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Criminal Procedure - Bifurcated Trial - The Right to Separate Trials on the Issues of Guilt and Punishment - People ex rel. McKevitt v. District Court, 447 P.2d 205 (Colo. 1968)

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for most professional service taxpayers is the best answer now available. There are professional service people who are now being pushed too quickly and are being ill advised by mutual funds and insurance groups (who are the ones who stand to benefit from the corporate form through retirement plans). Incorporation must take place only after careful investigation and planning. The best answer would be federal legislation that would put self-employed and corporate employees on equal footing and thus end the journey into the unknown regions and pitfalls of professional service people incorporating. This legislation appears to be only a wish as it is fairly safe to say that chances for equalization by legislation are nill.[83]

T. Michael Carrington

CRIMINAL PROCEDURE — BIFURCATED TRIAL — THE RIGHT TO SEPARATE TRIALS ON THE ISSUES OF GUILT AND PUNISHMENT — *People ex rel. McKevitt v. District Court,* 447 P.2d 205 (Colo. 1968).

CLARENCE English was charged, by direct information, with the crime of murder in the first degree. The public defender submitted a "Motion for Bifurcated Trial" on behalf of English, requesting separate trials before separate juries on the issues of guilt and of punishment. The Denver District Court ordered *separate* trials on the issues of guilt and punishment but before the *same* jury. Thereafter, on behalf of the People, the district attorney instituted an original proceeding on a writ of prohibition against the district court and against the judge who issued the order alleging that the Colorado statute concerning trials for murder in the first degree[1] had been misinterpreted.[2] The Supreme Court of Colorado, after issuing to the district court a rule to show cause, *held* the rule absolute and directed the trial court to reverse its order that English be given separate trials before the same jury. The language used

[83] The Commissioner of Internal Revenue, Randolph W. Thrower, has indicated that the I.R.S. might attack professional service corporations through the administration's legislative tax proposals. These proposals could be to force all Subchapter S Corporations to use "Keogh" or H.R. 10 plans rather than corporate plans. *See* P.H. FED. TAX REPORT BULLETIN § 60,293-94.

[1] COLO. REV. STAT. ANN. § 40-2-3(1) (1963) provides:

> The jury before which any person indicted for murder shall be tried, shall, if it find such person guilty thereof, designate by its verdict whether it be murder of the first or second degree, and if murder of the first degree, the jury shall *in its verdict* fix the penalty to be suffered by the person so convicted, either at imprisonment for life at hard labor in the penitentiary, or at death; and the court shall thereupon give sentence accordingly (emphasis added).

[2] People *ex rel.* McKevitt v. District Court, 447 P.2d 205 (Colo. 1968).

by the statute "clearly negates the concept of separate verdicts resulting from separate trials on the issues of guilt and punishment, regardless of whether the separate trials be before the same or different juries."[3]

This Comment addresses itself to an analysis of the Colorado Supreme Court's decision in *People ex rel. McKevitt v. District Court* in light of the arguments surrounding (1) the power of a judge to order a split trial on the issues of guilt and punishment, (2) the defendant's constitutional right to allocution, and (3) the constitutional impact of the equal protection and self-incrimination questions, with a view toward legislative amendment of the present procedure.

I. THE JUDGE'S POWER TO ORDER THE TRIAL TO BE DIVIDED INTO TWO STAGES

The brief for the intervenor, Clarence R. English, represented by the public defender, sets forth as its main contention that a trial judge has the power to order a two-step trial in a capital case.[4] As precedents for this contention, the brief cites the cases of *United States v. Curry*,[5] and *State v. Raskin*.[6] In *Curry*, the Court of Appeals for the Second Circuit stated:

> [T]he unitary trial can be highly unsatisfactory. The most serious problem arises when the trial judge is compelled either to exclude evidence relevant to an intelligent disposition of the sentence in question, or to admit such evidence knowing that the trial of guilt is thereby open to matters prejudicial and otherwise inadmissible. . . .
>
> Since the unitary trial possesses these fundamental problems, we do not interpret the silence of Congress on this question as precluding the trial judge from confining the first presentation to the jury to the issue of guilt when the defendant's right to a fair trial would be jeopardized by a unitary trial.[7]

The *Curry* case involved a federal homicide statute which states in part that: "Whoever is guilty of murder in the first degree, shall suffer death unless the jury qualifies its verdict by adding thereto 'without capital punishment' in which event he shall be sentenced

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[3] *Id.* at 206.

