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DOES NEW YORK'S DEATH PENALTY STATUTE VIOLATE THE NEW YORK CONSTITUTION?

Hon. Stewart F. Hancock, Jr.
Christopher Quinn
Professor Richard D. Klein

Judge Lawrence Brennan:

Good afternoon. I am Judge Lawrence Brennan from the Nassau County Family Court, which has no jurisdiction in death penalty cases, which makes me a perfect moderator. Until the reinstatement of the death penalty in New York, there were only three classes of people in our society that had the right to take life; soldiers in time of war, police personnel and physicians, and only under very controlled circumstances. Once again, that power has now been given to juries under the jurisdiction of judges.

Our first speaker is going to be Judge Stewart Hancock, who is a retired Judge of the New York State Court of Appeals, for which he served eight years through 1993. Prior to that, he served nine years in the Appellate Division, Fourth Department; and prior to that six years in the Supreme Court. He was the senior partner of Hancock & Estabrook in Syracuse, as well as the Corporation Counsel for the City of Syracuse for two years. He is also a renowned lecturer and author and extensively involved at this stage of his career as counsel to his former firm in arbitration and mediation. He is also the distinguished jurist in residence at Syracuse University School of Law.

Christopher Quinn, our next speaker, is the Deputy Attorney General in charge of the criminal division. He is a graduate of the Long Island University C.W. Post College and Union College Albany Law School. He is in charge of the division that is equivalent in scope and comparable to any United States Attorney or District Attorney in the State of New York. He supervises all the criminal and Medicaid prosecutions, drug prosecutions, and

of course, he is responsible for the capital program concerning the death penalty, which is why he is here today. Mr. Quinn was also for ten years the law secretary to County Court Judge Donald Belfi. You may remember him as the judge who presided over the Colin Ferguson trial. Before that, he was in the law departments of both the county court and district courts in Nassau County and was in private practice as a civil negligence lawyer for O'Connor & Hayes.

Our commentator, Professor Richard Klein, has his Bachelor's from Wisconsin University, his Master's and Ph.D. in International Affairs from Columbia, and his J.D. from Harvard. Prior to becoming a Professor of Law at Touro, he was in charge of the Director of the Criminal Justice Program at Hofstra University School of Law, the senior trial attorney in the criminal division for the Legal Aid Society in New York City. He has published scores of articles. He is a frequent lecturer. Of particular interest today is one of his more recent articles entitled "Constitutional Concerns About Capital Punishment, The Death Penalty Statutes in New York State," which was published by the Journal of the Suffolk Academy of Law in 1996. I thank you for your attention. I am going to ask Judge Hancock if he would please come up to commence his presentation. Thank you.

Judge Hancock:

Thank you very much, Larry, and members of this very interesting symposium that we are having here. Judge Lazer, I was very interested in your comment about Judge Ciparick's dissenting from her own majority opinion. After listening to the comments about some of the cases that the New York Court of Appeals has handed down in recent years, many of which I wrote the opinions for, I think that perhaps I should have gone both ways on those, too. A good way to be sure you are right is to write the opinion and then dissent from it. As a matter of fact, Judge Simons and I did that many years ago in a case named *CPC International, Inc. v. McKesson Corp.*¹

So there is a precedent for it, and there is also another very interesting precedent which you may or may not know about, the case of *McCleskey v. Kemp*.² This five to four decision upheld the Georgia Death Penalty Statute in 1987 against dissents written

¹ 70 N.Y.2d 268, 514 N.E.2d 116, 579 N.Y.S.2d 804 (1987). In *CPC*, the Court of Appeals held that there was "no implied private cause of action" for securities fraud under state and federal antifraud statutes. *Id.* at 275, 514 N.E.2d at 118, 579 N.Y.S.2d at 806. Judge Hancock wrote the majority opinion, but he and Judge Simons disagreed with the majority, arguing that the legislative intent of the state antifraud statute was "not to grant various powers to the Attorney General," but to deter securities fraud. *Id.* at 277, 514 N.E.2d at 119, 579 N.Y.S.2d at 807. Judges Hancock and Simons stated that they would find "an implied private cause of action that broadens the statutory purpose." *Id.*

² 481 U.S. 279 (1987). In *McCleskey*, a black defendant was convicted in Georgia state court of the murder of a white police officer. *Id.* at 283. In the sentencing phase, the jury found two aggravating factors to warrant the sentence of death, that it was committed during another felony, and that it was committed against a police officer on duty. *Id.* at 284-85. The Georgia Supreme Court affirmed his conviction and sentence. *Id.* at 285. He filed a writ for habeas corpus in Federal District Court, and cited a study prepared by Professors David C. Baldus and other scholars. This study claimed to demonstrate a disparity in the application of the death penalty "based on the race of the murder victim, and, to a lesser extent, the race of the defendant." *Id.* at 286.

by Justice Brennan,³ and Justice Blackmun,⁴ based on the Eighth Amendment⁵ and the Equal Protection Clause of the Fourteenth Amendment.⁶ Justice Powell wrote the majority opinion,⁷ and he

³ *Id.* at 320-45 (Brennan, J., dissenting). Justice Brennan argued that the Baldus study was accurate, and that the death sentence violated the Eighth and Fourteenth Amendments. *Id.* at 320 (Brennan, J., dissenting). He asserted that "a system that features a significant probability that sentencing decisions are influenced by impermissible considerations cannot be regarded as rational. *Id.* at 323 (Brennan, J., dissenting). The Baldus study, in his view, indicated that once several nonracial factors were considered, the jury was more likely to have spared the defendant's life if his victim had been black. *Id.* at 325 (Brennan, J., dissenting).

⁴ *Id.* at 345-65 (Blackmun, J., dissenting). Justice Blackmun admonished the majority for departing from "well-developed constitutional jurisprudence." *Id.* at 345 (Blackmun, J., dissenting).

⁵ U.S. CONST. amend. VIII. This amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *Id.*

⁶ U.S. CONST. amend. XIV, § 1. This amendment requires that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." *Id.*

⁷ *McCleskey*, 481 U.S. at 282-320. The Court, per Justice Powell, held that *McCleskey* had no standing to argue that the Fourteenth Amendment's Equal Protection Clause had been violated, because the Baldus study he offered, though it cited evidence of racial disproportion in the application of the death penalty, did not prove that he was discriminated against personally on the basis of race. *Id.* at 292-93. His own expert testified that the statistics of the Baldus study only stated that murderers of white victims were more likely to receive the death penalty on the average. *Id.* at 293 n.11. The majority also rejected the argument that the study alone gave rise to an inference of discriminatory intent, because death penalty verdicts are handed down by a different jury in each trial, and that jury must decide the sentence based on many factors that vary according to the particular defendant. *Id.* at 293-94. The Court held that prosecutors should not have to account for their "wide discretion" by explaining their reasons for seeking the death penalty. *Id.* at 296. The majority went on to reject *McCleskey*'s Eighth Amendment argument, because capital punishment was not considered "cruel and unusual punishment" by contemporary standards. *Id.* at 300. This issue had already been decided in *Gregg v. Georgia*, 428 U.S. 153 (1976), where the Court held that the death penalty was part of Anglo-American legal tradition. *McCleskey*, 481 U.S. at 301. Additionally, the essence of federalism was to let a state legislature determine its own penalty, and therefore the death penalty for murder was not unconstitutional. *Id.* at 301-02 (citing *Gregg*, 428 U.S. at 186-97). Lastly,

has recently declared publicly in his memoirs that if he were to hear *McCleskey v. Kemp* again, he would vote the other way with the dissenters.⁸ So there is precedent for it.

The New York State Death Penalty Statute⁹ was adopted on September 1, 1995.¹⁰ There are numerous bases for constitutional attacks on this statute. I will enumerate a few of them. Obviously, one is that the statute offends the Cruel and Unusual Clause of the Eighth Amendment of the United States Constitution¹¹ and Article I, section 5 of the New York State Constitution.¹² The argument there is that the punishment is inhumane, ghoulish, unbearably cruel, and that it offends contemporary standards of human decency. There is another basic argument that death as a punishment is disproportionate, and there are cases that would back that up.¹³

since *Gregg* was decided, death penalty statutes have been limited so as to bifurcate the jury, require the jury to find at least one aggravating circumstance before imposing the death penalty, and allow for the defendant to introduce any mitigating circumstances to persuade the jury not to impose it. *McCleskey*, 481 U.S. at 302 (citing *Gregg*, 428 U.S. at 163-64). Moreover, the Georgia statute at issue was amended to provide for an automatic appeal. *McCleskey*, 481 U.S. at 303. Lastly, there was "a required threshold below which the death penalty [could] not be imposed." *Id.* at 305.

⁸ JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 451-52 (1994). In an interview with his former clerk, Justice Powell expressed regret for his ruling, and stated that he felt the death penalty was unconstitutional as a matter of law. *Id.* at 451. Justice Powell also stated that death penalty was useless, and could not be fairly enforced. *Id.* at 452.

⁹ N.Y. PENAL LAW § 60.06 (McKinney 1995).

¹⁰ 1995 N.Y. Laws ch. 1, § 2 (1995).

¹¹ U.S. CONST. amend. VIII, § 2.

¹² N.Y. CONST. art. I, § 5.

¹³ See *Payne v. Tennessee*, 501 U.S. 808 (1991). In *Payne*, the Court held that the Eighth Amendment places certain limits on a state's imposition of the death penalty. *Id.* at 824. There is a "threshold below which the death penalty cannot be imposed," meaning that it cannot be imposed for any other crime but first degree murder. *Id.* (citing *McCleskey v. Kemp*, 481 U.S. 279, 305-06 (1987)). Additionally, "a societal consensus that the death penalty is disproportionate to a particular offense prevents a state from imposing the death penalty for that offense." *Payne*, 501 U.S. at 824. See also *Richmond v. Lewis*, 506 U.S. 40 (1992). In *Richmond*, the Court held that Arizona's "especially heinous, cruel, or depraved" aggravating factor was facially

There is also a basis for a due process attack on the Death Penalty Statute. It offends fundamental rights, such as the right to life and the right not to be sentenced to death arbitrarily or capriciously. Because it offends those fundamental rights, the state must show a compelling interest and it must also show that its means of fulfilling that compelling interest are the least restrictive. The argument, of course, is that there are ways of achieving the accepted justifications for punishment other than executing the defendant.

