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Criminal Law: Instructions from the Court Concerning the Parole Laws in a Capital Offense Prosecution

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principles or possible local prejudice,[26] would be eager to invoke section 1979 and thereby gain access to the federal courts.

In essence, the decision brings the heretofore hazy concepts of federal civil rights closer to the everyday interests of the common litigant. It is suggested that the *York* decision will prompt an increased use of these concepts via section 1979.

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CRIMINAL LAW: INSTRUCTIONS FROM THE COURT CONCERNING THE PAROLE LAWS IN A CAPITAL OFFENSE PROSECUTION

Burnette v. State, 157 So. 2d 65 (Fla. 1963)

During its deliberations in a murder prosecution, the jury returned to the courtroom and requested information about the possibility of parole if it returned a verdict of guilty with a recommendation of mercy thereby invoking the automatic penalty of life imprisonment.[1] The court responded by instructing the jury that "Under the laws of the State of Florida, a person imprisoned becomes eligible to submit an application after having been in prison for a period of six months. And the application is acted upon by a parole commission . . . ." The jury returned a verdict of guilty of murder in the first degree, and the court sentenced the defendant to death. On appeal to the Florida Supreme Court, HELD, that the trial court's instruction on the substantive law of parole was error. The court

26. See Antelope v. George, 211 F. Supp. 657, 660 (N.D. Idaho 1962); Note, 36 IND. L.J. 317, 321 (1961).

1. FLA. STAT. §919.23 (2) (1963) provides in part: "Whoever is convicted of a capital offense and recommended to the mercy of the court by a majority of the jury in their verdict, shall be sentenced to imprisonment for life. . . ."

suggested that the jury should be instructed, as a part of the general charge, that the provisions for parole or pardon are a part of the laws of the state and are administered by public officials and that the jury should not discuss these procedures in arriving at its verdict or in considering a recommendation of mercy.[2] Reversed and remanded for a new trial.

There is no general agreement in other jurisdictions whether parole is a proper subject on which to instruct the jury.[3] Some courts have adopted the rule that the jury should not consider the matter and should be instructed to this effect *upon inquiry*.[4] The reasoning of these courts is that the possibility of parole is neither a relevant nor proper factor for the jury to consider in arriving at its verdict. Thus, the jury is instructed that the power to parole is vested in a coordinate branch of the government and that it should decide guilt or innocence without recourse to conjecture as to the probable action of the parole authority. One court has expressed the view that the trial judge should instruct the jury, *after inquiry*, on the substantive law of parole, but should also charge that this matter should not be considered in the deliberations.[5] The basis for this view is that once the jury indicates that parole could be a factor in its deliberation, it is the duty of the court to read the relevant statutes on parole to the jury in order to remove any popular misconceptions that passage of time alone entitles a prisoner to parole. Other jurisdictions allow an instruction to the jury, after inquiry, as to the parole laws without further restriction or qualification.[6] This is premised on the theory that in a capital case, where a recommendation of mercy automatically reduces the penalty, the jury has the dual function of determining the punishment as well as the guilt or innocence of the accused. These jurisdictions conclude that the jury should have full knowledge of the parole procedures in order to perform its duties fairly and accurately and to prevent any misconceptions of the law. Until recently, California represented a unique minority position in holding that the judge in a capital case should instruct the jury on

2. Although the court strongly advised the giving of this charge, it clearly stated that failure to give such would not alone constitute reversible error.

3. See Knowlton, *Problems of Jury Discretion in Capital Cases*, 101 U. PA. L. REV. 1099, 1124-25 (1953); Comment, 10 WASH. & LEE L. REV. 219 (1953).

4. McCray v. State, 261 Ala. 275, 74 So. 2d 491 (1954); State v. Lammers, 171 Kan. 668, 237 P.2d 410 (1951); State v. Conner, 241 N.C. 468, 85 S.E.2d 584 (1955); Jones v. Commonwealth, 194 Va. 273, 72 S.E.2d 693 (1952).

5. State v. Maxey, 42 N.J. 60, 198 A.2d 768 (1964); State v. White, 27 N.J. 158, 142 A.2d 65 (1958).

6. Glover v. State, 211 Ark. 1002, 204 S.W.2d 373 (1947); State v. Nelson, 65 N.M. 403, 338 P.2d 301 (1959); State v. Tudor, 154 Ohio St. 249, 95 N.E.2d 385 (1950).

the subject matter of parole *before* an inquiry is made by the jury. The reasoning of the California courts was that since the jury fixes the penalty in a capital case by granting or withholding a recommendation of mercy, it should be given all relevant facts, "to assist it in assessing the significance of a life sentence."[7] In 1964, however, the California Supreme Court in *People v. Morse*[8] conducted an excellent analysis of its position and concluded that the practice of instructing the jury on the substantive law of parole resulted in prejudice to the accused. The court in overruling its previous decisions adopted a position similar to that in *Burnette*.

