

ORIGINAL

In the  
**Supreme Court of the United States**

McARTHUR CORBITT,

Appellant,

v.

STATE OF NEW JERSEY,

Appellee.

No. 77-5903

Washington, D. C.  
October 3, 1978

Pages 1 thru 41

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McARTHUR CORBITT, :   
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Appellant, :   
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v. : No. 77-5903  
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STATE OF NEW JERSEY, :   
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Appellee. :   
:   
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Washington, D.C.

Tuesday, October 3, 1978

The above-entitled matter came on for argument at  
1:01 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States  
WILLIAM J. BRENNAN, JR., Associate Justice  
POTTER STEWART, Associate Justice  
BYRON R. WHITE, Associate Justice  
THURGOOD MARSHALL, Associate Justice  
HARRY A. BLACKMUN, Associate Justice  
LEWIS F. POWELL, JR., Associate Justice  
WILLIAM H. REHNQUIST, Associate Justice  
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

JAMES K. SMITH, JR., Assistant Deputy Public  
Defender, 576 Central Avenue, East Orange, New  
Jersey 07018; for the Appellant.

JOHN DeCICCO, Deputy Attorney General, State House  
Annex, Trenton, New Jersey 08625; for the Appellee.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Corbitt against New Jersey.

Mr. Smith, you may proceed whenever you are ready.

ORAL ARGUMENT OF JAMES K. SMITH, JR., ESQ.,

ON BEHALF OF THE APPELLANT

MR. SMITH: Mr. Chief Justice, may it please the Court:

At issue in the present case are the sentencing provisions of the New Jersey murder statute. It is our position that that statute penalizes a defendant's right to jury trial in violation of the Fifth and Sixth Amendments as applied to the states, to the Due Process Clause.

It is also our position that that statute violates the Equal Protection Clause of the Fourteenth Amendment by creating a discriminatory classification.

In effect, there are two penalties for the crime of first degree or felony murder in New Jersey, depending solely upon whether a defendant has exercised his right to a jury trial. If a defendant is willing to enter a non vult plea to an indictment for murder--and I should stop for a moment and indicate that in New Jersey we do not allow guilty pleas to the crime of murder. A defendant must enter a plea of either non vult or nolo contendere, both of which are basically the equivalent of a guilty plea.



Q Does it make any difference for our purposes whatever difference there may be between non vult and nolo contendere in New Jersey?

MR. SMITH: None. In fact, the common practice is for all pleas to be entered as non vult pleas.

If that defendant enters a non vult plea in a murder case, he may be sentenced to life imprisonment or to a term of not more than 30 years. This is true even though the defendant, in setting forth a factual basis for his plea, may admit that he has committed a felony murder. The judge is not to make any determination as to the degree of the crime. Rather, the judge has complete discretion to impose any sentence which to him appears appropriate.

However, if that same defendant goes to trial on the same facts and is convicted of first degree murder, then he must receive the mandatory life sentence.

In this case, of course, Mr. Corbitt did go to trial in a felony murder case, and he was convicted. Therefore, he had to receive the mandatory life sentence.

Q As I understand it, under your system in New Jersey, if a defendant pleads not guilty, he may not waive a jury; is that correct?

MR. SMITH: That is true.

Q He cannot have a bench trial on a not-guilty plea.

MR. SMITH: All trials must be jury trials. That is correct.

Q He cannot have a bench trial on a not-guilty plea. That is correct, is it not?

MR. SMITH: Yes.

Q Under the mandatory life sentence, is he eligible for parole after a number of years?

MR. SMITH: Under the mandatory life sentence, he is eligible for parole, as I understand it, in 14 years, eight months, and ten days.

Q Is the usual experience still that he is actually more often than not released on parole at that time?

MR. SMITH: I honestly could not say, Your Honor. I just know that they are eligible for parole at that time.

In any event, it is clear that in this case, as I said, Mr. Corbitt went to trial and was convicted of felony murder; at his sentencing his attorney asked the court to consider imposing a term of years in the state prison as he could have done if Mr. Corbitt had entered a non vult plea. However, the judge indicated that he was powerless to do so. Therefore, it is clear that simply because Mr. Corbitt was convicted at a jury trial, he was denied the right to be sentenced to a term of years in the state prison.

We submit that this loss of discretion in the sentencing judge or lack of sentencing alternatives is a severe

penalty for a defendant to pay simply because he has exercised his constitutional right to a jury trial.

Q Mr. Smith, you cite in your brief our decision last year of Bordenkircher against Hayes, and this case strikes me as not too much different from the New Jersey legislature simply enacting into law what the prosecutor actually did in Bordenkircher.

MR. SMITH: I think there is a clear distinction to be made between this case and Bordenkircher. Bordenkircher was dealing with the practice of plea bargaining, and this Court held that a defendant who engages in plea bargaining and turns down a plea bargain is not penalized for asserting his rights. In New Jersey a defendant who refuses to enter a non vult plea in a murder case but instead goes to trial is penalized for asserting his rights.

Q Has not the New Jersey legislature just specified the terms of the plea bargain in effect?