The other two attacks on the statute are *the United States v. Jackson*¹⁴ issue, and the *McCleskey v. Kemp*¹⁵ issue. First, *United States v. Jackson*. As you probably all know, the only way that a defendant may be convicted of first-degree murder in New York under this new Death Penalty Statute¹⁶ is by a jury verdict.¹⁷ There are two steps to the trial. First is the guilt phase.¹⁸ If the defendant is found guilty, then the punishment phase begins, and

vague, so the sentencing judge contravened the Eighth Amendment in considering it. *Id.* at 47-48; *Graham v. Collins*, 506 U.S. 461 (1993). In *Graham*, the Court cited *Furman v. Georgia*, 408 U.S. 238 (1972), to demonstrate the competing ends of the Eighth Amendment that the Court had tried to reconcile. *Graham*, 506 U.S. at 468. States must control the discretion allotted to judges and juries to ensure the death sentences are not given out randomly, but states must also give the sentencer enough discretion to take account of defendant's character and circumstances. *Id.*

¹⁴ 390 U.S. 570 (1967).

¹⁵ 481 U.S. 279 (1987).

¹⁶ N.Y. PENAL LAW § 60.06 (McKinney 1995). This statute provides:

When a person is convicted of murder in the first degree . . . the court shall, in accordance with the provisions of section 400.27 of the criminal procedure law, sentence the defendant to death, to life imprisonment without parole . . . or to a term of imprisonment for a class A-1 felony other than a sentence of life imprisonment

Id.

¹⁷ N.Y. CRIM. PROC. LAW § 400.27 (McKinney 1995). This statute provides that after a defendant has been convicted of first degree murder, a separate sentencing proceeding shall be conducted to determine whether the defendant shall receive the death sentence, or be imprisoned for life without parole. *See id.* § 400.27(1). The court shall use "the jury that found the defendant guilty" to conduct this proceeding. *See id.* § 400.27(2).

¹⁸ *See id.* § 400.27(1).

the jury must determine whether the defendant will be sentenced to life imprisonment without parole or sentenced to death.¹⁹ The only way the defendant can receive the death sentence is by the jury's verdict.

Second, you should know that up until September 1, 1995, it was prohibited for a defendant charged with first degree murder to plead guilty.²⁰ The Death Penalty Law included three amendments of the Criminal Procedure Law under which it became possible for the first time for a defendant to enter a guilty plea with the permission of the court and the consent of the prosecutor.²¹ As a result, in New York, the only way that a defendant convicted of first degree murder can escape the death sentence is if he waives his constitutional right to a jury trial to defend himself in a criminal proceeding, and his right not to incriminate himself.

This provision is the only one of its kind in any of the states that now have Death Penalty Statutes.²² All the research that

¹⁹ See *id.* § 400.27(2).

²⁰ N.Y. CRIM. PROC. LAW § 220.10(5)(e) (McKinney 1980) (amended 1995). This provision stated: "A defendant may not plead guilty to the crime of murder in the first degree." *Id.*

²¹ N.Y. CRIM. PROC. LAW § 220.10(5)(e) (McKinney 1995). The amendment provides that:

[A] defendant may enter such a plea with both the permission of the court and the consent of the people when the agreed upon sentence is either life imprisonment without parole or a term of imprisonment for the class A-1 felony of murder in the first degree other than a sentence of life imprisonment without parole.

Id. See also N.Y. CRIM. PROC. LAW § 220.30(3)(b)(vii) (McKinney 1995); N.Y. CRIM. PROC. LAW § 220.60(2)(a) (McKinney 1995) (providing that a defendant may change his plea from not guilty to guilty, subject to § 220.10(5)(e)).

²² See TEX. CRIM. P. CODE ANN. § 1.13(b)(West 1997). This provision states that:

In a capital felony case in which the attorney representing the State notifies the court and the defendant that it will not seek the death penalty, the defendant may waive the right to trial by jury but only if the attorney representing the State, in writing and in open court, consents to the waiver.

many people have done has revealed no comparable statute. Many of the states have statutes providing that if the defendant pleads guilty, he can also be sentenced to death on the recommendation of the jury.²³ So, in my opinion, and in the opinion of two judges in New York State who have ruled on this precise issue, this statute is unconstitutional because it imposes an unconstitutional burden on a defendant by using the risk of death as the threat to compel the defendant to waive constitutional rights. And it is unconstitutional under the Federal Constitution on the basis of the case of *Jackson*.²⁴

United States v. Jackson came down in 1967, and it involved the Lindbergh Law, the Federal Kidnapping Law.²⁵ Under this law, the only way that a defendant could be sentenced to death would be on the recommendation of the jury.²⁶ The defendant

Id. See also TEX. CRIM. P. CODE ANN. § 1.14(a)(West 1997) (providing that while a defendant in any other criminal trial may waive his legal rights, but in a death-penalty case the defendant may only waive his rights as permitted in Article 1.13(b)); ARK. CODE ANN. § 16-89-108(a) (Michie 1997) (providing that trial by jury cannot be waived by a capital defendant); MO. ANN. STAT. § 565.006 (West 1997) (providing that “a defendant . . . found guilty of murder in the first degree after a jury trial in which the state has not waived the death penalty . . . may not waive a jury trial . . .”).

²³ See S.C. CODE ANN. § 16-3-20 (Law Co-op. 1997) (providing that where trial by jury is waived, or where defendant pleads guilty, the judge will decide the sentence). See also IND. CODE § 35-50-2-9 (Michie 1997) (providing that if the trial was a bench trial, or a plea of guilty was entered, only the judge will conduct the sentencing hearing); NEV. REV. STAT. § 175.552 (1997) (providing that if the defendant is convicted on a guilty plea, the penalty phase of the trial is conducted before a three-judge panel); OHIO REV. CODE ANN. § 2929.03(C)(2)(b)(I) (Banks-Baldwin 1997) (providing that the penalty shall be imposed by “the panel of three judges that tried the offender upon the offender’s waiver of the right to trial by jury.”).

²⁴ 390 U.S. 570 (1967).

²⁵ *Id.* at 570-71. The statute, 18 U.S.C. § 1201(a), imposes the penalty of death, or of any prison term, for transporting a kidnap victim interstate. *Id.*

²⁶ *Id.* at 572. The Court construed the statute narrowly, observing that the language is of *the* jury, not *a* jury. The Government argued that a jury could still impose a death penalty on the defendant, even if he pled guilty. *Id.* at 577-78. The legislative history did not reveal intent to allow a “strangely

could avoid any risk of the death sentence either by waiving a trial by jury or by pleading guilty.²⁷ The unanimous holding of the United States Supreme Court in *Jackson*, is as follows:

Under the Federal Kidnapping Act therefore, the defendant who abandons the right to contest his guilt before a jury is assured that he cannot be executed. The defendant ingenuous enough to seek a jury acquittal stands forewarned that if the jury finds him guilty and does not wish to spare his life, he will die.²⁸

The inevitable effect of this provision is, of course, to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial.²⁹ There is no question that in *Jackson*, the Supreme Court of the United States held that that provision was unnecessary, that writing the statute differently could have obviated the denials.³⁰ The Court also noted that:

In some states . . . the choice between life imprisonment and capital punishment is left to the jury in every case, regardless of how the defendant's guilt has been determined. Given the availability of this and other alternatives, it is clear that the selective Death Penalty Provision of the Federal Kidnapping Act cannot be justified

bifurcated" jury to impose a death sentence following a guilty plea or a bench trial. *Id.* at 578.

²⁷ *Id.* at 571. The statute does not impose the death penalty on "a defendant who waives the right to jury trial or...one who pleads guilty." *Id.*

²⁸ *Id.* at 581.

²⁹ *Id.* "The goal of limiting the death penalty to cases in which a jury recommends it is entirely a legitimate one. But that goal cannot be achieved without penalizing those defendants who plead guilty and demand a jury trial." *Id.* at 582.

³⁰ *Id.* at 572. The court stated that:

[T]he death penalty provision of the Federal Kidnapping Act imposes an impermissible burden upon the exercise of a constitutional right, but we think that provision is severable from the remainder of the statute. There is no reason to invalidate the law in its entirety simply because its capital punishment clause violates the Constitution.

Id.

by its ostensible purpose. *Jackson* held the death sentence provisions of the Federal Kidnapping Act unconstitutional on the face of the statute.³¹

I doubt that there is any way that *Jackson* cannot apply, or can be distinguished in its applicability in this case. I think that statement is proven to be correct because of a decision of the New York State Court of Appeals, *People v. Michael A.C.*³² The Court of Appeals, in a decision by Chief Judge Fuld, was faced with a *Jackson* issue. A statute provided that any defendant who wanted to get youthful offender treatment had to give up the right to have a jury trial, and agree to a bench trial.³³

The Court of Appeals unanimously held as follows:

The defendant in the case before us would not have been subject to the death penalty had he consented to a nonjury trial, as in *Jackson*, but he certainly would have been exposed to a considerably longer period of imprisonment than he could receive if he was prosecuted as a youthful offender.³⁴ We do not mean to imply by this that the defendant's consent was necessarily rendered involuntary by the statutory scheme. However, a procedure that offers an individual a reward for waiving their fundamental constitutional right or imposes a harsher penalty for asserting it, may not be sustained under *Jackson*.³⁵

So, I think the argument on the federal side is very compelling.

³¹ *Id.* at 582-83.

³² 27 N.Y.2d 79, 261 N.E.2d 620, 313 N.Y.S.2d 695 (1970). In *Michael A.C.*, the Court of Appeals reviewed two cases in which each defendant was tried "without a jury, and adjudicated a youthful offender." *Id.* at 82, 261 N.E.2d at 622, 313 N.Y.S.2d at 697.

