TOURO LAW
JACOB D. FUCHSBERG LAW CENTER

Touro Law Review

Volume 14 | Number 3 Article 48

1998

Right to Jury Trial, Supreme Court, Appellate Division, Second Department: Hynes v. Tomei Court

U.S. Const. amend. VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .

N.Y. CONST. art. I § 2:

Trial by jury in all cases in which it has been heretofore been guaranteed by constitutional provision shall remain inviolate forever; but a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law. The legislature may provide, however, by law, that a verdict may be rendered by not less than five-sixths of the jury in any civil case. 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, 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. The legislature may enact laws, not inconsistent herewith, governing the form, content, manner and time of presentation of the instrument effectuating such waiver.

SUPREME COURT, APPELLATE DIVISION

SECOND DEPARTMENT

Hynes v. Tomei[1]
(decided December 22, 1997)

On July 18, 1997, defendant, Michael Shane Hale, sought to avoid the death penalty by pleading guilty to the crimes of second degree murder, kidnapping and first degree robbery.[2] In accordance with New York's Criminal Procedure Law

[1] 666 N.Y.S.2d 687 (2d Dep't 1997).
[2] *Id.* at 689.

[hereinafter "CPL"],[3] the People consented to this guilty plea in exchange for a sentence of fifty years to life imprisonment, thereby allowing Hale to avoid the possibility of a death sentence, as was being sought under the indictment.[4] Before the plea agreement, Hale had moved for a declaration that New York's "plea bargain provisions"[5] are "unconstitutional on their face."[6] In essence, defendant Hale argued, and New York Supreme Court Justice Albert Tomei agreed, that these statutory provisions "unconstitutionally penalize a capital defendant's right to a jury trial."[7] As such, they effectively punish a defendant for exercising rights protected by both the United States Constitution[8]

---

[3] N.Y. CRIM. PROC. LAW § 220.10 (5)(e) (McKinney 1998). This section of the CPL states in pertinent part:

> A defendant may not enter a plea of guilty to the crime of murder in the first degree as defined in section 125.27 of the penal law; provided, however, 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.

[4] *Hynes*, 666 N.Y.S.2d at 688.

[5] *Id.* Hale challenged CPL 220.10 (5)(e), CPL 220.30 (3)(b)(vii) and CPL 220.60 (2)(a), collectively known as "the plea bargain provisions." *Id.*

[6] *Id.*

[7] *Id.*

[8] U.S. CONST. amend. V. The Fifth Amendment provides in pertinent part: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." *Id.*; U.S. CONST. amend. VI. The Sixth Amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." *Id.*

and the New York Constitution[9] by placing that defendant in peril of execution should a jury trial be sought.[10]

The People brought this Article 78 proceeding[11] to challenge Justice Tomei's determination that the plea provisions are invalid and should "be severed and stricken from the statute."[12] The Appellate Division, Second Department, converted the proceeding into an action for a declaratory judgment,[13] and found New York's plea bargain provisions constitutional.[14] The holding of the court was based on a recognition of the constitutional safeguards employed by New York's death penalty statute[15] and an affirmation of the social utility and "judicial acceptance of plea bargaining."[16] The court concluded that "the determination of the respondent Tomei to the contrary . . . should not be followed.[17]

---

[9] N.Y. CONST. art. I, § 2. Article I, § 2 of the New York State Constitution provides in pertinent part: "Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever. 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.*

[10] *Hynes*, 666 N.Y.S.2d at 689.

[11] N.Y. C.P.L.R. § 7801 (McKinney 1994).

[12] People v. Hale, 173 Misc. 2d 140, 194, 661 N.Y.S.2d 457, 488 (Sup. Ct. Kings County 1997) (holding that New York's plea bargain provisions discourage one's Fifth Amendment right to plead not guilty, as well as one's Sixth Amendment right to demand a jury trial, by making the guilty plea the only assurance of avoiding the death penalty).

[13] Hynes v. Tomei, 666 N.Y.S.2d 687 (2d Dep't 1997). "The remedy of a declaratory judgment 'is available in cases where a constitutional question is involved or the legality or meaning of a statute is in question . . . .'" *Id.* at 689 (citation omitted).

[14] *Id.* at 693. "Ordered that the proceeding is converted into an action for a judgment declaring that CPL 220.10(5)(e), CPL 220.30(3)(b)(vii), and CPL 220.60(2)(a) are constitutional." *Id.*

[15] *Id.* at 691. "[T]he death penalty statute in New York provides for a bifurcated trial where the defendant's guilt, and the sentence to be imposed, are determined separately by the jury. [T]he defendant retains all of his or her constitutional protections . . . ." *Id.*

[16] *Id.* at 693 (citing People v. Seaberg, 74 N.Y.2d 1, 7, 541 N.E.2d 1022, 1024, 543 N.Y.S.2d 968, 970 (1989)).

