COMMENTS

THE USE OF DEATH PENALTY PROVISIONS TO ENCOURAGE GUILTY PLEAS AND JURY WAIVERS: AN APPLICATION OF UNITED STATES V. JACKSON

State v. Forcella, 52 N.J. 263, 245 A.2d 181 (1968)

Under New Jersey's homicide statute, a defendant indicted for murder must plead either *non vult*, equivalent to a plea of guilty, or not guilty.[1] A plea of *non vult* will be accepted only in the court's discretion.[2] If the defendant chooses to plead not guilty, or if the court refuses the *non vult* plea, the statute requires a jury trial.[3] Only a jury can sentence the defendant to death,[4] and the defendant cannot waive the jury in a murder case.[5] In New Jersey, then, an accused murderer has two alternatives: to ask the court to accept a *non vult* plea, thus escaping all possibility of the death penalty, or to plead not guilty and risk death in front of the mandatory jury.

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1 N.J. STAT. ANN. § 2A:113-3 (1953):

In no case shall the plea of guilty be received upon any indictment for murder, and if, upon arraignment, such plea is offered, it shall be disregarded, and the plea of not guilty entered, and a jury . . . shall try the case.

Nothing herein contained shall prevent the accused from pleading *non vult* or nolo contendere to the indictment; the sentence to be imposed, if such plea be accepted, shall be either imprisonment for life or the same as that imposed upon a conviction of murder in the second degree.

The court admits that a plea of *non vult* is no different than a guilty plea for constitutional purposes. State v. Forcella, 52 N.J. 263, 270, 245 A.2d 181, 185 (1968).

2 State v. Belton, 48 N.J. 432, 226 A.2d 425 (1967); State v. Sullivan, 43 N.J. 209, 203 A.2d 177 (1964), *cert. denied*, 382 U.S. 990 (1966). *State v. Belton* outlined the court's discretionary powers in considering the acceptance of a *non vult* plea. The court is not to decide guilt or whether it would recommend life imprisonment. The question to be asked is whether the public interest is better served by rejecting the plea and sending the case to the jury. In considering what would serve the public interest, the trial court may consider any matter bearing upon culpability or punishment.

3 N.J. CT. (CRIM.) REV. R. 3:7-1(a) (1958):

Trial by jury—cases required to be tried by the jury shall be so tried unless the defendant, in writing, waives a jury trial with the approval of the court and the consent of the state, excepting however that in murder cases a jury trial may not be waived.

4 N.J. STAT. ANN. § 2A:112-4 (1953):

Every person convicted of murder in the first degree . . . shall suffer death unless the jury shall by its verdict . . . recommend life imprisonment . . . .

5 N.J. CT. (CRIM.) REV. R. 3:7-1(a) (1958).

Four petitioners, two by post-conviction action and two by interlocutory appeal, challenged the constitutionality of the statute.[6] They argued that the death penalty was being improperly used to coerce them into forfeiting their fifth amendment right not to incriminate themselves and their sixth amendment right to a jury trial.[7] HELD: The statute is constitutional. Neither fifth nor sixth amendment rights are violated by a statute which allows a person to plead guilty and reduce his punishment to less than death or contest guilt and face a possible death penalty from a mandatory jury. The challenged provisions represent a form of statutory plea bargaining.[8]

The *Forcella* court assumes that the constitutionality of the New Jersey homicide law is determined by an analysis of *United States* v. *Jackson*.[9] In *Jackson*, the Supreme Court struck down the death penalty provisions of the Federal Kidnapping Act.[10] Under the Federal Rules, the defendant can plead either guilty with the permission of the court or plead not guilty.[11] If the defendant pleads not guilty, he may request a jury trial, or, with the consent of the court and prosecutor, waive a jury and be tried before the court.[12] Like the New Jersey homicide statute, the Federal Kidnapping Act provided that only a jury could impose the death penalty.[13] After examining the statute and

6. State v. Forcella, 52 N.J. 263, 245 A.2d 181 (1968).

7. *Id.* at 270-72, 245 A.2d at 184-85.