³³ *Id.* at 82, 261 N.E.2d at 622, 313 N.Y.S.2d at 697. The statute (Code Crim. Proc. § 913-g) required a defendant "between the ages of 16 and 19 to consent to a trial without a jury in order to render him eligible for youthful offender treatment" *Michael A.C.*, 27 N.Y.2d at 82, 261 N.E.2d at 622, 313 N.Y.S.2d at 697.

³⁴ *Id.* at 86, 261 N.E.2d at 624, 313 N.Y.S.2d at 700-01.

³⁵ *Id.* at 86, 261 N.E.2d at 624-25, 313 N.Y.S.2d at 701.

Many states courts since *Jackson* have come down with decisions under their own State Constitutions finding their Death Penalty Statutes similar New York's unconstitutional.³⁶ Many states since *Jackson* came down have revised their Death Penalty Statutes to comply with *Jackson*. New York has the only Death Penalty Statute that seems to directly conflict with *Jackson*.³⁷

³⁶ See *Washington v. Frampton*, 627 P.2d 922 (1981). In *Frampton*, the Washington Supreme Court agreed with the *Jackson* holding, and stated that where "the death penalty is imposed upon conviction following a plea of not guilty and a trial, but is not imposed when there is a plea of guilty, that statute is unconstitutional." *Id.* at 926. See also *Massachusetts v. Colon-Cruz*, 470 N.E.2d 116, 129 n. 31 (1984) (holding that Massachusetts' death penalty law was "more burdensome than the clause invalidated in *Jackson*.").

³⁷ See *People v. McIntosh*, 173 Misc. 2d 727, 662 N.Y.S.2d 214 (Co. Ct. Dutchess County 1997). In *McIntosh*, the court distinguished the New York statute from the Federal Kidnapping Statute, on the grounds that New York's statute required consent of the prosecutor and the judge for a guilty plea, while the federal statute did not. *Id.* at 729, 662 N.Y.S.2d at 216. This protects the state's policy of controlling when the death penalty will and will not be imposed. *Id.* at 729-30, 662 N.Y.S.2d at 216. The court also held that the guilty plea was a "vital part of the criminal justice system," and provides "prompt resolution of criminal proceedings with all the benefits that enure from final disposition." *Id.* at 730, 662 N.Y.S.2d at 216-17 (citing *People v. Seaberg*, 74 N.Y.2d 1, 541 N.E.2d 1022, 543 N.Y.S.2d 968 (1989)). Additionally, preventing a defendant from pleading guilty in the face of the "risk of death" continues New York's long-standing policy against permitting defendants to "plead guilty to a crime . . . punishable by death." *Id.* at 731, 662 N.Y.S.2d at 217. But see *People v. Hale*, 173 Misc. 2d 140, 661 N.Y.S.2d 457 (Sup. Ct. Kings County 1997). In *Hale*, defendant argued that the guilty plea provisions of the statute "effectively penalize[d] his right to a fair trial." *Id.* at 178, 661 N.Y.S.2d at 478. The *Hale* court cited to *United States v. Jackson* for the proposition that when the death penalty is not applied after a guilty plea, it penalizes the defendant for exercising his constitutional rights. *Id.* at 178-79, 661 N.Y.S.2d at 479. The *Hale* court thus held that:

It is apparent that New York's death penalty statute, likewise, provides for the imposition of the death penalty only upon recommendation of the jury; the provisions governing pleas in capital cases in New York expressly forbid the imposition of the death penalty upon a plea of guilty . . . and a defendant may not waive a jury trial where the crime charged may be punishable by death. Only if the defendant insists upon exercising his sixth amendment right to a jury trial and his fifth amendment privilege against self-incrimination does he risk death. Therefore, unless

Assume that the New York state court chooses not to follow *Jackson*, for some reason. There are some arguments that could be made that *Jackson* should not be followed. There is an extremely compelling state constitutional basis for a state court to depart from *Jackson* and give greater protection under the State Constitution. I think this will be interesting because it will tie right in with some of the theory that you have heard, I'm sure, from Judge Simons and others on state constitutional analysis.

Consider the right to trial by jury. In New York, Article I, section 2 of the New York State Constitution says, "[t]rial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever."³⁸ Those words have been in the New York State Constitution since 1777, fourteen years before the first Congress of the United States adopted the Bill of Rights. This wording is entirely different from the Sixth Amendment. In the Sixth Amendment all it says about trial by jury is that "[t]he accused shall enjoy the right to a

New York's law may be distinguished from the act in question in *Jackson*, this court is bound to find the plea provisions to be unconstitutional.

Id. at 179-80, 661 N.Y.S.2d at 479-80 (citations omitted). However, this holding was set aside in *Hynes v. Tomei*, 237 A.D.2d 52, 666 N.Y.S.2d 687 (2d Dep't), *rev'g* *People v. Hale*, 173 Misc. 2d 140, 661 N.Y.S.2d 457 (1997). The Appellate Division, Second Department, in a declaratory judgment, held that New York's death penalty statute was distinguishable from the statute at issue in *Jackson* because the jury was not bifurcated, and did not balance the aggravating factors against the mitigating circumstances. *Hynes*, 237 A.D.2d at 57-58, 666 N.Y.S.2d at 690-91. The reviewing court also cited to *Brady v. United States*, 397 U.S. 742 (1970), which also concerned the Federal Kidnapping Act, to hold that "a guilty plea is not invalid merely because entered to avoid the possibility of a death penalty." *Hynes*, 237 A.D.2d at 59, 666 N.Y.S.2d at 691. The Second Department also cited to New York case law upholding the validity of plea bargaining, and reiterated its own prior holding that only the Court of Appeals can provide broader constitutional rights under the State Constitution. *See People v. Keta*, 165 A.D.2d 172, 567 N.Y.S.2d 738 (2d Dep't 1991), *rev'd on other grounds sub nom. People v. Scott*, 79 N.Y.2d 474, 593 N.E.2d 1328, 583 N.Y.S.2d 920 (1992).

³⁸ N.Y. CONST. art. I, § 2.

speedy and public trial, by an impartial jury of the State and the district wherein the crime shall have been committed. . . ."³⁹ The right to trial by jury in the Sixth Amendment is one of many enumerated rights in the Sixth Amendment.⁴⁰ In the New York State Constitution, by contrast, the right to trial by jury is the sole issue addressed in the provision.⁴¹ This section contains meticulous provisions with respect to how a trial by jury may be waived in a criminal case.⁴² This was added in 1937.⁴³

A defendant in all criminal cases may waive a jury trial by a written instrument signed "by the defendant in person in open court before and with the approval of a judge or justice of a court having jurisdiction to try the offense."⁴⁴ The State Constitution contains this provision which is critical: "A jury trial may be waived by the defendant in all criminal cases, except those in which the crime charged may be punishable by death."⁴⁵ Thus, waiver of a jury trial is expressly prohibited in a capital case where the guilty verdict may result in execution.

So using an interpretive analysis, you can see from the differences in wording between Article I, section 2 and the jury trial right in the Sixth Amendment and particularly the emphatic language in Article I, section 2—i.e., "shall remain forever inviolate" that the framers of the New York Constitution in 1777⁴⁶ attached particular importance to an accused's right to a jury trial. There is also a strong indication that the drafters of the

³⁹ U.S. CONST. amend. VI.

⁴⁰ *Id.* The Sixth Amendment also provides in pertinent part: "In all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have Assistance of Counsel for his defence." *Id.*

⁴¹ N.Y. CONST. art. I, § 2.

⁴² *Id.* Article I, § 2 provides that: "A jury trial may be waived by the defendant in person in open court before and with the approval of a judge or justice of a court having jurisdiction to try the offense." *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* (emphasis added).

⁴⁶ *Id.*

amended version of Article I, section 2 in 1937⁴⁷ has a particular concern for protecting the right of a defendant to a jury in a capital case because of the express provision against waiving a jury trial in capital cases.

Judge Brennan:

Thank you, Your Honor.

Mr. Quinn:

I have the ability to stand here and say one thing and sit down, because of the rule of law, that the death penalty statute of the State of New York is presumed constitutional.⁴⁸ I do not think I should do that. Some people may ask what the Attorney General has to do with death penalty cases as well. We are presently involved in a number of death penalty cases. The other reason that the Attorney General is involved is that under § 71 of the Executive Law, the New York Attorney General is required to defend the constitutionality of a statute of the State of New York.⁴⁹ That is what brings us into most of the cases.

⁴⁷ N.Y. CONST. art. I, § 2 (amended 1937).

⁴⁸ See *People v. Davis*, 43 N.Y.2d 17, 371 N.E.2d 456, 400 N.Y.S.2d 735 (1977).

⁴⁹ N.Y. EXEC. LAW § 71 (McKinney 1993). This statute states in pertinent part:

Whenever the constitutionality of a statute is brought into question upon the trial or hearing of any action or proceeding, civil or criminal, in any court of record of original or appellate jurisdiction, the court or justice before whom such action or proceeding is pending, may make an order, directing the party desiring to raise such question, to serve notice thereof on the attorney-general and that the attorney-general be permitted to appear at any such trial or hearing in support of the constitutionality of such statute. The court or justice before whom any such action or proceeding is pending may also make such order upon the application of any action or proceeding upon motion of the attorney-general. When such order has been made in any manner herein mentioned it shall be the duty of the attorney-

We are presently involved on the trial level in a number of cases; one in Essex County, a murder for hire case, and one in a Schoharie County, also a murder for hire case. These two cases are awaiting a decision whether to seek the death penalty. There is a case pending in Dutchess County, and we have a person sitting at the table awaiting a trial for that case as well.

