

The Burger Court Opinion Writing Database

McGautha v. California

402 U.S. 183 (1971)

Paul J. Wahlbeck, George Washington University

James F. Spriggs, II, Washington University

Forrest Maltzman, George Washington University



70-205

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

CHAMBERS OF
THE CHIEF JUSTICE

August 18, 1970

Re: Tyler v. Washington

MEMORANDUM TO THE CONFERENCE:

I have Justice Douglas' memorandum of August 14 dictated by telephone to his office.

From what little is presented it appears the movant sought to present a Witherspoon question to the State Court but Justice Douglas is probably correct that this claim is merely allegation.

My impression was that the consensus at Conference was to "hold" all death cases until we had disposed of the issues defined in Maxwell and now set for McGautha and Crampton.

If a "polling" of the Conference were feasible I would refer the case to you but since that is not practicable except on an informal basis it seems to me the view of the Conference -- if I have evaluated it correctly -- dictates a stay in this case and I have so ordered.

WEB

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

CHAMBERS OF
THE CHIEF JUSTICE

April 13, 1971

Personal

No. 203 -- Dennis Councle McGautha, v. State of California

No. 204 -- James Edward Crampton, v. State of Ohio

Dear John:

Rather than make some comments orally I will put them in writing to facilitate your evaluation of my reactions to your opinion.

Generally I am in full accord with you and none of my points is earth-shaking.

(1) - For the reader it will help if your Part "A", page 2, is in some way identified as "McGautha's Guilt Trial." This would call for a "B" on page 4 beginning first full paragraph "McG's Penalty trial and your B on page 8 changed to "C" labelled "Crampton's Trial."

(2) - For me it would also help clarify what is necessarily a long opinion to add at the end of the last sentence page 7, perhaps as a new paragraph, something like this:

Two factors concerning McGautha's trial warrant mention: first, the meticulous charge of the trial judge part of which is quoted on pages 5 and 6 of this opinion; the second is the discriminating verdict of the jury distinguishing between the relative culpability of McGautha and Wilkinson, the co-defendant. Although the law of Ohio and the instruction of the judge permitted a death penalty for Wilkinson, the jury, believing him less blameworthy, failed to vote the extreme penalty. That the jury was able to make this choice is not insignificant as a factor undermining the claimed need for standards, apart from any constitutional command to that end.

(3) - It would also help sort out the two cases if after the first full paragraph, page 8, line four a "reminder" along the following lines were inserted.

As we have noted, Crampton's guilt and the penalty were determined in a single unitary proceeding. Crampton claims a constitutional right to separate trials on the issues of guilt and penalty, along with standards to guide the jury in fixing the penalty.

(4) - Under Part II page 12, final sentence on that page, 'I feel that sentence perhaps gives too much credit to the contention. There is indeed a superficial or surface appeal to the claim for standards but as a constitutional claim it is for me essentially a plausible claim for what might arguably be a better system. Our problem is a constitutional one, of course, and while we seem frequently -- and sometimes correctly -- to give short shrift to 183 years of history and experience, it would take much more than the arguments presented to lift this claim above plausibility.

For my part, I would insert "surface" between "undeniable" and "appeal" at the end of page 12 and then add something along these lines.

We must bear in mind, at the outset, that our function is not to construct a better system of justice for the state but narrowly to decide whether a capital verdict without standards for the jury's choice is a violation of federal due process.

(5) - After the first paragraph concluded at top of page 23 something along these lines would fill in the contours of the discussion:

We must assume that jurors confronted with the truly "awesome responsibility" of decreeing death for a fellow human will discuss a variety of factors, many of which will have been suggested by the evidence or by the arguments of defense counsel. No one suggests defense counsel is restricted in what factors he may advance. For a court to attempt to catalog the appropriate factor in this elusive area could inhibit rather than expand the scope of consideration. No list of considerations or standards would ever be really

"complete" and in the arguments in this case counsel conceded as much. The infinite variety of cases and facets to each case would make general standards either meaningless "boiler plate" or a statement of the obvious which no jury would need.

