University of Miami Law Review

Volume 7 | Number 1 Article 13

12-1-1952

Criminal Law -- Trial -- Instruction as to the Possibility of Parole as Reversible Error

ments have been held privileged.[15] *Bowman Dairy Co. v. United States,*[16] relied on by this court, reaffirmed the general rule that all material admissable as evidence, obtained by the Government through solicitation or volunteered by third persons, is subject to subpoena, but the court should be "solicitous to protect against disclosures of the identities of the informants."[17]

Defendants contend that such confidential informants "promise to become something more than mere informers."[18] They have testified before the grand jury and will probably be called as witnesses at the trial. The Government may finally elect not to use a given document rather than reveal the identity of an informant.[19] Writings not used at the trial but which have been presented to the grand jury are also protected from disclosure by a strong policy favoring secrecy of grand jury proceedings.[20] Furthermore, the denial of pre-trial inspection does not preclude further discovery during the trial.[21]

Only persons charged with treason or other capital offenses can demand as a matter of right a list of witnesses prior to the trial.[22] The court can take appropriate measures[23] to protect the rights of the defense in event of undue surprise during the course of the trial. Defendants' discovery of reports revealing the identity of informants would have afforded them a list of the Government's witnesses. This list is not essential to the defense, but would enable the Communist Party to police its ranks. The court recognized this, and prevented the circumvention of an established principle of law, by defendants' use of a procedural rule.

CRIMINAL LAW — TRIAL — INSTRUCTION AS TO THE POSSIBILITY OF PAROLE AS REVERSIBLE ERROR

The jury requested the court to advise them as to the probability of the defendant serving a full life sentence without parole, if they returned a

15. United States v. Deere & Co., 9 F.R.D. 523 (Minn. 1949); United States v. Kohler, 9 F.R.D. 289 (E.D. Pa. 1949).
16. 341 U.S. 214 (1951).
17. *Ibid* at 221.
18. Sorrentino v. United States, 163 F.2d 627 (9th Cir. 1947); Wilson v. United States, 59 F.2d 390 (3d Cir. 1932).
19. United States v. Coplon, 185 F.2d 629, 638-639 (2d Cir. 1950); United States v. Krulewitch, 145 F.2d 76, 78-79 (2d Cir. 1944); United States v. Andolschek, 142 F.2d 503, 506 (2d Cir. 1944).
20. Goodman v. United States, 108 F.2d 516 (9th Cir. 1939); Metzler v. United States, 64 F.2d 203 (9th Cir. 1933); United States v. Amazon Industrial Chemical Corp., 55 F.2d 254, 261 (D. Md. 1931).
21. Shores v. United States, 174 F.2d 838, 844 (8th Cir. 1949); United States v. Krulewitch, 145 F.2d 76, 78 (2d Cir. 1944).
22. 62 STAT. 831 (1948), 18 U.S.C. § 3432 (Supp. 1951).
23. Rubio v. United States, 22 F.2d 766, 768 (9th Cir. 1927), *cert. denied* 276 U.S. 619 (1928) (The court had power to grant a continuance or a new trial upon a proper showing that the defendant's rights were not safeguarded because of surprise).

verdict with recommendation of mercy.[1] The court informed them that the parole board could release a person under a life sentence after seven years of imprisonment. A guilty verdict without recommendation was returned and defendant was sentenced to death. *Held*, reversed. The instruction was prejudicial and operated to influence the jury against a recommendation of mercy. *Strickland v. State*, 209 Ga. 65, 70 S.E.2d 710 (1952).

There is a decided judicial conflict[2] as to whether an instruction to the jury on the function of the parole board constitutes reversible error. Some courts refuse to upset the verdict, holding, that while such charge constitutes error and should not have been given, it is not sufficient for a reversal.[3] Others take the position that the jury should be so informed.[4] In passing upon the point some weight is evidently given where the statement to the jury is in response to an inquiry, rather than when volunteered by the court.[5] Those courts[6] holding that it is prejudicial error warranting a reversal, take the position that the jury should not be instructed as to the consequence of a verdict;[7] that it is highly improper for them to be advised that some other arm of the state may reduce the sentence,[8] and that the court should refuse to answer a request as to the question of parole.[9]

Ironically, the majority of courts permit the prosecutor to mention parole law in addressing the jury.[10] His remarks, although often inflammatory,[11] are not considered grounds for reversal. The courts appear to be in

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1. GA. CODE ANN. § 26-1005 (Temp. Supp. 1951) ("Whenever a jury, in a capital case of homicide, shall find a verdict of guilty, with a recommendation of mercy, . . . such verdict shall be held to mean imprisonment for life.")

2. *Accord:* Lovely v. United States, 169 F.2d 386 (4th Cir. 1948), *cert. denied*, 338 U.S. 834 (1949); Sukle v. People, 107 Colo. 269, 111 P.2d 233 (1941); Houston v. Commonwealth, 270 Ky. 125, 109 S.W.2d 45 (1937); *cf.* State v. Tennant, 204 Iowa 130, 214 N.W. 708 (1927); Coward v. Commonwealth, 164 Va. 639, 178 S.E. 797 (1935). *Contra:* State v. Barth, 114 N.J.L. 112, 176 Atl. 183 (1935); State v. Carrol, 52 Wyo. 29, 69 P.2d 542 (1937); *cf.* People v. Sukdol, 322 Ill. 540, 153 N.E. 727 (1926); Liska v. State, 115 Ohio 283, 152 N.E. 667 (1926); Massa v. State, 37 Ohio App. 532, 175 N.E. 219 (1930).

