The Burger Court Opinion Writing Database

Maxwell v. Bishop

398 U.S. 262 (1970)

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SUPREME COURT OF THE UNITED STATES

No. 13.—October Term, 1969

William L. Maxwell, Petitioner, v. O. E. Bishop, Superintendent, Arkansas State Penitentiary. | On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[May —, 1970]

Mr. Justice Black, dissenting.

Since I am still of the view that *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968), was erroneously decided, I dissent from the opinion of the Court in this case.

To: The Chief Justice
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
~~Mr. Justice Fortas~~
Mr. Justice Marshall

SUPREME COURT OF THE UNITED STATES

October Term, 1969

From: Douglas, J.

MEMORANDUM FOR THE CONFERENCE

From MR. JUSTICE DOUGLAS

Circulated: 5-11

Recirculated:

(May 11, 1970)

California Cases Held for Maxwell

According to the Clerk's Office we are holding 89 cases for *Maxwell.*

I have gone over all of those from California and briefly describe them below, and give my recommendation to the Conference.

There are, as you will see, some which I think we could providently dispose of the day we hand down the *per curiam* in *Maxwell.*

No. 481, Misc. *Robinson* v. *California*

This case has the "standards" question and the *Witherspoon* issue. The California Supreme Court wrote on the *Witherspoon* issue (70 Adv. Cal. 179, 449 P. 2d 198) and it seems to have disposed of the issue properly. The major opinion of the California Supreme Court on *Witherspoon* is in *People* v. *Satterfield & Anderson,* 65 Cal. 2d 752, where we denied certiorari. 389 U. S. 942, 964.

So this case should be held.

No. 2102. *Smith* v. *Nelson*

In my memo of May 7, 1970, I recommended that the case be remanded for reconsideration in light of *Witherspoon.*

No. 309, Misc. *Massie* v. *California*

While this case involves the "standards" issue and an involuntary guilty plea and waiver of jury trial (because it would have been a pre-*Witherspoon* "hanging" jury),

petitioner asks that he be executed. The case, being somewhat like *Rees* v. *Peyton,* 384 U. S. 312, should therefore be held.

No. 257, Misc. *Reeves* v. *California*

This case has the two points that No. 309 *Massie* has; but petitioner does not insist on being executed. We might consider whether the prospect of a pre-*Witherspoon* "hanging" jury is relevant to the issue of involuntary plea. Cf. *United States* v. *Jackson,* 390 U. S. 570. If so, this should be remanded.

No. 332, Misc. *Varnum* v. *California*

This case has the "standards" question and a *Witherspoon* issue that does not seem substantial. It should be held.

No. 364, Misc. *Aikens* v. *California*

This case has the "standards" issue. It also has the waiver of a jury trial to avoid the pre-*Witherspoon* "hanging" jury. The difficulty is that this was a pre-*Duncan* (391 U. S. 145) case which the Court held to be nonretroactive. 392 U. S. 631.

So the case should be held.

No. 486, Misc. *McGautha* v. *California*

This case has a "standards" question and a *Witherspoon* question. But the latter seems insubstantial. See 70 Adv. Cal. 823, 829 *et seq.,* where the Court discusses the point.

This case should be held.

No. 1347, Misc. *Mabry* v. *California*

This case has the "standards" issue. It also has the *White* No. 46 issue.

It should be held.

No. 1255, Misc. *Miller* v. *California*

The "standards" issue is presented. So is the *Witherspoon* issue. The latter involved three prospective jurors who were excused for cause. Each answered that his conscientious scruples "might preclude" him from returning a verdict of guilty "in a proper case." The Supreme Court ruled that their attitude in the words of *Witherspoon* "would prevent them from making an impartial decision as to the defendant's guilt." 71 A. Calif. Rep. 477, 489–490.

For myself, I am not at all sure this satisfies the *Witherspoon* test; and I am inclined to reverse *per curiam*.

