Mississippi College Law Review

Volume 1 | Issue 2 Article 6

1-1-1979

Proper Observance of the New Capital Murder Trial Procedures Does Not Necessarily Guarantee Defendants His Due Process Rights - Bell v. State

Michael T. McCollum

Custom Citation
1 Miss. C. L. Rev. 189 (1978-1980)

PROPER OBSERVANCE OF THE NEW CAPITAL MURDER TRIAL PROCEDURES DOES NOT NECESSARILY GUARANTEE DEFENDANT HIS DUE PROCESS RIGHTS

Bell v. State, 360 So. 2d 1206 (Miss. 1978).

On the night of June 21, 1976, Charles S. Bell and three companions stopped at an Amoco service station in Hattiesburg, Mississippi, to purchase gas. After making their purchase and leaving, Bell and his companions returned with a rifle and three shotguns to rob the station. The attendant, Danny Haden, was relieved of his money, ordered into the car, searched, and forced to give up other personal items. After a short drive, the driver stopped the car in a wooded area and ordered the attendant to get out. Bell and two of the accomplices took Haden into the woods. There he was decapitated by a shotgun blast to the neck and shot in the back by another gun. These facts were uncontradicted; however, there was conflicting testimony as to who actually fired the shots that murdered Haden.[1]

Bell was indicted for capital murder pursuant to section 97-3-19(2)(e) of the 1972 Mississippi Code as amended in 1974[2] and received a bifurcated trial in the Circuit Court of Forrest County[3] under the standards announced by the Mississippi Supreme Court in *Jackson v. State*.[4] The jury found Bell guilty of capital murder, and following a separate hearing for sentencing, returned a written verdict imposing the death penalty.[5] The Mississippi Supreme Court

---

[1]Bell v. State, 360 So. 2d 1206, 1208 (Miss. 1978).

Bell's account of Haden's murder was contradicted by a former co-defendant and a former cell mate. Bell's co-defendant testified that Bell told him that he had shot Haden in the back. This testimony was supported by Bell's cell mate who testified that Bell admitted that he shot Haden again as he fell. However, Bell testified that on the June night in question one of his companions "[blew Haden's] head off," and the other companion shot Haden in the back. *Id.*

[2]MISS. CODE ANN. § 97-3-19(2)(e)(Supp. 1978).

> The killing of a human being without the authority of law by any means or in any manner shall be capital murder in the following cases:
> (e) When done with or without any design to effect death, by any person engaged in the commission of the crime of rape, burglary, kidnapping, arson, or robbery, or in any attempt to commit such felonies.

[3]360 So. 2d at 1207.

[4]337 So. 2d 1242 (Miss. 1976). The murder occurred in June 1976 and Bell was indicted in the March 1977 Forrest County Grand Jury Term. On April 13, 1977, the Mississippi Legislature adopted new statutory procedures for trying capital murder cases, MISS. CODE ANN. § 99-19-101 (Supp. 1978), which calls for separate guilt and sentencing phases in a bifurcated trial. Bell therefore, was tried under the 1972 Mississippi Code, as construed by Jackson v. State in October 1976.

The first case tried and reviewed in accordance with the new capital murder statute was Washington v. State, 361 So. 2d 61 (Miss. 1978) (which quotes Bell v. State).

[5]360 So. 2d at 1208.

reviewed the trial court's actions in accordance with the guidelines of *Jackson v. State*[6] and, in a five to four decision, affirmed the holding below. The court, on its own motion, noticed possible errors in two different jury instructions, but the majority found that the problem constituted mere harmless error.[7]

While reviewing Bell's circuit court trial, the supreme court followed *Jackson v. State*,[8] which brought Mississippi's 1972 capital murder statute[9] into conformity with the United States Supreme Court decisions of *Gregg v. Georgia*,[10] *Jurek v. Texas*,[11] *Proffit v. Florida*,[12] *Woodson v. North Carolina*,[13] and *Roberts v. Louisiana*.[14] The court noted that Bell had been allowed a bifurcated trial with separate guilt finding and sentencing phases. A majority found that collectively the trial testimony was sufficient for the jury to find that Bell was guilty of capital murder.[15] No irregularities were found by the court with the sentencing phase of the trial.

