Hynes v. Tomei: The New York Court of Appeals Declares Certain Plea Provisions of the New York Capital Punishment Statute Unconstitutional as They Needlessly Encourage Guilty Pleas by Allowing Criminal Defendants to Avoid the Possibility of a Death Sentence by Waiving Their Fifth and Sixth Amendment Rights

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RECENT DEVELOPMENT
IN NEW YORK LAW

Hynes v. Tomei: The New York Court of Appeals declares certain plea provisions of the New York capital punishment statute unconstitutional as they needlessly encourage guilty pleas by allowing criminal defendants to avoid the possibility of a death sentence by waiving their Fifth and Sixth Amendment rights.

The resurrection of the death penalty as a possible sentence for conviction of murder in the first degree has brought with it unique plea machinery by which prosecutors and defendants negotiate in a criminal proceeding. On December 22, 1998, the New York State Court of Appeals, in Hynes v. Tomei, invalidated two plea provisions of the capital punishment statute that allowed criminal defendants charged with first degree murder to forego a jury trial, plead guilty, and thus avoid the possibility of a death sentence. The Court of Appeals, tracking the Supreme

1 See N.Y. CRIM. PROC. LAW § 400.27(1) (McKinney Supp. 1999) (authorizing the court to “promptly conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or to life imprisonment”); see also N.Y. PENAL LAW § 125.27 (McKinney 1998) (defining murder in the first degree).


4 See N.Y. CRIM. PROC. LAW § 220.10(5)(e) (McKinney Supp. 1999): 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
Court's decision in *United States v. Jackson*, declared sections 220.10(5)(e) and 220.30(3)(b)(vii) of the New York Criminal Procedure law unconstitutional, as they "‘needlessly’ encourage[d] guilty pleas in violation of *Jackson*.”

The *Hynes* decision may have unsettling ramifications in two areas of the law with respect to capital punishment. A sentence of death based on a guilty plea may be barred by Article 1, Section 2 of the New York State Constitution. Moreover, even if corrective legislation could remedy the constitutional infirmity of the plea provisions, plea negotiations in first-degree murder cases may nonetheless be a practical impossibility.

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5 390 U.S. 570, 583, 591 (1968) (invalidating the capital punishment clause of the Federal Kidnapping Act because it “needlessly encourages” pleas of guilty in violation of the Fifth and Sixth Amendments); see also 18 U.S.C. § 1201(a) (1994) ("Whoever unlawfully seizes, confines, ... kidnap[s] ... any person ... shall be punished by imprisonment ... and, if the death of any person results, shall be punished by death or life imprisonment."). When *Jackson* was heard before the Supreme Court in 1968, 18 U.S.C. § 1201(a)(1) contained the following clause: "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." *See Jackson*, 390 U.S. at 571 (quoting 18 U.S.C. 1201(a) (1964)).

6 *Hynes*, 706 N.E.2d at 1208. "*Jackson* compels us to invalidate these provisions." *Id.* at 1207.

7 *See* N.Y. CONST. 1 § 2 ("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 ... "); see also James R. Acker, *When the Cheering Stopped: An Overview and Analysis of New York's Death Penalty Legislation*, 17 PACE L. REV. 41, 93 (1996) (suggesting that the plea provisions violate the New York Constitution even if a guilty plea renders the death penalty inapplicable because it allows a defendant to waive a jury trial for a "‘crime’ that ‘may be punishable by death’"); Hon. Stewart F. Hancock, Jr. et al., *Does New York's Death Penalty Statute Violate the New York Constitution?*, 14 TOURO L. REV. 715, 727 (1998) (explaining that the State Constitution has a provision directly prohibiting the ability to waive a jury in a capital case where a guilty verdict would result in execution); Wise, *supra* note 2, at 1 ("[S]everal Prosecutors have warned that a state constitutional prohibition may thwart efforts to remedy the defect the Court identified in ... Matter of *Hynes v. Tomei*. ").

8 *See* Wise, *supra* note 2, at 1 ("Prosecutors and defense lawyers said ... that the opinion would make the negotiation of pleas quite difficult once a prosecutor had served notice that the death penalty would be sought.").
The plea provisions were declared unconstitutional by the trial courts in *People v. Hale* and *People v. Mateo*. In both proceedings, negotiated pleas were rejected by Justices Connell and Tomei, respectively. Declaratory judgment actions were brought before the appellate divisions of the Second and Fourth Departments and the plea provisions were subsequently declared constitutional. The Court of Appeals concluded that *Jackson* compelled the opposite result and reversed the appellate division. Chief Judge Kaye, writing for the Court of Appeals, noted that capital defendants would have “fewer opportunities to avoid the possibility of the death penalty” because of the court’s decision to strike down sections 220.10(5)(e) and 220.30(3)(b)(vii) of the capital punishment statute.