As I said, there is a strong presumption of constitutionality that must be overcome,⁵⁰ and if I could ask for a vote now, I could figure out whether I would have to proceed or not. The burden is upon my colleague here to show beyond a reasonable doubt that the statute is unconstitutional.⁵¹ The presumption of constitutionality in the death penalty comes under *People v. Davis*,⁵² a 1977 Court of Appeals case.⁵³ A court could only strike down the statute only as a measure of last resort.⁵⁴

Judge Hancock spoke about an interpretive versus a non-interpretive analysis.⁵⁵ In the non-interpretive analysis all that has to be shown is that there are some facts that the legislature relied upon in passing the statute and some rational reason for so

general to appear in such action or proceeding in support of the constitutionality of such statute.

Id.

⁵⁰ See *People v. Hale*, 173 Misc. 2d 140, 661 N.Y.S.2d 457 (Sup. Ct. Kings County 1997). "In reviewing the constitutionality of the law, the court is mindful that legislative enactments enjoy a strong presumption of constitutionality." *Id.* at 166, 471.

⁵¹ *Id.* "The party challenging the provision must prove beyond a reasonable doubt that the statute violates a constitutional requirement." *Id.*

⁵² 43 N.Y.2d 17, 371 N.E.2d 456, 400 N.Y.S.2d 735 (1977).

⁵³ *Id.* at 30. "We should not allow our personal preferences as to the wisdom of legislative action, or our distaste for such action, to guide our judicial decision in cases such as these. *Furman v. Georgia*, 408 U.S. 238, 411 (1972) (Blackmun, J., dissenting).

⁵⁴ *Id.* "[T]he State statutes under scrutiny carry with them a strong presumption of constitutionality, that they will be stricken as unconstitutional only as a last resort and that courts may not substitute their judgment for that of the Legislature as the wisdom and expediency of the legislation." *Id.*

⁵⁵ *Hale*, 173 Misc. 2d at 167, 661 N.Y.S.2d at 472. "First, the court must undertake an interpretive analysis of the constitutional provision in question, focusing on whether the text of the State Constitution specifically recognizes rights not enumerated in the federal Constitution." *Id.*

doing.⁵⁶ In New York State, the rational reasons used and adopted by the legislature are that the death penalty is both a deterrent and there is a reasonable inference for retribution against the defendant.⁵⁷

The analysis with respect to the argument of cruel and unusual punishment has been addressed by the Court of Appeals in the case *People v. Broadie*.⁵⁸ In *Broadie*, the Court of Appeals declined to adopt a greater protection under the State Constitution under the Cruel and Unusual Punishment Clause.⁵⁹ The interpretive analysis that the Judge spoke about is applied in the constitutional provisions when there is no difference between the State and Federal Constitution.⁶⁰ As the judge also said, we are in the middle of a division amongst the trial level courts.

The first court that will be making a decision, hopefully, is Justice Tomei, in the Second Department, who has ruled that the discretionary portion with respect to plea bargaining to avoid imposition of the death penalty is unconstitutional.⁶¹ He has

⁵⁶ *Id.* "Second, the court must apply a 'non-interpretive' analysis, which 'proceeds from a judicial perception of sound policy, justice, and fundamental fairness.'" *Id.* (citation omitted).

⁵⁷ *Id.* at 173-74, 661 N.Y.S.2d at 476. "Although retribution is not a valid penological goal standing alone, it may, along with deterrence, constitute one of the ends of the penal law." *Id.* at 174, 661 N.Y.S. 2d at 476.

⁵⁸ 37 N.Y.2d 100, 332 N.E.2d 338, 371 N.Y.S.2d 471 (1975).

⁵⁹ *Id.* at 118-19, 332 N.E.2d at 346-47, 371 N.Y.S.2d at 483.

⁶⁰ See N.Y. CONST. art. I, § 5. The Cruel and Unusual Punishment Clause provides that "Excessive bail shall not be required nor excessive fines imposed, nor shall cruel and unusual punishments be inflicted, nor shall witnesses e unreasonably detained." *Id.* See also *People v. Hale*, 173 Misc. 2d 140, 661 N.Y.S.2d 457 (Sup. Ct. Kings County 1997). "Justice Tomei pointed out that:

Because the relevant text of Article I, § 5 is the same as that of the eighth amendment, and arose from the same historical context, interpretive analysis leads us to the conclusion that the text of Article I, § 5 provides no basis for interpreting New York's prohibition against cruel and unusual punishment any differently from that of the eighth amendment.

Id. at 167, 661 N.Y.S.2d at 472.

⁶¹ See *People v. Hale*, 173 Misc.2d 140, 661 N.Y.S.2d 457 (Sup. Ct. Kings County 1997). Under New York's death penalty statute, a plea of guilty in

upheld the rest of the statute and the Severability Clause of that statute, and he has said that the statute shall stand without the plea provision.⁶² In *Ex rel Kemmler*,⁶³ the Court of Appeals determined that capital punishment is "authorized and justified by a law, adopted by the people as a means to the end of better security of our society. It is not cruel and unusual with the sense and meaning of the Constitution."⁶⁴ In the adoption of the new Death Penalty Statute in 1995, the legislative history shows that every effort was made to make this statute comply with all of the Supreme Court cases.⁶⁵ Obviously, it was left for a final decision by our Court of Appeals.

The Judge talks about the potential for ghoulish and wanton application of our Death Penalty Statute. Looking at the current figures, and presuming approximately two thousand murders in New York State per year, the death penalty statute has limited death penalty eligible cases. Since the first of September, 1995, there have been one hundred twenty two cases in which defendants have been charged with murder in the first degree. To date obviously, there have been no convictions after trial, other than in cases where the District Attorney or the prosecutor have not sought the death penalty.⁶⁶

capital cases precludes imposition of the death penalty. *Id.* at 179, 661 N.Y.S.2d at 479. However, a defendant may only plead guilty in capital cases upon consent of the District Attorney and permission of the court. *Id.* at 178, 661 N.Y.S.2d at 478. Furthermore, New York does not allow death-eligible defendants to waive their right to jury trial; therefore, the death penalty may only be imposed upon the recommendation of the jury. *Id.* at 179, 661 N.Y.S.2d at 479.

⁶² *Id.* at 186, 661 N.Y.S.2d at 484.

⁶³ 119 N.Y. 580, 24 N.E. 9 (1890).

⁶⁴ *Id.* at 586, 24 N.E. at 11.

⁶⁵ *Hale*, 173 Misc. 2d at 193, 661 N.Y.S.2d at 488. "[T]he death penalty statute was formulated and enacted in the wake of several United States Supreme Court decisions . . . ; the Legislature most certainly took these decisions into account in drafting the statute, and intended the terms of the statute to be consistent with them." *Id.*

⁶⁶ *People v. Hale*, 173 Misc. 2d 140, 176, 661 N.Y.S.2d 457, 477 (Sup. Ct. Kings County 1997).

New York State also goes further than the federal requirement in terms of the age of the defendant.⁶⁷ The federal interpretation permits a death penalty in a case of a sixteen or seventeen year old defendant.⁶⁸ New York uses the eighteen year old rule, and it is only in cases of intentional murder, with the aggravating factors that must be proven by the people.⁶⁹

The other factor that we have taken into consideration that the Judge spoke about was the bifurcation of the penalty phase.⁷⁰ New York has also provided for the direct review of a conviction to the Court of Appeals.⁷¹ The Court of Appeals also has the obligation to review any conviction in terms of any other defendant similarly situated.⁷² I do not know how it would be handled with respect to the first case that gets to the Court of Appeals if there is a conviction and death sentence.

There are also certain circumstances where the defendant, after a conviction, is given the ability to show why he should not be

⁶⁷ *Id.* "New York's legislation provides for all these protections and more." *Id.* at 166, 661 N.Y.S.2d at 471.

⁶⁸ See 18 U.S.C. § 1111 (Supp. 1998).

⁶⁹ *Hale*, 173 Misc. 2d at 166, 661 N.Y.S.2d at 471. Justice Tomei noted: New York goes beyond the requirements mandated by the Supreme Court by requiring that defendants be at least eighteen years old to be eligible for capital punishment; limiting death penalty eligible felony murders to those in which the defendant either intentionally killed the victim or commanded the killing; and prohibiting execution of the mentally retarded.

Id. at 166 n.17, 661 N.Y.S.2d at 471 n.17.

⁷⁰ *Hynes v. Tomei*, 666 N.Y.S.2d 667, 691 (2d Dep't 1997). New York's statute provides for a bifurcated trial proceeding where guilt and sentencing are determined separately by the jury. *Id.*

⁷¹ See N.Y. CONST. art. VI, § 3(b). Article VI, § 3(b) of the New York State Constitution provides in pertinent part: "Appeals to the court of appeals may be taken . . . [i]n criminal cases, directly from a court of original jurisdiction where the judgment is of death." *Id.*

⁷² *Hale*, 173 Misc. 2d at 166, 661 N.Y.S.2d at 471. New York's legislation, in keeping with the United States Supreme Court's ruling in *Gregg v. Georgia*, requires a determination of "whether the sentence in the particular case is disproportionate to those sentences imposed in similar cases" *Id.*

put to death with respect to mitigation.⁷³ There is much written about the role of the defense lawyer being able to, midstream, get a verdict against him and then turn to a social work type of position where he has to show his client to be a much more favorable person, basically requesting leniency. The Supreme Court also requires a second penalty phase. It gives the defendant much more latitude than the prosecutor, by permitting the defendant to use reliable hearsay evidence to show the nature of the defendant, while only permitting the prosecutor to rebut that particular evidence. The prosecutor does not go forward, rather the defendant goes forward and sums up last at the penalty phase.

There is also some discussion, and also an article written by Judge Hancock with respect to the alleged racial discrimination in the application of the death penalty.⁷⁴ I do not know of any studies that are available. The latest study in New York State that is available ended in 1963.⁷⁵ It found that of the last thirteen people that were executed, only one was a white person.⁷⁶ I do not believe that the use of that study is valid in New York State in 1997. Obviously, we would be arguing against anything of that nature. We have not had it since. I think 1963 was one of the last executions.⁷⁷ There is also the McCleskey case that the Judge spoke about.⁷⁸ The court found the study in that case to be flawed

⁷³ See *People v. Davis*, 43 N.Y.2d 17, 371 N.E.2d 456, 400 N.Y.S.2d 735 (1977). "It is essential only 'that the capital sentencing decision allow for consideration of whatever mitigating circumstances may be relevant to either the particular offender or the particular offense.'" *Id.* at 44, 371 N.E.2d at 471, 400 N.Y.S.2d at 751 (citing *Roberts v. Louisiana*, 431 U.S. 633, 637 (1977)).