No. 1051, Misc. *Pike* v. *California*

The "standards" question is present. The *Witherspoon* issue is also raised. The California Supreme Court discusses the latter question at some length. 71 A. Calif. Rep. 617, 622–625. And my view is that there was substantial compliance with *Witherspoon*. The case should be held.

No. 1313, Misc. *Coogler* v. *California*

Petitioner raises three questions. (1) The death penalty is more frequently imposed on blue collar workers than on white collar workers. 2. Execution by gas violates the Eighth Amendment. (3) A *Witherspoon* point.

As to *Witherspoon*, the claim is not substantial, as the juror made it plain that under no circumstances would she impose the death penalty. See Justice Tobrinder's treatment of the point in *People* v. *Coogler*, 71 A. Calif. Rep. 165, 185–188.

As to the discriminatory use of the death penalty, that point was not before the California Supreme Court. Its decision was May 28, 1969. The point is based on an

article in the June 1969 issue of the Stanford Law Review which purports to be a study of the California penalty jury in first-degree murder cases. It would require some doing to make this a "standards" issue.

We should deny this petition.

No. 1416, Misc. *Nye* v. *California*

Petitioner, by incorporating the petition for certiorari in No. 60, Misc., *Anderson* v. *California,* raises the "standards" issue. The other issues, including *Escobedo* and *Witherspoon,* do not seem substantial. The opinion of the Supreme Court is in 71 A. Calif. Rep. 376.

This case should be held.

No. 60, Misc. *Anderson* v. *California*

This case has both the "standards" issue and the *Witherspoon* issue.

On the latter the California Supreme Court agreed that *Witherspoon* was not satisfied as to *Satterfield* and *Anderson,* in a state habeas proceeding involving those two only. 65 Calif. 2d 613, 617 *et seq.* Three other petitioners—Talbot, Hines, and Beivelman—also claim a *Witherspoon* defect. An opinion only as respects Beivelman was filed. 70 Calif. 2d 60. As respects him and Talbot, I find no merit to the *Witherspoon* claim.

As respects Hines, the trial judge asked for a showing of hands of all jurors in the veniremen who "are opposed to the death penalty and have a state of mind that, under no circumstances, would they bring in a verdict of death." Eight jurors raised their hands and were excused. A ninth was excused as the eight were filing out of the room, after the following interchange:

JUROR: "May I be excused, too, your Honor?"

COURT: "For what reason?"

JUROR: "I have just sat and thought about it and felt that I would like to be excused."

While that, I think, was error, counsel for Hines did not object.

As respects all petitioners they claim that it was error for the trial court to deny petitioners an opportunity to make a massive evidentiary inquiry to show that the California system produces jurors who are prosecution prone. I do not think that was error.

The case should be held awaiting our ruling on "standards."

No. 1643, Misc. *Robles* v. *California*

This case involves only various aspects of *Witherspoon* including the right to an evidentiary hearing on the question whether the jury that convicted him was less than neutral on the issue of guilt. The trial preceded *Witherspoon* and the appeal was pending when *Witherspoon* was decided. The point is discussed by the California Supreme Court in 71 A. Calif. Rep. 966, 971 *et seq.* The point has no substance and we should deny certiorari.

No. 596, Misc. *Tolbert* v. *California*

There is a "standard" question raised. The main point concerns *Witherspoon*. The treatment of the point by the Supreme Court of California seems unexceptional. See the discussion, 76 Cal. Rep. 445, 454–457.

The points on *Witherspoon* raised in the petition ask for an enlargement of its rule, the argument being that a jury from which anyone is removed because of unwillingness to award the death penalty does not represent "the conscience of the community" because 50% of the people approve the death penalty.

I would not grant on this *Witherspoon* point. So the case should be held.

No. 400, Misc. *Hillery* v. *Nelson*

This is a federal habeas presenting no "standards" question. The case was here before for certiorari on direct review. We denied the petition. 389 U. S. 986.