The court weighed the mitigating circumstances against the aggravating ones involved in the crime. According to the trial record Bell was under the influence of marijuana and other drugs on the night of the killing. Bell had also testified that he was only an accomplice and had asked one of his companions not to kill Haden. At trial, Bell's co-defendant admitted that during the course of the evening, Bell requested that Haden not be killed. The court observed that the trial record revealed the additional mitigating circumstance that on the night of the crime Bell was still a youth. When the trial commenced he was only twenty years of age.[16]

After reviewing the mitigating circumstances the court considered

---

[6]337 So. 2d 1242, 1255-56 (Miss. 1976). *See also* note 4, *supra*.

In two of his assignments of error, Bell contended that it was unconstitutional and a violation of both separation of powers and the prohibition against *ex post facto* laws to try him under the standards announced in Jackson v. State which was decided after Bell's alleged criminal act. Both of these issues were heard and resolved against Bell in an earlier appeal for a previous homicide conviction, Bell v. State, 353 So. 2d 1141, 1143 (Miss. 1977). See also Dobbert v. Florida, 432 U.S. 282 (1977).

[7]360 So. 2d 1215.

As part of his assignments of error, Bell alleged that the indictment was erroneous and should have been quashed; and that his petition for psychiatric examination prior to trial, and his motion to suppress certain pre-trial statements should have been granted. The court reviewed all three of these issues and found that they all had been decided correctly at trial. *Id.* at 1208-11.

[8]337 So. 2d 1242 (Miss. 1976).

[9]MISS. CODE ANN. § 97-3-19(2)(e)(Supp. 1978).

[10]428 U.S. 153 (1976).

[11]428 U.S. 262 (1976).

[12]428 U.S. 242 (1976).

[13]428 U.S. 280 (1976).

[14]428 U.S. 325 (1976).

[15]360 So. 2d at 1211-12.

[16]*Id.* at 1212.

all aggravating factors. Evidence in the trial record showed that this killing was committed in conjunction with an armed robbery and kidnapping. The court noticed additional aggravating circumstances. Bell had a long line of convictions of violent crimes. The murder of Danny Haden occurred while committing a crime for pecuniary gain. The execution-style killing was committed in an especially heinous manner. After weighing these various factors the court found that the jury was justified in rendering the death penalty at the sentencing phase of the trial.[17]

Since the Mississippi Supreme Court has not affirmed any death sentences since 1964, the court compared the result of this case with thirty-one cases involving executions actually carried out from March 1955 through March 1964. After reviewing these prior cases, the court found that a penalty of death would not be wanton or arbitrary in Bell's situation. However, since these earlier cases were decided before the present guidelines were established, the court elected to test Bell's sentence with legislative intent and with similar cases from other jurisdictions. The court found that the legislature, by statute, had narrowed the list of crimes which could be punished by death.[18] It was also noted by the court that other jurisdictions have recently reviewed similar cases and have approved the death penalty.[19] Thus, the court held that the death penalty in Bell's instance was not disproportionate to the crime committed.[20]

Although not argued as error by the appellant, the supreme court noticed two problem areas regarding the jury instructions which were read to the jury by the trial judge.[21] The first problem involved the proper construction to be given to a charge regarding murder committed during the commission of another felony. The trial court submitted a poorly worded instruction that if the jury found that "the defendant was engaged in the criminal act of armed robbery or kid-

---

[17] 360 So. 2d at 1212-14.

[18] *Id.* at 1214. The court was referring to MISS. CODE ANN. § 97-3-19(2) (Supp. 1975), as construed by Jackson v. State.

[19] *Id.* at 1214-15.

[20] *Id.* at 1215.