3. People v. Sukdol, 322 Ill. 540, 153 N.E. 727 (1926); State v. Carrol, 52 Wyo. 29, 69 P.2d 542 (1937).

4. State v. Carrigan, 93 N.J.L. 268, 108 Atl. 315 (1919); State v. Rombolo, 89 N.J.L. 565, 99 Atl. 434 (1916).

5. Jones v. State, 161 Ark. 242, 255 S.W. 876 (1923); Freeman v. State, 156 Ark. 592, 247 S.W. 51 (1923).

6. See note 2 *supra*.

7. State v. Tennant, 204 Iowa 130, 214 N.W. 708 (1927).

8. Coward v. Commonwealth, 164 Va. 639, 178 S.E. 797 (1935).

9. Polly v. People, 107 Colo. 6, 108 P.2d 220 (1940); Zell v. State, 189 Ind. 433, 127 N.E. 1 (1920); Gains v. Commonwealth, 242 Ky. 237, 46 S.W.2d 75 (1932).

10. Sullivan v. State, 55 P.2d 312 (Ariz. 1936); Wechter v. People, 53 Colo. 89, 124 Pac. 183 (1912); People v. Murphy, 276 Ill. 304, 114 N.E. 609 (1916); State v. Junkins, 147 Iowa 588, 126 N.W. 689 (1910); Glenday v. Commonwealth, 255 Ky. 313, 74 S.W.2d 332 (1934). *Contra:* State v. Johnson, 151 La. 625, 92 So. 139 (1922); Dingus v. Commonwealth, 153 Va. 846, 149 S.E. 414 (1929).

11. People v. Murphy, 276 Ill. 304, 114 N.E. 609, 616 (1916) ("there is a parole law which turns them out as fast as it gets them there").

accord that, while the verdict will not be upset, the remarks are improper and should be excluded from the trial record.[12]

The three justices dissenting in the instant case[13] pointed out that the jury has a right to recommend, or decline to recommend, mercy with or without any reason, and is entitled to know whether a life sentence really means that the defendant will serve for life. An earlier case,[14] in which the same circumstances were before the court, resulted in the conviction being upheld. The majority opinion cites this case as being not contrary to the decision here. They do not, however, attempt to distinguish the two, and a distinction is not apparent. A long line of Georgia decisions[15] has upheld convictions in cases where the solicitor general has remarked to the jury concerning the parole law. Some of the remarks have been highly prejudicial.[16] This was probably[17] the first direct holding in Georgia that it constitutes reversible error for the court to instruct the jury on the function of the parole board.

It is submitted that this is one of the elements to be considered by the jury.[18] When the court so informs them, it is merely charging the law.[19] All the cases in which this question is presented involve heinous crimes. It is evident that the jury, while willing to extend mercy and thus prevent capital punishment, desire assurance that the defendant will not be turned loose upon society. This is a meritorious consideration in determining, once guilt has been established, whether a recommendation should be made.

INSURANCE—RECOVERY OF ATTORNEY'S FEES IN SUIT TO ENFORCE POLICY

Plaintiff beneficiary, having successfully sued the defendant for disability benefits on a foreign life insurance policy, claimed reasonable attor-

12. Wechter v. People, 53 Colo. 89, 124 Pac. 183 (1912); State v. Junkins, 147 Iowa 588, 126 N.W. 689 (1910).

13. Strickland v. State, 209 Ga. 65, 70 S.E.2d 710 (1952).

14. McRae v. State, 181 Ga. 68, 181 S.E. 571 (1935).

15. McLendon v. State, 205 Ga. 55, 52 S.E.2d 294 (1949); Hyde v. State, 196 Ga. 475, 26 S.E.2d 744 (1943); Thorton v. State, 190 Ga. 783, 10 S.E.2d 746 (1940); Sloan v. State, 183 Ga. 108, 187 S.E. 670 (1936); White v. State, 177 Ga. 115, 169 S.E. 499 (1933); Manchester v. State, 171 Ga. 121, 155 S.E. 11 (1930); Lucas v. State 146 Ga. 315, 91 S.E. 72 (1916).

16. McLendon v. State, 205 Ga. 55, 52 S.E.2d 294, 299 (1949) ("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"); White v. State, 177 Ga. 115, 169 S.E. 499, 504 (1933) (" . . . it means that after three years this defendant has a right to ask for a parole by going over with a sob sister from the interracial commission.").

17. But see Thompson v. State, 203 Ga. 416, 47 S.E.2d 54 (1948) (Trial judge answered jury that the parole law is changed so often, he didn't know what it was at the moment. In reversing, the court said in effect that the jury was instructed that next week, next month or next year defendant might be released).

18. State v. Carrigan, 93 N.J.L. 268, 108 Atl. 315 (1919).

19. Strickland v. State, 209 Ga. 65, 70 S.E.2d 710, 712 (1952) (dissenting opinion); Massa v. State, 37 Ohio App. 532, 175 N.E. 219 (1930).