The Court of Appeals compared the sentencing clause of the Federal Kidnapping Act (18 U.S.C. § 1201(a) (1964)), at issue in *Jackson*, to New York’s plea provisions. The court noted that the Act authorized the death penalty only on a recommendation from the jury, “while a defendant convicted of the same offense on a guilty plea or by a Judge escaped the threat of capital punishment.” After exhaustively analyzing the similarities between the clause at issue in *Jackson* and the New York plea provisions, Chief Judge Kaye concluded that only those defendants who exercised their Fifth Amendment rights against self-incrimination

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10 **664 N.Y.S.2d 981 (Monroe County Ct. 1997).**

11 **See id. at 982; Hale, 661 N.Y.S.2d at 479.**


13 **See Hynes, 706 N.E.2d at 1209.**

14 **Id. (calling the result an “ironic twist”). Moreover, Chief Judge Kaye was cognizant that the result of the Hynes decision would be to reduce the “flexibility of both prosecutors and defendants who wish to plea bargain in capital cases.” Id.**

15 **Id. at 1204. In Jackson, the Supreme Court concluded that the creation of two classes of defendants, one by conviction (penalty of death), and one by plea (penalty of imprisonment), created a situation in which defendants would be encouraged to waive jury trials and plead guilty. See United States v. Jackson, 390 U.S. 570, 581 (1968) (“The inevitable effect of any such provision . . . is 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.”); accord Pope v. United States, 392 U.S. 651 (1968) (per curiam) (vacating a death sentence under the Federal Bank Robbery Act, 18 U.S.C. § 2113(e), because of the same constitutional infirmity as that suffered by the Federal Kidnapping Act).**
and Sixth Amendment rights to a jury trial placed themselves at risk of death. Respondents argued that sections 220.10 (5)(e) and 220.30 (3)(b)(vii), which are identical and provide that a "defendant may enter such a plea with both the permission of the court and the consent of the people," were distinguishable from the Federal Kidnapping Act at issue in *Jackson*.

Contrasting the capital punishment statutes of various states, Chief Judge Kaye concluded that those statutes which survived constitutional scrutiny contained no guarantee that a plea of guilty would result in a sentence lesser than the maximum sentence that could be imposed after conviction at trial. Finally, Chief Judge Kaye addressed arguments which attempted to distinguish *Jackson* on the grounds that the bifurcated trial and sentencing system in New York was different from the unitary trial and sentencing system in *Jackson*, thus alleviating the "chilling effect" on a defendant's constitutional right. She dismissed

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16 See *Hynes*, 706 N.E.2d at 1207; People v. Michael A.C., 261 N.E.2d 620, 625 (N.Y. 1970) (holding that procedures which offer more severe penalties for those who assert a fundamental constitutional right than for those who do not cannot be sustained).

17 See *Hynes*, 706 N.E.2d at 1206. Respondents argued that defendants never had unilateral control of the plea bargaining process because the statute did not give defendants a choice between facing death by asserting trial rights or pleading guilty and avoiding death. See *id.* at 1205. The court responded by stating that "the need to obtain approval from the People and the court will not save plea provisions that otherwise violate *Jackson*." See *id.* at 1206. Appellants also argued that section 220.60(2)(a) of the N.Y. Criminal Procedure Law was unconstitutional. This statute allows a criminal defendant to withdraw a guilty plea at any time before the rendition of the verdict. See N.Y. CRIM. PROC. LAW § 220.60(2)(a) (McKinney Supp. 1999). "A defendant who has entered a plea of not guilty to an indictment may, with both the permission of the court and the consent of the people, withdraw [the] plea at any time before the rendition of a verdict and enter: (a) a plea of guilty to part of the indictment . . . ." *Id.* This section of the statute was, however, upheld by the *Hynes* court because it affected non-capital offenses as well. See *Hynes*, 706 N.E.2d at 1208.

18 See *Hynes*, 706 N.E.2d at 1206 (noting the respondent's reliance on *Corbitt v. New Jersey*, 439 U.S. 212 (1978), which held that a state may offer benefits to defendants in exchange for guilty pleas). Chief Judge Kaye pointed out that the New Jersey statute at issue in *Corbitt* provided for the possibility of the maximum penalty through either a plea of guilty or a conviction at trial. See *id*.

19 *Id.* at 1206–07. Respondent's argument was that during the sentencing phase even after a defendant has been convicted at trial, there was the opportunity to agree to a sentence even after the guilt phase. See *id.* at 1207. The Court responded by stating that this possibility did not cure the statute of the *Jackson* effect. Moreover, the court noted that a prosecutor might be "less willing to forego pursuit of the death penalty after a defendant's guilt has been established." *Id.* Ultimately, "[t]he question is not whether the chilling effect is 'incidental' rather than intentional; the
these arguments by concluding that the bifurcation did not alter the "statutory framework that allows the possibility of death only after a jury trial." Moreover, Chief Judge Kaye noted that although the plea provisions had been struck down, a defendant was not precluded from entering a plea of guilty to first degree murder when the district attorney has not yet filed a notice of intent to seek the death penalty. This was because "defendants in that situation face the maximum sentence regardless of how they are convicted."

"[S]tate statutes under scrutiny carry with them a strong presumption of constitutionality." In concluding that this presumption was not strong enough to overcome the constitutional infirmity of §§ 220.10(5)(e) and 220.30(3)(b)(vii), the Hynes court opened up a wound in the capital punishment statute that corrective legislation may not be able to repair. The nexus of the Hynes opinion was that a constitutionally compliant capital statute required the possibility of the same maximum sentence upon a plea of guilty as upon conviction at a jury trial. Thus, after Hynes, a New York criminal defendant charged with first degree murder would, if he chose to make use of the plea machinery, have to accept the possibility of a death sentence, the maximum penalty under the capital statute. Hynes, however,

question is whether that effect is unnecessary and therefore excessive." Jackson, 390 U.S. at 582.