[21] *Id.*

The court also judicially noticed two other minor problems in the trial record. The record did not reveal that the jury had been specifically sworn in accordance with MISS. CODE ANN. § 13-5-73 (Supp. 1978)which is required for death penalty cases. The court found that the rebuttable presumption, that the trial judge had properly carried out his duties, had not been overcome. *See generally* Thomas v. State, 298 So. 2d 690 (Miss. 1974) (court found harmless error which did not merit reversal); Hill v. State, 112 Miss. 375, 73 So. 66 (1916) (defendant to have waived statutory provision where no objection is made until a verdict is rendered against him). *But see* Miller v. State, 112 Miss. 19, 84 So. 161 (1920) (court found that defendant was tried by an "illegal" jury).

The record also failed to show that the defendant was present in the courtroom throughout the trial. The presumption, however, is to the contrary. 360 So. 2d at 1215.

napping"[22] it should find the defendant guilty of capital murder.[23] In other words, this improper instruction charged the jury that they could convict Bell of capital murder if they were convinced he had participated in the armed robbery or kidnapping. A properly worded instruction which was submitted by the state charged the jurors that if they found that Bell "willfully, unlawfully, and feloniously, and of his malice aforethought [did] kill and murder Danny Haden, a human being, while in the commission of the crime of armed robbery and kidnapping . . ." then they should find Bell guilty as charged.[24] Both instructions were read to the jury but the properly worded instruction did not call attention to the poorly worded one. The majority of the justices found that although the instruction submitted by the trial court was improperly drawn, if read in context with the state's instruction, together with all of the other instructions as a whole, the jury could not have been misled.[25]

The second problem involved a jury instruction which has often been labeled the "do not have to know" instruction. This instruction submitted by the State told the jury that "you do not have to know that the defendant is guilty of the crime charged . . ." in order to convict him.[26] This confusing instruction explained that the law requires that the jury "must believe from the evidence, beyond a reasonable doubt and to the exclusion . . ."[27] of any other explanation that the defendant is guilty. The majority admitted that the Mississippi Supreme Court has held the "do not have to know" instruction to be reversible error in numerous earlier criminal cases. They found, however, that in these earlier cases the convictions were based upon either circumstantial evidence or predominantly circumstantial evidence. This was not the situation here, since Bell himself testified and made admissions which clearly connected him to the victim's death. Therefore, the majority of the justices found that, beyond a reasonable doubt, these errors did not adversely affect the outcome of the proceedings and that Bell did receive a fair trial.[28]

In a strongly worded dissent, Justice Broom contended that although a defendant is not entitled to a perfect trial, he should be allowed a trial free from "substantial or serious error" before being put to death.[29] Justice Broom argued that the first questionable jury instruction authorized a murder conviction "for merely engaging in

---

[22]360 So. 2d at 1216-17 (Broom, J., dissenting).

[23]*Id.* at 1217; Trial Record at 705 (Jury Instruction No. C-8).

[24]Trial Record at 707 (Jury Instruction No. S-1).

[25]360 So. 2d at 1215.

[26]*Id.* at 1217.

[27]Trial Record at 710 (Jury Instruction No. S-4).

[28]360 at So. 2d at 1215.

[29]*Id.* at 1216.

either of two other offenses [armed robbery or kidnapping] and is reversible error."[30]

A similar problem involving jury instructions is authorizing a jury to convict a defendant of one crime because the jury finds that he has engaged in another crime. Such an instruction was condemned as reversible error by the court in a 1941 criminal case.[31]

Justice Broom agreed with the majority that the "do not have to know" instruction had previously been ruled to be reversible error, and he admonished the majority for attempting to differentiate this instruction's use "according to whether the evidence is 'circumstantial or predominantly' so."[32] He completely disagreed with the majority that "beyond a reasonable doubt" the jury would have reached the same verdict without the faulty instructions. Justice Broom stated that "the admittedly erroneous instructions are now in effect approved on the basis of a subjective standard, [that is, the] opinion of the [majority] justices that the jurors were not influenced by faulty instructions."[33] Finally, the dissent pointed out that the erroneous instructions were not corrected by any other instruction which directed the jurors' attention to the faulty instruction.[34]

The Mississippi Supreme Court, in a long line of cases, has held the "do not have to know" jury instruction to be reversible error.[35] In only three of the seven cases reported did the trial jury's verdict rest on circumstantial evidence,[36] and in none of these cases did the court specifically state that it ruled the way it did because the verdicts turned on circumstantial evidence.[37]

In 1972 in the landmark case of *Furman v. Georgia*,[38] the United States Supreme Court held that the death penalty as then administered in most jurisdictions was unconstitutional. The justices,

---

[30]*Id.* at 1217.