MR. SMITH: The New Jersey legislature has indicated that people who are willing to waive their constitutional rights may be sentenced to almost term from probation up to life imprisonment.

Q That is what the prosecutor did in Bordenkircher, was it not?

MR. SMITH: In Bordenkircher I think the answer to that is simply that the prosecutor could have proceeded on an

habitual offender indictment at the very beginning. So, the defendant was eligible for a sentence of life imprisonment on the date that he was first indicted, as it were. He paid no penalty because he ultimately was sentenced to life imprisonment. Mr. Corbitt, of course, could have received a much lesser sentence had he pled non vult. And because he was denied these sentencing alternatives when he was convicted at trial, he did pay a penalty for exercising his rights

Q On the other hand, he pleaded not guilty.

MR. SMITH: That is true, Your Honor.

Q And he could have been found not guilty.

MR. SMITH: That is very true.

Q And after having pleaded non vult, he could not possibly have been found not guilty, is that not correct?

MR. SMITH: That is very true. But I do not think that that factor distinguishes this case from United States v. Jackson, on which I rely. Jackson of course was the appeal of a pretrial motion to dismiss which was branded. In that case Mr. Jackson could have been acquitted and, for that matter, he could have been found guilty of kidnapping; but the jury could have recommended a sentence of life imprisonment.

Q But in the Jackson case the defendant could have pleaded not guilty and have waived a jury trial, and the judge under the then federal statute could not possibly have imposed the death sentence.



MR. SMITH: That is true.

Q Only the jury could do it.

MR. SMITH: And this case is different only in that--

Q Here he cannot waive a jury trial.

MR. SMITH: All trials and murder cases must be jury trials. But the fact is that in Jackson this Court held that the risk of the death penalty was an unnecessary burden upon the exercise of the right to jury trial, and in this case we submit that it is the risk of this mandatory life sentence which is also an unnecessary burden upon the same right.

Q Of course Jackson involved the death sentence, which was emphasized by your state supreme court.

MR. SMITH: That is true. I was just getting to that. The state of course claims that Jackson is limited solely to death penalty cases. And I think that this contention is at odds with a long line of cases which have come from this Court, holding that no significant burden may be placed upon the exercise of constitutional right. This Court's analysis has never been limited solely to death penalty cases or even to cases involving long terms of imprisonment. Rather, it has been held that any sanction which makes assertion of a right costly is forbidden.

For example, in Garrity v. New Jersey it was held that a state trooper could not be penalized through loss of his employment because he had asserted his Fifth Amendment rights.

In Harman v. Forssenius it was held that the filing of a certificate of registration in lieu of a poll tax was an impermissible burden upon the right to vote in state elections.

Q But there was certainly a burden in Bordenkircher too, was there not, as a result of the prosecutor's action?

MR. SMITH: Your Honor, I think we have to face the fact that people who plead guilty, whether or not there are plea bargains, come to receive lesser sentences or fines. However, those people do so freely and knowledgeably. If they refuse to enter that plea of guilty, they pay no penalty for doing so because when they are sentenced, they are still eligible for any sentence within the statutory range.

Of course in New Jersey a defendant who refuses to enter this non vult plea must receive the maximum. So, his constitutional right is being directly--

Q But in Bordenkircher the man was originally charged with something that was not as great as he was finally charged with after he refused the plea bargain.

MR. SMITH: I think that the opinion in that case noted rather clearly that the prosecutor could have begun from the very first day on an habitual offender indictment. The man fit all the criteria for that indictment. It was just done in sort of the reverse of the normal plea bargaining process, which is that the prosecutor indicts on a crime and then deals down.

Q But in New Jersey your client could, from the very first day, have elected his jury trial and refused to plea non vult, and he did.

MR. SMITH: And that is exactly what he did. And for doing that he paid this penalty. He was not eligible for this lesser term in the state prison even though the judge who sentenced him might have felt that this sort of sentence was completely warranted.

In any event, as I have said, I have mentioned the loss of employment in Garrity v. New Jersey and the finding--

Q But if a man charged with first degree murder sticks to a not-guilty plea, he will be tried by jury.

MR. SMITH: That is true.

Q And his lawyer and the prosecutor are talking and it becomes clear that the prosecutor would end up recommending 20 years if he pled guilty.

MR. SMITH: That is always a possibility.

Q Why is that not just the same incentive to disregard his jury right or the same burden on it?

MR. SMITH: It certainly is an incentive to disregard his jury right.

Q It is the same burden in the sense that he has to make up his mind about which alternative or which horn to jump on.

MR. SMITH: I think that a distinction has to be made

between offering a defendant incentives to give up his constitutional rights and penalizing him if he does not give up those rights. A defendant who--

Q Maybe the prosecutor says, "I will never recommend 20 years if you--obviously under this law I will never recommend 20 years if you go to trial. That is your penalty."

MR. SMITH: Of course, he must receive a life sentence if he is convicted upon the jury trial.

I have discussed these sanctions, the loss of employment and the filing of a certificate in lieu of poll tax, and these are relatively minor sanctions. Yet I think it is clear that they are the type of sanctions which deter exercise of constitutional right. I think that this New Jersey murder statute has the same effect. A defendant in a first degree murder case is not going to want to exercise his way to a jury trial and face the possibility of a mandatory life sentence when he can plead non vult, admit the crime, and still be eligible for a few years in the state prison or, for that matter, even a term of probation. The state of course claims that there is a need for this kind of sentencing provision in that it promotes plea bargaining.