[4] Brief for Intervenor at 5, People *ex rel.* McKevitt v. District Court, 447 P.2d 205 (Colo. 1968). *See generally* 1 WIGMORE, *Evidence* § 194(b) (1940). Professor Wigmore lends some support to this view when he states:

> The only way to avoid injustice in such cases is to reserve the evidence of former convictions until after a finding of guilt on the evidence in a particular case . . . . It is to be regretted that the Supreme Court of Pennsylvania did not handle the verdict procedure flexibly, and introduce this method without waiting for legislative authority. (Our Courts are too prone to wait for legislative interference before altering their procedure, which ought to be exclusively within their own control.)

[5] 358 F.2d 904 (2d Cir. 1965), *rehearing denied* 387 U.S. 949 (1967), 392 U.S. 917 (1968).

[6] 34 Wis. 2d 607, 150 N.W.2d 318 (1967).

[7] 358 F.2d 904, 914 (2d Cir. 1965).

to imprisonment for life . . . ."[8] Although the Colorado and federal statutes are similar in their effect, intervenor's citing of the *Curry* case in support of the judge's power to order split trials is somewhat misleading. The portion of the opinion quoted *supra* is essentially dictum, since the appellate court held that the trial judge did not abuse his discretion in conducting a unitary trial. The court continued:

> [W]e think it unwise to *require* the two-stage trial in every case under § 2113(e) [allowing the jury in a felony murder case to decide if the defendant should suffer the death penalty] and related statutes. . . . Moreover, it has been suggested that the two-stage trial does not always work to the defendant's advantage, and we are loath to compel unwilling defendants to submit to a procedure which is devised for their benefit but which may be prejudicial in its application to a particular case.[9]

This decision lends *some* weight to the proposition that the trial judge *may* order split trials when he deems it unfair not to do so. However, the fact that the opinion concerns a statute permitting a trial judge to order, in his discretion, a bifurcated trial, and the fact that the portion of that opinion concerned with the bifurcation question is dictum, leads to the conclusion that such a statute must be in effect before judicial discretion can be asserted.

Intervenor's second major argument for the inherent judicial power to order split trials rests on analogy. The brief states: "In a somewhat different context to a murder case but involving the precise principle applicable herein, the *power* of a trial court to so control the order of proof as to have presented sequentially to the jury the question of guilt first and then, if necessary, another collateral issue has been clearly recognized."[10] As authority in support of this contention, intervenor's brief cites *State v. Raskin.* However, the facts in *Raskin* differ on one important point from those in *McKevitt;* in the former, the question of a bifurcated trial ensued from a motion to separate the issues of *insanity* from guilt, while in *McKevitt,* insanity was not at issue.

The brief of the intervenor analogizes that since bifurcated trials have been established on the question of insanity in capital cases, they should also be established on the issues of guilt and punishment in capital cases where "the unfairness is greater . . . ."[12] Thus, a person who makes no insanity plea should have two separate trials — the first on the issue of his guilt and, if he is found guilty, the

[8] 18 U.S.C. § 111(b) (1964).

[9] 358 F.2d 904, 914 (2d Cir. 1965) (footnote omitted).

[10] Brief for Intervenor at 9, 447 P.2d 205 (Colo. 1968).

[11] 34 Wis. 2d 607, 150 N.W.2d 318 (1967).

[12] Brief for Intervenor at 11, 447 P.2d 205 (Colo. 1968).

second on the issue of punishment. It can be inferred from this line of reasoning that a person who makes an insanity plea should have three trials — the first on the issue of his mental soundness (was he mentally capable of committing the act?), the second on the issue of his guilt (did he commit the act?), and the third on the issue of his punishment.

In the *Raskin* case the issue was whether inculpatory statements made during a *compulsory* medical examination could be used in a trial on the issue of guilt. The court found that they could not, but that such statements could be used in a trial on the issue of insanity.[13] The analogy to the circumstance of Clarence English, where defendant sought to *voluntarily* present evidence of mitigation in the trial on punishment, is not conclusive. First, the compulsory nature of defendant's testimony is not present, as in *Raskin,* and second, the Colorado Supreme Court has already held that evidence for mitigation purposes *may* be presented by testimony in a unitary trial.[14] While the *Raskin* case is somewhat analogous to *McKevitt,* such differences as have been previously delineated make it not dispositive of the question of a trial judge's inherent power to order a bifurcated trial.