(6) - Finally, your reference in Part IV, page 36, 12th line to "American criminology" might more pointedly be "of the 'infant science' of criminology." It surely is "infant" and perhaps more accurately "embryo."

The final sentence, page 37, could usefully insert, after the word "task"

"of measuring the state's process by federal Constitutional standards"

Having said all this I must add that your opinions in these two difficult cases are painstaking and comprehensive in a high degree. Most of what I suggest simply rounds out the contours for me. If for any reason you would prefer my stating these thoughts separately, I will do so. I venture these ideas to you because of my profound aversion to multiple opinions.

Regards,

W. B.

Mr. Justice Harlan

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

CHAMBERS OF
THE CHIEF JUSTICE

April 22, 1971

Re: No. 203 - McGautha v. California
No. 204 - Crampton v. Ohio

Dear John:

I concur in the above.

Regards,

W. B.

Mr. Justice Harlan

cc: The Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

#203-4

Dear John

I heartily join
in your revised opinion
as I did in the original.

I have no thought of you
writing anything.

have a powerful
opinion on a very
difficult subject.

Regards

WEB

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackman

1st DRAFT

SUPREME COURT OF THE UNITED STATES

From: Black, MAR 4 1971
Nos. 203 & 204.—OCTOBER TERM, 1970
Circulated: _____

[March —, 1971]

MR. JUSTICE BLACK, concurring.

I concur in the Court's judgment and in substantially all of its opinion. However, in my view, this Court's task is not to determine whether the petitioners' trials were "fairly conducted." *Ante*, at ___. The Constitution grants this Court no power to reverse convictions because of our personal beliefs that state criminal procedures are "unfair," "arbitrary," "capricious," "unreasonable," or "shocking to our conscience." See, e. g., *Rochin v. California*, 342 U. S. 165, 174 (1952) (BLACK, J., concurring); *United States v. Wade*, 388 U. S. 218, 243 (1967) (BLACK, J., dissenting and concurring). Our responsibility is rather to determine whether petitioners have been denied rights expressly or impliedly guaranteed by the Federal Constitution as written. I agree with the Court's conclusions that the procedures employed by California and Ohio to determine whether capital punishment shall be imposed do not offend the Due Process Clause of the Fourteenth Amendment. Likewise, I do not believe that petitioners have been deprived of any other right explicitly or impliedly guar-

70-263

Supreme Court of the United States

Washington 25, D. C.

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

Goose Prairie, Washington
August 14, 1970

MEMORANDUM TO THE CONFERENCE:

I denied a stay in a death case -- Tyler v. Washington -- execution set for August 25, 1970.

Not a shadow of a Witherspoon question was presented. The questions of standards and bifurcation do not seem to be in the case. He presses hard the constitutionality of the death sentence a question we did not even set for argument. The questions raised seemed to me to be state questions.

I denied without prejudice as I realize some may think that every death case should be held for McGautha. ⁷⁰³ But I am of the contrary view, though I respect the opposed position.

I am circulating this note so that you may be advised of what is coming your way.

William O. Douglas

The Chief Justice
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

Reid

7
6th DRAFT

Wos
Cin
27.6.71

SUPREME COURT OF THE UNITED STATES

No. 204.—OCTOBER TERM, 1970

James Edward Crampton,
Petitioner,
v.
State of Ohio: } On Writ of Certiorari to the
Supreme Court of Ohio.

[March —, 1971]

MR. JUSTICE DOUGLAS, dissenting.

In my view the unitary trial which Ohio provides in first-degree murder cases does not satisfy the requirements of procedural due process under the Fourteenth Amendment.

Ohio makes first-degree murder punishable by death "unless the jury trying the accused recommends mercy, in which case the punishment shall be imprisonment for life." Rev. Code § 2901.01. Petitioner was indicted and tried for murder in the first degree for the killing of his wife. His pleas were "not guilty" and "not guilty by reason of insanity."