8. *Id.* at 279-80, 245 A.2d at 189-90.

9. United States v. Jackson, 390 U.S. 570 (1968). So far as the post-conviction petitions are concerned, see United States *ex rel.* Buttcher v. Yeager, 288 F. Supp. 906 (D.N.J. 1968) which held that *Jackson* was not retroactive even if it did apply.

10. 18 U.S.C. § 1201(a) (1964):

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

11. FED. R. CRIM. P. 11 (1968):

A defendant may plead not guilty, guilty or, with the consent of the court, nolo contendere. The court may refuse to accept a plea of guilty, and shall not accept such plea without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and consequences of the plea . . . . The court shall not enter a judgement upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

12. FED. R. CRIM. P. 23(a) (1968):

Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government.

13. The government contested this issue in *Jackson*, arguing that the language of the statute was meant as requiring a joint determination of both judge and jury that the death penalty was suitable. The government suggested that the judge could impanel a special jury, even if a bench

its legislative history, the Supreme Court ruled that by imposing death only in the jury trial situation, Congress intended to deter defendants from asserting their sixth amendment right to a jury trial and to discourage defendants' assertion of their fifth amendment right not to incriminate themselves.[14]

The New Jersey court deals with the sixth amendment challenge first. Examining *Jackson*, it points out that, unlike the Federal Kidnapping Act, the New Jersey homicide statute does not make the availability of the death penalty depend upon whether a jury is impaneled. In New Jersey, every defendant who contests guilt must have a jury trial and is therefore subject to the death penalty. The defendant, having once decided to plead not guilty, is under no pressure to forego his sixth amendment rights.[15]

The *Forcella* court then turns to the charge that the death penalty threat exercises an unconstitutional pressure on the defendant's fifth amendment right not to incriminate himself. Looking at *Jackson*, the court finds that the Supreme Court intertwined the fifth and sixth amendments in its discussion of the issue. This suggests to the New Jersey court that "not all of the members of the majority were ready to say that a statute which did no more than limit the penalty upon acceptance of a guilty plea must violate the fifth amendment."[16] Citing *Jackson*, the court states that in meeting the fifth amendment challenge, the crucial question to be answered is whether the potentially heavier penalty imposed on the person who contests guilt "needlessly chill(s) the exercise of basic constitutional rights."[17]

Considering whether there is any "need" for the type of statutory scheme embodied in their homicide statute, the New Jersey court finds that its objectives are humanitarian and consistent with modern views of penology: all defendants, no matter how repentant or rehabilitable, are not required to risk the death penalty; those who confess their

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trial was held on the issue of guilt, in order to make the defendant face the possibility of a death sentence. The Court rejected these arguments. United States v. Jackson, 390 U.S. 570, 580-81 (1968).

14 *Id.* at 581; *accord*, Pope v. United States, 392 U.S. 651 (1968) (per curiam), where the Court held invalid a similar death penalty provision of the Federal Bank Robbery Act, 18 U.S.C. § 2113(e) (1964). *See also* Spillers v. State, 436 P.2d 18 (Nev. 1968) which held that the right to trial by jury was violated under a rape statute which allowed a death penalty to be imposed only by a jury.

15 State v. Forcella, 52 N.J. 263, 272, 245 A.2d 181, 185 (1968).

16 *Id.* at 272, 245 A.2d at 185-86.

17 *Id.* at 273, 245 A.2d at 186.

guilt avoid the hardship of a long jury trial; the flexibility of the criminal process is preserved thereby increasing the court's ability to individualize justice; and finally, allowing and encouraging guilty pleas relieves overcrowded court dockets.[18] The court points out that these are the same considerations which justify the practice of plea bargaining, *i.e.*, the practice of prosecutors and courts informing the defendant that he will receive either a lesser sentence or be charged with a lesser included offense in exchange for a guilty plea.[19] Plea bargaining is accepted by many respected authorities. The Supreme Court in *Jackson* acknowledged the cruelty of imposing like punishment on all and the necessity for providing flexibility in the criminal process.[20] The *Forcella* court, therefore, assumes that plea

18. *Id.* at 275, 245 A.2d at 187.

