Supreme Court of the United States

OCTOBER TERM, 1970

In the Matter of:

Docket No. 204

JAMES EDWARD CRAMPTON, Petitioner,	
vs.	
STATE OF OHIO, Respondent.	

Place Washington, D. C.

Date November 9, 1970

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C O N T E N T S

IN THE SUPREME COURT OF THE UNITED STATES

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JAMES EDWARD CRAMPTON,
Petitioner,
vs. No. 204
STATE OF OHIO,
Respondent.

Washington, D. C.,

Monday, November 9, 1970.

The above-entitled matter came on for argument at 11:40 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HENRY BLACKMUN, Associate Justice

APPEARANCES:

JOHN J. CALLAHAN, ESQ.,
801 Security Building, Toledo, Ohio
Counsel for Petitioner

MELVIN L. RESNICK, ESQ.,
Assistant Prosecuting Attorney
Lucas County, Ohio
Counsel for Respondent

APPEARANCES (Continued):

ERWIN N. GRISWOLD, ESQ.,
Solicitor General of the United States

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 204, Crampton vs. State of Ohio.

Mr. Callahan, you may proceed whenever you are ready.

ARGUMENT OF JOHN J. CALLAHAN, ESQ.,

ON BEHALF OF PETITIONER

MR. CALLAHAN: Mr. Chief Justice, and may it please the Court, the Crampton case presents a similar challenge to the imposition of the death penalty for cases of murder in the first degree under the Ohio procedure.

Similar to McGautha, the McGautha case in California we decry the lack of standards to guide a jury in the selection of its penalty. We have the added feature in Ohio of contending that a procedure which permits a jury to consider and determine the issues of guilt and punishment in a single proceeding violates the defendant's rights under the Fifth Amendment to be free from self-incrimination.

The statutes involved in the Crampton case are the statute which defines murder in the first degree in Ohio which sets out the felony type murders and the necessity of deliberate and premeditated malice and also prescribes the punishment. The statute says that the punishment is death unless the jury recommends mercy, in which event the punishment is imprisonment in the penitentiary for life.

We are also bringing to the attention of the Court the statute which provides the right of allocution to a defendant in a criminal case. The factual context of the Crampton situation is this: James Crampton was a man approximately forty years of age at the time of this incident, and he had been married to Wilma Crampton approximately four months at the time of the murder.

In November of 1966, shortly after the couple were married, Crampton admitted himself voluntarily to a hospital for treatment for drug addiction. He later was confined under a "court order" of the Probate Court of Lucas County, Ohio to the Toledo State Hospital.

Shortly before the holidays of 1966, Crampton was released to his wife, Wilma, on a trial visit by the state hospital authorities. In January of 1967 she remonstrated with him to return to the hospital. He refused and he left the family home. He remained away for approximately ten days to two weeks, during which time he was with a friend whom he had met in Pontiac, Michigan and traveled throughout the Ohio, Michigan and Indiana area procuring drugs with money that they obtained from thefts, generally in motels.

On January 17 he returned to Toledo, Ohio and came to the residence of his wife, at approximately 7:00 o'clock in the evening. Later the same evening he was found driving a stolen car in the streets of downtown Toledo with a .45

caliber automatic on the front seat. His wife was discovered -- his wife's body was discovered the following morning and had been shot through the head with what appeared to be a .45 caliber automatic.

When he came to the Lucas County Court, he entered a plea of not guilty and not guilty by reason of insanity to the charge of murder in the first degree. At the trial of his case before a jury, he did not testify. He supplied, in order to support his plea of not guilty by reason of insanity, the medical records from the hospitals that he had been in, both before and after his arrest, and also his mother testified on his behalf with reference to his background.

The jury had to decide at a single sitting whether or not the defendant was guilty or innocent, whether or not he was insane at the time of the crime or possessed his faculties at the time of the crime, and whether his punishment should be life imprisonment or death.

The instruction given to the jury, we have no quarrel with the instructions with reference to the guilt or the insanity issues involved, the instruction given to the jury on the question of punishment was, if you find the defendant guilty of murder in the first degree -- this appears at page 5 of petitioner's brief -- the punishment is death, unless you recommend mercy, in which event the punishment is imprisonment during the penitentiary for life.

The jury found the defendant guilty of murder in the first degree, did not recommend mercy, and the defendant came before the court and was sentenced to death by electrocution in Ohio.

He has appealed to the Ohio courts. The judgment of the lower courts have been upheld and this court has granted certiorari on the question of the standards question and what has been alluded to as the single verdict question.

In view of the fact that the standards question has been treated in depth to this point, I will address myself first to the question of the Fifth Amendment problem as it arises in the Crampton case.

Q Can the trial judge in Ohio or the reviewing courts alter the sentence?

A No, Mr. Chief Justice, once the jury in Ohio imposes the penalty of death, it cannot be modified or affected by the trial court or by any appellate court unless there is a legal error found in the record with reference to the conviction. And if the conviction falls, of course, the punishment falls with it. But the sentence of death in and of itself imposed by the jury is absolutely immune at all stages in the trial and appellate procedure in Ohio.

Q Do you consider that a further important distinction from the McGautha case?

A I do indeed, Your Honor.

The petitioner, Crampton, contends that he has, under the federal Constitution, two rights involved in this case. One is the right not to incriminate himself under the Fifth Amendment, and the second is the right, if he is found guilty of the charge made against him, to have his sentence imposed on a rational basis. We contend that this is a due process right and that this latter right includes the right to a hearing on the question of life or death and the right to address evidence to the question of his punishment, address evidence to his sentencer.