Q It also structures the limits and structures the bargain.

MR. SMITH: Of course that could be done through any



number of other means.

Q I grant you, but it does that anyway.

MR. SMITH: Yes, it does. Our office is not in any way opposed to plea bargaining, nor do we wish to restrict the practice in any manner.

Q You would not want to do away with it, would you?

MR. SMITH: Certainly not. It is simply our position that plea bargaining is in no way involved in this case. This statute is not analogous to plea bargaining and it certainly is not necessary to plea bargaining. In fact, this appears to be a very unique statute. I have not been able to find any other criminal statute in the United States which contains separate ranges of penalties for a defendant who is convicted upon a jury trial and a defendant who is convicted on a guilty plea.

In fact, this is the only New Jersey statute which has separate penalty ranges.

Q Do not prosecutors make that kind of offer every day of the week?

MR. SMITH: Certainly.

Q What is the difference if a prosecutor makes it or if the legislature makes it?

MR. SMITH: As I said before, we have two penalties for the same offense. A person who plea bargains--say starts out with an armed robbery case and pleads to robbery by fear

certainly cannot be compared to the person who goes to trial and is convicted of armed robbery. I am just comparing Mr. Corbitt's situation, having been convicted of felony murder after a jury trial, with the position of people who plead non vult to the crime, admit the crime, and are still eligible for a much lesser sentence.

Q But they gave up the right to be found not guilty by a jury.

MR. SMITH: That is true, and Mr. Corbitt insisted upon his rights, and for that he received a mandatory penalty.

Q Mr. Smith, what happens in New Jersey if two-thirds of the way through the trial before a jury he decides to plead guilty?

MR. SMITH: If he decides to plead non vult in the middle of a trial, he is still eligible for either a sentence of life imprisonment or a sentence of up to 30 years in the state prison.

Q Does that help or hurt your argument?

MR. SMITH: I suppose it would help my argument because I cannot see any distinction between a person who admits his guilt halfway through a trial and a person who in fact insists upon his rights all the way and is convicted after the--

Q Is not part of your argument that once he goes into it he is irrevocably stuck with it? So, you do not need

that point.

MR. SMITH: That does not happen to be the practice in New Jersey.

In any event, as I said, this is the only New Jersey statute which has separate penalty ranges. Yet we know that plea bargaining works in New Jersey in all other statutes. It works in robbery cases, kidnapping cases; it works for any other crime that one could mention. There is no reason to believe that this sort of unique sentencing cheme therefore is necessary in any way to conduct plea bargaining. Rather, it is unnecessary, as this Court said in United States v. Jackson, unnecessary and therefore excessive.

As I have indicated previously, this statute is not analogous to the process of plea bargaining. First of all, as I have said before, it is not a voluntary process. And, secondly, it does not contain the mutuality of advantage which is commonly found in plea bargaining.

The defendant's aim in a plea bargaining is always to reduce his maximum possible exposure on a crime, and there is of course any number of ways that this could be done. But a defendant who pleads non vult in New Jersey does not limit his maximum possible exposure, for he is still eligible for the life sentence. The only thing that defendant achieves by pleading non vult is that he insulates himself from the possibility of the mandatory life sentence, which comes upon a jury conviction.

Therefore, we would submit that this murder statute is nothing more than a unilateral penalty imposed upon those persons who have exercised their rights. I recognize that a defendant in a criminal proceeding is oftentimes called upon to make difficult choices. But the threshold question has always been, Does compelling an election between two alternatives impair to any appreciable extent the underlying right involved? And I think that I have demonstrated that this New Jersey murder statute does in fact deter defendants from exercising their constitutional rights.

In a number of cases this Court has had the opportunity to consider the concept of vindictiveness. It has been held that a defendant may not be vindictively penalized for exercising a right, and we submit that this is exactly what the New Jersey murder statute does. It requires that a defendant who insists upon his rights must receive the maximum sentence. This is no different than a judge that would announce that it is his policy to impose a maximum sentence on any defendant who dares come before him in a jury trial and is convicted.

Thus, as I have indicated, in the final analysis this statute unnecessarily deters the right to jury trial by penalizing those defendants who insist upon their rights.

If I may move on to my Equal Protection argument, as I have indicated before, there are two scales of punishment for first degree murder in New Jersey. This classification is



not based in any way on the personal or penal status of the offender but rather solely upon whether he has exercised his right to a jury trial. It does not matter whether the defendant is a young man or an old man or whether he has no prior convictions or is an habitual offender. Rather, the first decision that a sentencing judge must make in this sort of case is whether the defendant has exercised his right to a trial. If the defendant has been convicted upon a non vult plea, then the judge of course has complete discretion to impose almost any sentence between probation and life imprisonment. If the defendant has been convicted on a jury verdict, then the judge has no discretion. He must impose the maximum sentence, even if he feels a lesser sentence is warranted.

