter of its exercise to the judgment and the consciences of the jury. . . . How far considerations of age, sex, ignorance, illness, or intoxication, of human passion or weakness, of sympathy or clemency, or the irrevocableness of an executed sentence of death, or an apprehension that explanatory facts may exist which have not been brought to light, or any other consideration whatever, should be allowed weight in deciding the question whether the accused should or should not be capitally punished, is committed by the act of Congress to the sound discretion of the jury, and of the jury alone.[16]

Subsequent to *Winston* the Court in *Andres v. United States*[17] approved instructions concerning the same statute which informed the jury that the power to recommend mercy was peculiarly within their realm and that "in this connection the Court cannot extend or prescribe to you any definite rule defining the exercise of this power, but commits the entire matter of its exercise to your judgment."[18] At first glance these two decisions seem explicitly to sanction a lack of jury guidelines in the sentencing process of a capital trial. One must note, however, that the Court in *Winston* and *Andres* was called upon only to interpret the statute provided by Congress and not to pass specifically on its constitu-

[13]402 U.S. at 207.
[14]172 U.S. 303 (1899).
[15]18 U.S.C. § 1111 (1970).
[16]172 U.S. at 313.
[17]333 U.S. 740 (1948).
[18]*Id.* at 743 n.4.

tionality. Prior to *McGautha* the Court had never addressed itself to a fourteenth amendment objection concerning the use of unbridled discretion by a jury in a capital case.[19]

It is well settled that a trial judge has wide discretion, within the maximum and minimum penalties prescribed by law, to determine the proper punishment for a convicted defendant. In *Williams v. New York*[20] the Supreme Court recognized this authority by affirming a trial judge's decision in a capital case to disregard the jury recommendation of mercy and instead impose the death sentence. More recently the Court had occasion to note:

> Sentencing judges are vested with a wide discretion in the exceedingly difficult task of determining the appropriate punishment in the countless variety of situations that appear. The Constitution permits qualitative differences in meting out punishment and there is no requirement that two persons convicted of the same offense receive identical sentences.[21]

The appellants in *McGautha* did not even challenge the wide discretion given a judge in the sentencing process. They argued that such a discretion was constitutionally invalid only if it were accorded to a jury.

There may be valid reasons why "due process of law" should allow a judge more discretion than a jury in the area of sentencing. He is, at least, a professional sentencer, and the fact that he sentences a large number of offenders promotes some consistency in the punishment which he hands down. Furthermore, a judge presumably has in mind the goals of wise penology and is less likely to base his sentence on an intense dislike of the defendant or on some similar visceral impulse.[22] Nevertheless, it is at least arguable that neither judge nor jury should be allowed to make such an awesome decision without the aid of controlling stan-

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[19]The identical issues decided by the Supreme Court in *McGautha* were briefed and argued but not decided in Maxwell v. Bishop, 398 U.S. 262 (1970). *See id.* at 267 n.4.

[20] 337 U.S. 241 (1949).

[21]Williams v. Illinois, 399 U.S. 235, 243 (1970).

[22]The judge very often perceives the stimulus that moves the jury, but does not yield to it. Indeed it is interesting how often the judge describes with sensitivity a factor which he then excludes from his own considerations. Somehow the combination of official role, tradition, discipline, and repeated experience with the task make of the judge one kind of decider. The perennial amateur, layman jury cannot be so quickly domesticated to official role and tradition; it remains accessible to stimuli which the judge will exclude.

H. KALVEN & E. ZEISEL, THE AMERICAN JURY 497-98 (1966), *cited in* Brief for NAACP Legal Defense Fund as Amicus Curiae at 37 n.43, Maxwell v. Bishop, 398 U.S. 262 (1968).

dards. While a judge is not as susceptible to the basic prejudices which are likely to infect a jury, his decisions are affected by his own individual predilections concerning the motives of criminology. Consequently, there is a wide disparity between sentences handed down by different judges confronted with similar factual situations. A cataloging by the legislature of the relevant criteria to be considered in the sentencing process would tend to eliminate this disparity and insure fairness and even-handed treatment for defendants convicted of capital crimes.