20 Hynes, 706 N.E 2d at 1207. Chief Judge Kaye declared that capital defendants under the New York statute "who are awaiting trial and are offered a plea are still faced with the choice Jackson declared unconstitutional." Id.

21 Id. at 1209. While a death notice is pending, a defendant is constitutionally barred from waiving his jury rights. See N.Y. CONST. art. 1, § 2.


23 The key to the New York capital punishment statute is that it maneuvers around the constitutional prohibitions outlined in article 1, section 2 of the New York State Constitution. This section prohibits a defendant from waiving a jury trial when the maximum penalty for the crime charged is death. See N.Y. CONST. art 1, § 2.

24 "[T]he death penalty statutes of States that have rejected a Jackson challenge, with one exception, provide for the possibility of a death sentence upon a guilty plea." See Hynes, 706 N.E.2d at 1207. The exception referred to was the Arkansas capital statute which requires the judge to make the final determination as to whether the death penalty would be imposed. Moreover, guilty pleas were allowed only after waiver by the prosecutor of intention to seek the death penalty. See Ruiz v. State, 630 S.W.2d 44, 46-47 (Ark. 1982) (per curiam).

25 See Hynes, 706 N.E.2d at 1208 ("[E]xcision of the capital pleading provisions eliminates the burden on constitutional rights prohibited by Jackson, since without those provisions there is only one maximum penalty [death]."); see also N.Y. CRIM.
failed to account for the statutory and constitutional walls that block a defendant from even trying to plea bargain in such a situation. Under section 320.10(1) of the New York Criminal Procedure Law, a defendant cannot waive a jury trial when the charge is first degree murder. Therefore, a defendant who wanted to plead guilty to first degree murder could not do so. Further, even if corrective legislation could be introduced to repeal this provision, a capital defendant is barred by the state constitution from waiving a jury trial when the crime charged carries with it a possible penalty of death. This represents a two-fold obstacle to a defendant who wishes to exercise plea options that may be available. Adding another legal difficulty into the equation, the language in Hynes now compels a prosecutor to withdraw a notice of intent to seek the death penalty should he or she wish to enter into plea negotiations with the defendant. The proverbial “catch” is that once a notice of intent to seek the death penalty is withdrawn it can no longer be re-filed and the defendant is no longer at risk of death.

PROC. LAW § 320.10(1) (McKinney 1993) ("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 and consent to a trial without a jury . . ."). A jury trial also cannot be waived in a capital murder case because it would violate article 1, section 2 of the New York State Constitution, which expressly prohibits waiver of a jury trial in capital cases. See N.Y. CONST. art. 1, § 2. A defendant's options are significantly narrowed, as he is now both statutorily and constitutionally blocked from pleading guilty to first degree murder.

26 Except for the crime of first degree murder, a “defendant may as a matter of right enter a plea of ‘guilty’ to the entire indictment.” N.Y. CRIM. PROC. LAW § 220.10(2) (McKinney 1993); see also N.Y. CRIM. PROC. LAW § 320.10(1) (McKinney 1993) (allowing a defendant as a matter of state law to waive jury trials and consent to trial without a jury when the indictment does not charge the crime of murder in the first degree); N.Y. CONST. art. 1, § 2.

27 See N.Y. CRIM. PROC. LAW § 320.10(1) (McKinney 1993).

28 See N.Y. CONST. art. 1, §2.

29 See N.Y. CRIM. PROC. LAW § 250.40(4) (McKinney 1999) ("A notice of intent to seek the death penalty may be withdrawn at any time by a written notice of withdrawal filed with the court and served upon the defendant. Once withdrawn the notice of intent to seek the death penalty may not be refiled"). New York’s Criminal Procedure Law allows the prosecutor to enter plea negotiations when the agreed upon sentence is life imprisonment without parole or imprisonment. See N.Y. CRIM. PROC. §§ 220.10(5)(e), 220.30(3)(b)(vii). “Under the resulting statute, a defendant may not plead guilty to first degree murder while a notice of intent to seek the death penalty is pending.” Hynes v. Tomei, 706 N.E.2d 1201, 1208–09 (N.Y. 1998).

The logical conclusion to this exercise is that a defendant, now aware that a death sentence is no longer a possibility, will naturally seek to assert Sixth Amendment rights to a jury trial. Furthermore, it is suggested that there will be little incentive for the defendant to honor plea agreements because the maximum penalties are the same under either scheme.\textsuperscript{31} This was the case in \textit{People v. Hale},\textsuperscript{32} the proceeding that gave rise to the \textit{Hynes} opinion, where "Justice Tomei had blocked entry of a plea to a term of 50 years to life [while the] death notice remained effective."\textsuperscript{33} The plea bargain agreement was available for a variety of sentences, all for non-capital offenses.\textsuperscript{34} Thus, the agreement satisfied complicated state statutory and constitutional constraints against entering guilty pleas and waiving jury trials in first degree capital murder cases because the crimes pleaded to were all non-capital offenses.\textsuperscript{35}

By invalidating this type of scheme under \textit{Jackson}, \textit{Hynes} presents an all or nothing situation. If a prosecutor chooses to seek death, no guilty plea may be entered to a capital murder charge, and the defendant is forced to go to trial and risk death. If a defendant wishes to plead, then it must be to a non-capital offense, precluding the possibility of death or life imprisonment.