[17] *Id.*

In the underlying case, Michael Shane Hale was charged under an indictment with varying degrees of murder, kidnapping and robbery.[18] Following Hale's arraignment, the People filed a "notice of intent to seek the death penalty"[19] pursuant to the CPL.[20] Subsequently, Hale moved to find New York's plea bargain provisions unconstitutional claiming that they "'effectively penalize[d] his right to a jury trial,' by exposing him to the risk of death only when he exercised that right."[21] Relying on the United States Supreme Court ruling in *United States v. Jackson*,[22] Justice Tomei granted defendant's motion and found that "the plea bargain provisions were unconstitutional in that they did 'not conform to the requirements of the [F]ifth and [S]ixth [A]mendments to the United States Constitution, and corresponding provisions of the New York Constitution.'"[23]

While the People were waiting to reargue this issue, they reached a plea agreement with Hale wherein the People would consent to Hale's plea of guilty to murder in the second degree, and Hale would submit to a minimum fifty years term of imprisonment.[24] However, Justice Tomei denied both (1) the People's motion to reargue the validity of the CPL provisions, and (2) permission to accept Hale's guilty plea, unless the People were to withdraw its intent to seek the death penalty.[25] In response, the People filed this Article 78 proceeding seeking

---

[18] *Id.* at 688.

[19] *Id.*

[20] N.Y. CRIM. PROC. LAW § 250.40 (McKinney 1998). This section states in pertinent part: "A sentence of death may not be imposed upon a defendant convicted of murder in the first degree unless . . . the people file with the court and serve upon the defendant a notice of intent to seek the death penalty." *Id.*

[21] *Hynes*, 666 N.Y.S.2d at 688-89.

[22] 390 U.S. 570, 581 (1968) (finding the selective death penalty provision of the Federal Kidnapping Act unconstitutional in its chilling effect on both the Fifth and Sixth Amendments and, in its needless encouragement of guilty pleas).

[23] *Hynes*, 666 N.Y.S.2d at 689 (citing People v. Hale, 173 Misc. 2d 140, 185, 661 N.Y.S.2d 457, 483 (Sup. Ct. Kings County 1997)).

[24] *Id.*

[25] *Id.*

prohibition of Justice Tomei's order, or in the alternative, a declaration that the challenged CPL provisions are constitutional notwithstanding Tomei's earlier ruling.[26]

The Appellate Division noted that prohibition is improper in cases such as these where a statute's constitutionality is at issue.[27] Accordingly, the court denied People's request for a writ of prohibition against Justice Tomei.[28] However, the court chose to grant the remedy of a declaratory judgment to curtail the effect that Justice Tomei's far-reaching ruling would most certainly have had on future cases.[29] In so holding, the court emphasized the well-respected rule that accords state statutes a strong presumption of constitutionality.[30] Indeed, in *People v. Davis*, the Court of Appeals admonished courts not to "substitut[e] their judgment for that of the Legislature as to the wisdom and expediency of the legislation."[31]

New York's statutory plea bargain provisions *allow* a capital defendant to plead guilty only in exchange for a sentence, other than death, commensurate with murder in the first degree.[32] Furthermore, a defendant charged with first degree murder may only plead guilty with the consent of the People and permission of the court.[33] Justice Tomei found these provisions unconstitutional because they force a capital defendant to trade away constitutional

---

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.* "[A] declaratory judgment may be used to attack a criminal court's interlocutory ruling when 'the ruling [has] an obvious effect extending far beyond the matter pending before it so that it is likely that the issue will arise again with the same result in other cases." *Id.* at 689 (citation omitted).

[30] *Id.*

[31] People v. Davis, 43 N.Y.2d 17, 30, 371 N.E.2d 456, 462, 400 N.Y.S.2d 735, 742 (1977) (finding New York's death penalty statute at the time unconstitutional for failing to specifically provide for consideration of mitigating factors).

[32] *Hynes*, 666 N.Y.S.2d at 690.