At the state level the scope of appellate review of the exercise of discretion afforded a trial judge in the sentencing process is varied. Thirteen states have specifically provided by statute for appellate review of sentencing on the merits, and a few states have adopted such a practice by judicial authority.[23] Four states have established special courts which sit solely for review of sentences imposed by judges.[24] Appellate review of judicial sentencing in the federal system seems to be minimal. The Supreme Court has stated that it has no authority to review sentences handed down by a federal trial judge,[25] but it has nevertheless exercised such authority on a few occasions. One such instance was in *North Carolina v. Pearce*,[26] where the Supreme Court limited the amount of discretion available to a trial judge in sentencing a defendant who had won the right to a second trial. The Court held that if a more severe sentence is imposed by the trial judge on retrial, he must affirmatively state his reasons for doing so, and the reasons must be grounded in the evidence produced at the second trial. In a number of instances the Court has overturned sentences where questionable information concerning a defendant's background was made available to the trial judge and where the defendant was not represented by counsel.[27] Thus, one may conclude that while it is unusual for a sentence imposed by a trial judge to be overturned by an appellate court, that possibility exists and serves as a restraining influence on the exercise of discretion by a trial judge. However, there are virtually no restraints on the exercise of discretion by a

[23]AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES 14-15 (1968).

[24]CONN. GEN. STAT. ANN. §§ 51-194 to -196 (Supp. 1965); MAINE REV. STAT. ANN. tit. 15, §§ 2141-2144 (Supp. 1967); MD. ANN. CODE art. 26, §§ 152-158 (1966); MASS. GEN. LAWS ANN. ch. 278, §§ 28A-28D (1959).

[25]Gore v. United States, 357 U.S. 386, 393 (1958).

[26]395 U.S. 711 (1969).

[27]Mempha v. Rhay, 389 U.S. 128 (1967); Specht v. Patterson, 386 U.S. 605 (1967); Townsend v. Burke, 335 U.S. 736 (1948).

capital jury in determining a sentence. Only four states allow appellate review of a jury's sentence in a death case.[28] At least three states, including California, allow the trial judge to set aside a death verdict brought in by a jury, but if he fails to act the state appellate court lacks the authority to exercise such power.[29] Thus, it appears that in most capital sentencing procedures the jury possesses an unbridled discretion, the exercise of which is unreviewable, to determine the proper sentence.

In *Giaccio v. Pennsylvania*[30] the Supreme Court ruled that an 1860 Pennsylvania statute which allowed the jury to exercise broad discretion in assessing costs against an acquitted defendant[31] violated the due process clause. Although Giaccio was acquitted of a criminal charge, the jury exercised its prerogative to assess against him the cost of his own prosecution. The statute upon which the jury relied contained no guidelines for determining when costs should be assessed against a defendant. The Supreme Court declared that such a grant of arbitrary power to a jury was unconstitutional:

> The act contains no standards at all, nor does it place any conditions of any kind upon the jury's power to impose costs upon a defendant. . . . Certainly one of the basic purposes of the Due Process Clause has always been to protect a person against having the Government impose burdens upon him except in accordance with the valid laws of the land. Implicit in this constitutional safeguard is the premise that the law must be one that carries an understandable meaning with legal standards that courts must enforce. This state Act as written does not even begin to meet this constitutional requirement.[32]

The Court's reasoning in *Giaccio* would seem to imply—if not compel—a finding that a death sentence left to the unbridled discretion of a jury would violate the due process clause. The majority in *McGautha* rejected such a broad application of *Giaccio*, pointing specifically to footnote eight of the opinion where the *Giaccio* Court stated

[28]These states (Arizona, Idaho, Nebraska, and Oklahoma) appear to follow a judicially enunciated test whereby a capital jury's verdict may be overturned by an appellate court for abuse of discretion. *See* State v. McGee, 91 Ariz. 101, 70 P.2d 261 (1962); State v. Ramirez, 34 Idaho 623, 203 P. 279 (1921); Sundahl v. State, 154 Neb. 550, 48 N.W.2d 689 (1951); Waters v. State, 87 Okla. Crim. 236, 197 P.2d 299 (1948).

[29]Brief for NAACP Legal Defense Fund as Amicus Curiae at 63 n.120, McGautha v. California, 402 U.S. 183 (1971).

[30]382 U.S. 399 (1966).