The California Supreme Court's opinion is in 65 Cal. 2d 795.

The questions are not certworthy: (1) alleged misconduct of a juror; (2) the prejudice of the trial judge; (3) admission of evidence of prior bad conduct; (4) search of a car pursuant to a warrant alleged to have been issued without the necessary showing of probable cause; (5) denial of counsel until sixth day after the arrest and use of incriminating statements obtained. The guilt trial was before *Escobedo*. The second penalty trial took place after *Escobedo*.

The use of the evidence does not seem erroneous in light of *Jenkins* v. *Delaware*, 395 U. S. 213.

We should deny certiorari.

No. 895, Misc. *Hill* v. *California*

This case presents the "standards" question, and a *Witherspoon* question. The Supreme Court of California ruled on the *Witherspoon* issue saying that it read the record as indicating that the two jurors in question could not impose the death penalty irrespective of the evidence. 70 Adv. Cal. Rep. 723. I think that is a fair reading of the record. Petitioner wants an evidentiary hearing on whether or not exclusion of jurors opposed to the death penalty results in an unfair trial. I would not grant or remand on any of these *Witherspoon* points.

The case should therefore be held.

W. O. D.

April 20, 1970

Re: No. 13 - Maxwell v. Bishop

Dear Chief:

Referring to the Clerk's memorandum of this date, my preference would be to set the case for argument on Monday, May 4. However, if the sentiment among the Brethren favors either a late sitting on Thursday for a split Thursday-Friday argument, either of those courses would be agreeable to me.

Sincerely,

The Chief Justice

cc: The Conference

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C. 20543

April 20, 1970

MEMORANDUM TO THE CHIEF JUSTICE

RE: ARGUMENT IN MAXWELL v. BISHOP
No. 13, October Term, 1969

I have been instructed by the Court to provide for argument in the above case as soon as possible. The calendar is such that if it were set for the week of April 27, it would be reached very late on Thursday and would require that the Court sit overtime or that the argument be split.

I suggest that you may wish to set the case to be heard on May 4, the following Monday, immediately after opinions are handed down. If this is not convenient to any member of the Court, it may be possible that it can be set for some other day that week.

At your suggestion, I am circulating this memorandum to all members of the Court.

Respectfully submitted,

John F. Davis

Clerk

May 11, 1970

Re: No. 13 -- Maxwell v. Bishop

Dear Potter:

I join your Per Curiam, which, in light of what transpired at our Conference discussion, seems to me to be the proper disposition of the case.

Sincerely,

W. O. D.

Mr. Justice Stewart

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 12, 1970

RE: No. 13 - Maxwell v. Bishop

Dear Potter:

I agree with your Per Curiam in the above case.

Sincerely,

W.J.B. Jr.

Mr. Justice Stewart

cc: The Conference

Agree

SUPREME COURT OF THE UNITED STATES

No. 13.—October Term, 1969

William L. Maxwell, Petitioner, *v.* O. E. Bishop, Superintendent, Arkansas State Penitentiary.	On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[May —, 1970]

Per Curiam.

In 1962 the petitioner was found guilty of rape by an Arkansas jury without a verdict of life imprisonment, and the trial court imposed a sentence of death.[1] The Arkansas Supreme Court affirmed the judgment of conviction. 236 Ark. 694, 370 S. W. 2d 113. The petitioner then sought a writ of habeas corpus in the United States District Court for the Eastern District of Arkansas, claiming, among other things, that execution of the death sentence would deprive him of due process of law in that (1) the jury had determined the two issues of guilt or innocence and of a life or death sentence in a single proceeding, thereby precluding him from presenting evidence pertinent to the question of punishment without subjecting himself to self-incrimination on the issue of guilt; and (2) the jury had been given no

[1] At the time of the petitioner's trial Arkansas law provided only two alternative sentences upon conviction for rape:

"Ark. Stat. Ann. 41-3403. *Penalty for Rape.*—Any person convicted of the crime of rape shall suffer the punishment of death [or life imprisonment].