Probably the strongest argument advanced against the power of the trial judge to split the trial is found in the brief of the petitioner-district attorney, which argument was adopted by the Colorado Supreme Court:

> Petitioner has found no statutory or case authority in the State of Colorado for the use of the two-step trial. Rather, we find the language which is found in Colo. Rev. Stat. Ann. § 40-2-3(1) (1963) to be most compelling. . . .[15]
>
> . . . The Court will note with care that the language of the statute clearly indicates that the *same* verdict is to be used for [sic] to indicate the penalty imposed as is used to find the defendant guilty of murder in the first degree. . . .
>
> In conclusion, we feel that the order of the trial judge neither accomplishes what the Defendant sought by his motion nor accords to the People the opportunity to present its case in the manner which has long been a matter of tradition in this State and which has long received judicial approval. We would submit that the proper forum for a change of procedure would be the General Assembly which has the authority to institute such change.[16]

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[13] 34 Wis. 2d 607, 624, 150 N.W.2d 318, 328 (1967).

[14] Segura v. People, 431 P.2d 768, 769-70 (Colo. 1967). The court stated:
> Admittedly the Colorado statute requires the defendant to choose whether he will take the stand himself in an attempt to mitigate the crime, or to decline to testify. There is nothing in the statute which prevents the introduction of relevant evidence to establish mitigating circumstances. Such circumstances can be shown by witnesses other than the defendant.

[15] COLO. REV. STAT. ANN. § 40-2-3(1) (1963).

[16] Memorandum Brief in Support of Complaint for Writ of Prohibition at 3-4, 447 P.2d 205 (Colo. 1968).

II. THE RIGHT TO ALLOCUTION

Allocution refers historically to the procedure by which the judge asks the defendant who has been found guilty why sentence should not be imposed. The defendant may then provide information toward possible mitigation of punishment, which the judge may take into account when imposing sentence. Statutes in many states have codified the common law requirement of allocution.[17] Colorado statutes provide for allocution in noncapital cases.[18]

The Colorado Supreme Court, in the McKevitt opinion, considered the question of a constitutional right to allocution. The existence of such a right was denied by citing the decision of the United States Court of Appeals for the 10th Circuit in *Segura v. Patterson* that "the right to a pre-sentence report or other means of allocution has not risen to the dignity of a constitutional requirement. . . ."[19]

Thus, while it may be desirable at times to allow the defendant to speak for himself in mitigation of the crime of which he has been convicted, it has been held that omission of allocution is not a ground for reversal.[20] The United States Supreme Court has even held that noncompliance with the requirement of allocution in the Federal Rules of Criminal Procedure[21] is not an error of constitutional magnitude.[22] The right to have a bifurcated trial, therefore, cannot be predicated on a constitutional right to allocution.

III. THE CONSTITUTIONAL ARGUMENTS

If there is no constitutional right to allocution, is there nonetheless a violation of basic constitutional rights inherent in the Colorado unitary trial procedure? Attorney for intervenor argued that there was such a violation,[23] citing the Colorado statute allowing a presentence investigation of defendant's background in

[17] For a general treatment of the right to allocution, see: Annot., 96 A.L.R.2d 1292; for an historical treatment of bifurcation see: Besharou and Mueller, *Bifurcation: The Two Phase System of Criminal Procedure in the United States*, 15 WAYNE L. REV. 613 (1969).

[18] COLO. REV. STAT. ANN. § 39-7-8 (1963).

[19] 402 F.2d 249, 252 (10th Cir. 1968) (footnote omitted).

[20] Ball v. United States, 140 U.S. 118 (1891), citing the rule but recognizing opposing authority.

[21] FED. R. CRIM. P. 32(a), which provides:

> (a) Sentence
>
> (1) Imposition of Sentence. Sentence shall be imposed without unreasonable delay. Pending sentence the court may commit the defendant or continue or alter the bail. Before imposing sentence the court shall afford counsel an opportunity to speak on behalf of the defendant and shall address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment.

[22] Hill v. United States, 368 U.S. 424 (1962).