[33] N.Y. CRIM. PROC. LAW §§ 220.10(5)(e), 220.30(3)(b)(vii), 220.60(2)(a) (McKinney 1998).

rights in order to avoid risking his/her own life to contest guilt at trial.[34]

In *Jackson*, defendant challenged the death penalty provision of the Federal Kidnapping Act.[35] The district court found the Act to be unconstitutional "because it makes 'the risk of death' the price for asserting the right to jury trial, and thereby 'impairs . . . free exercise of that constitutional right.'"[36] The United States Supreme Court refined the lower court's ruling and found only that portion of the Act that imposes capital punishment at the cost of an individual's right to jury trial to be unconstitutional, thus preserving the remainder of the Act as valid.[37] Justice Tomei likened New York's death penalty statute to the invalid provision of the Federal Kidnapping Act, noting that both statutes authorize a jury to be the sole arbiter of death.[38] An obvious consequence then, is that defendants purposefully avoid the exercise of their Sixth Amendment right to a jury trial, and Fifth Amendment right not to plead guilty, specifically to avoid facing a jury and a possible death sentence.[39] The Court in *Jackson* characterized this effect as "evil" in that the Act "needlessly encourages" guilty pleas.[40]

However, the Appellate Division clearly distinguished the Federal Kidnapping Act and New York's death penalty statute.[41]

---

[34] *Hynes*, 666 N.Y.S.2d at 689.

[35] 18 U.S.C. § 1201(a). This statute provides in pertinent part:

> Whoever knowingly transports in interstate . . . commerce, any person who has been unlawfully . . . kidnapped . . . and held for ransom . . . or otherwise . . . shall be punished (1) by death if the kidnapped person has not been liberated unharmed and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed.

Id.

[36] United States v. Jackson, 390 U.S. 570, 571 (1968).

[37] *Id.* at 572.

[38] People v. Hale, 173 Misc. 2d 140, 178-79, 661 N.Y.S.2d 457, 479 (Sup. Ct. Kings County 1997).

[39] *Id.* at 179-80, 661 N.Y.S.2d at 479-80.

[40] *Jackson*, 390 U.S. at 583.

[41] Hynes v. Tomei, 666 N.Y.S.2d 667, 690-91 (2d Dep't 1997).

First, the court noted that New York's statute provides for a bifurcated trial proceeding, where guilt and sentencing are determined separately by the jury.[42] As such, defendant retains all constitutional protections during the guilt phase of trial,[43] and is afforded the benefit of presenting mitigating factors at sentencing.[44] Secondly, unlike the defendant in *Jackson*, a capital defendant in New York does not have the right to plead guilty; rather, he/she *may* be allowed to plead guilty at the discretion of the court and the People as an act of leniency and judicial economy.[45]

While *Jackson* invalidated the death penalty provision of the Federal Kidnapping Act, courts have since narrowed its impact.[46] In *Brady v. United States*,[47] a defendant indicted for kidnapping under 18 U.S.C. § 1201(a) became increasingly fearful of the death penalty upon learning that his co-defendant had entered a guilty plea and was preparing to testify against him.[48] Such fear motivated him to change his plea from not guilty to guilty, and sentence was imposed accordingly.[49] Later, defendant argued, "in reliance on *Jackson*, that the death penalty provision of the kidnapping statute had needlessly encouraged his guilty plea, and the waiver of his right to trial, because his plea had been motivated by a fear of the death penalty."[50] However, the United States Supreme Court found defendant's interpretation of *Jackson* to be overly broad.[51] Contrary to Brady's contention under *Jackson*, a guilty plea motivated by the possibility of a death sentence is not invalid, nor automatically deemed to be

---

[42] *Id.* at 691.

[43] *Id.* For example, "he or she is not compelled to take the witness stand, and the People must prove guilt beyond a reasonable doubt." *Id.*

[44] *Id.*

[45] *Id.*

[46] *See* Brady v. United States, 397 U.S. 742 (1970).

[47] 397 U.S. 742 (1970).

[48] *Id.* at 743. The Court noted that the standard for measuring voluntariness of guilty pleas is not governed by a capital defendant's desire to avoid the possibility of the death penalty. *Id.*

[49] *Id.*

[50] *Hynes*, 666 N.Y.S.2d at 691.

[51] *Brady*, 397 U.S. at 746.

involuntary.[52] In *Brady*, the judge who accepted defendant's guilty plea took precautions to make sure that the changed plea was not coerced; he noted that Brady was represented by competent counsel throughout the proceedings, was seemingly well-informed to make this decision and was not compelled beyond knowledge of his confederate's confession.[53] In summary, Brady's plea was deemed to be voluntary.[54]

Similarly, in *North Carolina v. Alford*,[55] a jury heard damaging evidence against a capital defendant who then entered a plea of guilty to avoid a likely death penalty.[56] All the while, however, defendant disavowed his guilt and claimed that he entered a guilty plea solely to avoid the threat of capital punishment.[57] On appeal, defendant argued, under *Jackson*, that his guilty plea was involuntary and motivated by fear of the death penalty.[58] Again, the United States Supreme Court rejected this interpretation of *Jackson*, instead upholding the standard from *Brady* that a plea of guilty is not "compelled within the meaning of the Fifth Amendment," even if entered solely to avoid the possibility of the death penalty.[59] "The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant."[60]