Under the Ohio unitary trial procedure, however, there is a dilemma confronting the defendant in a capital case. If he invokes his Fifth Amendment rights, the jury decides his punishment without ever hearing from the man whose life they hold in their hands. If he waives his Firth Amendment rights, he will take the stand and subject himself not only to the possibility of incriminating himself but also he is subject to impeachment as to his credibility, and in Ohio this covers a great range of inquiry, not only prior convictions for felonies and statutory misdemeanors in the civilian courts and in the military courts, he can be queried about his dishonorable discharge from service, any changes in employment, and -- an indication in a recent case is that he can be -- he is subject to impeachment by questioning about pending indictments, not convictions but only pending

indictments.

The only limitation placed upon the subject by the courts of Ohio is that the limitation is within the discretion of the trial court, and if the trial court does not abuse this discretion, and it clearly shows by the record that there is an abuse of discretion, there is no error. But to avoid this --

Q Mr. Callahan, Ohio -- how do you put on the testimony other than the defendant that would be for sentencing purposes rather than guilt or innocence?

A Under the Ashbrook case in Ohio, Mr. Justice Marshall, it would appear that the question of punishment is not in an issue and no evidence can be addressed by the defendant to the question of his sentence. He must only go and present evidence on the question of his guilt or his responsibilities for the crime.

Q So in no place can he put on the usual evidence that -- well, for example, like is done in California, there is no way --

A No, Your Honor, not directly. Now, I will admit that in many cases in Ohio, and I think this is in one of the opinions written by the Honorable Chief Justice at an earlier time, indicated that in many cases a plea of not guilty by reason of insanity is entered, and many mitigating factors directed toward the sentencing come in in an indirect fashion under the plea of not guilty by reason of insanity.

Q What about the state, can it put in evidence on the issue of guilt and evidence that goes only to the issue of punishment?

A Mr. Justice Harlan, I believe that it would be difficult to distinguish whether the state's evidence is directed to the issue of guilt or punishment because the aggravating factors that would be necessarily involved in proving the crime itself would also be directed toward the punishment phase of the matter.

Q Not necessarily. You might have had a lot of prior convictions that wouldn't be admissible on the issue of guilt but would be on the issue of punishment. The state, I gather, cannot put in that kind of evidence?

A Not unless the defendant comes on the stand himself or subjects his character or reputation to inquiry.

Q Right.

A Then, of course, the state can put on that type of evidence.

Q May I ask you this question while you are pausing here. Is it not as a practical matter possible for a defendant in any capital case to put the whole range of his life in evidence by use of psychiatric and other expert testimony as to his background, his boyhood, his habits, his narcotic addiction, if any -- the whole range of his behavior patternsn, his life style?

A Yes, sir. Yes, he can put it in. It is possible for him to put it in.

Q And he can put it in without being subjected himself to cross-examination, put it in through the mouth of an expert?

A That's correct, but there is incriminating evidence that comes in with this psychiatric testimony, the testimony of the psychiatric type. In the course of entering these hospitals, a full and complete record is taken with respect to his case history. If he has been involved in prior criminal incidents, they are appearing not only in the admissions reports, in the psychologist's report and many times in the findings by the psychiatrists, and he is when he submits the evidence of his background through medical records oft-times incriminating himself vicariously through what he has said to the psychiatrist on an earlier occasion.

Q You say this often happens, but it doesn't necessarily happen, does it, that this incriminating evidence comes in?

A It doesn't necessarily, no, sir. It would be difficult, however, to try a case in front of a jury and attempt to block part of the medical records from a technical standpoint, to deprive the jury of some part of the medical record when you are submitting the others for examination. So there is a certain compulsion to submit to the jury the

entire medical record when there is this evidence in it.

When the defendant, Crampton, was confronted with the dilemma in the present case, he elected to invoke his Fifth Amendment rights and he thereby surrendered his right to address the jury, who is in effect the sentencer in this case, on the right of his punishment.

Now, the statute in Ohio with reference to allocution is a mandatory statute so held by our Supreme Court, and we go through the ritual in Ohio of bringing the defendant before the court in a capital case after he has been found guilty without a recommendation of mercy by the jury, and asking him if he has anything to say as to why sentence should not be imposed upon him.

The court is not the sentencer in this case. It is merely imposing the verdict upon the basis of the mandatory allocution statute he is asked this, but the statute is meaningless, totally meaningless in the cases of murder in the first degree. But even where -- where a death penalty has been imposed.

Now, if you can conceive of a situation wherein the judge asks the question, do you have anything to say why judgment should not be imposed against you and a reason were to be advanced by the defendant in this hypothetical situation, there is a serious question as to whether the judge, the trial judge, could modify or in any way reach the sentence

that has been imposed by the jury to amend it. It is totally insulated under the laws of Ohio once the jury has made this decision.

Q Does Ohio typify the allocution right of constitutional dimension?

A It has not, Your Honor, it is a statutory right in Ohio and the Ohio court has said that it is a mandatory right to be accorded to defendant.

Q And it is your position that under the situation where the jury fixes punishment, it is totally or close to totally meaningless?

A That is correct, Your Honor, because the judge is not the sentencer. The jury is the sentencer in a capital case. And if allocution is to have any meaning, the meaning that the legislature intended for it, since it is a mandatory statute, it should permit the defendant to address the sentencer, the actual sentencer and not the man who merely echoes the words or the findings of the jury.

Q Is that not essentially a question for the State of Ohio, however, the Ohio courts, the Ohio legislature?

A I believe, Your Honor, that under the due process clause that this court has said that the defendant has a right to an opportunity to be heard on a matter of his punishment. In Specht vs. Patterson and Mempa vs. Rhay, that I feel that the matter of allocution in a capital case rises

to a constitutional level because there is more involved in a capital case allocution than there is involved in the case of the ordinary crime where the judgment is for a term of years. Here it is a matter of life or death. Here is the one place under the Constitution where the right of allocution should rise to the requirement of the due process clause.

Q If you don't take that position, then your dilemma is one between a constitutional right and a right which is less than of constitutional dimensions?

A That is correct, Your Honor.

Q Of course, this may be of no significance. I am merely mentioning it because this is a position to which you are driven.