[31]Tit. 5, § 62, [1860] Pa. Pub. L. 382.

[32]382 U.S. at 403.

that it was not casting doubt on the constitutionality of allowing "juries finding defendants guilty of a crime the power to fix punishment within legally prescribed limits."[33] It is doubtful, however, that the Court in *Giaccio* meant footnote eight, by itself, to be definitive on the issue of jury discretion in capital cases.[34] Furthermore, the *McGautha* juries would seem to fall outside the limitation of footnote eight because their sentencing discretion was not confined in any meaningful sense "within legally prescribed limits."[35] The reasoning of *Giacco* is all the more striking when one considers that two members of the Court sought to base the opinion on the premise that a state cannot constitutionally impose costs on an acquitted defendant.[36] The majority resisted such a course, though, and held that a statute which fails to place any limitations upon a jury's power to sentence a defendant violates the due process clause.

The Supreme Court in many of its decisions has taken precautions to insure that state power is exercised through procedures which guarantee fairness and even-handed treatment and which provide a reasonable degree of certainty in their application. Nearly a century ago in *Yick Wo v. Hopkins*[37] the Court struck down as violative of the equal protection clause an administrative discrimination against a minority group under a San Francisco statute which gave the Board of Supervisors complete freedom in deciding whether or not to license a laundry. The Court characterized this discretion as a "naked and arbitrary power" which acknowledged neither guidance nor restraint.[38] In roundly con-

[33]*Id.* at 405 n.8.

[34]Having regard to the Court's long-standing aversion to unnecessarily deciding serious constitutional questions, Peters v. Hobby, 349 U.S. 331, 338 (1955), it seems unlikely that the Court would have decided the constitutionality of the standardless death penalty procedure in a case in which the issue was not even raised. The Court was probably taking care not to express an opinion on the issue so that it could be decided later in a more appropriate context.

[35]It is unclear what the Court meant by the phrase "to fix punishment within legally prescribing limits." 382 U.S. at 405 n.8. Perhaps the Court was distinguishing a jury whose sentencing discretion is limited by fixed standards from one whose discretion is absolute by stating that there can be no doubt of the constitutionality of a jury to exercise sentencing discretion *if* it is guided by legally prescribed standards. If this interpretation is correct, the footnote would seem to reinforce rather than limit the *Giaccio* opinion and the holding in *McGautha* must be considered a clear overruling of *Giaccio*. More likely the Court was speaking of the range of possible penalties available to a jury; in determining a sentence a jury can only exercise its discretion within legislatively pronounced maximum and minimum penalties.

[36]382 U.S. at 405 (Stewart & Fortas, JJ., concurring).

[37]118 U.S. 356 (1886).

[38]*Id.* at 366.

demning this power, the Court stated, "[O]ur institutions of government . . . do not mean to leave room for the play of purely personal and arbitrary power . . . . For the very idea that one man may be compelled to hold his *life* . . . at the mere will of another . . . is . . . intolerable."[39]

More recently, in *Louisiana v. United States*[40] the Court has interpreted the due process clause to bar the use of arbitrary state power to disenfranchise citizens from voting.[41] In *Louisiana* the Court ruled on the constitutionality of a revision of the Louisiana Constitution which required every new voting applicant to "be able to understand" as well as to "give a reasonable interpretation" of any section of the state or federal constitution "when read to him by a registrar."[42] The revised constitution vested in the voting registrar virtually unregulated power to determine the manner in which the test would be given, the section of the constitution the applicant would be required to read, and its correct interpretation. Mr. Justice Black, speaking for the Court, denounced such a procedure:

> The cherished right of people in a country like ours to vote cannot be obliterated by the use of laws like this, which leave the voting fate of a citizen to the passing whim or impulse of an individual registrar. Many of our cases have pointed out the invalidity of laws so completely devoid of standards and restraints.[43]

Both *Yick Wo* and *Louisiana* illustrate judicial limitations by the Supreme Court upon the arbitrary use of power by states against their citizens. While each state undoubtedly possessed the power to license a laundry or to legislate voting qualifications, the Court held that this

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[39]*Id.* at 369-70 (emphasis added).

[40]380 U.S. 145 (1965).