[23] Brief for Intervenor at 21, 447 P.2d 205 (Colo. 1968).

cases where the court has discretion as to the penalty to be inflicted.[24] Another Colorado statute pertinent to the question of equal protection but not cited by intervenor relates to applications for probation.[25] Both statutes provide for a report prepared by a probation officer concerning the background of defendant, his prior criminal record, his characteristics, his financial condition, and such information about his behavior as would be helpful in imposing sentence. Neither statute applies to a charge of murder in the first degree where the defendant pleads not guilty, because in such a case the court has no discretion as to penalty, and probation may not be granted.[27] Hence, there exists the incongruous situation that in all crimes except murder in the first degree there is afforded to the sentencing authority an opportunity to receive evidence in allocution. In a first degree murder case, however, where the penalty is potentially the most severe and the issue of penalty is closely related to the issue of guilt, no such presentencing procedure is provided. Certainly the incongruity of such a situation is a strong argument for its revision. However, the question remains: Is such an incongruity a denial of equal protection of the laws?

One argument asserting such a denial is that since a person who pleads guilty to a charge of first degree murder may receive a presentence hearing under the Colorado statute,[28] while a person

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[24] COLO. REV. STAT. ANN. § 39-16-2 (1963).

> Presentence investigation. — Whenever any person shall be adjudged guilty of any felony, where the court has discretion as to the penalty, the court, before the imposition of sentence, shall cause a probation officer to make an investigation of the background of such person including any prior criminal record and such information about his characteristics, his financial conditions and circumstances affecting his behavior as may be helpful in imposing sentence and such other information as may be required by the court, in order that the court may be fully informed concerning said person. The probation officer, after completing said investigation, shall make a written report to the court.

[25] *Id.* at § 39-16-3.

> Application — deferment — ineligibles. — Any person after conviction of a felony or misdemeanor, or after a plea of guilty to a felony or misdemeanor, except murder of the first or second degree, may make application to the court to be released on probation. Whenever such application is made, the court shall defer sentence and cause a probation officer to make an investigation of the background of the applicant including any prior criminal record of the defendant and such information about his characteristics, his financial condition and circumstances affecting his behavior as may be helpful in determining the advisability of granting probation and such other information as may be required by the court, and of the facts of the offense of said applicant. The probation officer within such time as the court may prescribe shall make a written report to the court of said investigation, together with his recommendation as to whether or not probation should be granted. A person, having been twice convicted of a felony in this state or elsewhere prior to the case on which his application for probation is based, shall not be eligible for probation.

[26] *Id.* at § 40-2-3(1).

[27] *Id.* § 39-16-3.

[28] *Id.* §§ 39-16-2, 39-16-3.

who pleads not guilty receives no opportunity for allocution,[29] there is a denial of equal protection of the laws. In support of this contention, intervenor's brief cites the case of *United States v. Jackson*.[30] In that case, defendant was charged with a violation of the Federal Kidnaping Act which provides that interstate kidnapers shall be punished: "(1) by death if the kidnaped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment by any term of years or for life, if the death penalty is not imposed."[31] Thus, a person charged under the Act could plead guilty (waiving a jury trial) and be assured of not having the death penalty imposed. However, if he pled not guilty, thereby asserting his right to a jury trial, he would incur the possibility of the death sentence. The United States Supreme Court held that the clause authorizing capital punishment was invalid as imposing an impermissible burden upon the accused's exercise of his fifth amendment right to not plead guilty and his sixth amendment right to demand a trial by jury, but upheld the remaining clauses of the statute.[32]

The *Jackson* decision presents an interesting question of whether the Colorado procedure is a violation of an accused's fifth and sixth amendment rights. On the surface, the defendant in a murder trial in Colorado is presented with a dilemma similar to the defendant in *Jackson*. Under the Colorado statute, the accused must choose between foregoing the benefits of a presentence hearing by pleading not guilty and thereby running the risk of a greater penalty; before *Jackson*, the accused was faced with a similar risk by pleading not guilty to the kidnaping charge and possibly being sentenced to death. In summary, by analogizing the Colorado procedure to that of the Federal Kidnaping Act, it would appear that since the former is, the latter may be, violative of an accused's constitutional rights.