Q Would the New Jersey system be constitutionally acceptable, in your view, if the statute did not require that all not guilty pleas be tried through a jury but simply required that if there was to be a waiver of a jury, it had to be by both sides? In other words, both the defendant and the prosecution would have to waive the jury.

MR. SMITH: If I understand Your Honor's question correctly, I would think that there would still be a defect in that in that even if a defendant waived the jury, that he would still be eligible for a wide range of sentences upon a non vult plea while he would still have to receive the maximum penalty upon a conviction, whether it would be a judge conviction or a

jury conviction. I have no objection to the concept of extending leniency towards those persons who admit their guilt. But this provides no justification whatsoever for imposing the maximum sentence on a defendant simply because he has exercised his rights to a jury trial. It may be that in certain cases a judge, as a matter of his own discretion, will feel that a defendant who has admitted his guilt is more amenable to rehabilitation. But it does not logically follow that the defendant who has insisted upon his constitutional rights must be so incorrigible that only the maximum sentence would be appropriate.

In this case we are simply asking that the defendant, having insisted upon his right to a jury trial, be eligible for the same range of penalties that he would have been had he admitted his guilt through a non vult plea.

Q If he pleads not guilty to a charge, an indictment, of first degree murder, he can be found not guilty. He can be found guilty of some lesser included offense of homicide, can he not?

MR. SMITH: Not in this particular case. I have used the felony murder example in my brief because this was a felony murder case.

Q This was an arson, was it not?

MR. SMITH: Right. The jury was not charged here with either a second degree murder or manslaughter. If

Mr. Corbitt was convicted, it would have had to have been for a felony murder.

Q Which is first degree murder in New Jersey.

MR. SMITH: Correct. If he would have pled non vult, he also would have had to admit a felony murder.

Q But he would not have been admitting a felony murder; he would have been admitting murder.

MR. SMITH: He would have said, "Your Honor, I started a fire and"--

Q Am I not correct as a matter of technical New Jersey law--I just want to be sure I understand your law--that when you plead non vult, it is not to a degree of homicide, it is just to murder; is that right?

MR. SMITH: That is correct.

Q Generalized murder.

MR. SMITH: Although--

Q Is that correct?

MR. SMITH: That is correct, although murder encompasses both first degree murder and second degree.

Q Yes, but you are not pleading non vult to felony murder or to first degree murder.

MR. SMITH: No, you are pleading non vult to murder, and you are admitting a felony murder or--

Q But the jury found him guilty of felony murder.

MR. SMITH: That is correct.

Q Had he pleaded non vult, it would not have been to felony murder; correct?

MR. SMITH: No, it would have been to--

Q Murder.

MR. SMITH: --an unspecified degree of murder. But, as I have indicated before, he obviously in setting forth a factual basis for his plea he would have had to admit having committed a felony murder.

Q Would you think it unconstitutional for a state to require, as I think some do, every defendant in a murder case to go to trial?

MR. SMITH: No, I do not think there would be anything unconstitutional about that. I do not think it would be a wise legislative policy.

Q Even if it is accompanied by certain mandatory penalties--in other words, eliminating all possibility of plea negotiations?

MR. SMITH: Like I said, as long as the same range of penalties is available, I do not see any problem with it. I certainly think that that would be an unwise legislative policy. Of course that is for the states to decide.

As I have said before, simply because Mr. Corbitt here has exercised his right to a jury trial, he was not eligible for a number of valuable sentencing alternatives, which of course is a sentence up to 30 years in the state prison. Therefore, the



defendant would submit that he was denied his right to equal protection of the law in violation of the Fourteenth Amendment.

Mr. Chief Justice, if I may, I would like to reserve five minutes for rebuttal.

Q If you are relying on Jackson, one very clear difference is that in Jackson, if a defendant pleaded either guilty of kidnapping with harm to the victim interstate, or if he pleaded not guilty to the same offense and waived a jury trial, he absolutely could not have been sentenced to death. Here, if he pleads non vult, he can be sentenced to life imprisonment, the same maximum sentence that a jury can impose.

MR. SMITH: That is true. I should note, however, that a life sentence upon a jury conviction is not necessarily the same as a life sentence upon a non vult plea in that the life sentence upon a jury conviction of course is mandatory and it must be to the state prison. A life sentence upon a non vult plea is purely discretionary, and it may be--

Q I know. But the sentencing judge may impose it and may send him to the state prison.

MR. SMITH: That is true.

Q That makes this different from the Jackson case where there was absolutely no power in the absence of a jury recommendation under the statute to impose the sentence that a jury could have recommended.

MR. SMITH: That is certainly a factual distinction, Your Honor. I would submit, however, that the real question that must be decided in a case like this is, Does the statutory scheme serve to deter exercise of the constitutional right? And I think that this clearly deters defendants from exercising the right to a jury trial. Therefore, I would submit it is unconstitutional just as the Federal Kidnapping Act.

Q Mr. Smith, I gather that New Jersey still uses in the murder indictment the old common law form, just "wilfully, feloniously, and of malice of forethought" and so forth. It says nothing whatever in the indictment itself that it is a felony.

MR. SMITH: That is correct.