The court, after a psychiatric examination, concluded that petitioner was sane and set the case for trial before a jury. The issues of guilt, punishment and insanity were simultaneously tried and submitted to the jury.

Petitioner did not testify at the trial. But a psychiatrist testified on his behalf, offering medical records of his case from two state hospitals. His mother testified concerning his childhood, education, and background.

On the issue of punishment the jury was charged:

"You must not be influenced by any consideration of *sympathy* or *prejudice*. It is your duty to carefully weigh the evidence, to decide all disputed questions of fact, to apply the instructions of the court to your finding, and to render your verdict

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

Rechin

8th

7th DRAFT

WOD
Rec'd
3/1/71

SUPREME COURT OF THE UNITED STATES

No. 204.—OCTOBER TERM, 1970

James Edward Crampton,
Petitioner,
v.
State of Ohio. } On Writ of Certiorari to the
Supreme Court of Ohio.

[March —, 1971]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN concurs, dissenting.

In my view the unitary trial which Ohio provides in first-degree murder cases does not satisfy the requirements of procedural due process under the Fourteenth Amendment.

Ohio makes first-degree murder punishable by death "unless the jury trying the accused recommends mercy, in which case the punishment shall be imprisonment for life." Rev. Code § 2901.01. Petitioner was indicted and tried for murder in the first degree for the killing of his wife. His pleas were "not guilty" and "not guilty by reason of insanity."

The court, after a psychiatric examination, concluded that petitioner was sane and set the case for trial before a jury. The issues of guilt, punishment and insanity were simultaneously tried and submitted to the jury.

Petitioner did not testify at the trial. But a psychiatrist testified on his behalf, offering medical records of his case from two state hospitals. His mother testified concerning his childhood, education, and background.

On the issue of punishment the jury was charged:

"You must not be influenced by any consideration of sympathy or prejudice. It is your duty to carefully weigh the evidence, to decide all disputed questions of fact, to apply the instructions of the

ws

Received

Deck Copy
Recd

974
2nd DRAFT

3-3

SUPREME COURT OF THE UNITED STATES

No. 204.—OCTOBER TERM, 1970

James Edward Crampton,
Petitioner,
v.
State of Ohio. } On Writ of Certiorari to the
Supreme Court of Ohio.

[March —, 1971]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN concurs, dissenting.

In my view the unitary trial which Ohio provides in first-degree murder cases does not satisfy the requirements of procedural due process under the Fourteenth Amendment.

Ohio makes first-degree murder punishable by death "unless the jury trying the accused recommends mercy, in which case the punishment shall be imprisonment for life." Rev. Code § 2901.01. Petitioner was indicted and tried for murder in the first degree for the killing of his wife. His pleas were "not guilty" and "not guilty by reason of insanity."

The court, after a psychiatric examination, concluded that petitioner was sane and set the case for trial before a jury. The issues of guilt, punishment and insanity were simultaneously tried and submitted to the jury.

Petitioner did not testify at the trial. But a psychiatrist testified on his behalf, offering medical records of his case from two state hospitals. His mother testified concerning his childhood, education, and background.

On the issue of punishment the jury was charged:

"You must not be influenced by any consideration of *sympathy or prejudice*. It is your duty to carefully weigh the evidence, to decide all disputed questions of fact, to apply the instructions of the

ω0

1
Rec'd

W.D.
Rec'd
3/4/71

1070
8th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 204.—OCTOBER TERM, 1970

James Edward Crampton, Petitioner,
v. State of Ohio. } On Writ of Certiorari to the
Supreme Court of Ohio.

~~AMPT~~

[March —, 1971]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL concur, dissenting.

In my view the unitary trial which Ohio provides in first-degree murder cases does not satisfy the requirements of procedural due process under the Fourteenth Amendment.