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\textsuperscript{31} See \textit{Hynes v. Tomei}, 666 N.Y.S.2d 687, 689 n.1 (2d Dep't 1997), \textit{rev'd}, \textit{Hynes}, 706 N.E.2d 1201. ("[A] defendant would inevitably choose to withdraw from the plea bargain negotiations and proceed to trial where he would no longer be subject to the possibility of the death sentence."). See Wise, \textit{supra} note 2 (reporting that the \textit{Hynes} decision "would make the negotiations at pleas quite difficult once a prosecutor had served notice that the death penalty would be sought"). Under the \textit{Hynes} formulation, pleas to lesser counts would be allowed, "but not to a capital murder count while the death notice remained in place." \textit{Id}. Only a capital defendant charged with first degree murder could be sentenced to life without parole as no lesser count has this as a sentence. \textit{See id}. Moreover, "[p]rosecutors will be reluctant to withdraw death notices because under the state law, once they are withdrawn, they cannot be reinstated." \textit{Id}. Furthermore, the \textit{Hynes} decision creates a legal situation where defendants would have "tremendous incentive . . . to renege on plea promises once the death penalty is withdrawn because the worst possible penalty they would face if they went to trial would be life without parole." \textit{Id}.  


\textsuperscript{33} Wise, \textit{supra} note 2.

\textsuperscript{34} See \textit{Hynes}, 666 N.Y.S.2d at 688 ("Various provisions of New York's Criminal Procedure Law . . . enable a defendant . . . to avoid any possibility of a death sentence by entering into a plea bargain agreement with the People.").

\textsuperscript{35} See \textit{id}.\
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without parole, because life imprisonment without parole is reserved for capital murder only.\textsuperscript{36}

A proper analysis of the \textit{Jackson} opinion and its progeny indicates that the Supreme Court was loath to invalidate plea agreements entered for fear of receiving the death penalty alone.\textsuperscript{37} Even in \textit{Jackson}, the Court recognized that the plea apparatus was essential to the operation of an efficient and flexible criminal process.\textsuperscript{38} The death provision in the Federal Kidnapping Act, at issue in \textit{Jackson}, had, as its trial and sentencing apparatus, a unitary system in which the sentence of death was imposed by a jury recommendation only, and which the judge was compelled to follow.\textsuperscript{39} The Act did not have any plea system in place by which a defendant could receive the death penalty upon a plea of guilty.\textsuperscript{40} Moreover, the Court rejected the government's argument that the Act alleviated the "increased hazard of capital punishment" by authorizing the judge to set aside

\textsuperscript{36} See Hynes v. Tomei, 706 N.E.2d 1201, 1209 (N.Y. 1998) (referencing the reduced flexibility that would result from the \textit{Hynes} decision between prosecutors and defendants who wished to utilize the plea apparatus). Moreover, Chief Judge Kaye noted that such a case like this "might be decided differently today in light of the increased significance of plea bargaining and substantial changes in the administration of capital punishment." \textit{Id.} Chief Judge Kaye, seemingly reluctantly, acceded to the authority of the Supreme Court, perhaps indicating that, if there were another way, the court would have decided the case differently. "[A]lthough the Supreme Court itself may revisit its interpretation of Federal constitutional provisions, State courts are bound under the Federal Constitution to follow controlling Supreme Court precedent, and \textit{Jackson} compels the result here." \textit{Id.} "[W]hile a defendant may not plead guilty to first degree murder while a notice of intent to seek the death penalty is pending, plea bargaining to lesser offenses even when a notice of intent is pending, or to first degree murder in the absence of notice of intent remains unaffected." \textit{Id.}

\textsuperscript{37} See Brady v. United States, 397 U.S. 742 (1970). In this case, the defendant sought post-judgment relief because he had entered a guilty plea to the Federal Kidnapping Act. \textit{Id.} at 743. In reliance on \textit{Jackson}, he claimed his plea had been motivated by a fear of the death penalty. \textit{Id.} at 744–45. Justice White, writing for the majority, stated, "a plea of guilty is not invalid... because [it is] entered to avoid the possibility of the death penalty." \textit{Id.} at 755.

\textsuperscript{38} See United States v. Jackson, 390 U.S. 570, 584 (1968) (recognizing that the rejection of all guilty pleas would create an inflexible and unworkable criminal system).

\textsuperscript{39} See \textit{Jackson}, 390 U.S. at 570–71 (discussing former statute 18 U.S.C. § 1201(a)). The specific language of the statute was that anyone who unlawfully kidnaps "shall be punished by death... if the verdict of the jury shall so recommend." \textit{Id.} at 571. The only discretion the trial judge had was to void the death sentence if the kidnapped person were liberated unharmed. \textit{See} 18 U.S.C. § 1201(a)(1), \textit{reprinted in}, \textit{Jackson}, 390 U.S. at 570–71.