Q And that is why, going back to your answer to my Brother Stewart, that is why you say when he pleads, he does not plead to felony murder. He pleads to that common law indictment, does he not?

MR. SMITH: That is correct.

Q And then the fact that it was a felony murder simply comes out in his admission as to the conduct which constituted the offense.

MR. SMITH: Right. When he sets forth a factual basis for a plea, he would have to admit it.

Q In this case the jury found your client guilty of what, murder or felony murder?

MR. SMITH: Well, that is interesting. They found him guilty of murder. Under New Jersey law they are required to specify either first degree murder or second degree murder. They did not do that. But of course this was a felony murder case. There was no instruction given on second degree murder. And the assumption of course always was made that he had to receive the mandatory life sentence.

Q Can you make assumptions in criminal cases when the jury has not found him guilty?

MR. SMITH: The situation there was, when I first got this case after it had been accepted by the New Jersey Supreme Court, I attempted to raise that same argument. But they had granted certification limited to the question of the constitutionality of this statute, and they did not choose to hear me on that argument.

Q So, by hypothesis in this case he was found guilty of felony murder.

MR. SMITH: That is correct.

MR. CHIEF JUSTICE BURGER: Mr. DeCicco.

ORAL ARGUMENT OF JOHN DeCICCO, ESQ.,

ON BEHALF OF THE APPELLEE

MR. DeCICCO: Mr. Chief Justice, and may it please the Court:

The issue presented by this case is whether the New Jersey statutory sentencing scheme for murder impermissibly

infringes upon a defendant's Fifth and Sixth Amendment rights to trial. A subsidiary question is whether the statutory scheme at issue deprives an accused of equal protection of the laws.

It is our position that New Jersey's homicide statutes do not in any way burden those wishing to exercise their Fifth and Sixth Amendment rights to defend against murder charges before a jury, nor do our statutes deprive those individuals of equal protection of the laws.

At the outset we recognize and emphasize that if the sole objective and result of state legislation is to unnecessarily discourage the assertion of constitutional rights, then the statutory scheme is patently unconstitutional. However, this case involves nothing more than a statutory codification of plea bargaining in homicide cases and nothing else. Even assuming any form of an inducement, this Court has held that there is no chilling effect on the exercise of constitutional rights when three criteria have been met. One, the statutory scheme serves a necessary and legitimate state interest and/or interest to a defendant, which is present here.

Q Would you explain to me what that state interest is? Is it anything other the same interest you have in a plea bargain of course in persuading the defendant not to stand trial?

MR. DeCICCO: The interest is to conserve scarce



judicial and prosecutorial resources. Secondly, the interest is to facilitate the correctional process with respect to the specific offender. The interest runs both ways.

Q Those are always present when you persuade a defendant not to stand trial.

MR. DeCICCO: That is correct.

Q So, then is it not still true that the sole thing that this tends to accomplish is to persuade him not to stand trial? And there are byproducts of that if it works out.

MR. DeCICCO: I would not characterize it as a sole accomplishment. It allows him to avoid the rigors of life imprisonment. It allows the defendant to realize--

Q This statute allows him to avoid that?

MR. DeCICCO: Yes, it does. The non vult provision does.

Q He cannot avoid that if he elects to exercise his constitutional right.

MR. DeCICCO: Yes, he might even avoid it there, should he be acquitted or should he be convicted of a lesser degree of homicide.

Secondly, if the statutory goals are unobtainable through any other means, then this Court has upheld statutory schemes such as the present.

And, third, and I think most important, is that any inducement--

Q Excuse me again, Mr. DeCicco. You say the Court has upheld statutory schemes such as this?

MR. DeCICCO: It has upheld statutory and/or common law schemes whereby the goals are unattainable through any other--

Q Has it ever upheld a statutory scheme in which the range of penalties for one who stands trial is more severe than the range of penalties for one who pleads guilty.?

MR. DeCICCO: Not a statutory scheme, but int Bordenkircher--

Q So, it has not upheld a statutory scheme.

MR. DeCICCO: No; excuse me, sir. In Bordenkircher it upheld the prosecutorial plea negotiation system whereby the same result was obtained.

In striking the balance with relation to these three components of our equation, it is submitted that the New Jersey homicide statutes are beyond constitutional attack. Indeed, appellant has failed to demonstrate any measurable incidence of defendants who have been needlessly chilled in their exercise of their Fifth and/or Sixth Amendment rights to trial.

Initially, in considering the extent of any chilling effect purportedly exerted on our homicide statutes, reference to United States v. Jackson is helpful. There of course a defendant who proceeded to jury trial would be subject to the death penalty, while a defendant who chose any other means of

either admitting his guilt or going to trial would be eligible for something less than the death penalty.

Q It is stronger than that. The death penalty could not be imposed on any such defendant, could not legally have been imposed upon him.

MR. DeCICCO: Yes.

Q Not that he was eligible for something less.

MR. DeCICCO: In Jackson the maximum permitted was greater, should he choose to go to trial, than the maximum under the New Jersey statutory scheme. We think that is significant.