19. *Id.*

20. The authorities are collected by the *Forcella* court, *Id.* at 275, 245 A.2d at 187. *See generally* Barber v. Gladden, 220 F. Supp. 308 (D. Ore. 1963), *aff'd*, 327 F.2d 101 (9th Cir.), *cert. denied*, 377 U.S. 971 (1964); State v. Taylor, 49 N.J. 440, 231 A.2d 212 (1967); THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF CRIMINAL JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 11, 135 (Feb. 1967) (Though the Commission indicates that plea bargaining may be a useful procedure, the dignity of the law, quality of justice and protection of society are not enhanced by the practice. However, it also recognizes that the practice serves important functions: time, effort and money can better be used elsewhere; overcrowded dockets are relieved; trial process speed is increased; harshness of outmoded sentencing provisions is mitigated.); ABA, STANDARDS RELATING TO PLEAS OF GUILTY (Tent. Draft Feb. 1967) (hereinafter cited as ABA, PLEAS OF GUILTY); D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL (1966) (hereinafter cited as NEWMAN); 8 MOORE'S FEDERAL PRACTICE (1968); Note, *Guilty Plea Bargaining*, 112 PA. L. REV. 865 (1964). It is true, as the *Forcella* court points out, that the Supreme Court finds the Federal Kidnapping Act "needlessly" chills the basic constitutional rights of defendants. The Supreme Court also lists as valid reasons for allowing guilty pleas most of the objectives the New Jersey court attributed to its homicide statute. However, the Supreme Court listed these objectives, not as reasons for sustaining plea bargaining-like arrangements, but in response to a suggestion by the government that all persons accused under the Kidnapping Act be forced to a jury trial and thus face a death sentence. The *Forcella* court is correct in stating that the Supreme Court found these objectives valid. The question, however, is whether they may be achieved without the coercion that plea bargain-like arrangements exert. The *Forcella* court avoids this problem by couching the plea bargaining situation in a semantically more acceptable form. The court admits that "no man should receive an extra penalty because he defends against a charge." It follows this, however, by saying that:

> . . . a man who acknowledges his guilt should . . . be given consideration on that account. . . . And wholly apart from such express agreements for leniency, it is commonplace for sentencing judges to give weight to a guilty plea. . . .
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> State v. Forcella, 52 N.J. 263, 275-76, 245 A.2d 181, 187 (1968).

The purpose of plea bargaining is at least mildly coercive. As its name implies, it allows the prosecutor to "bargain" for a guilty plea. The basic issue is still the same, i.e., the constitutionality of the plea bargaining practice. Justifying plea bargaining with the humanitarian motive of allowing a defendant to plead guilty in a situation in which he desires to do so without being motivated by a possibly greater penalty only clouds the court's reasoning.

bargaining, and with it the New Jersey homicide statute, is constitutional.[21]

I. The Constitutionality of Plea Bargaining

The major premise of the court's argument is that plea bargaining, or its statutory equivalent, is necessary for humanitarian and pragmatic reasons. Since it is necessary, under the rationale of *Jackson*, it is constitutional. An examination of the basis for this premise is crucial in testing the soundness of the court's result.

Initially, it should be noted that guilty pleas which are improperly induced, whether by threats or promises, are void.[22] A conviction based upon a coerced guilty plea is as invalid as a coerced confession.[23] To assure the validity of a guilty or a *non vult* plea, both the New Jersey and federal courts require a judicial determination of its voluntariness.[24] It is incontrovertible that if plea bargaining improperly induces the defendant to plead guilty, its pragmatic justifications are overshadowed by the individual's constitutional rights.[25] The problem is deciding when the defendant is "improperly" induced to plead. At one extreme are physical abuses and assaults; these are the easy cases. At the other extreme is the position that plea bargaining is inherently coercive: that merely by requiring a person to choose between an uncertain but possibly heavy penalty and an assured but definitely lighter one, unconstitutional pressure is applied.[26]

The confusion about the constitutionality of plea bargaining

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21 State v. Forcella, 52 N.J. 263, 275, 245 A.2d 181, 187 (1968).