Unfortunately, however, the issue of constitutionality in *McKevitt* was not framed in the same context as in *Jackson*. In *McKevitt*, the constitutional issue was limited to the question of a bifurcated trial. The United States Supreme Court, in *Jackson*, expressly denied the government's contention that a second trial on the issue of penalty could ensue in kidnaping cases. It said: "Thus, when such a jury has been convened, the statutory reference is to that jury alone, not to a jury impaneled after conviction for the limited purpose of

[29] *Id.* at § 39-16-2.

[30] 390 U.S. 570 (1968).

[31] 18 U.S.C. § 1201(a) (1964).

[32] United States v. Jackson, 390 U.S. 570, 572 (1968).

determining punishment."[33] The effect of this reasoning is that, although the portion of the Federal Kidnaping Act relating to the death penalty is violative of the Constitution, the bifurcation issue is separate, and bifurcated trials were specifically excluded from the meaning of the federal statute by the Court's holding in *Jackson.*[34]

Considering the manner in which the bifurcation issue was raised in *McKevitt,* and also the Colorado statutory pronouncement denying bifurcation, it is probable that the constitutional questions concerning the Colorado procedure for imposing the death penalty were not controlled by the *Jackson* decision. To have ruled on such questions, the Colorado court would have had to exceed the bounds of the issues presented by the case before it.

The accused under the Colorado procedure is confronted with an additional dilemma having possible constitutional ramifications. The defendant in a unitary trial must choose between presenting mitigating evidence to the jury on the issue of punishment, or maintaining his privilege against self-incrimination on the issue of guilt. However, the courts have not found this dilemma to be of constitutional status. The Colorado Supreme Court in *Segura v. People* stated:

> Admittedly the Colorado statute requires the defendant to choose between taking the stand himself in an attempt to mitigate the crime, or declining to testify. There is nothing in the statute which prevents the introduction of relevant evidence to establish mitigating circumstances. . . . We know of no jurisdiction in which it has been held that this practice [unitary trials] purports to deny constitutional rights.[35]

The Court of Appeals for the 10th Circuit likewise found that:

> It is always the case that in exercising the constitutional right to remain silent, the individual is forced to forego his opportunity to personally appeal to the jury. Whether such an appeal relates to the determination of guilt or punishment or both, it cannot be denied that the inducement not to remain silent and thus to forego a specific constitutional right does not arise from any unnecessary burden imposed by the State. We conclude that the

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[33] *Id.* at 577 (footnote omitted).

[34] The Court in *Jackson* went on to say:

> The Government would have us give the statute this strangely bifurcated meaning without the slightest indication that Congress contemplated any such scheme. Not a word in the legislative history so much as hints that a conviction by a court sitting without a jury might be followed by a separate sentencing proceeding before a penalty jury.
>
> It is one thing to fill a minor gap in a statute — to extrapolate from its general design details that were inadvertently omitted. It is quite another thing to create from whole cloth a complex and completely novel procedure and to thrust it upon unwilling defendants for the sole purpose of rescuing a statute from a charge of unconstitutionality.

Id. at 578-80.

[35] 431 P.2d 768, 769-70 (Colo. 1967).

> single-verdict procedure does not "needlessly chill the exercise of basic constitutional rights."[36]

The Supreme Court of the United States has also ruled on the constitutionality of split trials:

> To say that the two-stage jury trial . . . is probably the fairest, as some commentators and courts have suggested, and with which we might well agree were the matter before us in a legislative or rule-making context, is a far cry from a constitutional determination that this method of handling the problem is compelled by the Fourteenth Amendment. Two-part jury trials are rare in our jurisprudence; they have never been compelled by this Court as a matter of constitutional law, or even as a matter of federal procedure.[37]

While the Court did not address itself directly to the self-incrimination issue in this case, it can be inferred that notions of due process do not compel a split trial to preserve the right against self-incrimination.

Thus, there is authority, as represented by the aforementioned cases, for the proposition that the unitary trial system is not violative of the constitutional rights protecting a defendant in a criminal trial against compulsory self-incrimination.

IV. Legislative Pronouncements on the Bifurcation Issue

As the Court in *Spencer* intimated, although the unitary trial system is not unconstitutional, the bifurcated trial system may well be more equitable.[38] Since courts seem to be reluctant to change the unitary trial procedure to the bifurcated procedure, any modifications must come from the legislature in the tradition of judicial deference to that body.