A We are aware that it is in Ohio a statutory right that it must be afforded to the defendant, and we are asking this Court for the decision with respect to the -- whether or not the right in a capital case rises to a constitutional level.

It has been suggested in the brief that the testimony with respect to the defendant's background and other factors that he would wish to get before the jury may be supplied by other than the defendant. For instance, in the present case the mother of the defendant testified. But I don't believe that the problem that we face is cured by the testimony of others, because the jury during the course of the

trial sees the defendant in the court room each day, hears the testimony of others with respect to his background and never hears from him because he has invoked his Fifth Amendment rights. And I think that the jury, the individual jurors, are inclined to draw inferences from the fact that he did not testify and that if he does not testify, particularly in a case where he has pleaded not guilty, not guilty by reason of insanity, if they do not hear from him the inference is that he is hiding something and that in their punishment phase they can punish him for not being full, free, fair and candid with them. It is sort of a Pricilla-John Alden syndrome of why don't you speak for yourself, why come in with these other witnesses to have them testify about what you could tell us much better.

Under the system in Ohio, the unitary system, the --

Q How many states have the unitary system?

A All except six, Your Honor. The states which have it -- there are a number of states, of course, which do not have the death penalty -- but in the states which do have the death penalty, only Connecticut, Pennsylvania, New York, Texas, California, and Georgia have the bifurcated system of trying a case, that is a trial on the guilt phase and a hearing on the penalty phase after the hearing on the guilt phase either by the same jury or another jury.

Q Some states which have had bifurcated trials

in some areas of the criminal justice have abandoned it after trying it out, have they not?

A I believe they have, Your Honor, but I do not know of any in the capital case area where it has been abandoned.

Q What is the earliest date of any state adopting the bifurcated trial on the issue of capital punishment? California was '57.

A I believe California and New York were almost simultaneous, adopted the matter.

MR. Fine. We will recess for lunch now, Counsel.

MR. CALLAHAN: Thank you.

(Whereupon, at 12:00 o'clock meridian, the Court was in recess, to reconvene at 1:00 o'clock p.m., the same day.)

AFTERNOON SESSION

1:00 p.m.

MR. CHIEF JUSTICE BURGER: You may proceed, Mr. Callahan.

ARGUMENT OF JOHN J. CALLAHAN, ESQ.,

ON BEHALF OF PETITIONER -- RESUMED

MR. CALLAHAN: Thank you, Mr. Chief Justice, may it please the Court.

The petitioner, Crampton, in this case, when he was confronted at the outset of his trial with the dilemma as to his rights, chose to exercise his Fifth Amendment right and because he feared that if he tried to address his sentencer, the jury in this case, he would subject himself to the broad range of impeachment and inquiries and also subject himself to incriminating cross-examination.

This selection is coerced by the unitary trial system in Ohio. He is compelled to select one of the rights, either the right to avoid incriminating himself or the right to allocution, because he feared the consequences that may come from selecting the other.

In this case, his choice was not a completely free one, and this compulsion that was induced by the system that prevails in Ohio; it has been suggested that this choice of right is no more than a dilemma that confronts any criminal defendant as to the matter of his trial tactics or trial

strategy.

But we would submit to this Court that in making this selection, it is far more than a selection of trial tactics or a choice of trial tactics. In this case the petitioner laid his life on the line in making the selection. He knows as he goes into the trial that the jury will be informed and instructed on what to consider and what not to consider on the issue of his guilt. But on the issue of his punishment, he knows that they may condemn him to death for any reason, for twelve different reasons or for no reason at all, and --

Q Wouldn't that be true in a regular trial?

A It would be, Your Honor, that he would be looking at the issue of punishment. There is no instruction with respect to punishment in the State of Ohio. The jury is merely told, as they were in the Crampton case, that they had to decide after he was found guilty, if they found him guilty of first degree murder, whether or not they should recommend mercy.

Q Mr. Callahan, as a practical matter, isn't it true that the overwhelming majority of defendants have other factors that inhibit them from taking the stand, whether there is a death penalty involved or not?

A I would agree with you, Your Honor, that there are an unlimited number of other factors in addition to the

death penalty in these cases, but the reason of paramount importance --

Q You mean this choice is that much more important in a capital case?

A Because of the capital case, because --

Q It is the only difference, isn't it?

A I beg your pardon?

Q It is the only real difference, isn't it?

A Yes.

Q Every defendant in every criminal case is somewhat chilled or otherwise discouraged about taking the stand in most cases, isn't that true?

A Not all, sir -- yes, most. But in a capital case we submit there is a distinction because of the punishment involved and because of the manner in which that punishment is meted out in Ohio.

Q But you are not suggesting that either this defendant or defendants generally in capital cases would take the stand except for this factor?

A I believe, Your Honor, that the choice that the defendant makes in a capital case at the outset of the case, if he were aware that he could address his sentence around the matter, he would be more inclined to take the stand in the penalty phase of the trial, similar to California, which we do not have in the Ohio case, if I under-

stand Your Honor's question.

Q That is just another way of saying that if you have a bifurcated trial, he has nothing to lose because he doesn't reach the second stage until he has been found guilty therefore --

A That's right.

Q -- he has nowhere to go except to improve his posture. That is the reality of it, isn't it?

A It is true, but it is also a possibility that in a bifurcated trial the penalty phase could work against him permitting the states to introduce evidence of aggravation. Now his character and reputation are at issue but they are not at issue in the guilt phase unless he puts them at issue. So I submit that the difference is that when he makes the election, considering the point.

Q Well, but take this bifurcated situation where the second trial is on penalty only, he is not compelled to take the stand, is he?

A No, sir, not under the present procedures of which I am aware.

Q And the states, in the cases where they have the two-stage trial, may put in a very wide range of evidence adverse to him, factors in aggravation, whether he takes the stand or whether he doesn't?