22 Machnbroda v. United States, 368 U.S. 487 (1962).

23 Pennsylvania *ex rel.* Herman v. Claudy, 350 U.S. 116 (1956); Waley v. Johnston, 316 U.S. 101 (1942).

24 Fed. R. Crim. P. 11 (1968); N.J. Ct. (Crim.) Rev. R. 3:5-2 (Supp. 1967). The Supreme Court has left uncertain how much of the federal law regarding voluntary pleas is applicable to the states.

25 *See generally* Crow v. United States, 397 F.2d 284 (10th Cir. 1968); Rogers v. Wainwright, 394 F.2d 492 (5th Cir. 1968); Cooper v. Holman, 356 F.2d 82 (5th Cir. 1966); Euziere v. United States, 249 F.2d 293 (10th Cir. 1957); United States *ex rel.* Garrett v. Russell, 281 F. Supp. 104 (E.D. Pa. 1968); United States *ex rel.* Thurmond v. Mancusi, 275 F. Supp. 508 (E.D.N.Y. 1967); United States *ex rel.* Elksnis v. Gilligan, 256 F. Supp. 244 (S.D.N.Y. 1966), United States v. Tateo, 214 F. Supp. 560 (S.D.N.Y. 1963); 22 Rut. L. Rev. 167 (1967).

26. United States v. Wiley, 278 F.2d 500 (7th Cir. 1960). Though concerned explicitly with judicial participation in the plea bargaining process, the Michigan Court of Appeals makes a long and telling critique of plea bargaining in general and the ABA standards in particular. People v. Earegood, 12 Mich. App. 256, 162 N.E.2d 802 (1968). The court states:

> the standards state it is proper for a trial judge to grant sentence concessions to

stems from the decision in *Shelton v. United States*.[27] In *Shelton*, the petitioner moved to set aside his conviction on the ground that his plea of guilty was involuntary. He alleged that government counsel induced him to plead guilty with promises of leniency. The circuit court held that the trial court, before accepting the plea, did not ascertain whether the plea was voluntary and not induced by such promises. The court stated that there was no doubt that the defendant pleaded guilty in reliance on the promises. The conviction was set aside and the plea vacated.

The court, sitting *en banc*, reversed and held the plea voluntary. The proper test of voluntariness, it said, is whether the plea is entered by one fully aware of the consequences and value of commitments. Unless the plea is induced by threats, misrepresentations or improper promises, it must stand.[28] The dissent contended that the proper inquiry should be whether the plea of guilty is made under such circumstances that it constitutes reliable and trustworthy evidence of the defendant's guilt.[29]

When the United States Supreme Court was presented with the problem, the Solicitor General conceded that the plea of guilty may have been improperly obtained. The Fifth Circuit was reversed in a *per curiam* decision.[30] That court since has declared that it does not consider the dissent to be the law.[31] It is unclear whether the Supreme Court reversed *Shelton* because of the trial judge's failure to comply with the federal procedural rules or because the court thought that a plea induced by a promised sentence is invalid.[32]

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those who plead guilty so long as the judge himself does not participate in the bargaining. . . .

The commentary accompanying the standards takes no notice of either the relatively few supportive or the greater number of contrary judicial statements. . . , but rather relies on its own exegesis. . . (T)he ABA guilty pleas standard 1.8. . . offers a truly minimum standard.

Id. at 266, 162 N.E.2d at 808-09.

27. Shelton v. United States, 242 F.2d 101 (5th Cir.), *rev'd en banc*, 246 F.2d 571 (5th Cir. 1957), *rev'd per curiam*, 356 U.S. 26 (1958). Compare Allen v. State, 118 Ga. App. 354, 163 S.E.2d 839 (1968), *cert. denied*, 89 S. Ct. 1305 (1969). *But see*, McCarthy v. United States, 89 S. Ct. 1166 (1969); State v. Alford, 274 N.C. 125, 161 S.E.2d 575 (1968), *appeal granted*, 89 S. Ct. 1306 (1969).