With much the same reasoning, the United States Supreme Court in *Corbitt v. New Jersey*[61] conceded that post-*Jackson* practices may encourage guilty pleas; however, the Court further clarified that such pleas are not needlessly encouraged, but rather, are a necessary "attribute of any legitimate system which tolerates

---

[52] *Id.* at 755. "Under this standard, a plea of guilty is not invalid merely because entered to avoid the possibility of a death penalty." *Id.*

[53] *Id.* at 754-55.

[54] *Id.* at 755.

[55] 400 U.S. 25 (1970).

[56] *Id.* at 28-29. The Court stated that a guilty plea entered to avoid the possibility of the death penalty is not per se invalid. *Id.*

[57] *Id.* at 28.

[58] *Id.* at 31.

[59] *Id.*

[60] *Id.*

[61] 439 U.S. 212 (1978).

and encourages the negotiation of pleas."[62] Furthermore, the discretion given a prosecutor to consent to a guilty plea in a capital case is viewed as an act of leniency, without which a civilized society could not tolerate a system of capital punishment.[63]

In the present case, the Appellate Division also based its decision on recognition of the social utility and necessity of plea bargaining in our criminal justice system.[64] This process of negotiating sentences was highly regarded by the United States Supreme Court in *Santobello v. United States*[65] as an "essential component of the administration of justice."[66] Similarly, the Court in *Bordenkircher v. Hayes*[67] stated "that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned."[68]

With such encouragement from the United States Supreme Court on the practice of plea bargaining, New York courts in recent decisions have declared State plea bargain provisions to be constitutional.[69] In *People v. McIntosh*,[70] defendant, like Michael Shane Hale in the instant case, attempted to strike down the CPL

---

[62] *Id.* at 220 (quoting Chaffin v. Stynchcombe, 412 U.S. 17, 31 (1973)). The Supreme Court upheld the practice of plea bargaining in a capital case despite the fact that "every such circumstance has a discouraging effect on the defendant's assertion of his trial rights." *Id.* at 219 n.8.

[63] McCleskey v. Kemp, 481 U.S. 279, 312 (1987). The Court noted that "[d]iscretion in the criminal justice system offers substantial benefits to the criminal defendant." *Id.* at 311.

[64] Hynes v. Tomei, 666 N.Y.S.2d 687, 693 (Sup. Ct. Kings County 1997).

[65] 404 U.S. 257 (1971).

[66] *Id.* at 260. The Court noted that without some form of negotiation of criminal sentencing, the "States and the Federal Government would need to multiply by many times the number of judges and court facilities." *Id.*

[67] 434 U.S. 357 (1978).

[68] *Id.* at 361-62. "Plea bargaining flows from 'the mutuality of advantage' to defendants and prosecutors, each with his own reasons for wanting to avoid trial." *Id.* at 363.

[69] *See* Hynes v. Tomei, 666 N.Y.S.2d 687 (Sup. Ct. Kings County 1997). *See also* People v. McIntosh, 173 Misc. 2d 727, 682 N.Y.S.2d 214 (Dutchess County Ct. 1997).

[70] 173 Misc. 2d 727, 682 N.Y.S.2d 214 (Dutchess County Ct. 1997).

plea bargain provisions.[71] McIntosh claimed that the provisions only allow for a death sentence if recommended by a jury after a trial, and that no such potentiality exists should a defendant plead guilty.[72] Therefore, "this restriction impermissibly penalizes his exercise of his right to have a trial . . . ."[73] In its analysis, the Dutchess County Court cited the Supreme Court's decision in *United States v. Jackson* and likewise distinguished the CPL provisions from the Federal Kidnapping Act.[74] The true difference, the court pointed out, is that New York's statute undermines the power of a defendant to choose, as of right, a course of action which avoids the death penalty.[75] Indeed, New York's plea bargain provisions require the consent of both the prosecutor and the court to prevent a defendant from unilaterally choosing to avert a death sentence.[76] The court reasoned that "there is not the chilling effect on the defendant's exercise of his right to a jury trial as was the case in *Jackson* because the option to forego a trial rests not only with [defendant] McIntosh, but with the district attorney and the court as well."[77] The court went on to note that the "unilateral nature" of the scheme in *Jackson* made the waiver of one's constitutional rights "needless."[78] Since the New York statutes are not unilateral in nature and otherwise afford constitutional protections, a waiver of one's Fifth and Sixth Amendment rights is not "gratuitous."[79] Rather, a defendant *may* be offered an opportunity at a "more favorable outcome" because he/she is not compelled to take the offer.[80] "The dynamic of striking an agreement between two equal