Q Why is that different from just changing the minimum? In other words, in one case you can get either 30 days or life imprisonment. In the other case you must get life imprisonment. You have the same maximum. But are you suggesting there is no material difference between those choices because the maximum is the same?

MR. DeCICCO: Generally speaking, I would say there is no material difference when you are speaking of disparate minimum sentences because that is in essence what all plea bargaining is about. The defendant who chooses not to go to trial generally--not always--generally will receive a lesser term of incarceration, i.e., a lesser minimum, whereas a defendant who goes to trial may receive a greater term of incarceration.

Q That is true of plea bargaining generally, but I do not see how that supports your notion that as long as the maxima are the same in both alternatives there is no significant disparity. I take it that is your distinction of Jackson.

MR. DeCICCO: That is one of our distinctions of Jackson, yes. I would also note that we are dealing here with two different forms of conviction. A conviction for non vult murder is to a general short form murder indictment in New Jersey. It is unspecified as to what in fact the defendant has in fact pled guilty to other than the general category of murder; whereas having been tried for first degree murder and having been convicted, there is a specific designation which the legislature has determined should be penalized by a mandatory term of life imprisonment.

The distinction that we would like to first draw with Jackson is the fact that the death penalty is not present here, whereas it was there. In fact, it was a greater maximum than under the New Jersey statutory scheme. This Court has recognized even in Jackson--and most recently in Lockett v. Ohio--that the death penalty is qualitatively different from mere imprisonment.

Q Mr. DeCicco, if you rely on the death penalty as the distinguishing feature, are you suggesting that it would be impermissible for a prosecutor who had obtained an indictment for a capital offense to offer as an inducement to a plea of



guilty that he would withdraw the capital charge and substitute a lesser charge? In other words, is it permissible plea bargaining to offer to dismiss a capital charge?

MR. DeCICCO: Yes, I think it would be.

Q If it is permissible, then how does that distinguish the Jackson case?

MR. DeCICCO: Because I think that in Jackson and in death generally, whenever we are talking about that, we are talking about the extent of the encouragement. I believe this Court in Jackson used the phrase "needless encouragement." And what we are trying to do here at this point of the argument is to demonstrate that doing away with the potential for death does away greatly--if not in fact altogether--with the extent of any unnecessary inducement, any chilling effect.

Secondly, and as I have already mentioned, more significantly, is the fact that a defendant in New Jersey is subject to the same maximum sentence, life imprisonment, regardless of whether he chooses to go to trial or to plead non vult. The maximum in Jackson was greater; since death was only available, trial rights were asserted.

The argument that has been raised that disparate minimum sentences induce the defendant to forego his Fifth Amendment rights does not take into account our plea bargaining practice in general. And in this case specifically the fact that the defendant who does proceed to trial faces various

alternatives between conviction of first degree murder, conviction of second degree murder, conviction of manslaughter, or acquittal. The defendant who pleads non vult also has various alternatives confronting him from a term of life imprisonment to anything less.

Q Did this particular defendant face any alternatives other than those of acquittal or conviction of felony murder?

MR. DeCICCO: In this particular case, it was tried to the jury on a felony murder theory. There were no other instructions.

I would not, in all honesty, assume any jury nullification in this case. Either he was going to be convicted or he was going to be acquitted.

Q And convicted of an offense for which the--

MR. DeCICCO: Felony murder.

Q --punishment was mandatory life--

MR. DeCICCO: Yes, it was.

Q A sentence of life in prison.

MR. DeCICCO: That is correct. However, had he pled, that would not be so. There would be no designation as to extent of the crimes in which he had pled.

Q Mr. DeCicco, on your maximum distinction, supposing a statute provided that for reckless driving or speeding the penalty could be anywhere from a \$10 fine to a

maximum of 30 days in jail. But if the man elects to stand trial, the maximum 30 days in jail must be imposed. Would you think that was a valid statute?

MR. DeCICCO: I think the statute would be somewhat different from this.

Q In what respect?

MR. DeCICCO: If I understand your hypothetical, we are talking about a driving offense for which, if he pleads guilty, he will receive no term of incarceration and if he pleads--if he goes to trial at the municipal level, he--

Q Suppose it says the fine shall be up to \$5,000 then, from \$10 to \$5,000, at the judge's discretion; but if he stands trial, it is \$5,000.

MR. DeCICCO: We have the same maximum?

Q Yes.

MR. DeCICCO: It would be in essence the same case as this.

Q You say that is perfectly okay?

MR. DeCICCO: Yes.

Q It would be different though if the maximum was 30 days in jail instead of \$5,000.

MR. DeCICCO: Yes, that is Jackson. If the maximum is greater, then--

Q No, the maximum in both cases; it is from a \$10 fine to a maximum of 30 days in jail, and a \$10 fine to \$5,000.

MR. DeCICCO: I misunderstood.

Q And in the other case, the 30-day jail is automatically imposed if he elects to stand trial.

MR. DeCICCO: That is correct.

Q And you say--

MR. DeCICCO: It would be the same case. I misunderstood your--

Q It would be the same case as this?

MR. DeCICCO: Yes.

Q And you say that statute would be all right?