28. Shelton v. United States, 246 F.2d 571, 572 (5th Cir. 1957), *citing* Shelton v. United States, 242 F.2d 101, 115 (5th Cir. 1957) (dissenting opinion, 3-judge panel).

29. Shelton v. United States, 246 F.2d 571, 579 (5th Cir. 1957).

30. Shelton v. United States, 356 U.S. 26 (1958) (per curiam). *See generally* Fay v. Noia, 372 U.S. 391 (1963); State v. Wolf, 46 N.J. 301, 216 A.2d 586 (1966).

31. Martin v. United States, 256 F.2d 345 (5th Cir. 1958).

32. ABA, PLEAS OF GUILTY at 64.

Notwithstanding *Shelton* and its possible implications, plea bargaining is generally accepted.[33] In fact, plea bargaining has been openly advocated when accompanied by the proper safeguards.[34] Questionable practices usually result from secret and hurried bargaining between prosecutor and defense counsel. Inherent in this type of situation are constitutional infirmities, for the defendant may be tricked or fail to understand precisely the disposition agreement. To counter this potential for the violation of constitutional rights, it has been urged that plea agreements be reached openly, that the defendant be kept fully informed and that the ultimate decision be his alone.[35] The American Bar Association, for example, recommends that a court should not accept a guilty or *nolo contendere* plea unless it actually determines that the plea is voluntary.[36] This requires a genuine effort by the trial judge to insure that the defendant is accorded his constitutional safeguards. The inquiry should reveal if any plea agreement was reached and, if so, upon exactly what terms.[37] When used in this manner, plea bargaining serves what at least some courts are willing to accept as a valid purpose. For example, a crime is rarely committed in precisely the same way and by identical personalities. Therefore, charge reductions help serve to individualize criminal justice.[38] Additionally, trial judges are normally in a better position than the legislature to determine what type of sentence should be imposed on a particular individual.[39] Not only should the penalty fit the crime but it should also fit the individual defendant.

II. STATUTORY PLEA BARGAINING

New Jersey's homicide statute, in effect, assumes the role of a prosecutor who offers a sentence reduction in exchange for a plea of *non vult*. If the defendant decides to plead not guilty, he still maintains his fifth and sixth amendment rights. To those who

33 *See generally* ABA, PLEAS OF GUILTY and NEWMAN. For a discussion of the opposite position, see People v. Earegood, 12 Mich. App. 256, 162 N.E.2d 802 (1968) and cases collected

34 *See generally* ABA, PLEAS OF GUILTY; NEWMAN; THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF CRIMINAL JUSTICE.

35 See authorities cited in note 34, *supra*.

36 ABA PLEAS OF GUILTY § 1.5.

37 See *Id* § 1.5, NEWMAN at 27.

38 See NEWMAN at 112. *See also* ABA, PLEAS OF GUILTY.

39 See NEWMAN. *See also* ABA, PLEAS OF GUILTY.

advocate openly conducted plea bargaining, the New Jersey statute must serve as a model. There can be nothing more open than a statute which offers the same "bargaining" arrangement to each defendant. One problem with covert plea bargaining is that there is a greater chance for disparity of sentencing and plea agreements. Conversely, a statutory form of implicit plea bargaining avoids the prejudices of covert arrangements. This is not to say that New Jersey's type of statute does not lend itself to disparate offers from the prosecution. It does, however, assure that all defendants are treated more equally because each has the opportunity to select a route most likely to avoid death. Because the so-called implied bargain offer is framed in statutory form, there is no adequate reason to invalidate it if non-statutory and otherwise proper plea bargaining is judicially acceptable.

In view of its general acceptance and usefulness, it is submitted that the *Forcella* court is at least arguably correct in concluding that plea bargaining is necessary. If the New Jersey court read *Jackson* correctly, the necessity for the practice sustains its constitutionality. There is, however, an intrinsic difficulty in the process by which the *Forcella* court separates the sixth amendment jury trial issue from the fifth amendment right-to-contest issue and then narrows the latter to the question of the necessity for plea bargaining type arrangements. This logical gap weakens the holding of the court and blurs the contrast between the Federal Kidnapping Act and the New Jersey homicide statute.