⁷⁴ See Steward F. Hancock et al., *Race, Unbridled Discretion, and the State Constitutional Validity of New York's Death Penalty Statute – Two Questions*, 59 ALB. L. REV. 1545 (1996).

⁷⁵ *Id.* at 1558-59. The study "shows that eighty percent of those executed in New York between 1890 and 1963 were African Americans, even though they represented only 8.45 percent of the state population." *Id.*

⁷⁶ *Id.* at 1559.

⁷⁷ *Id.* at 1558.

⁷⁸ *McCleskey v. Kemp*, 481 U.S. 279 (1987). However, "Justice Powell, author of the majority opinion in *McCleskey* has publicly stated that he would

as well, and permitted the states to have a constitutionally permissible range of discretion.⁷⁹ By limiting the cases that are death penalty eligible, the New York State legislation and the Governor have reduced the number of cases and put limitations on the cases that will proceed under the Murder in the First Degree Statute.⁸⁰

The Judge also spoke with respect to equal protection. I am sorry, I would rather move into the area of prosecutorial discretion. I think that is going to be one of the challenges that the Judge refers to, and it is the issue that was the underlying issue in *People v. Hale*,⁸¹ the case that will be argued on appeal in the Second Department. If you compare other statutes in the State of New York, there are times when the discretion of the prosecutor is limited. However in this instance, the defendants have taken the position that this gives the prosecutor unbridled discretion to make the decision with respect to whether to charge or not.⁸² That responsibility and that discretion is protected under a Supreme Court ruling which respects the prosecutor's charging decision.⁸³ The difference in New York, focuses on the waiver of the right to a jury trial, and the last point made by his Honor with respect to that was that New York State's Constitution prohibits

now change his vote and join the dissenters." *Hancock*, supra note 74, at 1558.

⁷⁹ *Id.* "Where the discretion that is fundamental to our criminal process is involved, we decline to assume that what is unexplained is invidious." *Id.* at 313.

⁸⁰ See *People v. Hale*, 173 Misc. 2d 140, 661 N.Y.S.2d 457 (Sup. Ct. Kings County 1997). A capital punishment statute must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Id.* at 157-58, 661 N.Y.S.2d at 466.

⁸¹ 173 Misc. 2d 140, 661 N.Y.S.2d 457 (Sup. Ct. Kings County 1997).

⁸² *Hale*, 173 Misc. 2d at 165 n.16, 661 N.Y.S.2d at 471 n.16. Defendant claims that "C.P.L. § 250.40 gives unfettered discretion to prosecutors to seek the death penalty" *Id.*

⁸³ See *McCleskey v. Kemp*, 481 U.S. 279, 296 (1987). "It is well-established that the prosecutor may be entrusted with charging decisions, and the exercise of that discretion in the context of capital cases, unless proved to be for an invidious purpose, is not unconstitutional." *Hale*, 173 Misc. 2d at 177, 661 N.Y.S.2d at 478.

the waiver of the right to a jury trial.⁸⁴ I do not know how that will square with respect to the inviolate right of a jury trial. I think that will be argued next week and we will see how the case comes out.⁸⁵

With respect to plea bargaining, there is no absolute right to plea bargaining.⁸⁶ That has never been found, I do not believe, in any court. It is a tool that is used by the prosecutor with respect to the cases placed before him or her, and that rule, the power given to that prosecutor and the discretion given to that prosecutor, is given again in the capital case.⁸⁷ Part of the reason and rationale to provide the prosecutor with that discretion is to prevent a defendant from saying, "My life is over I want to commit suicide and I want to go and receive the death penalty." Obviously, there would be a limited number of times when something like that would occur, but the state has an interest in preventing that from occurring.

There is also, in death penalty cases, discussion about death qualified jurors.⁸⁸ I would prefer to call them "fairness qualified jurors." In the voir dire, we go through much greater steps in terms of determining whether somebody is qualified to sit on a

⁸⁴ See N.Y. CONST. art. I, § 2. Article I, § 2 provides in pertinent part: "A jury trial may be waived by the defendant in all criminal cases, except those in which the crime charged may be punishable by death" *Id.*

⁸⁵ See *Hynes v. Tomei*, 661 N.Y.S.2d 687 (2d Dep't 1997). This case was decided December 22, 1997 and reversed Justice Tomei's earlier ruling that the plea provisions are unconstitutional and should be stricken from the statute. *Id.*

⁸⁶ *Id.* at 693. "[I]t provides a means where, by mutual concessions, the parties may obtain a prompt resolution of criminal proceedings with all the benefits that inure from final disposition." *Id.*

⁸⁷ N.Y. CRIM. PROC. LAW § 220.30 (3)(b)(vii). This section provides: "A defendant may not enter a plea of guilty to the crime of murder in the first degree . . . provided, however, that a defendant may enter such a plea with both the permission of the court and the consent of the people." See also *McCleskey v. Kemp*, 481 U.S. 279, 312 (1987). "[A] capital punishment system that did not allow for discretionary acts of leniency 'would be totally alien to our notions of criminal justice.'" *Id.* (quoting *Gregg v. Georgia*, 428 U.S. 153, 200 n.50 (1976)).

⁸⁸ See generally Mary Falk et al., *Rights and Freedoms Under the State Constitution*, 13 TOURO L. REV. 59, 73-82 (1996).

particular case.⁸⁹ The intent is to remove those jurors that are “unwilling to exercise their rights to say a person should be put to death,” from those who would never, and those who would always.⁹⁰ It takes those people out of the jury pool, and puts those open-minded people in, in an attempt to remove any potential prejudice to the defendant.⁹¹

Under equal protection, there is a discussion with respect to strict scrutiny. I do not believe that to be the test. As I said before, there is a rational basis or a legitimate state purpose for this statute.⁹² The statute has been, and should be upheld. Those legitimate state purposes are deterrence and retribution; although, it has been argued that these are not legitimate state purposes. As I said earlier, under that particular statute there are Court of

⁸⁹ *Id.* at 77-78. Ms. Falk explains:

[W]hat the statute means by death qualification is that potential jurors who pronounce themselves unable to impose the death penalty can and will be challenged for cause and will be struck from the jury before the guilt determination phase. Therefore, people who could not impose the death penalty at the separate sentencing phase can not sit at the guilt determination phase.”

Id.

⁹⁰ See N.Y. CRIM. PROC. LAW § 270.20 (1)(f) (McKinney 1995). This statute states in pertinent part:

A challenge for cause is an objection to a prospective juror and may be made on the ground that . . . [t]he crime charged may be punishable by death and the prospective juror entertains such conscientious opinions either against or in favor of such punishment as to preclude such juror from rendering an impartial verdict or from properly exercising the discretion conferred upon such juror by law”

Id.

⁹¹ *People v. Hale*, 173 Misc. 2d 140, 190, 661 N.Y.S.2d 457, 486 (Sup. Ct. Kings County 1997). “The purpose of the statute is to insure an impartial verdict, the touchstone of any jury trial. No method has been suggested to supplant death qualification in achieving that essential goal.” *Id.*

⁹² See *Gray v. Lucas*, 677 F.2d 1086, 1004 (5th Cir. 1982) (finding that legislative classifications that may result in the death penalty do not require a higher level of scrutiny than rational basis).

Appeals rulings with respect to it not violating the equal protection clause.⁹³

The Judge also spoke with respect to the right to life. I do not believe that we have a constitutional right to life.⁹⁴ I do not think we have a case that has so held thus far. I do have a provision here. I think the best position from the people, is a legislative declaration under the Human Rights Law: "The state has the responsibility to act to assure that every individual within the state is afforded an equal opportunity to enjoy a full and productive life, and the failure to provide such equal opportunity, whether because of discrimination, prejudice, etcetera" ⁹⁵ Well, I think the greater argument can be made in 1997, that the victim had the right to a full and productive life as well.

⁹³ *Hancock*, supra note 74, at 1568. "Indeed, it was precisely because this proof of discrimination could not be made that the Supreme Court in *McCleskey* dismissed the equal protection challenge . . . this holding in *McCleskey* prevents a successful equal protection attack against the statute under the federal constitution." *Id.*

⁹⁴ See *People v. Hale*, 173 Misc. 2d 140, 661 N.Y.S.2d 457 (Sup. Ct. Kings County 1997). The court pointed out that:

It is enough to say that there is no support in the federal or state constitution or any other source of Anglo-American law, for the claim that the convicted perpetrator of a particularly atrocious murder enjoys an unqualified right to life notwithstanding the legislature's rational determination that the only appropriate sanction for the defendant's egregious conduct is death.

Id. at 175, 661 N.Y.S.2d at 476-77.

⁹⁵ N.Y. EXEC. LAW § 290 (McKinney 1993). This statute states in pertinent part:

The legislature hereby finds and declares that the state has the responsibility to act to assure that every individual within this state is afforded an equal opportunity to enjoy a full and productive life and that the failure to provide such equal opportunity, whether because of discrimination, prejudice, intolerance or inadequate education, training, housing or health care not only threatens the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state and threatens its inhabitants.

Id.

The issue specifically addressed in *United States v. Jackson*⁹⁶ is the discretion of the prosecutor. The argument made at trial, that I am sure will be made in the Second Department, is that there is no waiver of a right to a jury trial permitted in our statute.⁹⁷ As I said earlier, it is not permitted in our Constitution as well.⁹⁸ The second position taken has been, and will be, that there is no open plea permitted under our statute; therefore, there is no right to that plea.⁹⁹ The legislature has made a determination that they will not permit somebody to plead guilty to it.¹⁰⁰ The third position, and probably the weakest position that has been taken, was that the statute under *Jackson* called for a mandatory death penalty.¹⁰¹ Obviously, the United States Supreme Court has struck all mandatory death penalty provisions including that of the Court of Appeals in *People v. Smith*.¹⁰² These two gentlemen may have been on the bench at the time.