[31]Cutshall v. State, 191 Miss. 764, 770-72, 4 So. 2d 289, 292 (1941) (cited in Bell v. State, 360 So. 2d at 1217). Cutshall v. State held that although the jury, after receiving proper instructions from the judge, could have found that defendant's actions constituted gross negligence, the misdemeanor of driving while intoxicated does not constitute manslaughter.

[32]360 So. 2d at 1217.

[33]*Id.*

[34]*Id.* at 1218.

[35]Kidd v. State, 258 So. 2d 423, 428 (Miss. 1972); Gilleylen v. State, 255 So. 2d 661, 664 (Miss. 1971); Kent v. State, 241 So. 2d 657, 660 (Miss. 1970); Nobles v. State, 241 So. 2d 826, 827-28 (Miss. 1970); Spencer v. State, 240 So. 2d 260, 263 (Miss. 1970); Pryor v. State, 239 So. 2d 911, 912 (Miss. 1970) (cited in Bell v. State, 360 So. 2d at 1217) (none of these cases, however, involved the death penalty). *cf.* McGill v. State, 235 So. 2d 451, 452 (Miss. 1970) (The instruction itself was not held to be reversible error; however, it might constitute reversible error in a close case).

[36]Gilleylen v. State, 255 So. 2d 661, 664 (Miss. 1971); Kent v. State, 241 So. 2d 657, 660 (Miss. 1970); Pryor v. State, 239 So. 2d 911, 912 (Miss. 1970).

[37]*See* note 35, *supra*. *See also* Bell v. State, 360 So. 2d at 1217 (Broom, J. dissenting).

[38]408 U.S. 238 (1972).

writing separate opinions for the majority,[39] held generally that the arbitrary infliction of the death penalty violated the eighth amendment's guarantee against cruel and unusual punishment[40] as applied to the states through the due process clause of the fourteenth amendment.[41] After *Furman*, later Supreme Court decisions have given guidance to state courts and legislatures as to what procedures would be acceptable in determining the death penalty.[42] The Court firmly established in *Gregg v. Georgia*[43] that the death penalty is not unconstitutional *per se*. Since the death penalty is such an unique and irreversible punishment, suitable only to the most extreme crimes, the focus following *Furman* has been on the procedure through which the penalty is administered.[44] In 1976, the Mississippi Supreme Court in *Jackson v. State*[45] construed the state's capital murder statute to conform to the recent guidelines furnished by the United States Supreme Court.

A well written capital murder statute does not necessarily guarantee that a defendant's constitutional rights will be protected. The statute must not only be properly administered, but basic constitutional due process must be accorded.[46] In *Gardner v. Florida*,[47] the United States Supreme Court held generally that although Florida has a well constructed capital murder statute, the Florida Supreme Court violated the defendant's basic due process rights by not properly applying the statute. In *Gardner*, the trial judge used a confidential pre-sentencing report and sentenced the defendant to death, ignoring the jury's recommendation of life imprisonment. The Supreme Court held that the judge had violated the defendant's due process rights even though the Florida statute allowed the judge to decide the sentence after receiving a recommendation from the jury. *Gardner* stands for the proposition that although a specific capital murder

---

[39]*Id.* at 240, 257, 306, 310, 314.

[40]U. S. CONST. amend. VIII, which states that "[c]ruel and unusual punishment [shall not be] inflicted."

[41]U. S. CONST. amend. XIV.

[42]Gregg v. Georiga, 428 U.S. 153 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976).