\textsuperscript{40} See \textit{Jackson}, 390 U.S. at 572.
a verdict of death if, within discretional bounds, he or she felt compelled to do so.\textsuperscript{41} The Act provided, in the final instance, for a jury verdict of either death or imprisonment, sentence to be imposed by the jury only. Conspicuously absent was the existence of any plea machinery by which a defendant could plead guilty and suffer the possibility of death.\textsuperscript{42} The core of the \textit{Jackson} opinion was the prevention of two classes of defendants, each guilty of the same crime but with the jury class risking death and the pleading class at ease with the knowledge that their lives would be spared.\textsuperscript{43}

The death penalty statute in New York contains a bifurcated operating structure. The first phase of the statute requires a jury trial to determine guilt or innocence of the charge of first degree murder. The second stage requires an entirely separate proceeding to determine whether the defendant shall be sentenced to death or life imprisonment without the possibility of parole.\textsuperscript{44} Upon jury conviction of the defendant for first degree murder, the sentencing phase begins and the jury must weigh aggravating and mitigating factors presented by the prosecutor and defendant, respectively, so that it can decide the appropriate sentence to be levied upon the defendant.\textsuperscript{45}

\textsuperscript{41} See id. at 573. The Court was correct in its analysis, for the Judge could only set aside a verdict of death if the kidnapping victim was liberated unharmed. Moreover, the court examined the legislative history of the statute and concluded that Congress specifically sought to remove the power to inflict a death sentence from the judge to the jury, in defiance of settled federal practice. See id. at 575. "The difficulty is that Congress intentionally discarded that tradition when it passed the Federal Kidnapping [sic] Act. Congress rejected a version of the Kidnapping [sic] Act that would have left punishment to the court's discretion . . . ." Id. at 575–76.


\textsuperscript{43} "Under the Federal Kidnapping [sic] Act . . . the defendant who abandons the right to contest his guilt before a jury is assured that he cannot be executed; the defendant ingenious 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." \textit{Jackson}, 390 U.S. at 581.

\textsuperscript{44} See N.Y. CRIM. PROC. LAW § 400.27(1) (McKinney Supp. 1999). "If the jury unanimously determines that a sentence of death should be imposed, the court must thereupon impose a sentence of death." N.Y. CRIM. PROC. LAW § 400.27(11)(d) (McKinney Supp. 1999).

\textsuperscript{45} See N.Y. CRIM. PROC. LAW § 400.27(3)–(9) (McKinney Supp. 1999). Sections three through eight provide for the presentation of what are and what are not aggravating factors. Aggravating factors are such factors as outlined in section 125.27 (first degree murder definition) of the penal law and those factors must be proven beyond a reasonable doubt at trial. With the exception of subdivision seven, the ter-
considered all relevant aggravating and mitigating factors, the judge will charge the jurors and they will be instructed that they must be unanimous with respect to either sentence, or the judge must sentence the defendant to a term of life imprisonment.\textsuperscript{46} The jury may not "direct imposition of a sentence of death unless it unanimously finds beyond a reasonable doubt that the aggravating factor or factors substantially outweigh the mitigating factor or factors established... and unanimously determines that the penalty of death should be imposed."\textsuperscript{47}

New York's capital punishment statute, which adds this separate sentencing proceeding, is distinguishable from the Federal Kidnapping Act considered in \textit{Jackson} in that guilt and sentence are determined separately under New York's statutory scheme.\textsuperscript{48} This distinction does not carry with it substantive significance until it is considered that the defendant in \textit{Jackson} "could plead guilty as of right to the capital kidnapping charge, and thus avoid the death penalty by his own unilateral action."\textsuperscript{49} The New York capital plea provisions, in contrast, "prohibit a capital defendant from pleading guilty, as of right, to murder in the first degree; rather, they merely grant the People the discretion to enter into a plea bargain agreement with the capital defendant so as to remove the case from the capital punishment track."\textsuperscript{50}

The key distinction in New York's capital plea provisions is that, while a defendant may wish to enter a plea in order to avoid risk of a death sentence, it is within the discretion of the prosecutor and the court to engage the defendant in plea nego-
tations. Should they choose not to, the defendant is in the same position he was before: charged with capital murder and faced with a possible sentence of death.\(^{51}\) It is this unilateral control of the pleading apparatus, which the defendant possessed in *Jackson* as a matter of right, by which he or she could avoid risk of death simply through the unilateral action of pleading guilty. This is not available to a capital defendant in New York. More simply put, a New York capital defendant can wish all he or she wants to enter plea negotiations and avert the possibility of death, but if the prosecutor and court do not wish to, the defendant will face the possibility of death.\(^{52}\)

The Supreme Court, after its opinion in *Jackson*, narrowed its application of the "needless encouragement" standard in *Brady v. United States*.\(^{53}\) In *Brady*, a defendant's application for post judgment relief under the same death provision of the same Federal Kidnapping Act invalidated in *Jackson* was denied, on the ground that his plea of guilty was "needless[ly] encourage[d]" by the risk of death.\(^{54}\) In *North Carolina v. Alford*,\(^{55}\) a defendant indicted for first degree murder (a capital offense), entered a guilty plea with the consent of the People to second degree murder which was not punishable by death.\(^{56}\) In rejecting his argument that his plea was invalid under *Jackson*, the Court reiterated its holding in *Brady*. According to the Court, a plea of

\(^{51}\) See *id.*

\(^{52}\) The court in *Hynes* addressed this contention by concluding that the involvement of the People in the plea process does not prevent "needless encouragement" of guilty pleas. See *Hynes*, 706 N.E.2d at 1205. Moreover, the court cited *State v. Atkinson*, 167 S.E.2d 241, 259 (1969), rev'd, *Atkinson v. North Carolina*, 403 U.S. 948 (1971), where the Supreme Court declared unconstitutional North Carolina's capital pleading statute. See *id.* The statute allowed the defendant to tender a plea and, if the court and People accepted it, the sentence would be life imprisonment. See *Atkinson*, 167 S.E.2d at 259. If they did not accept it then the case would go to trial on a plea of not guilty, and the defendant would be exposed to the death penalty. See *id.* The Supreme Court reversed the sentence of death without comment. See *Atkinson*, 403 U.S. 948.