A I agree, and that is a possibility. But it has

when you consider that that evidence cannot be introduced by the state in the single trial unless the defendant puts it into issue himself, then the defendant's choice in avoiding the testimony and avoiding getting onto the stand gives him the -- deprives him of the opportunity to discuss this matter of punishment with the people who actually are going to decide whether he lives or dies.

Q Mr. Callahan, was there any request for a bifurcated trial?

A There was no request made in this case, Your Honor, subsequent to this case. There had been requests for bifurcated trials made by the defendants in Ohio. I know of no case in which it has been granted, a motion made prior to trial by the defendant.

Q May I ask you, in your study of this case, are you able to tell us when this objection that you are making was first made to this kind of a trial?

A Yes, sir.

Q And by whom?

A The objection was made by the defendant on filing his --

Q I am not talking about your case. I am talking about when anyone, after the adoption of our Constitution, first raised the question that you are now presenting with reference to coercion on account of this kind of proceeding.

A The first instance that I know of in my study of this case, Your Honor, is the case of Maxwell vs. Bishop, which was before this Court in the 1968 Term, I believe.

Q Did you find any suggestion before that time?

A No, sir, I did not.

This procedure in Ohio that forces the defendant to make his selection between these two rights is, we claim, similar to the procedure that was condemned by this Court in the Simmons case, that a constitutional right should not have to be surrendered in order to assert another constitutional right. We submit that the Ohio single verdict procedure compels this type of surrender.

The procedure also imposes --

Q In that statement, are you claiming the right of allocution in the constitutional right?

A I am, sir. The right of allocution, the right to offer evidence on the question of his punishment and the right to have an opportunity to be heard by his sentencer, I submit, is a right guaranteed under the due process clause.

Q Is any case, state or federal, so held?

A The only cases that we refer to as supporting this contention, Your Honor, is the cases of Specht vs. Patterson and Mempa vs. Rhay.

This Court has also considered the burdens that are placed upon the assertions of a constitutional right in the

United States versus Jackson, and in Crampton we contend that there is an inpermissible burden placed upon the defendant's exercize of his Fifth Amendment right against self-incrimination in violation of this Court's holding in the Jackson case.

The procedure in Ohio has the quality of needlessly encouraging a waiver of this Fifth Amendment right if he wishes to talk to the jury, and it needlessly chills the right to present evidence on the question of punishment relative to his rational sentencing. The Court under the United States Constitution has held that the defendant need not do anything to defend himself against a charge brought against him, but it has likewise observed that he certainly cannot be required to help convict himself. We submit that the Ohio procedure requires that he help convict himself, and that the judgment below should be reversed for that reason.

Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Callahan.

Q Let me ask you one question. As I understand it, this record contains evidence bearing upon the defendant's sanity or alleged insanity, does it not?

A That is correct, Your Honor.

Q Is this not in itself mitigating to a degree, in any event?

A It is, to a certain extent. However, in

introducing the medical records to support the plea of not guilty by reason of insanity, the defendant had to take another calculated risk as to his trial tactic, because in those records was contained his prior criminal record, which he had told the admissions officer, the doctors and the psychiatrist at the hospital.

Q That leads me to my next question. Doesn't the record contain already evidence as to his alleged addiction and his prior convictions?

A Yes, sir, it does.

Q Well then, what prejudice was he concerned about in not taking the stand?

A The prejudice of incriminating himself. The possibility of incriminating himself in this case in violation of his rights under the Fifth Amendment. The basic contention is that the jury having at one sitting to consider guilt or innocence, sanity or insanity, and punishment, either death or life, is a procedure that compels the defendant to make certain choices which are needlessly made, which he does not have to make, if there were a bifurcated trial, if there were judge sentencing or review of the sentence by a judge in Ohio, or if the death penalty were abolished.

Q Well, I understand your general argument. I am trying to be a little pragmatic at this point, and you have answered my inquiry that the record does contain already evidence

as to his prior convictions, it already contains evidence as to his difficulty with drugs, and it already contains evidence with respect to the issue of sanity, and I think my question, therefore, is: How otherwise, as a practical matter, would he have been prejudiced by taking the stand?

A He would be subjecting himself to, by the state's questions, to testimony about the crime itself. The prejudice is in incriminating himself. He would be in effect helping the state to convict himself, convict him of this crime.

Q One last question. Do you have any comment about Spencer vs. Tracy -- that's Spencer vs. Texas.

A Vs. Texas; yes.

Q What was the name of the case to which you referred me, was the first time you had seen this raised?

A Maxwell vs. Bishop, Mr. Justice.

Q Vs. Bishop.

A Vs. Bishop, which was --

Q I don't find it cited in here.

A I do not believe it was cited. It was decided by this Court during the last term

Q Well, have you answered Justice Blackmun's question yet fully?

A This was --

Q Now that I have my characters straightened out,

it is Spencer vs. Texas. That shows what I do on Sundays.

A With reference to Spencer vs. Texas, the recidivist report being made available to the jury prior to the trial of the case as part of their consideration of the crime, the only manner in which we can distinguish that case, Your Honor, is that the -- this was, if I recall, not a capital case.

Q That's correct.

A And I would feel that the, that there would be a great deal more concern about the defendant's right to speak to a jury, or the right of records coming in in violation of his Fifth Amendment right in a capital case.

Q You feel that a decision in your favor here would compel an overruling of Spencer vs. Texas?

A No, sir, I do not.

Q All right. Just one more question. You have me a little bit confused when you referred to a separate stage trial on the issue of criminal responsibility or the insanity claim. You don't raise that as a constitutional question.

A No, sir, I do not raise that as a constitutional question. I am merely contending that in this case the defendant was entitled to a trial on the issue of his guilt, and an opportunity to address his sentencer on the issue of his punishment. The trifurcated trial, the California problem, we are not saying in our submission is a constitutional matter.

Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Callahan.

Mr. Resnick, you may proceed whenever you are ready.

ARGUMENT OF MELVIN L. RESNICK, ESQ.