Judge Hancock:

I was and I think it was in 1985, with Judge Kaye presiding.

Mr. Quinn:

The Judge had stated that the only way to escape the risk of the death penalty is to plead to life without parole. There is also another way to escape the death penalty, and that is to go to trial, as intended by the statute, and be found not guilty. There are many extra provisions put in place to protect the defendant's rights, including the voir dire, money that is given to the Capital

⁹⁶ 390 U.S. 570 (1968).

⁹⁷ See N.Y. CRIM. PROC. LAW § 320.10 (1). This statute provides in pertinent part: "Except where the indictment charges the crime of murder in the first degree, the defendant . . . may at any time before trial waive a jury trial."

⁹⁸ See *supra* note 92 and accompanying text.

⁹⁹ See *supra* note 95 and accompanying text.

¹⁰⁰ *Id.*

¹⁰¹ *United States v. Jackson*, 390 U.S. 570, 574-75 (1968).

¹⁰² 63 N.Y.2d 41, 468 N.E.2d 879, 479 N.Y.S.2d 706 (1984).

Defender's Association, setting up the Capital Defender's Office, and increased fees. An argument can be made that a person not being paid enough would not pay enough attention to a case. The legislature and the Governor have taken that into consideration and they have increased the amount of money to set up the Capital Defender's Office to provide these defendants with the rights to protect their interests. Based upon all that, I believe that the statute would be upheld as constitutional.¹⁰³ I do not know that we will ever get to see the decision. Well, I will not guess when it will happen. I am sorry to say it should happen. I do not know when. We have yet to have one go to trial. There is a group of attorneys in the United States, an association, that have said that apparently the majority of people that are sitting on death row are those people that have been offered and turned down life without parole, and elected to go to trial and were found guilty and sentenced to death. Thank you very much.

Professor Richard D. Klein:

I would like to ask questions. First of all, Mr. Quinn, I believe you stated that there is a presumption in New York that a statute is constitutional. But then I think you said that the person or the party who is challenging the constitutionality of the statute must show beyond a reasonable doubt that the statute is unconstitutional. Can you just elaborate on that and give us some sources.

Mr. Quinn:

The burden is on the proponent who is seeking to show that there is an unconstitutional provision.

¹⁰³ See *People v. Davis*, 43 N.Y.2d 17, 371 N.E.2d 456, 400 N.Y.S.2d 735 (1977). "Whatever one thinks or capital punishment, the Legislature is entitled to conclude, rightly or wrongly, that the death penalty serves useful social purposes. Since the Legislature has so concluded, and has drawn a statute that comports with constitutional requirements, the statute should be upheld." *Id.* at 46, 371 N.E.2d at 472, 479 N.Y.S.2d at 752.

Judge Hancock:

May I comment on that question? I think that Mr. Quinn has stated the correct rule. I think that we say the person seeking to attack a statute has the burden of proof, we are just stating the corollary rule that there is a presumption of constitutionality. I think it is kind of confusing to talk about burden of proof when you are really talking about a legal question. No one is really faced with proving anything. There is a presumption, as we all know, that a statute enacted by the legislature is constitutional. I really think that is all we are talking about.

Professor Klein:

But Mr. Quinn had said the burden was beyond a reasonable doubt.

Judge Hancock:

Well again, maybe that is saying there is a strong burden, but as some learned judges have said, there are presumptions and then there are presumptions. It depends upon how strong you want to read the presumption. You know, I really do not -- I think when you are talking law, and not facts that have to be proven, that you cannot really equate the two. That is my own view, anyway.

Professor Klein:

Judge Hancock, let me ask you a question. Why is the situation regarding pleas in the death penalty case really that different from the typical plea bargaining situation where, indeed, it is told to the defendant if you give up your constitutional right to have a jury trial we will give you a benefit; you will get a reduced sentence. Is that not really pretty much the same thing?

Judge Hancock:

I think that it is a question of degree. As many of the cases say, death is different.¹⁰⁴ And when you can use the risk of death as a weapon for plea bargaining, that is different than the ordinary kind of plea bargaining which, of course, goes on all the time. So I think that the *Jackson*¹⁰⁵ Court makes that clear, and cases subsequent to *Jackson* I think have too.¹⁰⁶

Mr. Quinn:

Death is different, but there is no right to a plea bargain. Any prosecutor could say I will not offer any plea at any time. Obviously, they would not last in office very long if they did so, but someone could run for office against any plea negotiations any plea-bargaining.

Professor Klein:

Mr. Quinn, let me ask you a particular concern, perhaps, about the arbitrariness issue. I think the Supreme Court has historically looked very carefully at whether or not a certain state's imposition of the death penalty is an arbitrary and capricious one, and whether the state distinguishes which people are getting the death penalty from those who do not. Do you think there is any issue in New York State, because of the absolute discretion given prosecutors under the New York Murder in the First Degree law,¹⁰⁷ to either go for the death penalty or not. That the very

¹⁰⁴ See *Harris v. Alabama*, 513 U.S. 504 (1978). In *Harris*, the Court stated "our opinions have repeatedly emphasized that death is a fundamentally different kind of penalty from any other that society may impose." *Id.* at 515.

¹⁰⁵ 390 U.S. 570 (1968).

¹⁰⁶ See *Woodson v. North Carolina*, 428 U.S. 280 (1976) (holding that North Carolina's death sentence for first-degree murder violated the Eighth and Fourteenth Amendments).

¹⁰⁷ N.Y. PENAL LAW 60.06 (1995). This statute provides:

sharp divergence in views amongst prosecutors in New York to show that perhaps who gets the death penalty in New York will result in arbitrary decisions? If someone could kill someone -- Murder in the First Degree -- in the Bronx, it is unlikely, perhaps, that that District Attorney¹⁰⁸ will seek the death penalty, but if they committed the exact same act a mile away in Westchester, it is very likely that that District Attorney¹⁰⁹ will seek the death penalty. Do you think, therefore, there is a problem in arbitrary enforcement of the statute in New York State?

Mr. Quinn:

I do not know that you can label it as arbitrary enforcement. Every District Attorney is -- and the argument is before the court right now¹¹⁰ -- an independently elected official to enforce the laws of the State of New York within the bounds of discretion. Obviously, the Court of Appeals will take all of this into consideration -- if and when the case gets to them, and review it. Finally, after reviewing all the cases, and I think most people in this classroom have seen - no two cases are alike -- I do not see that a defendant is going to have the ability to go in behind the closed door of the decision-making process to determine what went into that prosecutor's mind in determining whether to seek the death penalty or not.

When a person is convicted of murder in the first degree . . . the court shall, in accordance with the provisions of section 400.27 of the criminal procedure law, sentence the defendant to death, to life imprisonment without parole . . . or to a term of imprisonment for a class A-1 felony other than a sentence of life imprisonment. . . .

¹⁰⁸ The District Attorney for The Bronx County is Robert T. Johnson.

¹⁰⁹ The District Attorney for Westchester County is Jeanine Pirro.

¹¹⁰ See *People v. Hale*, 173 Misc. 2d 140, 661 N.Y.S.2d 457 (Sup. Ct. Kings County 1997). In Support of the Defendant's Motion to Strike the Death Notice, the defendant claimed that "New York's Capital Punishment legislation is unconstitutional because [it] . . . gives unfettered discretion to prosecutors to seek the death penalty. . . ." *Id.* at 165 n. 16, 661 N.Y.S.2d at 471 n. 16.

Professor Klein:

Judge Hancock, do you want to comment?

Judge Hancock:

I would. That of course ties in exactly with the other argument, the *McCleskey v. Kemp*¹¹¹ argument. You have to understand that there is another aspect to the Cruel and Unusual Clause in the Eighth Amendment¹¹² and in the Comparable Clause in Article I, section 5 the professor alluded to.¹¹³ In *Furman v. Georgia*,¹¹⁴ the Supreme Court of the United States held that it is a violation of the Cruel and Unusual Clause of the Eighth Amendment to impose on a defendant¹¹⁵ a risk of being sentenced to death arbitrarily, based on improper considerations, such as death or race. So the imposition of a risk of that kind on a person violates the Eighth Amendment, and in my view, Article

¹¹¹ 481 U.S. 279 (1987). In *McCleskey*, a black defendant was convicted in Georgia state court of the murder of a white police officer. *Id.* at 283. In the sentencing phase, the jury found two aggravating factors to warrant the sentence of death, one that it was committed during another felony, and second that it was committed against a police officer on duty. *Id.* at 284-85. The Georgia Supreme Court affirmed defendant's conviction and sentence. *Id.* at 285. The defendant filed a writ for habeas corpus in Federal District Court, and cited a study prepared by Professors David C. Baldus and other scholars which claimed to demonstrate a disparity in the application of the death penalty "based on the race of the murder victim, and, to a lesser extent, the race of the defendant." *Id.* at 286.

¹¹² U.S. CONST. amend. VIII. The Cruel and Unusual Punishment Clause provides that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted". *Id.*

¹¹³ N.Y. CONST. art. I, § 5. The Cruel and Unusual Punishment Clause provides that "Excessive bail shall not be required nor excessive fines imposed, nor shall cruel and unusual punishments be inflicted, nor shall witnesses be unreasonably detained." *Id.*

¹¹⁴ 408 U.S. 238 (1972).

¹¹⁵ *Id.* at 240.