Four states have already taken this step through legislative enactments. California,[39] Connecticut,[40] New York,[41] and Pennsylvania[42] have enacted bifurcated trial procedures for first degree murder cases. The California statute is representative:

> The guilt or innocence of every person charged with an offense for which the penalty is in the alternative death or imprisonment for life shall first be determined, without a finding as to penalty. If such person has been found guilty of an offense punishable by life imprisonment or death, and has been found sane on any

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[36] Segura v. Patterson, 402 F.2d 249, 253 (10th Cir. 1968) (footnote omitted).

[37] Spencer v. Texas, 385 U.S. 554, 567-68 (1967) (footnote omitted).

[38] Even the Colorado Court in *Segura* acknowledged this fact when it said: "It may well be that a better method of determining punishment could be devised [other than the unitary system]."

[39] Cal. Penal Code § 190.1 (West 1959).

[40] Conn. Gen. Stat. Ann. § 53-10 (Supp. 1963).

[41] N.Y. Penal Law § 1045-a(2) (McKinney 1967).

[42] Pa. Stat. tit. 18, § 4701 (1963).

> plea of not guilty by reason of insanity, there shall thereupon be further proceedings on the issue of penalty, and the trier of fact shall fix the penalty. *Evidence may be presented at the further proceedings on the issue of penalty,* of the circumstances surrounding the crime, of the defendant's background and history, and of any facts in aggravation or mitigation of the penalty.[43]

The Model Penal Code also provides for a two-step trial in its recommendations for the sentencing procedure in murder cases.[44]

Some examples of admissible evidence at California penalty trials are: prior acts of misconduct; [45] comments by prosecution of defendant's recidivist character;[46] wife's testimony as to defendant's violent acts;[47] and the fact that murder victims were innocent children.[48] Examples of inadmissible evidence in California at the penalty trial are: confession tapes including mention of prior

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[43] CAL. PENAL CODE § 190-1 (West 1959) (emphasis added).

[44] MODEL PENAL CODE § 210.6(2) (1962 Draft).

> (2) *Determination by Court and Jury.*
> Unless the Court imposes sentence under Subsection (1) of this Section, it shall conduct a separate proceeding to determine whether the defendant should be sentenced for a felony of the first degree or sentenced to death. The proceeding shall be conducted before the Court alone if the defendant was convicted by a Court sitting without a jury or upon his plea of guilty or if the prosecuting attorney and the defendant waive a jury with respect to sentence. In other cases it shall be conducted before the Court sitting with the jury which determined the defendant's guilt or, if the Court for good cause shown discharges that jury, with a new jury empanelled for the purpose.
>
> In the proceeding, evidence may be presented as to any matter that the Court deems relevant to sentence, including but not limited to the nature and circumstances of the crime, the defendant's character, background, history, mental and physical condition and any of the aggravating or mitigating circumstances enumerated in Subsections (3) and (4) of this Section. Any such evidence which the Court deems to have probative force may be received, regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant's counsel is accorded a fair opportunity to rebut any hearsay statements. The prosecuting attorney and the defendant or his counsel shall be permitted to present argument for or against sentence of death.
>
> The determination whether sentence of death shall be imposed shall be in the discretion of the Court, except that when the proceeding is conducted before the Court sitting with a jury, the Court shall not impose sentence of death unless it submits to the jury the issue whether the defendant should be sentenced to death or to imprisonment and the jury returns a verdict that the sentence should be death. If the jury is unable to reach a unanimous verdict, the Court shall dismiss the jury and impose sentence for a felony of the first degree.
>
> The Court, in exercising its discretion as to sentence, and the jury, in determining upon its verdict, shall take into account the aggravating and mitigating circumstances enumerated in Subsections (3) and (4) and any other facts that it deems relevant, but it shall not impose or recommend sentence of death unless it finds one of the aggravating circumstances enumerated in Subsection (3) and further finds that there are no mitigating circumstances sufficiently substantial to call for leniency. When the issue is submitted to the jury, the Court shall so instruct and also shall inform the jury of the nature of the sentence of imprisonment that may be imposed, including its implication with respect to possible release upon parole, if the jury verdict is against sentence of death.

[45] People v. Tahl, 65 Cal. 2d 719, 423 P.2d 246, 56 Cal. Rptr. 38 (1967).

[46] People v. Talbot, 64 Cal. 2d 691, 414 P.2d 633, 51 Cal. Rptr. 417 (1966).