[43]428 U.S. 153, 186, 187 (1976).

[44]Gregg v. Georgia, 428 U.S. 153, 162-68, 187 (1976); Jurek v. Texas, 428 U.S. 262, 276 (1976); Proffitt v. Florida, 428 U.S. 242, 258-60 (1976); Woodson v. North Carolina, 428 U.S. 280, 287, 303-05 (1976); Roberts v. Louisiana, 428 U.S. 325, 333-36 (1976).

See also Davis, *The Death Penalty and the Current Status of the Law*, 14 CRIMINAL LAW BULLETIN 7, 7-8 (1978); *van de Haag, In Defense of the Death Penalty: A Legal-Practical-Moral Analysis*, 14 CRIMINAL LAW BULLETIN 51, 54 (1978) 8 MEMPHIS ST. U. L. REVIEW 107 (1977).

[45]337 So. 2d 1242 (Miss. 1976). *See* notes 4, 6, 8 *supra*.

[46]U. S. CONST. amend. V, which states that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."

[47]430 U.S. 349 (1977).

statute, on its face, avoids the constitutional deficiencies identified in *Furman*, it can still be misapplied through substantial error in due process.[48]

Even before the death penalty decisions of the seventies, the United States Supreme Court held in *Chapman v. California*[49] "that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."[50] Likewise, long ago the Mississippi Supreme Court ruled that "[c]onstitutional rights in serious criminal cases rise above mere rules of procedure. . . . Besides, no person can be deprived of his liberty except by due process of law."[51]

When confronting the question, in a criminal case, whether faulty jury instructions can be cured by other instructions or constitute reversible error, a majority of jurisdictions recognize that they can be cured. The general rule is that an error in one instruction is cured by another when the instructions considered as a whole correctly state the law. Only in this instance will the error not be reversible. The Mississippi Supreme Court has long subscribed to this rule.[53] This general rule provides the standard by which the court can determine if the requirements have been met. The Mississippi Supreme Court[54] and courts of several other jurisdictions[55] have stated that the requirements of this test are not met when a correct instruction does not cure or correct a faulty one, but contradicts it. The Supreme Court of Hawaii has gone so far as to hold that a faulty instruction cannot be cured by a correct instruction if the proper instruction does not call

---

[48]*Id.* See note 46 supra.

[49]386 U.S. 18 (1967).

[50]*Id.* at 24. In Chapman both defendants were convicted for robbery, kidnapping, and murder. One defendant was sentenced to life imprisonment and the other to death. Both the state prosecutor's argument and the trial judge's instruction commented on the defendants' failure to take the stand. On writ of certiorari, the Supreme Court held that the state failed to demonstrate beyond a reasonable doubt that such comments and instructions did not contribute to the defendants' convictions.

[51]Brooks v. State, 209 Miss. 150, 155, 46 So. 2d 94, 97 (1950) (quoting MISS. CONST. art. 3 § 14).

[52]*See e.g.* Howard v. United States, 389 F.2d 287 (U.S. App. D.C. 1967); Johnson v. State, 252 So. 2d 663, 664 (Miss. 1977); Odom v. State, 311 So. 2d 454, 456 (Miss. 1975); Alexander v. State, 250 So. 2d 629, 632 (Miss. 1971); Wilson v. State, 234 So. 2d 303, 309 (Miss. 1970); State v. Swift, 290 N. C. 383, 226 S.E.2d 652, 664 (1976); Loveday v. State, 74 Wis. 2d 503, 247 N.W. 2d 116, 125 (1976).

[53]Moon v. State, 1976 Miss. 72, 168 So. 476 (1936). *See also* note 52, *supra.*

[54]McMullen v. State, 291 So. 2d 537, 541 (Miss. 1974) (murder conviction, reversed); Butler v. State, 177 Miss. 91, 95, 170 So. 148, 149 (1936) (manslaughter conviction, reversed).