\(^{53}\) 397 U.S. 742, 746 (1970). The court ruled in response to defendant's claim in reliance on *Jackson* that his guilty plea was "needlessly encouraged" because of the death penalty provision in the Federal Kidnapping Act. *Id.* The Court responded that a "plea of guilty is not invalid merely because entered to avoid the possibility of a death penalty." *Id.* at 755.

\(^{54}\) *Id.* at 746.


\(^{56}\) See *id.* at 29 (noting that the maximum penalty for second-degree murder is thirty years in prison).
guilty entered to avoid a possible death sentence was not necessarily "compelled within the meaning of the Fifth Amendment."\(^{57}\)

The defendant in \textit{Alford}, under oral examination, indicated that he was pleading guilty to avoid the death penalty and in the same breath maintained his innocence of the criminal charges.\(^{58}\)

Justice Brennan forcefully argued in his dissenting opinion that "such a denial of guilt is... a relevant factor in determining whether the plea was voluntarily and intelligently made" and that "the facts set out in the majority opinion demonstrate that [the defendant] was 'so gripped by fear of the death penalty' that his decision to plead guilty was not voluntary."\(^{59}\)

In \textit{Parker v. North Carolina},\(^{60}\) the Supreme Court upheld a sentence of life imprisonment for a fifteen year old boy who pled guilty to burglary, which was a capital offense. The Court stated that it "may be that under [\textit{Jackson}] it was unconstitutional to impose the death penalty under the statutory framework which existed in \textit{North Carolina} at the time of Parker’s plea."\(^{61}\) The Court concluded, however, that based on its decision in \textit{Brady}, "an otherwise valid plea is not involuntary because induced by the defendant’s desire to limit the possible maximum penalty to less than that authorized if there is a jury trial."\(^{62}\)

The \textit{Hynes} opinion points out that subsequent to these decisions, the Supreme Court summarily reversed several death sentences imposed under North Carolina’s capital statute.\(^{63}\) These subsequent cases are in apparent contradiction to \textit{Brady}, \textit{Alford}, and \textit{Parker}. On the one hand, the Court was upholding sentences rendered under capital pleading schemes that were seemingly stricken in \textit{Jackson}, while, on the other, it was vacating death sentences levied upon convictions under the same

67 Id. at 31. The lower court orally examined the defendant to see whether his plea was voluntary or not. The defendant maintained that he was "not guilty" but that he was "pleading guilty" to avoid the death penalty. \textit{Id.} This is precisely the kind of situation the court reacted against in \textit{Jackson}. The Court however, did not invalidate his plea. Perhaps the Supreme Court was trying to erode some of the ramifications of \textit{Jackson} on the pleading process.
68 See id. at 29.
69 Id. at 40 (Brennan, J., dissenting) (footnote omitted).
71 Id. at 794–95.
72 Id. at 795.
It appears the Supreme Court was actually targeting the imposition of the death penalty itself within these statutes and not the plea provisions per se. This was accomplished by upholding “valid pleas” where the defendants had received prison sentences and striking down death sentences imposed under these statutes containing the plea schemes. Thus, rather than strike down a plea system that results in a lesser maximum sentence than if there were a trial, the Court simply invalidated all death sentences resulting from that very same system. This was an attempt to compensate and equalize the maximum penalties received through either a plea sentence or a conviction sentence.

Application of this analysis to *Hynes* suggests that the Court of Appeals could have decided, in accordance with the Supreme Court’s most recent decisions on the matter, to uphold valid pleas under the capital plea provisions, and to reverse any death sentences resulting from any convictions under the same statute. In *Hynes*, the argument supporting the constitutionality of New York’s capital plea provisions relied heavily on the Supreme

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65 See, e.g., Atkinson, 403 U.S. 948. This seems to be a logical conclusion because in *Brady*, *Alford*, and *Parker*, the Court made every effort to explain that *Jackson* did not create new plea standards. The Court, however, struck down death sentences based upon statutes similar to that in *Jackson* without opinion. The inference was that the sentence of death itself under a statutory scheme such as the one set up in *Jackson* was unconstitutional, but not the plea machinery itself which could, short of death, generate valid and constitutional pleas. See, e.g., *Parker*, 397 U.S. at 794–95 (distinguishing between the imposition of the death penalty and an otherwise valid plea under the statutory scheme); Ruiz v. State, 630 S.W.2d 44, 47 (Ark. 1982) (per curiam) (holding that a “plea bargain is not invalid per se merely because it is induced by fear of receiving the death penalty or because in agreeing to the plea bargain the defendant averts the possibility of receiving the death penalty”). Chief Judge Kaye recognized what the Supreme Court was trying to do when she stated, “it was the death penalty provision itself... that caused the constitutional infirmity.” *Hynes* v. Tomei, 706 N.E.2d 1201, 1208 (N.Y. 1998).