---

[71] *Id.* at 728, 682 N.Y.S.2d at 215 (finding New York's plea bargain statutes to be in compliance with constitutional mandates).
[72] *Id.*
[73] *Id.*
[74] *Id.* at 729, 662 N.Y.S.2d at 215-16.
[75] *Id.* at 729, 662 N.Y.S.2d at 216.
[76] *Id.*
[77] *Id.* at 731, 662 N.Y.S.2d at 217.
[78] *Id.* at 733, 662 N.Y.S.2d at 218.
[79] *Id.* at 733, 662 N.Y.S.2d at 219.
[80] *Id.*

participants in the justice system is not per se coercive."[81] Accordingly, the court upheld the constitutionality of the plea bargain provisions.[82]

Other states have similarly upheld plea bargain statutes in light of constitutional attacks. In *Ruiz v. State*,[83] the Supreme Court of Arkansas noted that "the holding in *Jackson* has been eroded in recent decisions,"[84] and found that mere encouragement to plead guilty is not automatically suspect.[85] "The fact that a defendant agrees to waive trial by jury on the issue of guilt, or the right to have guilt determined by a jury because the court and state will waive the death penalty, does not chill an accused's right to a jury trial."[86]

Federal law, under *United States v. Jackson,* condemns "needless encouragement of a defendant's waivers of his/her Fifth and Sixth Amendment rights. . . ,"[87] and refers to such practice as "evil."[88] However, as the present decision makes clear, the dynamic of a plea bargain, wherein a defendant may be allowed to plead guilty with the consent of the court and the people, does not result in needless surrender of one's rights; rather, it grants the defendant an opportunity to negotiate a more favorable sentence.[89]

---

[81] *Id.* at 733, 662 N.Y.S.2d at 218.

[82] *Id.* at 733, 662 N.Y.S.2d at 220.

[83] 630 S.W.2d 44, 46 (Ark. 1982) (finding that Arkansas' death penalty statute "does not place an impermissible burden on the exercise of the constitutional right to trial by jury."). In *Ruiz*, defendants, convicted and sentenced to death, sought post conviction relief by claiming that Arkansas' death penalty statute is violative of one's Fifth and Sixth Amendment rights. *Id.* at 46. Defendants cited the ruling in *Jackson* to stand for the proposition that a capital defendant "can be assured of escaping execution *only* by waiving his right to a jury trial." *Id.*

[84] *Id.*

[85] *Id.* at 47.

[86] *Id.*

[87] *McIntosh*, 173 Misc. 2d at 730, 662 N.Y.S.2d at 216.

[88] United States v. Jackson, 390 U.S. 570, 583 (1968).

[89] Hynes v. Tomei, 666 N.Y.S.2d 687, 691 (Sup. Ct. Kings County 1997).

New York law parallels federal law in its recognition of the constitutional infirmities present in *United States v. Jackson*.[90] However, New York's plea bargain provisions, unlike the statute in *Jackson*, have been upheld despite constitutional challenges, because they require prosecutor and defendant to agree on a prison sentence instead of permitting defendant to unilaterally choose to avoid the risk of death.[91] This practice of plea bargaining has "been repeatedly approved by Federal and New York courts."[92] Indeed, the New York Court of Appeals, recognized as the policy-making tribunal of the State,[93] has categorically endorsed the plea bargaining process.[94] The system of negotiating sentences not only alleviates the great volume of criminal prosecutions, "it 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."[95]

COUNTY COURT

DUTCHESS COUNTY

People v. McIntosh[96]
(decided August 4, 1997)

---

[90] *Id.* at 690-91.

[91] *Id.* at 693.

[92] *McIntosh*, 173 Misc. 2d at 730, 662 N.Y.S.2d at 216.

[93] *Hynes*, 666 N.Y.S.2d at 692.

[94] *See* People v. Seaberg, 74 N.Y.2d 1, 541 N.E.2d 1022, 543 N.Y.S.2d 968 (1989).

[95] *Id.* at 7, 541 N.E.2d at 1024, 543 N.Y.S.2d at 970 (noting the vital role that plea bargaining plays in our criminal justice system, "enabl[ing] the parties to avoid the delay and uncertainties of trial and appeal and permit[ing] swift and certain punishment of law violators with sentences tailored to the circumstances of the case at hand") (citation omitted).

[96] 173 Misc. 2d 727, 662 N.Y.S.2d 214 (Dutchess County Ct. 1997)