"Ark. Stat. Ann. 43-2153. *Capital cases—Verdict of life imprisonment.*—The jury shall have the right in all cases where the punishment is now death by law, to render a verdict of life imprisonment in the State penitentiary at hard labor."

pp. 1, 4

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[1] At the time of the petitioner's trial Arkansas law provided only two alternative sentences upon conviction for rape:

"*Penalty for rape.*—Any person convicted of the crime of rape shall suffer the punishment of death [or life imprisonment]." Ark. Stat. Ann. § 41-3403 (1964 Repl. Vol.).

"*Capital cases—Verdict of life imprisonment.*—The jury shall have the right in all cases where the punishment is now death by law, to render a verdict of life imprisonment in the State penitentiary at hard labor." Ark. Stat. Ann. § 43-2153 (1964 Repl. Vol.).

TO
GOW

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

May 26, 1970

MEMORANDUM TO THE CONFERENCE

At our Conference last Friday there seemed to be general agreement that we should announce the Court's Per Curiam opinion in Maxwell on Monday, June 1, and that on the same day we should announce the grant of certiorari in a case or cases presenting the original Maxwell claims. Accordingly, I requested the three law clerks who are engaged in reviewing the capital cases now pending to recommend the case or cases best presenting those issues. A copy of their memorandum is attached.

I assume that each of you will want to make an independent review of the law clerks' recommendations, on the basis of the individual memorandum on each case now in your office. We can then at our Conference on Thursday, May 28, discuss each of the four cases and decide whether to grant certiorari in one or more of them.

P.S.

P.S.

Dear Mr. Justice Stewart:

Pursuant to your directions on behalf of the Conference, we have studied the records in the cases now being held for Maxwell with a view to finding two cases presenting the Maxwell issues in a form appropriate for review by this Court. Our search has been guided by the following criteria: (i) the Maxwell issues should be presented by the record; (ii) they should have been properly raised below as well as in the petition for certiorari; (iii) there should not be other issues which make it possible for the Court to decide the case on other grounds; (iv) in at least one case, the question of standards should be presented without the issue of bifurcation. On the basis of these criteria, we recommend the following cases as suitable for a grant of certiorari to review the Maxwell issues:

No. 1783 Misc., Williams v. Cox, a petition from the denial of state collateral relief;

No. 486 Misc., McGautha v. California, a petition from the affirmance of conviction on direct appeal.

Alternatives would be:

No. 709 Misc., Crampton v. Ohio, a petition from the affirmance of conviction on direct appeal (standards and bifurcation);

No. 60 Misc., Anderson v. California, a petition from the denial of state collateral relief (standards only).

In the first case listed, No. 1783 Misc., Williams, both Maxwell issues are present and raised. Amsterdam is on the brief. In the second case, No. 486 Misc., McGautha, the trial was bifurcated, and therefore only the question of standards is at issue. No. 1783 Misc. is now being circulated and will be on the conference list for Thursday; No. 486 Misc. is presently being held for Maxwell.

Richard Cooper
Marshall Moriarty
Harry Rissetto

SUPREME COURT OF THE UNITED STATES

No. 13.—October Term, 1969

William L. Maxwell, Petitioner, *v.* O. E. Bishop, Superintendent, Arkansas State Penitentiary.	On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[June 1, 1970]

Per Curiam.

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May 11, 1970

Re: No. 13 - Maxwell v. Bishop

Dear Potter:

Please join me.

Sincerely,

H.L.B.

Mr. Justice Stewart

cc: Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

April 21, 1970

Re: No. 13 - Maxwell v. Bishop

Dear Chief:

While I would prefer John Harlan's suggestion of May 4, any day will be satisfactory with me.

Sincerely,

T.M.

The Chief Justice

cc: The Conference