[41]The three judge district court opinion which was affirmed by the Supreme Court noted that discriminatory voting qualifications are usually prohibited by the equal protection clause. United States v. Louisiana, 225 F. Supp. 353, 391 (E.D. La. 1963). In this case, however, the discrimination inherent in the Louisiana Constitution was so unjustifiable that it violated the due process clause. The court stated:

> [S]ome laws may never win constitutional approbation, because they have no rational relation to a legitimate governmental objective and because the unrestrained discretion without standards . . . makes them incurably subjective, unreasonable, and incapable of equal enforcement. . . . The vices cannot be cured by an injunction enjoining [the statute's] . . . unfair application.

Id. at 391-92.

[42]Act 613, § 1(d), [1960] La. Acts 1166, *amending* LA. CONST. art. VIII, § 1(d) (1921).

[43]380 U.S. at 153.

power had to be administered in a regulated manner which would protect citizens against arbitrary and capricious decision-making. The common ground in *Yick Wo*, *Louisiana*, and *McGautha* is the exercise of unguided power by an arm of the state so as to deprive citizens of their rights.[44] The discretion accorded the *McGautha* juries in determining a sentence is arguably just as capricious and unregulated as that denounced by the Court in *Yick Wo* and *Louisiana*, for those juries could have returned a death verdict for any reason or for no reason. Nevertheless, the majority in *McGautha*, placing much weight on the long history of the administration of the death penalty, refused to say that such a procedure violates "due process of law."

The *McGautha* Court placed much emphasis on the unsuccessful efforts of sovereigns throughout history to devise adequate guidelines for use by a capital jury in the sentencing process. While it is true that no American jurisdiction has ever prescribed standards to guide a capital jury in its sentencing deliberations, this surely does not mean that the creation of such standards is impossible. The *Model Penal Code* drafted by the American Law Institute has set forth a quite lucid scheme which enables the trier of fact in a capital case to determine rationally an appropriate sentence.[45] A jury under the *Model Penal Code* is still given wide discretion, but it may not impose the death penalty unless it finds one of the specifically enumerated aggravating circumstances and also finds that there are no mitigating circumstances sufficiently substantial to require leniency. Given the existence of a workable system of standards in the *Code*, it is difficult to understand the *McGautha* Court's insistence that drafting such guidelines is an impossibility.[46]

The legislatures of the states of California and Ohio must have had some criteria in mind, some rational ideas about the objectives of penol-

[44]*McGautha* may be distinguished from *Yick Wo* and *Louisiana* in that in *McGautha* a jury rather than a mere agency of the state was exercising unregulated discretion. The jury has traditionally occupied a deep-seated, revered position in American legal philosophy, evidenced by the guarantees of jury trials embodied in the sixth and seventh amendments to the Constitution. For that reason the Court may have been reluctant to restrain the jury's conduct.

[45]MODEL PENAL CODE § 210.6 (Proposed Official Draft 1962).

[46]Paradoxically, the *McGautha* Court, after proclaiming the impossibility of drafting successful standards for use by a capital jury, included the *Model Penal Code* provisions in the appendix to its opinion. The Court obviously recognizes that such guidelines can be formulated, but it is worried about the practical effect of requiring standards. The motives behind the death penalty are diffuse and controversial; achieving a legislative consensus on these criteria would indeed be difficult. Furthermore, the Supreme Court would undoubtedly be called upon at a latter date to pass upon the sufficiency of these standards.

ogy, when they established the two discretionary penalties for first degree murder. Instead of cataloging these thoughts, however, the legislatures of both states elected to let the jury operate in a legal vacuum. As a result neither state has a regularized system of law and procedure to guide a capital jury in making such an awesome decision; rather, each follows a system which allows the final verdict to turn on the whim or caprice of any juror. Each has licensed a raw power, unguided by any principles, undirected by any concern for relevant facts, a power which may claim a person's life for a rational as well as an irrational reason. Such a procedure cannot be said to come within the bounds of "due process of law," but must fall into the category of institutionalized arbitrariness. While *McGautha* clearly held that the states are not constitutionally compelled to prescribe standards for capital juries, it by no means indicates that they cannot or should not do so.[47]

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[47]The majority opinion in *McGautha* concedes that prescribing criteria for jury sentencing discretion "may be a superior means of dealing with capital cases." 402 U.S. at 221.