66 Cf. *Hynes*, 706 N.E.2d 1201 (invalidating the plea provisions relating to death penalty cases instead of following the Supreme Court’s example of invalidating the death penalty). Chief Judge Kaye determined that invalidation of the death penalty was not “necessary to obviate the *Jackson* problem: excision of the capital pleading provisions eliminates the burden on constitutional rights prohibited by *Jackson*." *Id.* at 1208.
Court's decision in *Corbitt v. New Jersey*. In *Corbitt*, the Court held that a state could encourage guilty pleas through the offering of benefits to defendants, such as lesser sentences. The Court of Appeals distinguished *Hynes* from *Corbitt* by noting that in *Corbitt*, the possibility of the maximum sentence (life imprisonment) could occur either through a plea or a jury conviction. Furthermore, the Court of Appeals concluded that all of the states that have survived a *Jackson* challenge, with the exception of Arkansas, provide for the possibility of death in a guilty plea. Moreover, the court found support for its decision in that other states have had to invalidate their plea provisions because of the same constitutional infirmity. By finding that invalidation of the death penalty provision would not cure the statute's infirmity, nor comport with legislative intent, the court concluded that excision of the plea provisions accomplished this purpose. Implicit within the *Hynes* ruling was the court's at-

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68 See id. at 219–20. The Court looked at the cases after *Jackson*, and decided that practices were sustained if they were not "needless" encouragement of guilty pleas. Id. at 220 n.9. See generally Santobello v. New York, 404 U.S. 257 (1971) (discussing the necessity of plea bargaining in the criminal system).

69 See *Hynes*, 706 N.E.2d at 1206. "While a lesser sentence was permitted for those defendants who pleaded guilty, it was not guaranteed." Id. This is precisely the practical problem with the *Hynes* opinion. In invalidating the capital plea scheme, the Court of Appeals simply invalidated per se, pleading itself, under the capital statute. A capital defendant cannot, as a matter of right, plead guilty to a capital offense under New York Law. See N.Y. CRIM. PROC. LAW §§ 220.10(2), 320.10(1) (McKinney Supp. 1999); N.Y. CONST. art. 1, § 2. Moreover, a capital defendant cannot constitutionally waive rights to a jury trial under a capital offense. A death sentence imposed upon conviction may be a foregone conclusion because there simply is no plea mechanism at all remaining under the statute after *Hynes*. *Hynes* creates a new rule: should you be a capital defendant, you must assert your right to a jury trial and risk death, no exceptions. The irony is noted in the opinion. See *Hynes*, 706 N.E.2d at 1209.

70 See *Hynes*, 706 N.E.2d at 1207. "Arkansas, avoided a *Jackson* problem because the Trial Judge, not the jury, made the final determination of whether the death penalty would be imposed, and because guilty pleas were permitted only after the prosecutor waived the death penalty." Id. (citation omitted). The possibility of entering a guilty plea when subject to the death penalty is not an issue in New York, as waiver of a jury trial in capital cases is barred by the state constitution.

71 See, e.g., State v. Johnson, 595 A.2d 498, 501 (N.H. 1991) (finding that, under *Jackson*, a death penalty provision that selectively allows defendants to escape a death sentence by a guilty plea stifles the defendant's right to maintain his innocence); Commonwealth v. Colon-Cruz, 470 N.E.2d 116 (Mass. 1984) (concluding that *Jackson* mandates that a defendant not be penalized by asserting his right to trial by the imposition of a harsher sentence that if he pled guilty).
tempt to reconcile the *Jackson* standard concerning capital pleading schemes and New York's legislative policy in retaining some form of the death penalty.\(^7\) Thus, the court responded to the capital pleading provisions by striking them down, rather than following the Supreme Court's example of striking down the death sentences imposed under those systems but upholding valid pleas imposed under those systems.\(^7\) The *Hynes* decision is consistent with the prior decision in *People v. Michael, A.C.*,\(^7\) where the court invalidated provisions of the criminal code which required the defendant to waive a jury trial in order to receive youthful offender status.\(^7\) Even though this case did not involve a death penalty provision, the Court of Appeals maintained consistency in *Michael* by striking the plea mechanism, which created unequal imposition of penalties rather than the penalties themselves.\(^7\)

Several important questions remain to be considered. Can corrective legislation resolve the *Hynes* problem with respect to New York's capital pleading provisions? Moreover, can the state preserve its compelling interest in maintaining a flexible plea-bargaining system with respect to capital crimes? Can these remedial measures be drafted so as to comply with Constitutional requirements and promote effective administration of capital statutes? As it stands, a capital defendant under *Hynes* cannot enter a plea of guilty to first degree murder while a death notice is pending. This is because the maximum penalty (life imprisonment without parole) under sections 220.10(5)(e) and

\(^{72}\) See *Hynes*, 706 N.E.2d at 1207–08 (concluding that elimination of those provisions leaves only one maximum penalty for first degree murder). Moreover, Chief Judge Kaye noted that "the very purpose of the Legislature and Governor in enacting the statute was to provide for capital punishment in New York." *Id.* at 1208.

\(^{73}\) See *id*. The court noted the severability clause, which indicated the legislature intended that if plea provisions were declared unconstitutional, the rest of the statute would survive. *See id.*

\(^{74}\) See *supra* notes 64–66 and accompanying text.