Ohio makes first-degree murder punishable by death "unless the jury trying the accused recommends mercy, in which case the punishment shall be imprisonment for life." Rev. Code § 2901.01. Petitioner was indicted and tried for murder in the first degree for the killing of his wife. His pleas were "not guilty" and "not guilty by reason of insanity."

The court, after a psychiatric examination, concluded that petitioner was sane and set the case for trial before a jury. The issues of guilt, punishment and insanity were simultaneously tried and submitted to the jury.

Petitioner did not testify at the trial. But a psychiatrist testified on his behalf, offering medical records of his case from two state hospitals. His mother testified concerning his childhood, education, and background.

On the issue of punishment the jury was charged:

"You must not be influenced by any consideration of sympathy or prejudice. It is your duty to carefully weigh the evidence, to decide all disputed questions of fact, to apply the instructions of the

file
Recd
4-23

10th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 204.—OCTOBER TERM, 1970

James Edward Crampton,
Petitioner,
v.
State of Ohio. } On Writ of Certiorari to the
Supreme Court of Ohio.

[May —, 1971]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL concur, dissenting.

In my view the unitary trial which Ohio provides in first-degree murder cases does not satisfy the requirements of procedural due process under the Fourteenth Amendment.

Ohio makes first-degree murder punishable by death "unless the jury trying the accused recommends mercy, in which case the punishment shall be imprisonment for life." Rev. Code § 2901.01. Petitioner was indicted and tried for murder in the first degree for the killing of his wife. His pleas were "not guilty" and "not guilty by reason of insanity."

The court, after a psychiatric examination, concluded that petitioner was sane and set the case for trial before a jury. The issues of guilt, punishment and insanity were simultaneously tried and submitted to the jury.

Petitioner did not testify at the trial. But a psychiatrist testified on his behalf, offering medical records of his case from two state hospitals. His mother testified concerning his childhood, education, and background.

On the issue of punishment the jury was charged:

"You must not be influenced by any consideration of sympathy or prejudice. It is your duty to carefully weigh the evidence, to decide all disputed questions of fact, to apply the instructions of the

WD

Heim

12

4th DRAFT

Desk Copy
Recd
4-27

SUPREME COURT OF THE UNITED STATES

No. 204.—OCTOBER TERM, 1970

James Edward Crampton,
Petitioner,
v.
State of Ohio. } On Writ of Certiorari to the
Supreme Court of Ohio.

[May —, 1971]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL concur, dissenting.

In my view the unitary trial which Ohio provides in first-degree murder cases does not satisfy the requirements of procedural due process under the Fourteenth Amendment.

Ohio makes first-degree murder punishable by death "unless the jury trying the accused recommends mercy, in which case the punishment shall be imprisonment for life." Rev. Code § 2901.01. Petitioner was indicted and tried for murder in the first degree for the killing of his wife. His pleas were "not guilty" and "not guilty by reason of insanity."

The court, after a psychiatric examination, concluded that petitioner was sane and set the case for trial before a jury. The issues of guilt, punishment and insanity were simultaneously tried and submitted to the jury.

Petitioner did not testify at the trial. But a psychiatrist testified on his behalf, offering medical records of his case from two state hospitals. His mother testified concerning his childhood, education, and background.

On the issue of punishment the jury was charged:

"You must not be influenced by any consideration of *sympathy or prejudice*. It is your duty to carefully weigh the evidence, to decide all disputed questions of fact, to apply the instructions of the

W.B.

Dusk Copy
Recd 4-28

12th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 204.—OCTOBER TERM, 1970

James Edward Crampton, Petitioner, v. State of Ohio. } On Writ of Certiorari to the Supreme Court of Ohio.

[May 1971]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL concur, dissenting.

In my view the unitary trial which Ohio provides in first-degree murder cases does not satisfy the requirements of procedural due process under the Fourteenth Amendment.

Ohio makes first-degree murder punishable by death "unless the jury trying the accused recommends mercy, in which case the punishment shall be imprisonment for life." Rev. Code § 2901.01. Petitioner was indicted and tried for murder in the first degree for the killing of his wife. His pleas were "not guilty" and "not guilty by reason of insanity."