ON BEHALF OF RESPONDENT

MR. RESNICK: Mr. Chief Justice, may it please the Court, the petitioner's basic position in regard to the question of bifurcation of trials in capital cases consists of three matters.

His first position is that there is a collision of constitutional rights. In this particular case, he claims his Fifth Amendment privilege against self-incrimination and his alleged Fourteenth Amendment right to allocution are colliding and that one impermissably burdens the exercise of his privilege not to testify. His reliance in that regard on the cases of U.S. vs. Jackson, Simmons and cases where two specific constitutional rights were involved. It is further the amicus' claim that wehave a question of fundamental fairness under the due process clause. It is the position of the State of Ohio that there is no collision of constitutional rights in that, No. 1, allocution has never risen to a constitutional right; secondly, that there is no burden or penalty on the exercise of his right against self-incrimination because allocution evidence can be admitted by other witnesses.

Secondly, the petitioner had a choice to do what he considered would benefit him the most when he made his decision

not to take the stand. There was no compulsion; there was no extra burden. It was a pure voluntary choice.

It is also our position that the unitary trial is fundamentally fair, and indeed, better on the facts than in the case of Spencer vs. Texas which Justice Blackmun referred to.

Q Mr. Resnick, on this allocution testimony, do you tell us that in Ohio in the trial on chief you can put witnesses on who know nothing about the crime at all, but just that he's a nice fellow? Could you do that?

A In this specific case, Mr. Justice Marshall, the mother of the defendant who knew nothing of the facts of the actual crime testified as to the petitioner's entire life, background, his trouble with the law, his marriages, whatever.

Q Well, as a prosecutor, have you ever been worried about mothers' testimony hurting your case?

A Pardon? I am sorry?

Q As a prosecutor, have you ever heard of a defendant's mother's testimony hurting your case? I am saying the general run of the mill testimony, people in the neighborhood, church people -- you don't put that on the regular hearing on guilt. Am I right?

A The Ohio statute provides for character witnesses, as to reputation and background.

Q Before? You can put it on at any time? If

the witness does not take the stand?

A I am talking about the defendant's case, Your Honor. In his case --

Q Well, I am talking about the law of Ohio. The defendant does not take the stand, he can still put on character testimony?

A The defendant may put in his character in issue other than through himself, yes, under Ohio law.

Q But until its in issue, its not -- I just have difficulty in seeing that he has all of the benefits of a sentencing hearing in his regular trial; that's my only point. And there must be some difference in Ohio.

A Well, the difference in Ohio, if the Court please, is that the defendant himself -- and I think this is what the petitioner is getting to, counsel for the petitioner is getting to -- he cannot personally appeal to the jurors in the case. That is his main contention.

Q Well, sir --

A He is not contending that other witnesses may not testify as concerns that.

Q Certainly he cannot tell the jury, which he could do at a sentencing hearing, "Of course I admit my guilt and I am sorry for it and I ask for mercy." Of course he could not take that position, could he?

A That is correct.

Q So at least he loses that much, doesn't he?

A That much we would go along with.

Q I mean, you don't have to win all of this in order to sustain your point. That's all I was -- the brush was a little broad.

A We submit, if it please the Court, that as argued by counsel, the allocution statute in the State of Ohio, as in most other states, is really only a legal objection and it is so historically, and this Court has noted that distinction in the case of Schwab vs. Berggren, decided in 1892. As stated in the Government's brief, it is usually something like the pleading of a pardon or any other type of legal objection. It actually has nothing to do with the sentencing discretion regarding the defendant's opportunity to give mitigating evidence.

The only place where I could imagine that this plea of allocution under the Ohio statute would apply would be where the defendant could claim that there is an insufficiency of the evidence upon which the verdict was based. These are the normal things that would be brought up on a motion for new trial.

In regard further to allocution, the Court in Williams vs. New York, Williams vs. Oklahoma held that the due process clause did not require a hearing and to give a convicted person an opportunity to participate in a sentencing

procedure.

The Hill case in 1962, although not a capital case, specifically stated that allocution was not a constitutional right. Petitioner claims, his only claim as to elevating allocution to a constitutional right is based on the decision of this Court in Spect. But that case is easily distinguishable, that case had its dependence upon another factfinding determination which had to be made.

From these cases we submit that the petitioner's reliance on cases such as Simmons, Jackson, Jackson-Denno, is misplaced. We are not dealing with two specific constituional rights and we submit that the issue is very similar indeed to the case of Spencer vs. Texas, is a two-part trial necessary purely because the jury must decide two issues. We submit that it is not.

As noted in the discussion with Justice Marshall, in this case the defendant's mother did testify. There was testimony of two psychiatrists. There was testimony of a physician, and there was introduced into the record three different hospital records. All of these, we submit, could only serve one purpose, and that was to mitigate the penalty in this case.

In this case the petitioner did not take the stand and he then claimed that the procedures of the unitary trial necessarily chilled the assertion of his privilege. His

decision to take the stand or not is a decision similar, I submit, to the guilty plea cases decided by this Court last term. The question is, was it compelled, was it a voluntary decision?

We state that the case of Williams vs. Florida, the alibi, notice of alibi case, this Court stated that the defendant faces such a dilemma demanding a choice between complete silence and presenting a defense has never been thought to be an invasion of the privilege against self-incrimination.

In the instant case, neither impeachment evidence or similar acts evidence was introduced into the record. If it had been, the Court under Ohio law would have had to give limiting instructions to the jury as to the nature of that evidence and how they could consider it. This Court has held that under the doctrine of Spencer vs. Texas, those type of limiting instructions are perfectly proper.

Thepetitioner in this case introduced practically everything he could introduce. If the procedure in Spencer vs. Texas was fundamentally fair, where prior crime evidence was introduced without any question, then I submit in a unitary capital case where impeachment is only possible if the defendant takes the stand, that we have a trial more eminently fair than in Spencer.