The *Burnette* case is a culmination of several Florida cases presenting the question, whether, upon inquiry, the court should instruct the jury as to the parole laws. In *McKee v. State*,[9] a capital offense prosecution, when the jury inquired as to the parole laws and the trial court read to the jurors the statute relating to parole,[10] the Florida Supreme Court held that no error was committed in that the verdict of guilty carried with it a recommendation of mercy. However, in the later case of *Phillips v. State*,[11] when the trial court had informed the jury of the possibility of parole if there was a verdict of guilty with a recommendation of mercy, the supreme court found no error even though the jury had returned a verdict of guilty without a recommendation of mercy. The court merely indicated, without further explanation, that "if the charge had any effect whatever it was to the advantage of the appellant and harmless."[12] The reasoning of the court seemed to be that it was the duty of the trial court to charge on the possible penalty, as well as the law, and that the parole laws are a part of the penalties fixed by law. The *Phillips* case was overruled by the instant case to the extent that the court concluded that a trial judge should not instruct the jury on the parole laws, but should charge that parole laws do exist in the state but are not to be considered by the jury in their deliberations.

The holding in *Burnette* is sound in that the court concludes that a jury should be instructed not to consider parole in its deliberation. Assuming that the jury will respect an admonishment of this nature, such should prevent parole from becoming a factor in the jury's decision to the prejudice of the accused. Presumably the jury will decide guilt or innocence in an impartial atmosphere without allowing parole to affect its decision whether to recommend mercy if the

7. People v. Purvis, 52 Cal. 2d 871, 885, 346 P.2d 22, 30 (1959); *accord,* People v. Ketchel, 59 Cal. 2d 503, 381 P.2d 394 (1963).
8. 36 Cal. Rptr. 201, 388 P.2d 33 (1964).
9. 159 Fla. 794, 33 So. 2d 50 (1947).
10. FLA. STAT. §947.16 (1963).
11. 92 So. 2d 627 (Fla. 1957).
12. *Id.* at 628.

verdict is guilty. In the principal case, the trial court's instruction that a prisoner is eligible for parole after serving six months in prison might have presented a misleading picture. Most felons convicted of capital offenses are not placed on parole for several years even though by statute[13] they are eligible for parole after six months of imprisonment. It would be impossible for a court to guarantee that the accused will not be released for a substantial period of time because each potential parolee is considered individually by the parole commission.[14] The jury, in a capital case, can only foreclose a possibility of parole by refusing to recommend mercy thereby invoking the mandatory death penalty. The alternative of recommending mercy but denying defendant any possibility of parole is not within the power of the jury. To permit such practice would, in effect, be abolishing a function of the Parole Commission whose power is derived from the legislature.[15] Thus the suggested instruction in *Burnette* is sound in that it forbids the jury to speculate upon future actions of the Parole Commission.[16]

In rejecting the trial court's instruction on the substantive law of parole, the court in *Burnette* cited its decision in *Pait v. State*[17] where the jury returned to the courtroom and inquired about the possibility of parole. The judge refused to answer the question and instructed the jurors that they would have to confine their deliberations to the evidence presented at trial. Although approving the trial judge's answer in *Pait*, the court in *Burnette* was not satisfied that an appropriate answer upon inquiry afforded an adequate solution to the problem of preventing an injustice resulting from jury consideration of parole. Thus the court concluded that it would be better practice for the trial judge to instruct the jury as a part of the general charge, *before any inquiry is made*, that parole laws do exist, but are administered by a separate governmental agency and are not to be considered by the jury.

The court's conclusion is subject to considerable controversy. Whether it is best to await inquiry or to raise the issue in the general

13. FLA. STAT. §947.16 (1963).

14. FLA. STAT. §§947.16, .17, .18 (1963). See Clark, *Parole in Florida*, 11 U. FLA. L. REV. 68, 74-82 (1958).

15. FLA. STAT. §947.13 (1963).

16. In *People v. Morse* the California Supreme Court expressly stated: "The objective situation is difficult enough without blurring the functions. The function of the jury is to consider the facts surrounding the crime and defendant's background, and upon that basis, reach its decision. The jury should not be invited to decide if the defendant will be fit for release in the future; it should not at all be involved in the issue of the time, if any, when the defendant should be released; it should not be propelled into weighing the possible consequences of the Authority's administrative action." 36 Cal. Rptr. 201, 208, 388 P.2d 33, 40 (1964).

17. 112 So. 2d 380 (Fla. 1959).

charge in the hope of preventing jury consideration without the knowledge of the court is a question that is difficult to resolve. On one hand it may be argued that if the subject of parole is mentioned in the general charge, the jury could construe this as an implied warning that the defendant might be discharged after serving a minimum sentence. In any event the jury's attention would be directed to the subject. The argument of "implied warning" is refuted if one assumes that the jury will, in good faith, follow the court's admonishment not to consider the matter in deliberation. Moreover, this argument assumes that the jury or an individual juror does not consider parole in the absence of judicial instruction. But the number of cases in which the issue is raised upon inquiry should itself indicate the disturbing possibility of the number of times that a jury has acted on its own information.[18] Thus it would appear that the court's suggestion for instruction as a part of the general charge eliminates the risk of such "unknown" action by the jury.

It is submitted that the holding in *Burnett* and the subsequent decision of the California Supreme Court in *People v. Morse* represent the better view.[19] Both Florida and California, in distinguishing the functions of the court, the jury, and the parole commission, have moved to the forefront of a continuing effort to protect the rights of one accused of a capital crime.

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18. See 35 A.L.R.2d 769, 771 n.10.
19. *But cf.* 7 U. MIAMI L.Q. 120 (1952).