[55]State v. Dammons, 293 N. C. 263, 237 S.E.2d 834, 841 (1977); Barnes v. State, 348 So. 2d 599, 601 (Fla. App. 1977) (Manslaughter conviction); People v. Jenkins, 69 Ill. 2d 61, 370 N.E. 2d 532, 534 (1977) (attempted murder and aggravated battery).

the jury's attention to the erroneous one.[56] The Mississippi Supreme Court reached a similar conclusion in *McHale v. Daniel*.[57]

When analyzing the opinion in the instant case, one must remember that it is not a civil case, or even an ordinary criminal case, but a decision pronouncing the death penalty. Since *Furman* the United States Supreme Court has repeatedly stressed the irrevocability and irreversability of the death penalty and the need to provide sufficient protection to the defendant in such cases.[58] Although a defendant in a capital murder trial cannot be guaranteed a perfect trial, he should be allowed a trial "free from any substantial or serious error"[59] before being sentenced to death. Upon review the emphasis of the court is whether any errors at trial were serious, substantial or harmless. The test furnished in *Chapman v. California*[60] for deciding this issue is not that the appellate court declares a belief that any error was harmless, but that "the court must be able to declare"[61] beyond a reasonable doubt that the error did not contribute to the defendant's conviction. In the *Bell* case a majority of the justices found that, beyond a reasonable doubt, the verdict would not have been different without the two faulty jury instructions and that Bell did in fact receive a fair trial.[62] The dissent strongly disagreed,[63] therefore the issue is whether the majority could have "been able to" find that the faulty instructions did not contribute to Bell's conviction.

The first questionable jury instruction directed the jurors to find Bell guilty of capital murder if they found that he "engaged in the criminal act of armed robbery or kidnapping."[64] The majority admitted that this instruction was improperly drawn but could not have misled the jury when read in conjunction with the other instructions.[65] The dissent challenged this erroneous instruction as reversible error. Evidently the majority applied the general rule that

---

[56]State v. Napeahi, 57 Haw. 365, 556 P.2d 569, 577 (1976).

[57]233 So. 2d 764, 768 (Miss. 1970) (cited in Bell v. State, 360 So. 2d at 1218). In McHale v. Daniel the court ruled that a faulty instruction on a material issue is not cured by a proper instruction on the same issue. Although *McHale* is a civil case, the reasoning is applicable to all situations civil or criminal: contradictory, self-contained jury instructions can be materially confusing to the jury. If a court is willing to find such contradictory instructions reversible error in a civil trial, it certainly should find reversible error in a criminal trial where conviction carries a sentence with the finality of the death penalty.

[58]*See* notes, *supra*.

[59]360 So. 2d at 1216 (Broom, J., dissenting).

[60]386 U.S. 18 (1967). *See* note 50, *supra*.

[61]*Id.* at 24.

[62]360 So. 2d at 1215.

[63]*Id.* at 1217, 1218.

[64]*Id.* at 1216-17 (Broom, J., dissenting). Apparently, the trial judge was attempting to charge the jury regarding the felony-murder doctrine. However, as indicated in the textual material, the result constituted a defective instruction.

[65]*Id.* at 1215.

all jury instructions must be considered together, and when any errors are cured or corrected by other instructions, the jury will not be confused. However, the problem in this case is that the erroneous instruction was complete, in and of itself, and the proper instruction, also complete, did not call attention to the erroneous one. The proper instruction did not really cure or correct the faulty one, but actually contradicted it. On that ground the dissenting justices concluded that the jury had not been given proper guidance.[66]

The guideline furnished by *McHale v. Daniel*[67] supported the dissenting justices. Even though *McHale* involved litigation on a civil issue, an analagous argument can be made on behalf of a defendant in a criminal proceeding, especially a proceeding involving the death penalty.[68] This case fully supported Justice Broom's belief that the jury's improper guidance constituted reversible error.[69] As the dissent points out, the majority invoked a subjective standard; that is, "how much attention the [majority] justices think the jurors paid to [the] faulty jury instruction."[70] Under such circumstances the dissenting justice concluded that Bell should be tried by another jury which has been properly charged.[71] The *Chapman* test yields a subjective standard when applied to the issue of jury instructions. A reviewing court will never be able to objectively declare harmless error beyond a reasonable doubt when attempting to decide what jurors might have thought. Since the court decided this issue *en banc* and reached a five to four decision, perhaps the majority should prevail. Admittedly the scales of justice could tip either way on this issue. Perhaps a more judicious decision would be to allow another jury, properly instructed, to decide the case, especially in one involving the death penalty.