The court, after a psychiatric examination, concluded that petitioner was sane and set the case for trial before a jury. The issues of guilt, punishment and insanity were simultaneously tried and submitted to the jury.

Petitioner did not testify at the trial. But a psychiatrist testified on his behalf, offering medical records of his case from two state hospitals. His mother testified concerning his childhood, education, and background.

On the issue of punishment the jury was charged:

"You must not be influenced by any consideration of sympathy or prejudice. It is your duty to carefully weigh the evidence, to decide all disputed questions of fact, to apply the instructions of the

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

13th DRAFT

SUPREME COURT OF THE UNITED STATES

Young: Douglas, J.

No. 204.—OCTOBER TERM, 1970

James Edward Crampton, Petitioner, v. State of Ohio. } Recited On Writ of Certiorari to the Supreme Court of Ohio.

4/29/21

[May 3, 1971]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL concur, dissenting.

In my view the unitary trial which Ohio provides in first-degree murder cases does not satisfy the requirements of procedural Due Process under the Fourteenth Amendment.

Ohio makes first-degree murder punishable by death "unless the jury trying the accused recommends mercy, in which case the punishment shall be imprisonment for life." Ohio Rev. Code § 2901.01. Petitioner was indicted and tried for murder in the first degree for the killing of his wife. His pleas were "not guilty" and "not guilty by reason of insanity."

The court, after a psychiatric examination, concluded that petitioner was sane and set the case for trial before a jury. The issues of guilt, punishment and insanity were simultaneously tried and submitted to the jury.

Petitioner did not testify at the trial. But a psychiatrist testified on his behalf, offering medical records of his case from two state hospitals. His mother testified concerning his childhood, education, and background.

On the issue of punishment the jury was charged:

"You must not be influenced by any consideration of sympathy or prejudice. It is your duty to carefully weigh the evidence, to decide all disputed questions of fact, to apply the instructions of the

3rd DRAFT

2.21

SUPREME COURT OF THE UNITED STATES

Nos. 203 & 204.—OCTOBER TERM, 1970

Dennis Councle McGautha, Petitioner, 203 v. State of California.	On Writ of Certiorari to the Supreme Court of California.
James Edward Crampton, Petitioner, 204 v. State of Ohio.	On Writ of Certiorari to the Supreme Court of Ohio.

[March —, 1971]

MR. JUSTICE HARLAN delivered the opinion of the Court.

Petitioners McGautha and Crampton were convicted of murder in the first degree in the courts of California and Ohio respectively and sentenced to death pursuant to the statutes of those States. In each case the decision whether the defendant should live or die was left to the absolute discretion of the jury. In McGautha's case the jury, in accordance with California law, determined punishment in a separate proceeding following the trial on the issue of guilt. In Crampton's case, in accordance with Ohio law, the jury determined guilt and punishment after a single trial and in a single verdict. We granted certiorari in the *McGautha* case limited to the question whether petitioner's constitutional rights were infringed by permitting the jury to impose the death penalty without any governing standards. 398 U. S. 936 (1970). We granted certiorari in the *Crampton* case limited to that same question and to the further question whether the

April 21, 1971

Re: Nos. 203 and 204 - McGautha, Crampton

Dear Chief:

As you will see from the enclosed recirculation in these cases, I have adopted in substance almost all the changes proposed in your letter of April 13, although with some alterations in phrasing or placement. I decided not to modify the opinion to refer to the excellence of the charge in McGautha's case and to the absence of any restriction on argument by defense counsel in either case. Nothing in the opinion turns on either point, and I feared that explicit reference to them by the Court might unnecessarily invite future attempts to distinguish these cases. This danger, of course, would not be presented by discussion in a concurring opinion on your part, should you still feel constrained to make such observations separately.

I hope that you may find the changes made in this circulation acceptable, and am obliged to you for the suggestions which I think have improved the opinion.