The *Forcella* court recognizes that the Supreme Court treated the fifth and sixth amendment issues concurrently in *Jackson*.[40] It, however, departs from *Jackson* and decides them separately. It sustains the homicide statute against the sixth amendment attack by stating that all defendants, once they elect to contest guilt, must have a jury trial.[41] This begs the question: though the defendant might want the issue of his guilt determined by a jury, as he is so entitled under the sixth amendment, might not the threat of the death penalty keep him from challenging his guilt at all? The defendant cannot assert his sixth amendment right to a jury trial without also exercising his fifth amendment right to contest guilt. *Jackson's* joint treatment of the fifth and sixth amendment issues is understandable only if it is assumed that the Supreme Court thought that part and parcel of the

40. State v. Forcella, 52 N.J. 263, 272, 245 A.2d 181, 185 (1968).
41. *Id.* at 272, 245 A.2d at 185.

fifth amendment right to challenge an accusation of guilt is the right under the sixth amendment to have that challenge heard by a jury.[42]

CONCLUSION

Only by formulating the *Jackson* holding as the Supreme Court did, in terms of both fifth and sixth amendment rights, can plea bargaining be sustained as constitutional.[43] It may be argued, if this rationale is correct, that the Supreme Court struck down the penalty portion of the Federal Kidnapping Act because it separated the fifth amendment right to contest guilt from the sixth amendment right to a jury trial. *Jackson* does not decide whether both may be affected together, as they are in the plea bargaining situation, by the offer of a lower sentence. The Supreme Court does decide that the state cannot coerce the defendant into asserting only part of his constitutional rights. Under this reading of *Jackson*, it is not only the right to contest that an individual asserts if he refuses to admit his guilt and demands a trial. The fifth amendment right to contest guilt must be read to include the sixth amendment right to a jury.[44]

Such a reading of *Jackson* does not fault the determination of the *Forcella* court, but it more clearly defines the basic question that must be answered before the statute can be constitutionally sustained. Does *Jackson* forbid all coercion which might create an incentive for a defendant contemplating the surrendering of his constitutional rights,

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42 Under the Federal Kidnapping Act, a defendant still could challenge his guilt and avoid the possibility of a death sentence by waiving a jury and agreeing to a bench trial. As the *Forcella* court points out, this alone gives the Supreme Court cause to strike the penalty provision as a violation of the sixth amendment. *Id.* at 269, 245 A.2d at 184. The Supreme Court states that not only is the defendant's sixth amendment right to a jury trial "deterred" but his fifth amendment right not to plead guilty is "discouraged." Apparently, the *Forcella* court was unable to decide how the fifth amendment rights of the defendant would be discouraged by the Federal Kidnapping Act provisions. *Id.* at 273, 245 A.2d at 186. It is submitted that the reason the *Jackson* court thought the defendant's fifth amendment rights were discouraged is that his assertion of his right not to plead guilty—his right to trial—was incomplete if he was deterred from requesting a jury. The coercion applied by the death penalty deters the defendant from asserting his sixth amendment rights and this, by itself, discourages him from exercising his fifth amendment rights.

43 What is needless in *Jackson*, and therefore unconstitutional, is making the penalty depend upon whether the defendant contests his guilt before a jury or judge. But, contrary to what the *Forcella* court asserts, "when the focus is upon the fifth amendment (rather than the sixth) . . other values" do *not* come into play. *Jackson* holds that the rights *must* be considered together

44 This is consistent with the Supreme Court's recent emphasis on the right to jury trial as part of the due process clause of the fourteenth amendment.

or does necessity, such as that upon which plea bargaining is founded, override the possibility of minor infringements to which such coercion gives rise? This is a question to which the *Forcella* court properly addressed itself. It should not, however, be clouded by subtle distinctions between the constitutional rights assured by the fifth and sixth amendments.