Wesubmit further that the sentencing in a unitary

trial is rational when based on the evidence in the case. All of the factsin this case came out in that trial. All of the facts of the defendant's background. The jury saw this defendantsitting there for the week that the case was tried. They saw the witnesses, they heard his psychiatrist.

We would also submit -- pardon me, I would like to come back to one other thing, the question of the jury instruction in this particular case.

The Court will find in Volume 1 of the record in this case thaton the voir dire examination of the entire venire of the jury, the court did a little more than what was found in the final charge when it described the duties of juries' functions, when it came to the recommendation of mercy. The court there stated that that decision must be based upon the facts and circumstances in the evidence.

We also submit to the court that the alternative of the bifurcated trial is -- the alternative of a bifurcated trial is not free of potential harm. Just again as in the guilty plea cases where this Court stated that it would not be fair or that it would be cruel to make all defendants submit to a jury trial, we respectfully submit that it would also be cruel to make all defendants submit to a penalty trial.

The use of the unitary trial has a very long history in this country. Only six states, as the Court has noted, have the split verdict procedure. The states have a very valid

interest and purpose in maintaining that unitary trial. The alternative of bifurcation -- and I submit possibly trifurcation and quadrifurcation -- if a constitutional principle is to be announced, could only add to the time, cost and complexity of criminal trials and appeals. That burden became very evident this very morning when it was stated that 69 per cent of the penalty trials in California have been reversed, requiring new juries, more court time. The extra burden would be disproportionate, we submit, to the alleged possible benefits, and in some instances actually detrimental to the defendants.

There have been cases where defendants have complained that they had to stand a penalty trial. We submit that the convenience of a single proceeding weighs heavily against an added procedure which this Court has stated is not constitutionally required.

Inregard to the standards issue, as I have stated in the bifurcated trial argument, the issue is based upon the evidence in the State of Ohio. The Ohio Supreme Court cases have so held, the Hull case, the Caldwell, the Shelton case. The Ashbrook case which has been cited by the petitioner here that there can be no evidence introduced pointing towards mercy was a court of appeals case. The Supreme Court of the State of Ohio in this very case indirectly overruled the court of appeals holding.

I think that the question is ultimately, Can any type of standard ever be attainable? We submit that it would be almost impossible to articulate any type of list of factors in advance for every conceivable situation that might arise in the future. To say that on one hand there are required findings a jury must make, or to say no, on the other hand, that it is just a matter of reference to the jury so it can guide them we think is an inconsistency.

Constitutionally if it is required it would have to be findings. This Court in the past, in the Winston case andin the Andrews case, approved full jury discretion. We don't believe, and we submit earnestly, that regardless of any standards thatthe decisions of the juries would not be any different than what they are today in the two cases the Court is now hearing. The jury discretion expresses the conscience of the community, as this Court has held in Witherspoon, and it is in the end a value judgment as to the sentence and not the guilt, and it should not be subject to the same formalities of the guilt determination process.

The longstanding and widespread use of absolute discretion which this Court noted, plus the fact that no court has ever ruled in favor of the defendant on this particular issue, and there have been many, many cases as cited in the briefs, we believe reflects that the principle of a unitary trial with standardless discretion to the jury is not only

constitutionally sound, but one in the administration of criminal justice is now required.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Resnick.

Mr. Solicitor General.

ARGUMENT OF ERWIN N. GRISWOLD, ESQ.,

SOLICITOR GENERAL OF THE UNITED STATES

MR. GRISWOLD: May it please the Court, this case too involves the issue of standards, which was the only issue in the McGautha case. I have only a little more to say about that.

No one has been able to put before the Court just what the standards are or should be. They have never been formulated. The closest that has come to that is the very serious effort made by Professor Wexler as reporter for the American Law Institute for the Model Penal Code, in which there were included some eight or ten aggravating factors and mitigating factors.

Much the same factors are included in the recently-published preliminary or study draft of a new criminal code by the National Commission on Reform of the Federal Criminal Laws, but it is not surprising that they are very similar to those of the Model Penal Code, because Professor Schwartz who was the director of that study was the associate reporter for the American Law Institute study of the modern penal code.

In the massive investigation into the actual experience in California which was published a year ago in the Sanford Law Review there were some 175 factors which they worked out and undertook to tabulate to see what the actual experience had been, and I would hazard a guess that putting 175 factors before a jury, and in particular without any clear instruction as to how they should be weighed, and I don't know how such instructions could be given, would not be a productive assignment.

There is one more factor with respect to standards that I think might be worth mentioning. The statutory pattern in these two cases varies somewhat. In California the jury is given discretion to determine the penalty. In Ohio the statute provides that the penalty for first degree murder is death, but that if the jury recommends mercy, then it shall be life imprisonment. There is some suggestion in some of the briefs that this is a very vital distinction. I do not believe that it is any distinction. I think that it is considering the solemnity and the obvious significance of the past with which the jury is confronted and all experience shows that juries are, particularly properly selected juries, are extremely conscientious on this task, that it does not make any difference either in result or in law, as to which formulation is used.

Now I will turn to the split trial or bifurcated trial issue which is presented only in the Crampton case, and

first I would like to answer a question asked by Mr. Justice Black. He asked when this question of the necessity for a bifurcated trial was first raised, and we believe that it was in the New Jersey case cited in our brief at page 29 of State vs. Johnson. That was in 1961.

An appeal was taken from that decision to this Court and it was dismissed for want of a substantial federal question in 1961.

Q I understand from my reading of the history of the bifurcated trials that this question was raised before legislatures long before that.

A I believe so, Mr. Justice. I was referring to it being judicially raised and particularly before this Court. It was raised in that case before this Court in 1961. I know of no previous allusion to it, either in court or before this Court.

Q What was the earliest legislative action?

A The earliest legislative act was 1957 in California, and I am not aware of any serious presentation of the matter either in academic journals or review articles or before legislatures prior to that time.

Q And since then, how many states?