MR. DeCICCO: Yes. There may come a time when the statutory scheme is so disparate between the--let us say in your example, if it were a ten-day or a ten-year prison term, depending upon the choice, in that situation, as in Jackson where you have the death penalty versus a mere term of years, perhaps you would find a needless encouragement. The extent of the encouragement would be so great as to make the scheme constitutionally defective.

Q Even if the maxima are the same?

MR. DeCICCO: It is possible even if the maxima are the same, if there were a great disparity.

Q As soon as you admit that, how do you get out of the box in this case, then? What is the difference in range of penalties that may be imposed here?

MR. DeCICCO: We are dealing here between life



imprisonment, which has already been indicated, the first--

Q And what would have been the minimum if he had taken a plea?

MR. DeCICCO: The minimum could be zero. But he could get--

Q That is quite a difference in range.

MR. DeCICCO: He could get up to 30 years.

Q Is that greater or lesser than the difference I gave to you of \$100 to 30 days in jail?

MR. DeCICCO: It is lesser because in practical terms a murder defendant pleading guilty will not receive a non-custodial term or a fine merely; rather, generally we are bargaining then at that point in time for terms of years, i.e., 25 to 30 or whatever the case may be.

Q As in the earlier situation with some of the questions, however, if he stands trial, he also has the opportunity to get no penalty at all, does he not?

MR. DeCICCO: That is correct. He may be acquitted.

Q He is found not guilty.

MR. DeCICCO: And again I--

Q Of course that was true in the Jackson case, was it not?

MR. DeCICCO: Yes, that was true in the Jackson case, but again he did not face the same--he faced a greater maximum, and we feel that is a pivotal--

Q But that much was true in the Jackson case. He could have been acquitted. In that case we were not dealing there with a convicted person, were we? That had been a motion to dismiss. And had not the district judge, Judge Timbers, found the whole statute unconstitutional in the Jackson case; am I right in that recollection?

MR. DeCICCO: Yes.

Q Or were we dealing with somebody who had been convicted by a jury?

MR. DeCICCO: In Jackson?

Q Yes, in Jackson.

MR. DeCICCO: We were dealing with someone who was convicted by a jury.

Q I thought there had been a motion to dismiss the indictment and that the district judge had found the whole statute unconstitutional.

MR. DeCICCO: He had been convicted by a jury, and this Court vitiated the death penalty in that case.

Q The district court had held the entire statute unconstitutional in Jackson.

MR. DeCICCO: And this Court knocked the penalty out, yes.

In any event, I think it should be made clear that this Court has held on various occasions that the Constitution does not forbid every governmental imposed choice in the

criminal process that may have the potential of discouraging the exercise of constitutional rights. While to this point we have emphasized that the quantum of the encouragement to plead non vult to avoid the potential of life imprisonment is miniscule, we would also want to emphasize the legitimate benefits which are attributable to the New Jersey statutory scheme.

This Court--and again I reiterate the plea bargaining theme because I think it is so very significant in the disposition of this case--this Court has previously recognized the vitality of the concept of plea bargaining as a necessary component to the criminal justice system. In most plea bargaining situations the defendant must determine whether to exercise his right to plead innocent and to receive a possibly or, in all probability, higher sentence or whether to forego his right to contest his guilt and to receive in all probability a lesser sentence. Thus, plea bargaining has always had as an incidental effect the discouragement of the defendant's assertion of his trial rights. This Court has held that the imposition of this difficult choice is an inevitable attribute of the plea bargaining system. And in this regard, our statutory system does not in any way deviate from plea bargaining in general.

The benefits of the non vult statutory scheme in New Jersey are several. The benefits the defendant involved

by permitting him to avoid the expense and hardship of a trial. It assures the prompt commencement of the correctional process. Statutory plea bargaining affords the defendant the possibility of ameliorating the rigors of life imprisonment, which is perhaps the most important benefit attributable to the present scheme.

Q And, incidentally, I gather if he got life after a plea, his eligibility for parole is no different than if he got a mandatory life sentence after a jury--

MR. DeCICCO: There is absolutely no distinction between the two.

It must also be emphasized that plea bargaining is predicated upon the concept that those who acknowledge their guilt are in a better position and are in a better process for rehabilitation and should be given consideration on that account.

From the state's viewpoint, our statutory scheme for murder conserves scarce judicial and prosecutorial resources. It also must be recognized that the state's interests are served by our scheme in that the legislature has determined that a conviction for the specific crime of first degree murder should carry a mandatory term of life imprisonment. In essence, the statutory scheme is a bilateral scheme rather than a unilateral scheme as has been advanced here today.

Q Are they not both convictions?



MR. DeCICCO: Yes, they are.

Q I thought you said that they were different.

MR. DeCICCO: They are.

Q One is a conviction and one is not. You are not saying that, are you?

MR. DeCICCO: One is a conviction to murder in general, the general category of murder. In New Jersey our murder indictments reflect--

Q What is the one before the judge, the non vult?

MR. DeCICCO: That is a conviction of first degree murder specifically.

Q No, no, not the one before the judge as a result of non vult. It is just the opposite.

MR. DeCICCO: Oh, I am sorry. It is before a jury. Exactly.

Q But do you not have to explain to the judge what you did?