The second faulty jury instruction does not present such a close question. The use of the "do not have to know" jury instruction has been previously condemned in Mississippi.[72] The majority swept aside the court's earlier rulings condemning this instruction by finding that the earlier decisions turned mostly on circumstantial evidence.[73] The dissenting justices claim that if the use of this instruction amounted to reversible error in non-death penalty cases, it should certainly be reversible error for death penalty cases.[74] Earlier cases which condemned this instruction did not state that the instruction

---

[66] *Id.* at 1217.

[67] 233 So. 2d 764, 768-69 (Miss. 1970). *See* note 57 and accompanying textual material, *supra.*

[68] *See* notes 44, 58, *supra.*

[69] *See* note 66, *supra.*

[70] 360 So. 2d at 1218.

[71] *Id.* at 1218 (Broom, J., dissenting).

[72] *See* note 35, *supra.*

[73] 360 So. 2d at 1215.

[74] *Id.* at 1217-18.

was erroneous because the decisions turned on circumstantial evidence.[75] The court's apparent decision to limit their earlier condemnation of the "do not have to know" instruction to decisions which turn on circumstantial evidence could have been announced in a case where conviction results in a penalty which is less final and less controversial. Justice Broom, in the dissenting opinion, offers the more judicially correct conclusion: "In a case where criminal conviction carries with it the death penalty, the requirements of due process include jury instructions not previously held to be reversible error."[76]

In the instant case the majority of the justices on the supreme court focused so intently upon the proper application of the guidelines announced in *Jackson v. State* that they overlooked customary due process considerations. The minority justices seem to have reached the more judicious conclusion. In a death penalty trial, the trial court should not give contradictory jury instructions regarding one issue which can be confusing to the jurors. The different instructions which are potentially contradictory should call attention to each other so that the jury can understand and consider them as a whole. The trial court should not have used the questionable "do not have to know" instruction which has been previously condemned by the state's supreme court.

The holding in this case poses some unanswered questions which can lead to confusing results in future cases. Has the court used this case as a vehicle to state that the "do not have to know" instruction may be used in future capital murder cases so long as the evidence is predominantly circumstantial? If so, who decides what predominantly circumstantial means? Has the court decided that the standard to be applied to contradictory jury instructions will be the subjective standard of whether upon review the majority justices think the jurors were confused? Such a decision is contrary to the very nature of the death penalty decisions since *Furman* which call for the fact finder to determine the question of the death sentence as objectively as possible after considering all relevant factors.

Statutory and case law guidelines for the proper adjudication and administration of capital murder trials do not guarantee a proper resolution if the trial court, when applying those guidelines, violates the defendant's right to a fair and impartial trial. While working within the framework mandated for capital cases, the trial court must continue to observe the requirements of due process in such areas as presentation of evidence, arguments by counsel, and jury instructions. Upon review, an appellate court should not focus on proper application and adminstration of capital murder guidelines to the exclusion of the defendant's constitutional rights to a fair trial through proper

---

[75] *See* note 35, *supra*. *See also* Bell v. State, 360 So. 2d at 1217.

[76] 360 So. 2d at 1218.

due process.[77] "Constitutional rights in serious criminal cases rise above mere rules of procedure."[78]

Michael T. McCollum

---

[77]*See generally* Gardner v. Florida, 430 U.S. 349 (1977), Brooks v. State, 209 Miss. 150, 46 So. 2d 94 (1950).

[78]Brooks v. State, 209 Miss. 150, 155, 46 So. 2d 94, 97 (1950). *See also* note 51, *supra*.