A Six states now have it, including one or two which have adopted it within recent years, the last two or three years. New York, California and Texas are large and

important states which now have the procedure.

With respect to the bifurcated --

Q What page in your brief?

A Page 29, Mr. Justice, the State vs. Johnson.

Q Thank you. Is there any legislative history available as to the -- that prompted the California Legislature in 1957 to act as it did?

A Mr. Justice, I am unable to answer that. I do not know.

Q Any claims in California that this is constitutionally required, I wonder?

A I do not believe it was ever contended that it was constitutionally required. It has been contended that this was wise --

Q Good policy.

A -- state penology and a good way for a state to set up its criminal law. I have never seen a serious contention except inthese cases that it is constitutionally required.

Incidentally, State vs. Johnson also involved the standards issue and there again the Court dismissed the appeal on the ground that it did not raise a substantial federal question.

With respect to the bifurcated trial, we have again a question that seems to me essentially a separation of powers,

even assuming that the bifurcated trial is a good thing or is a desirable innovation, is this a determination which should be made by thepeople through their representatives in the legislatures or in Congress, or is this something that this Court should now, as an exercise of the judicial power, find to be required by the very general language of the due process clause of the Fifth and Fourteenth Amendments?

This Court has already in various ways indicated that bifurcated trials are not constitutionally required. The clearest example is Spencer vs. Texas, to which reference has already been made and which is discussed at pages 84 and 87 of our brief, decided just three years ago and with a clear statement there that there is no basis for finding it required by the Constitution, whatever its merits may otherwise be.

The constitutional attention -- constitutional contention made there was surely more serious than that advanced here. That case strikes me as a tougher case than this one to decide. But the Court did not accept it, making it plain that the details of procedure in criminal cases are to a very great extent matters to be decided by the legislatures of the several states.

It may be noted too that this Court has never required a two-stage trial in the exercise of its supervisory power over the trial of federal criminal cases, though such trials have been required or at least authorized in certain

circumstances by the court of appeals for the District of Columbia.

As I have indicated, bifurcated trials have been adopted in this country now by six states, the first being California in '57. Our experience so far is relatively limited and the procedure is surely in the experimental stage, hardly a situation for constitutional mandate.

Incidentally, California has trifurcated trials by the express provision of its statute. If there is an issue as to sanity, you have guilt, sanity and penalty as separate trials. It has been suggested that some other issues, like alibi and self-defense, are just as logically susceptible to this treatment, and you could have great multiplication of trials, at least theoretically.

Now, it's argued that split trials must be provided in order to avoid a violation of the defendant's privilege against self-incrimination, but this contention will not withstand analysis as several decisions of this court show. The guilty plea cases of last spring are very close to this. The privilege against self-incrimination does not mean that only matters adverse to the defendant are barred while he remains free to show such things which are favorable to him through his own testimony. On the contrary, the privilege means that the defendant cannot be called as a witness at his own criminal trial.

On the other hand, he is always free to be a witness if he chooses, but if he is a witness, he is a witness for all purposes including cross-examination. The effort of a trial is to get at the truth, including facts which are adverse to the defendant as well as those which are favorable to him. For basic policy reasons, the Constitution limits the efforts to develop the truth by providing that the defendant cannot be compelled to testify. That is his privilege. It is for him to decide whether to exercise it, guided by the assistance of his counsel. It is often a hard choice for the defendant would like to show favorable matters without getting himself involved inthe unfavorable.

But the pressure comes from the facts which have been introduced at the trial through witnesses other than the defendant. He is not deprived of his privilege merely because he would like totestify to favorable matters.

This is well illustrated by the record in this case. In fact, the defendant here did exercise his privilege against self-incrimination. He did not testify. It cannot be said here that he was deprived of his privilege. Moreover is the matter of the record: He did not ask for a bifurcated trial. It is true that the law of Ohio does not provide for such a division of a trial, but the fact remains that he did not seek it, and there may well have been reasons for that decision, as I shall explain in a moment.

Moreover, he did have an opportunity to show favorable matters through witnesses other than himself. The defendant's mother testified and he introduced substantial medical evidence on the insanity issue, thus putting before the jury much material bearing on the defendant himself and his background favorable to his interests. It is true that he did not testify himself, but that surely does not mean its exact opposite, that he was denied his privilege against self-incrimination.

And indeed, this highlights the basic difficulty with the bifurcated trial as it has been developed in the six American states which now use it. In the penalty trial, the state can and does show things adverse to the defendant which would not be admissible in a unitary trial, and I think the McGautha case itself is a very clear example of that. If there had not been a separate trial, much that was harmful to McGautha and much that served to distinguish him from his co-defendant would not have been before the jury. Because there was a separate penalty trial, the state showed the prior convictions, the two co-defendants testified, each one trying to charge the other with having fired the shot, and the jury drew its conclusions from that.

Notable among the things which can be shown are the prior criminal convictions and other evidence reflecting adversely on the defendant's character. Thoughtful students

have concluded that a death penalty is more likely in a bifurcated trial than it is in a unitary one. Indeed, we might well have arguments before this Court that the bifurcated trial deprives the defendant of due process of law, though such an argument would presumably be ineffective in the light of this Court's decisions in such cases as Spencer vs. Texas and the two Williams cases.

It would be improvident, we believe, to freeze this ambivalent procedure with its merits and demerits still elusive into a constitutional directive, with a clear indication that separate penalty trials may have an adverse effect on defendants who are exposed to them. There is a need for prudent restraint in deciding that the Constitution requires their adoption as an integral feature of due process. Certainly our experience with bifurcated capital trials over the past thirteen years is empty of any genuine or compelling indication that such procedures are more fair to an accused than the traditional unitary trial.

In this situation a procedure never thought of when the due process clause became part of our Constitution in 1790 and again in 1868. You remember, in 1790 the trial had to be begun and completed between sun-up and sun-down, and never seriously advanced in the first 175 years of our constitutional history should not now be read into the due process clause where it surely cannot be found by any accepted

process of construction. If that were to be done, perhaps it could be said that it would be hard to articulate the standards which led to the conclusion that the judgment of the Supreme Court of Ohio should be affirmed.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Solicitor General.