\(^{75}\) 261 N.E.2d 620 (1970).

\(^{76}\) See *id*. at 624. Although not subject to the death penalty, defendants would be exposed to longer prison sentences if they were not prosecuted as youthful offenders. *See id*. The court analogized the situation to *Jackson*, finding that this procedure gave incentives to defendants to waive their fundamental right to a jury trial. *See id*. The court held that this could not be upheld under *Jackson* because it "needlessly encourages" guilty pleas. *Id.* (quoting United States v. Jackson, 390 U.S. 570, 583 (1968)).

\(^{77}\) See *Michael*, 261 N.E.2d at 624.
220.30(3)(b)(vii) is less than the maximum penalty at trial, which is death.\textsuperscript{78} A prosecutor can choose to withdraw its death notice, and plea negotiations can take place because the maximum penalties are the same (life imprisonment without parole), but the prosecutor then loses the possibility of re-filing the death notice if plea negotiations break down.\textsuperscript{79} This frustrates legislative and public policy in enacting capital statutes. Another possibility is simply not to allow plea bargaining in capital cases, thereby forcing a capital defendant to assert trial rights which may "cost him his life."\textsuperscript{80} It is unlikely, however, that this is a viable option.

Any corrective legislation must account for the state’s compelling interest in maintaining a viable plea bargaining system.\textsuperscript{81} The Supreme Court has noted that "[d]isposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons."\textsuperscript{82} The value of the plea bargaining system in congested urban centers such as New York is self evident, considering the voluminous number of cases disposed of every year.\textsuperscript{83} The core of the plea bargain is that it “enables the parties to avoid the delay and uncertainties of trial and appeal.”\textsuperscript{84} With respect to New York’s capital plea provisions, corrective legislation, in the nature of allowing a prosecutor to

\textsuperscript{78} The court noted that the plea provisions as written prescribed a lesser sentence for those defendants who plead guilty. \textit{See Hynes, 706 N.E.2d} at 1206. The court, therefore, struck sections 220.10(5)(e) and 220.30(3)(b)(vii), which left the statute to prohibit guilty pleas in first degree murder cases when intent to seek the death penalty was exhibited. \textit{See id.} at 1207–08. The court cautioned that the removal of the plea provisions did not bar guilty pleas in first degree murder cases when there was no intent to seek the death penalty, as the maximum penalty was the same in both situations. \textit{See id.} at 1209.

\textsuperscript{79} \textit{See N.Y. CRIM. PROC. LAW § 250.40(4) (McKinney Supp. 1999)} (indicating that although a notice of intent to seek the death penalty may be withdrawn at any time, once withdrawn, it cannot be refiled).

\textsuperscript{80} United States v. Jackson, 390 U.S. 570, 572 (1968).

\textsuperscript{81} “Plea bargaining is now established as a vital part of our criminal justice system... the volume of criminal prosecution is so great that if full trials were required in each case New York’s law enforcement system would collapse.” \textit{Hynes v. Tomei, 666 N.Y.S.2d} 687, 693 (2d Dep’t 1997), \textit{rev’d}, \textit{Hynes v. Tomei, 706 N.E.2d} 1201 (N.Y. 1998) (quoting \textit{People v. Seaberg, 74 N.Y.2d} 1 (1989)). \textit{See People v. Selikoff, 35 N.Y.2d} 227, 233 (1974) (noting that the negotiated plea “staves off collapse of the law enforcement system”).


\textsuperscript{83} \textit{See Selikoff, 318 N.E.2d} at 788 (discussing the necessity of plea bargaining).

\textsuperscript{84} \textit{Hynes, 666 N.Y.S.2d} at 693 (quoting \textit{People v. Seaberg, 74 N.Y.2d} 1 (1989)).
re-file a notice of intent to seek the death penalty once plea negotiations fail, may at least serve to retain the option of death, as a possible sentence for capital defendants, as well as promote legislative policy. It has recently been suggested that legislation aimed at retaining death by lethal injection as a possible sentence to a plea intended to alleviate the Jackson problem may be constitutionally barred under New York's constitution. Hopefully, the Supreme Court will have a chance to revisit Jackson and clarify the complex and important issue of capital pleading schemes, as New York's interest in maintaining the integrity of its capital statutes and its plea negotiation systems hangs in the balance.

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86 See Wise, supra note 2.

87 See id. This may be prohibited because New York's constitution bars capital defendants from waiving their rights to jury trials. See N.Y. CONST. art 1, § 2.

88 See Wise, supra note 2. Brooklyn District Attorney Charles J. Hynes declared that he would seek leave to appeal to the U.S. Supreme Court as he believed the ruling would chill plea bargaining in all capital cases where a death notice has been filed. See Spencer, supra note 2. As a final note, Shane Hale, the defendant in People v. Hale, 661 N.Y.S.2d 457 (Sup. Ct. 1997), rev'd, Hynes v. Tomei, 706 N.E.2d 1201 (N.Y. 1998), is currently awaiting trial. Angel Mateo, the defendant in People v. Mateo, 664 N.Y.S.2d 981 (Monroe County Ct. 1998), was convicted of first degree murder. The jury returned a verdict of death. He is currently awaiting sentencing. See id.