Sincerely,

JMH

The Chief Justice

CHANGES THROUGHOUT. MAJOR CHANGES AT 4, 12, 18, 24, 38 + APPENDIX.

4th DRAFT

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

SUPREME COURT OF THE UNITED STATES

From: Harlan, J.

Nos. 203 & 204.—OCTOBER TERM, 1970 Circulated:

Dennis Councle McGautha, Petitioner, 203 v. State of California. } On Writ of Certiorari to the Supreme Court of California. Recircu

[April —, 1971]

MR. JUSTICE HARLAN delivered the opinion of the Court.

Petitioners McGautha and Crampton were convicted of murder in the first degree in the courts of California and Ohio respectively and sentenced to death pursuant to the statutes of those States. In each case the decision whether the defendant should live or die was left to the absolute discretion of the jury. In McGautha's case the jury, in accordance with California law, determined punishment in a separate proceeding following the trial on the issue of guilt. In Crampton's case, in accordance with Ohio law, the jury determined guilt and punishment after a single trial and in a single verdict. We granted certiorari in the *McGautha* case limited to the question whether petitioner's constitutional rights were infringed by permitting the jury to impose the death penalty without any governing standards. 398 U. S. 936 (1970). We granted certiorari in the *Crampton* case limited to that same question and to the further question whether the

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

THE LIBRARY OF CONGRESS

STYLISTIC CHANGES THROUGHOUT. SEE PAGES: 24, 28, 31, 33, 35

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

5th DRAFT

SUPREME COURT OF THE UNITED STATES

From: Harlan, J.

Nos. 203 & 204.—OCTOBER TERM, 1970

Circulated:

APR 27 1971

[May —, 1971]

MR. JUSTICE HARLAN delivered the opinion of the Court.

Petitioners McGautha and Crampton were convicted of murder in the first degree in the courts of California and Ohio respectively and sentenced to death pursuant to the statutes of those States. In each case the decision whether the defendant should live or die was left to the absolute discretion of the jury. In McGautha's case the jury, in accordance with California law, determined punishment in a separate proceeding following the trial on the issue of guilt. In Crampton's case, in accordance with Ohio law, the jury determined guilt and punishment after a single trial and in a single verdict. We granted certiorari in the *McGautha* case limited to the question whether petitioner's constitutional rights were infringed by permitting the jury to impose the death penalty without any governing standards. 398 U. S. 936 (1970). We granted certiorari in the *Crampton* case limited to that same question and to the further question whether the

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 1, 1971

RE: Nos. 203 & 204 - McGautha v. California
Crampton v. Ohio

Dear John:

While I am joining Bill Douglas' dissent in Crampton, I am going to write separately on the standards issue in both cases. I had hoped I could rest on what I circulated two years ago but, in light of your treatment, I think I'll have substantially to expand what I then said.

I regret having to hold you up but I hope you'll bear with me if this should take me a little time.

Sincerely,



W.J.B. Jr.

Mr. Justice Harlan

cc: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 1, 1971

RE: No. 204 - Crampton v. Ohio

Dear Bill:

This is just formally to ask you to
join me in your dissent in the above.

Sincerely,



W.J.B. Jr.

Mr. Justice Douglas

cc: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 31, 1971

203 & 204

Dear Chief:

My notes of the conference of March 26 indicate that one of the McGautha cases, No. 5025 - Schneble v. Florida was to be relisted for discussion Friday, April 2. It is not included in the list just circulated for that conference. Is my record in error?

Sincerely,

Bill
W.J.B. Jr.

The Chief Justice

cc: The Conference

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

1st DRAFT

SUPREME COURT OF THE UNITED STATES

From: Brennan, J.

Nos. 203 & 204.—OCTOBER TERM, 1970 Circulated: 4-20-71

Recd

Dennis Councle McGautha, Petitioner, 203 v. State of California. } On Writ of Certiorari to the Supreme Court of California.

James Edward Crampton,
Petitioner,
204 v. On Writ of Certiorari to the
State of Ohio. Supreme Court of Ohio.