[47] People v. Mathis, 63 Cal. 2d 416, 406 P.2d 65, 46 Cal. Rptr. 785 (1965).

[48] People v. Modesto, 59 Cal. 2d. 722, 382 P.2d 33, 31 Cal. Rptr. 225 (1963).

crimes;[49] photographs of deceased where defendant admitted crime;[50] evidence of prosecution's willingness to plea bargain and defendant's unwillingness.[51]

The limits of admissible evidence at the penalty trial are not boundless. The rules of evidence are not relaxed because the second trial is solely on the issue of penalty, but many of the same questions as to admissibility at the trial on guilt pertain to the trial on punishment.[52] Accordingly, incompetent[53] or irrelevant[54] evidence can not be introduced at either trial. The test of admissibility is weighing the probative value of the evidence against its inflammatory effect.[55]

Thus, it seems that there is substantial legislative authority for the Colorado legislature to amend its present murder statute to include the bifurcated trial provisions. The public defender in Denver prepared and introduced such a bill in the 47th General Assembly of Colorado.[56]

CONCLUSION

At this point, in view of the zealous efforts to promote the bifurcated trial procedure in Colorado by the public defender and the equally zealous efforts to oppose it by the district attorney, it should be pointed out that the bifurcated trial procedure is a two-way street. While the defense may introduce evidence at the trial on punishment in mitigation of the offense, the prosecution may introduce counterbalancing evidence in aggravation. In California, the evi-

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[49] People v. Hines, 61 Cal. 2d 164, 390 P.2d 398, 37 Cal. Rptr. 622 (1964).

[50] *Id.*

[51] People v. Terry, 61 Cal. 2d 137, 390 P.2d 381, 37 Cal. Rptr. 605 (1964).

[52] Handler, *Background Evidence in Murder Cases,* 51 J. CRIM. L.C. & P.S. 317, 326 (1960).

[53] People v. Purvis, 52 Cal. 2d 871, 346 P.2d 22 (1959).

[54] People v. Hill, 66 Cal. 2d 536, 426 P.2d 908, 58 Cal. Rptr. 340 (1967).

[55] *See* Handler, *supra* note 52 at 325.

[56] S. 318, 47th General Assembly of Colorado (1969). The substance of the bill, which passed the senate but was not reported out of the House Judiciary Committee, reads:

> Every person charged with first degree murder as defined in this article may petition the court prior to trial for an order that the issue of guilt and the issue of penalty shall be tried separately because prejudice may otherwise ensue to the defendant. If the court shall find that one trial on both issues may be prejudicial to the defendant he shall then order that the guilt or innocence of the person charged with first degree murder shall first be determined without his finding as to penalty. If such person shall be found guilty of first degree murder then there shall thereupon be further proceedings before the court or the same jury on the issue of penalty. Evidence may be presented at the further proceeding on the issue of penalty, 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 determination of the penalty of life imprisonment or death shall be in the discretion of the court or jury trying the issue of fact on the evidence presented and the penalty fixed shall be expressly stated in the decision or verdict.

dence in aggravation is even permitted to the introduction of prior crimes not admissible in the trial on the issue of guilt.[57] Hence, it would appear that both prosecution and defense attorneys would favor the bifurcated procedure.

Having determined that the bifurcated trial procedure is precluded by the present Colorado statute, and that the unitary procedure is not constitutionally violative, it is apparent that the *McKevitt* decision is proper within these guidelines. Nevertheless, the bifurcated procedure, having advantages for both the prosecution and the defense sides, seems to be more equitable. Normally inadmissible evidence or evidence withheld from admission because of its privileged nature is admissible in the second portion of the bifurcated proceeding. Such admission is proper since the jury in a murder case is permitted to hear evidence concerning bad character of the defendant as well as his good character. Where relevant, both types of evidence should be presented to the jury so that their sentence may be deemed more just and proper. The legislative bill proposed by the Denver public defender would be the realization of this procedure and should be given serious consideration.

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[57] People v. Tahl, 65 Cal. 2d 719, 423 P.2d 246, 56 Cal. Rptr. 318 (1967). The court in interpreting CAL. PENAL CODE § 190.1 (West 1959) upheld the view that prior acts of misconduct by a defendant at a penalty trial are admissible even if he has never been prosecuted for them.