I, section 5. In *Furman* and in *Gregg*,¹¹⁶ and in the subsequent cases that followed along from *Furman*, the Supreme Court of the United States looked at the statute as a whole, and looked at the way it operated. That is the way the Supreme Court viewed the challenges to the Death Penalty Statutes until *McCleskey* came along. It was urged in *McCleskey*, on the basis of statistics, which by the way, the Supreme Court of the United States conceded were valid, that the Georgia Statute viewed as a whole imposed arbitrary and unequal risk of being sentenced to death on certain racial groups; specifically, on black defendants who kill white victims would be the extreme case.¹¹⁷ In *McCleskey*, the Supreme Court of the United States changed its course. Instead of looking at the statutory scheme as a whole, even though it accepted the statistics as valid, they said no, we will not set a death sentence aside on the basis of these factors unless you can show specific purposeful discrimination in the actual case, either by the prosecutor in making the critical prosecutorial decisions which have to be made or by the jury.¹¹⁸ Well, of course, that imposes an impossible burden. You cannot prove it. There is no way you can get inside the mind of the prosecutor or inside what went on in the jury to say, ha-ha, they intentionally discriminated. It is impossible. The equal protection argument made by Justice Blackmun in his dissent is similar.¹¹⁹ I will not

¹¹⁶ *Gregg v. Georgia*, 428 U.S. 153 (1976). Petitioner, Troy Gregg, was sentenced to death after being convicted of committing armed robbery and murder. *Id.* The Supreme Court held that punishment of death for the crime of murder did not, under all circumstances, violate the Eighth and Fourteenth Amendments. *Id.* at 154. The Court held that the Georgia scheme was constitutional. *Id.*

¹¹⁷ *McCleskey*, 481 U.S. at 287.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 345-65 (Blackmun, J., dissenting). Justice Blackmun admonished the majority for departing from "well-developed constitutional jurisprudence." *Id.* at 345 (Blackmun, J., dissenting). He believed that *McCleskey* had made the necessary showing under *Washington v. Davis*, 426 U.S. 229 (1976) (requiring a criminal defendant who alleges an equal protection violation to prove the existence of purposeful discrimination), and met the three part test enumerated in *Batson v. Kentucky*, 476 U.S. 79, (1986) and *Castaneda v. Partida*, 430 U.S. 482 (1977) (requiring a defendant to establish that he is a

go into it. The state constitutional analysis here is that under Article I, section 5, the Court of Appeals and other state courts do not have to buy into *McCleskey*. *McCleskey* has been rejected in case after case by the highest state courts and in law review articles.¹²⁰ One article calls *McCleskey* the *Dred Scott* of death sentence jurisprudence.¹²¹ And so the Court of Appeals will have to decide whether it wants to adopt the broader view and look at the statutory scheme as a whole, the way Justice Brennan and Justice Blackmun would look at it, and then decide, based on statistics which are available. There are all sorts of statistics that can develop the racial discrimination argument. And also there are statistics showing, as we have just heard, that there is a tremendous difference between whether you get convicted or whether you are accused of a crime, let us say in Cattaraugus County or in Manhattan or the Bronx and there is an enormous divergence in attitudes of the prosecutors. But remember, the prosecutors are elected officials, so there is a divergence in attitudes among the people who vote for them and it is natural that the prosecutors are sensitive to those attitudes. That factors in to the arbitrariness and capricious argument which is the basis of the cruel and unusual argument.¹²² Sorry to make such a long answer, but I did want to talk about *McCleskey*.

member of a group "that is a recognizable, distinct class, singled out for different treatment," make a showing that he was in fact singled out for different treatment, and show that the alleged discriminatory procedure is susceptible to abuse or is not racially neutral), to require the Court to overturn the conviction.

¹²⁰ See *Blystone v. Pennsylvania*, 494 U.S. 299 (1990) (finding that the Pennsylvania death penalty statute comported with the Court's decisions interpreting the Eighth Amendment).

¹²¹ See Hugo Adam Bedau, *Someday McCleskey Will be the Death Penalty's Dred Scott*, L.A. TIMES, Aug. 1, 1987, at 13.

¹²² See *Richmond v. Lewis*, 506 U.S. 40, 50 (1992) (stating "the federal constitutional question is whether such reliance is so arbitrary or capricious as to constitute an independent due process or eighth amendment violation"); *Sawyer v. Whitley*, 505 U.S. 333, 341 (1991) (stating "our eighth amendment jurisprudence has required these states imposing capital punishment to adopt procedural safeguards protecting against arbitrary and capricious impositions of the death sentence. . . .").

Mr. Quinn:

Thank you. Cited as authority by Justice Tomei, Judge Hancock's client, "The party challenging the provision must prove beyond a reasonable doubt that the statute violates a constitutional requirement."¹²³

Professor Klein:

Mr. Quinn, you had made the point that you thought that the requirement for a death-qualified jury was really protective of the defendant's rights in part -- maybe if I could explain a bit about what a death qualified jury is. The New York Law mandates that for the jurors who are going to sit on the guilt phase of a capital case, cannot have jurors who are anti death penalty. So if a juror says on voir dire, "I do not believe in the death penalty, I do not think the death penalty ought to be given in any case," they are stricken from the jury and they cannot sit in that case. So we are left in the guilt phase of a capital murder prosecution without any jurors who are anti-death penalty. And I think statistics have shown that those jurors who are pro death penalty tend to be, in general, more pro-prosecutorial, are less aware of and would give less consideration to the presumption of innocence, and are more likely to believe police officer's testimony.¹²⁴ My first question is, do you think that presents a problem, because you now have a different kind of a jury that is going to make the guilt determination in a capital case? Secondly, statistics have also shown, in New York especially, that if you look at those who are anti-death penalty, and therefore cannot sit as jurors in a

¹²³ Fenster v. Leary, 20 N.Y. 2d 309, 314, 229 N.E.2d 426, 429, 282 N.Y.S.2d 739, 743(1967).

¹²⁴ See Vidmar & Ellsworth, *Public Opinion and the Death Penalty*, 26 Stan. L. Rev. 1245, 1258-62 (1974); Bronson, *On the Conviction Proneness and Representatives of Death-Qualified Jury: An Empirical Study of Colorado Veniremen*, 42 U. COLO. L. REV. 1 (1970).

capital case; more blacks, more Hispanics and more women are anti-death penalty, so you are going to end up with jurors on the guilt phase of the trial who are not going to be as representative of the community as jurors who sit in other cases.¹²⁵ Can you just respond?

Mr. Quinn:

The first point you are talking about jurors that are anti-death penalty, also excluded, and most articles forget to mention the fact that those people that would seek the death penalty in every situation must be excluded as well. By so limiting, you are limiting the pool, but is that pool large enough so that a defendant can get an unprejudiced jury? I believe it is. Are there particular people who will be excluded from the panel? Yes, there will. The scheme that is set up has been found to meet constitutional muster by the Supreme Court.¹²⁶ And it is also set up specifically to protect the defendant in terms of – we talk about the mitigation at that point in time when mitigation should be proven. It is the defendant who has the ability then to bring forth evidence to show reasons why leniency should be shown toward him.

Professor Klein:

I was not worrying about what happens after that jury determines the defendant is guilty. I was asking about the group

¹²⁵ *People v. Hale*, 173 Misc. 2d 140, 162, 661 N.Y.S.2d 457, 485 (Sup. Ct. Kings County 1997). Interestingly however, “since the new death penalty statute was passed . . . whites have committed only 18% of death eligible murders, yet 60% of all defendants against whom a notice of intent to seek the death penalty has been filed are white.” *Id.* at 160, 661 N.Y.S.2d at 477.

¹²⁶ *See generally* *Lockhart v. McRee*, 476 U.S. 162, 167 (1986), *Wainwright v. Witt*, 469 U.S. 412, 421 (1985), *Adams v. Texas*, 448 U.S. 38, 45 (1980). “[T]he proper constitutional standard is simply whether a prospective juror’s views would ‘prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.’” *Id.* (citations omitted).

of people who are going to be making the determination whether the defendant is guilty or innocent of the crime to start with.

Mr. Quinn:

The first point, obviously, must be the assistance of counsel who conducts his or her voir dire. They, obviously, have to make the determination based upon what questions are asked. The statutory scheme in New York requires that each juror be individually voir dired so that questions can be asked and answered in a much more private setting. Jurors may be much more willing to answer those questions in that setting than they would be willing to answer in front of a panel of twelve or more. It, obviously, presents an issue, but the Supreme Court has upheld it.

Professor Klein:

Judge Hancock, perhaps if I could ask you a question that I think many people have wondered about, and it is a rare opportunity to have someone who has actually sat as a judge on the Court of Appeals here with us. To what extent do you think politics might play a role in the Court of Appeals' ultimate determination of the constitutionality of the statute? I mean, we know that they have been subjected to criticism. We know that judges across the state, and even across the country have been recently subjected to a lot of criticism by politicians.¹²⁷ Do you think in any way the political ramifications of the decision by the Court of Appeals finding the statute unconstitutional might somehow lead them to not take that step?

¹²⁷ See generally Bettijane Levine, *More Judges Feeling The Heat Of Criticism*, Times Union, Apr. 10, 1997, at 3; Jonathan Lippman, *Preserving Judicial Independence*, N.Y. L.J., Mar. 27, 1997, at 1.

Judge Hancock:

No, I do not think so. Having been a judge for twenty-three years, having been criticized, as any judge is, by people who disagree with your decisions, I know that it would not affect me. A judge has a sworn duty to make the decision as he or she sees fit. I have every confidence that the people who are now on the Court of Appeals, in the Appellate Divisions and in the state judiciary generally will carry that out. Now, you ask about the possibility of politics entering in. The only way that politics could conceivably enter in would be in the selection of future appointees to the Court. That is a possibility. Again, it is not political in the true sense of the word, but there could be some sort of an indication on the part of a future appointee as to how that appointee views the death penalty, as such; and so it is conceivable that it could enter into it in the years ahead, but I would not like to think that would not be so. But as to the present court and the judges that are now in office, I say absolutely not. Political ramifications would not affect them at all.