[April —, 1971]

MR. JUSTICE BRENNAN, dissenting.

These cases test the viability of principles whose roots draw strength from the very core of the Due Process Clause. The question which petitioners present for our decision is whether the rule of law, basic to our society and binding upon the States by virtue of the Due Process Clause of the Fourteenth Amendment, is fundamentally inconsistent with capital sentencing procedures that are purposely constructed to allow the maximum possible variation from one case to the next, and provide no mechanism to prevent that consciously maximized variation from reflecting merely random or arbitrary choice. The Court does not, however, come to grips with that fundamental question. Instead, the Court misapprehends petitioners' argument and deals with the cases as if petitioners contend that due process requires capital sentencing to be carried out under predetermined standards so precise as to be capable of purely mechanical application, entirely eliminating any vestiges of flexibility or discretion in their use. This misapprehended question is then treated in the context of the Court's assumption

WD

1, 2, 13, 17, 57, 61-63

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Stewart
Mr. Justice White
 Mr. Justice Marshall
Mr. Justice Blackmun

2nd DRAFT

From: Brennan, J.

SUPREME COURT OF THE UNITED STATES.

Circulated: _____

Nos. 203 & 204.—OCTOBER TERM, 1970 Recirculated: 4-29-71

James Edward Crampton,
Petitioner,
204 v. On Writ of Certiorari to the
State of Ohio. Supreme Court of Ohio.

[May —, 1971]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, dissenting.

These cases test the viability of principles whose roots draw strength from the very core of the Due Process Clause. The question which petitioners present for our decision is whether the rule of law, basic to our society and binding upon the States by virtue of the Due Process Clause of the Fourteenth Amendment, is fundamentally inconsistent with capital sentencing procedures that are purposely constructed to allow the maximum possible variation from one case to the next, and provide no mechanism to prevent that consciously maximized variation from reflecting merely random or arbitrary choice. The Court does not, however, come to grips with that fundamental question. Instead, the Court misapprehends petitioners' argument and deals with the cases as if petitioners contend that due process requires capital sentencing to be carried out under predetermined standards so precise as to be capable of purely mechanical application, entirely eliminating any vestiges of flexibility or discretion in their use. This misapprehended question is then treated in the context of the Court's assumption

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

BERS OF
TER STEWART

February 26, 1971

203 & 204 -- McGautha v. California

Dear John,

I am glad to join your excellent opinion for the Court in these cases.

Sincerely yours,

P.S.

Mr. Justice Harlan

Copies to the Conference

March 10, 1971

Re: Nos. 203 & 204 - McGautha v.
California

Dear John:

Please join me.

Sincerely,

B.R.W.

Mr. Justice Harlan

cc: Conference



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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 3, 1971

Re: No. 204 - Crampton v. Ohio

Dear Bill:

Please join me in your dissent.

Sincerely,


T.M.

Mr. Justice Douglas

cc: The Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

April 27, 1971

Re: Nos. 203 & 204 - McGautha v. California
Crampton v. Ohio

Dear Bill:

Please join me in your dissent.

Sincerely,


T.M.

Mr. Justice Brennan

cc: The Conference

March 5, 1971

SR RL
Re: No. 203 - McCaugha v. California
No. 204 - Crampton v. Ohio

Dear John:

Please join me in your fine and careful
opinion for these cases.

Sincerely,

H. A. B.

Mr. Justice Mariano

cc: The Conference

June 17, 1971

MEMORANDUM TO THE CONFERENCE

Re: No. 203 - McGautha v. California
No. 204 - Crampton v. Ohio

We are holding petitions for rehearing in these two capital cases.

Mr. Redak points out to me that under our Rule 59.2, when a petition for rehearing is not acted upon prior to adjournment, the mandate will not be stayed unless specifically so ordered by the Court or a Justice. If it is important that the mandates in these two cases not issue for the time being, an order to that effect should be entered.

H. A. B.

WB