MR. DeCICCO: Yes, the factual--

Q And does not the judge determine whether that is manslaughter, first degree, or second degree?

MR. DeCICCO: No.

Q How does the judge determine how much time you get? Be careful of what you are saying now.

MR. DeCICCO: The judge--

Q The judge gives whatever time he wants. Does

he not have to determine in his own mind, does he not? Would he give the same time for first degree murder as manslaughter?

MR. DeCICCO: The judge of course would determine the facts of the case vis-a-vis the gravity--

Q That is what I thought.

MR. DeCICCO: --and the heinous nature of the crime in determining whether to impose 25 or 30 or 20 years.

Q That is what I thought.

MR. DeCICCO: Yes. But again we must also take into consideration--

Q And would not that be the same if the man just came in and said, "I want a trial before a judge without a jury"? Would the judge do the same thing?

MR. DeCICCO: He cannot have a trial without a jury.

Q In any of the other 50 states where he could, would not the judge determine it?

MR. DeCICCO: In the other states, yes. I would like to emphasize something else, Mr. Justice Marshall--

Q The part that worries me is the distinction that you see that I do not see.

MR. DeCICCO: This might help. What I do want to emphasize--and perhaps I have not up to this point--is the fact that there is no right on the part of the defendant to his non vult plea accepted by the judge at all. That is a discretionary act with the judge. If he looks at the facts of this case--

as you have indicated, a factual basis must be laid in New Jersey; otherwise a plea cannot be accepted, which is different from the Alford type situation. In New Jersey the factual predicate must be laid. When the judge sees those facts, he might determine not to accept a plea, based upon--let us say the prosecutor recommends 25 years and the judge will think to himself that that just is a little too easy vis-a-vis the facts of the case.

Q I see.

MR. DeCICCO: Also significant is the fact that in New Jersey under our present statutory scheme the benefits of it are unavailable, are unattainable, by any other means. Elimination of the mandatory life sentence would nullify the legislative determination that that is the appropriate penalty for first degree murder. Abolition of the non vult plea would have a detrimental effect on defendants who wished to acknowledge their guilt and to properly avail themselves of less harsh treatment by immediately commencing the rehabilitation process.

Thus, in our view, the New Jersey statutory scheme does not place an excessive burden or in fact any burden upon a defendant's right to plead not guilty.

Moreover, the scheme is justified by necessary and legitimate state needs.

We recognize that no man should receive an additional

penalty because he defends against a charge. But it does not follow that one who acknowledges his guilt should not be given consideration on that account.

I will now briefly turn to the Equal Protection argument raised in this case. It is our view that the Equal Protection argument--the issue as to Equal Protection does not exist in this case. If there is an unconstitutional compulsion placed upon a defendant's Fifth and/or Sixth Amendment rights, this case would of course be disposed of on Jackson grounds. If there is no constitutional impediment, then it follows that the Equal Protection argument would equally be meritless. We submit that the category in New Jersey at the time of the decision whether to proceed to trial or to plead non vult the category is the same. You have one category; that is, indicted murders. And they all have the identical choices. So, therefore, there is no Equal Protection argument at that point in time.

If the appellant argues that the classes do not come into existence subsequent to conviction, which I believe the appellant does argue, that also must fall because at that point we have two classes. We do not have one but two classes, and they are those people who have been convicted of murder and those people who have been convicted of first degree murder for which the legislature has determined a life imprisonment penalty. And so that under either alternative or theory the



Equal Protection argument would be non-existent.

Lastly, even assuming a cognizable class for purposes of the Equal Protection argument, in our view the argument must fail. We have in New Jersey a legitimate and indeed compelling state interest in fostering the statutory scheme which we have mentioned here today. These are, to repeat, amelioration of the rigors of life imprisonment, recognition of the rehabilitative prospects by one willing to admit his guilt, the ability to avoid trial, facilitation of plea negotiations, the conservation of scarce judicial and prosecutorial resources, and prompt punishment of offenders.

Suffice it to say the benefits accrued by defendants in the state demonstrate that the Equal Protection argument is meritless. Thank you for your attention to our argument.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. DeCicco.

You have about three minutes left. Do you have anything further?

REBUTTAL ARGUMENT OF JAMES K. SMITH, JR., ESQ.,

ON BEHALF OF THE APPELLANT

MR. SMITH: Your Honor, I would like to make just one quick point, that being that a defendant in New Jersey of course cannot plead to the offense of first degree murder. Pleas are not accepted to either first degree or second degree murder. The state before the New Jersey Supreme Court made the same argument that basically there was a difference

between a conviction for first degree murder and a conviction for murder. The New Jersey Supreme Court held--and I am reading from page 33 of the Appendix--that "We do not accept the position as a fully satisfactory basis for meeting the defendant's argument, which, it seems to us, can and should be dealt with more directly."

I think, therefore, that the opinion of the New Jersey Supreme Court does not revolve on this matter of statutory construction, but it was decided upon the constitutional principles upon the assumption that a person who pleads non vult to murder and admits a felony murder is in fact in the same position as a person who is convicted of a felony murder. Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.  
The case is submitted.

[The case was submitted at 1:51 o'clock p.m.]

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