Professor Klein

Mr. Quinn, I think those of us who have been concerned about the death penalty in this country for a long time took some solace in what has happened in New York with the creation of the Capital Defenders Office. I am sure you know, especially throughout the South, when you look at the quality of the effectiveness of counsel for people in death penalty cases it is been absolutely abhorrent. There have been lawyers who have been paid very, very low fees in a capital case and they have spent very little time preparing the case or actually bringing the case to trial. In New York we have had the Court of Appeals approve monies being given to assist counsel in a capital case for

paralegal work, as well as for lower-level law associates.¹²⁸ But the Pataki administration has taken the position of refusing to allocate funds; forty dollars an hour, I think it was, for low-level law associates and twenty-five dollars an hour for paralegals.¹²⁹ This week that issue has been litigated in Genesee County.¹³⁰ I just wonder if you can explain why exactly the administration is opposing the allocation of funds, and is not going along with the Court of Appeals in approving of funds for paralegals, for lawyers, and for assistance in a capital prosecution.

Mr. Quinn:

Not being involved with the case and not being part of the administration, it would be inappropriate for me to take a position with respect as to why the governor has made that decision, as well as the Attorney General's Office who would be defending the decision. I cannot speak for the reasoning why. If I were to speculate, I would speculate that the governor has made the decision that the increased fees, the money allocated for the capital defender, as well as the increased fees for capital cases is sufficient to protect the defendants. It would provide sufficient monetary means for counsel to represent the defendants.

Professor Klein:

Judge Hancock, Mr. Quinn did refer to the fact that there were one hundred and twenty-two murder prosecutions in the first-degree, and I think that there are only thirteen cases in which the death penalty is actually being sought. Why do you think that number is so few?

¹²⁸ See Daniel Wise, *Capital Cases: Preparing for the Unbelievable*, N.Y. L.J., Jan. 14, 1997, at 1.

¹²⁹ *Id.*

¹³⁰ Mahony v. Pataki, N.Y. L.J., Nov. 17, 1997, at 27 (Sup. Ct. Genesee County 1997).

Judge Hancock:

Well, of course, it depends upon the mix of the cases. A typical case, which the prosecutor might choose not to prosecute as a death case, would be a felony murder case,¹³¹ which could conceivably be murder one, where you could seek the death penalty. But there are so many felony murders, particularly in drug-related cases, things of that kind, where, I hate to use this terminology, but I will, there is the typical drug, robbery, felony murder. Those usually are not cases where the District Attorney seeks the death penalty. There are many, many of those cases in New York City in the metropolitan area. There is one startling contrast. There is a felony murder robbery case in Albany; a defendant held up and killed a taxi driver. It is a murder one, and the death penalty is being sought in Albany. There is the identical case, either in Manhattan or in the Bronx, where the death penalty is not sought. I hate to use the term a "run of the mill felony murder," but that is the way such murders are often treated.

The Audience:

If I could interject, and I will only take a second. One of the reasons that this happens is because one of the functions of the capital defenders is to submit mitigation evidence to the District Attorney in capital eligible cases before he charges. So in many cases, the District Attorney looks at the mitigation evidence that it is going to be presented and says, I cannot get a conviction for that. That is essentially what the capital defenders have been

¹³¹ N.Y. PENAL LAW 125.25(3) (1995). This statute provides in pertinent part:

Acting either alone or with one or more other persons, he commits or attempts to commit robbery, burglary, kidnapping, arson, rape in the first degree, sodomy in the first degree, or escape in the second degree, and, in the course of and in furtherance of such crime or of immediate flight therefrom, he, another participant, if there be any, causes the death of a person other than one of the participants. . . .

Id.

doing in many of the cases today. It results in the consequence you are talking about where officially two cases look the same, but the mitigation evidence looks very different.

Mr. Quinn:

There are two reasons for that situation. In Albany County there has been an increased influx of drugs by mass transportation, specifically buses. The District Attorney has taken the view that this would be a factor in his determination in deciding to seek the death penalty, because the influx comes from outside Albany County. The Judge spoke about the capital defender providing mitigation. The capital defender does do so in certain instances; however, in the most celebrated case that is in the Court of Appeals now with respect to the murder of Kevin Gillespie, the police officer, they chose not to.¹³² They made a conscious decision that they would not show us anything. Whereas, in a case in Oswego County where an eighteen-year old white man shot his mother and father in the head, they chose to do so, and in so doing, the Attorney General made a decision that he would offer a life without parole.¹³³ The decision that they make will have an ultimate impact on what is actually offered or whether the prosecutor seeks the death penalty in this situation. There is one other point that is just an anecdote. We talk about deterrence and people cannot prove deterrence. I can just let you know Judge Brennan has spoken about Colin Ferguson. At Colin Ferguson's first court appearance after the election in November, 1994. His first question to the judge was now that Governor Pataki has been elected, do I face the death penalty? He was a scared individual. I think some correction officers stirred up part of it and they may have played some cruel jokes on him, but it certainly entered into his mind after the fact. I do not know

¹³² *In re Johnson v. Pataki*, 229 A.D.2d 242, 642 N.Y.S.2d 463 (1st Dep't), *leave to appeal denied*, 90 N.Y.2d 900, 685 N.E.2d 211, 662 N.Y.S.2d 430 (1997).

¹³³ *People v. Gordon Mower*, Oswego County, Indictment #96-15.

whether he would have been in the situation had the death penalty been in place in 1993.

Professor Klein:

We have time for a few questions.

The Audience:

Thank you. This is directed to the Judge regarding the *Jackson*¹³⁴ argument. As I am sure you are aware, in *North Carolina v. Alford*,¹³⁵ the Supreme Court permitted a plea of guilty in the capital case where the defendant said the only reason he was going to plead guilty was because he did not want to die in the gas chamber. So they permitted a plea to a non-capital murder offense. I have a second question, but I would like to hear, if I could, how you would reconcile the *Alford* case with *Jackson*. Don't you think *Alford* undermines your *Jackson* argument?

Judge Hancock:

I will be happy to comment on that. You are familiar with *Brady*,¹³⁶ and *Alford*.¹³⁷ All of those cases do not involve facial

¹³⁴ 390 U.S. 570 (1968).

¹³⁵ *North Carolina v. Alford*, 400 U.S. 25 (1970). Defendant was indicted for first-degree murder, a capital offense in North Carolina. *Id.* at 26. Even though defendant claimed to be innocent he accepted a reduced charge of second-degree murder and pled guilty. *Id.* at 27. Defendant then sought post conviction relief claiming that his guilty plea was the result of fear and coercion. *Id.* at 29. The Supreme Court held that the guilty plea, which represented a voluntary and intelligent choice among alternatives available to defendant, especially where he was represented by competent counsel, was not compelled within the meaning of the Fifth Amendment merely because the plea was entered to avoid the possibility of the death penalty. *Id.* at 37.

¹³⁶ *Brady v. United States*, 397 U.S. 742 (1970). *Brady* was charged with kidnapping and entered a plea of guilty upon learning that his co-defendant would enter a plea of guilty and would also testify against him. *Id.* at 743-44. *Brady* was subsequently convicted and then sought relief claiming his plea was

attacks on the statute. These are cases where the sole question had to do with whether or not the particular plea given in the case was voluntary. These pleas were entered after the *Jackson* decision came down. So the courts have adopted the rule, and it alluded to in *People v. Michael A.C.*,¹³⁸ which I just read, that *Jackson* does not hold that the Federal Kidnapping Law¹³⁹ is inherently coercive. It does not say that. It says that the Federal Kidnapping Law imposes an unconstitutional inducement, which violates the defendant's rights. Had the holding been that it was inherently coercive, then every plea would be knocked out. So that is the distinction. It is not inherently coercive. These cases that you have alluded to are fact specific cases having to do with particular pleas in specific cases.

The Audience:

This is to Mr. Quinn. It is been long recognized that juries have the right of nullification, not merely because they believe that the law applied to the facts of this case would be unjust, but also because they might feel the law itself is unjust in the case of

not voluntary. *Id.* He alleged that his counsel exerted pressure on him and that his plea was induced by representations with respect to reduction and clemency. *Id.* The Supreme Court held that nothing in the record impeached Brady's plea or suggested that his admissions in open court were anything but the truth. *Id.* at 758. The Court was also convinced that his plea was voluntary and intelligently made. *Id.*

¹³⁷ *North Carolina v. Alford*, 400 U.S. 25 (1970).

¹³⁸ 27 N.Y.2d 79, 261 N.E.2d 620, 313 N.Y.S.2d 695 (1970). The court found that:

[A]lthough any defendant, including a youthful offender, is free to consent to a trial without a jury if, in fact and reality, he prefers to be so tried – and knowingly waives his constitutional right – this does not mean that a State may demand that such a consent be given as an absolute precondition to affording him the benefits of youthful offender treatment.

Id. at 85, 261 N.E.2d at 624, 313 N.Y.S.2d at 700.

¹³⁹ 18 U.S.C. 1201(a) (1997). This statute imposes the penalty of death, or of any prison term, for transporting a kidnap victim through interstate commerce. *Id.*

a death sentence that perhaps the penalty itself might be unjust, by loading the jury, by creating a death qualified jury, are you not, in essence, revoking part of jury nullification?

Mr. Quinn:

There has been a lot written about jury nullification. I do not know that it is a particular right, it is just a function of the jury system. You keep talking about death qualified. I think that you have two adversaries, one at each table. Their job is to seek that person who is, I assume, most favorable to their client or their purpose as well. So you have the competing interest in the courtroom every day. I do not know that by knocking out those people that would never impose a death penalty you create a situation where a case would never be nullified. The penalty phase is at a point in time where people have the opportunity to learn much more about the defendant. Obviously, the defendant can sit throughout the trial and not say anything or not do anything. But at the time of the penalty phase, it is his obligation and wanton wish to put forth as much evidence as possible to show him to be, for lack of a better words right now, a caring individual, decent human being, and give reasons to mitigate why he should be put to death. The defendant has that opportunity. By suggesting that, I do not think we can take away from the jury and say that jurors are not going to be human beings when they are sitting on there. Just because they agree that they can at some point in time impose the death penalty does not mean that they do not have a heart, and to see whom the person is and not vote to impose death.

Judge Brennan:

I am going to thank Professor Schwartz and Dean Glickstein for allowing us to put this program together. I think it has been a great day. There have been an awful lot of challenging and thought-provoking remarks. Thank you very, very much.