Mr. Callahan, you have ten minutes.

ARGUMENT OF JOHN J. CALLAHAN, ESQ.,

ON BEHALF OF PETITIONER -- REBUTTAL

MR. CALLAHAN: Thank you, Mr. Chief Justice.

I will not repeat what has been said generally with respect to standards. I would submit to the Court that Ohio, as it has been suggested in a couple of briefs filed in this case, could be considered to have a standard.

Cited on page 20 of the petitioner's brief is the case of Howell vs. State, in which the Ohio Supreme Court held that it was error -- not error to charge the jury in a capital case "to consider and determine whether or not in view of all the circumstances and facts leading up to and attending the alleged homicide as disclosed by the evidence, you should or should not make such recommendation of mercy."

Now, I would submit that that is merely an instruction to the jury that they should consider all of the evidence in a case, and it may be a standard, but it is not an adequate standard and it was not given in the Crampton case.

The only instruction that was given to the jury, that is other than to seat a jury, twelve people, appears at page 5 of the petitioner's brief. If you find the defendant guilty of murder in the first degree, the punishment is death, unless you recommend mercy, in which case it is life. But the instruction goes on and is diametrically opposed to the instructions that follow the penalty trial in California and the instruction which appears at page 6 of the brief says you must not be influenced by any considerations of sympathy or prejudice.

I submit that when you tell the jury that one of the things they must not consider is sympathy, you have effectively stopped any argument by the defendant for mercy in the case.

The distinguished Solicitor General has indicated that the single verdict trial, the bifurcated trial, would be available also to a defendant in cases of self-defense defenses or in cases of alibi defenses.

The distinction that I would point out with reference to those two observations is that both of these matters, self defense and alibi, relate to the question of the defendant's guilt. They do not go to the question of his punishment.

Q Does not the criminal responsibility also go to the question of guilty in a legal sense?

A That is correct, Your Honor.

Q But California, at least, bifurcates that

trial, do they not?

A That is correct.

Q So it wouldn't be very remarkable if someone would built on the analogy of bifurcated trials for the insanity question to bifurcated trial for alibi or self-defense trial?

A I submit that it could be argued that way, Your Honor, but it is not part of the submission in this case, that we require -- that they require a bifurcated trial under self-defense and alibi.

Q But wouldn't you agree that the arguments might be just as valid? Take the self-defense case.

A I don't think they could be just as valid as the insanity argument. The insanity plea has been -- is a different type of plea, involving a certain admission by the defendant.

Q Well, each of them, in the nature at least, in the broad sense, in the nature of a plea of confession and avoidance, isn't it?

A That is correct.

Q So that in that sense they have a common genesis and a common thread of logic?

A That is correct. But to say that they -- they do not, however, self-defense or insanity or alibi relate directly to the question of punishment, and what we are

contending in this case is that the bifurcated trial that permits the defendant, after he has been found guilty and responsible, to address the sentencer on the question of his punishment.

The trilogy of guilty plea decisions made by this Court last term, I believe, can be effectively distinguished from the Crampton case as the Crampton case -- in Crampton, he entered a plea of not guilty and stood on that plea throughout, whereas the cases decided by the Court in the last term, the Brady, McMann and Parker cases, involved originally a guilty plea, a concession by the defendant that he was guilty of the crime.

I submit to the Court that for the reasons that we have argued, the decision of the Ohio courts should be reversed and the cause remanded for determination with respect to punishment.

Q Your colleague in the other case, Mr. Selvin, suggested that as far as he could see there was no constitutional barrier to having a legislature vest in the judge the power to fix the sentence, without standards, or to fix a mandatory sentence. Do you have a view on that?

A Yes, I see no constitutional barrier for having the legislature fixing standards for the judge.

Q Well, no, my question is just the reverse, vesting the power of imposing the death sentence in the judge,

but without any standards.

A Oh, I would have to echo somewhat of what Mr. Selvin said in his case. The judge is, in effect, a professional sentencer by his training, by his expertise and his background. He brings a certain criteria to a case, and I think it is the essence of the judgeship that he should not have to have standards imposed by the legislature. It is only for the layman who sees -- who sits at one time and is in effect an ad hoc legislature on the question of the punishment in the case that we need standards to guide him.

Q I have never been satisfied as to the value or utility of these studies which are done because of the difficulty involved, but in the study of the jury function by Professor Calvin and his associates at the University of Chicago, their conclusion was that judges having the power to impose the death sentence imposed it exactly twice as often over a great number of cases as juries did.

A I recall that conclusion in the Calvin report.

Q That would not certainly leave defendants as a group to want to move this out of juries and put it in judges, really, would it?

A No, sir, not that conclusion.

With reference to the problem of standards, there appears in the petitioner's brief at page 21 probably the best evidence with respect to the necessity for standards, where a

foreman of a jury comes before the court and asks the court what criteria, what are the grounds for granting mercy in the case, and there is a colloquy there between the judge and the foreman of the jury that betrays the jury's curiosity as to the standards necessary for the granting of mercy, even to the point where they want to consider the sociological and environmental factors in it. And it is possible that these standards should not be as detailed as the standards in the model penal code, but there should be some guidelines given to to the jury so that they could move ahead on this question of standards with guidelines, rather than operate in the vacuum as they appear to be doing in the Caldwell case which we have cited.

Accordingly, I submit that the decision below should be reversed. Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Mr. Callahan, like Mr. Selvin, you acted at the request of the Court and by the appointment of the Court, and we thank you for your assistance to the petitioner and to the Court for your services.

MR. CALLAHAN: Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Solicitor General. Thank you. The case is submitted.

(Whereupon, at 2:00 o'clock p.m., argument in the above-entitled matter was concluded.)

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