Death Penalty Jurisprudence in New York and the Supremacy Clause

of the United States Constitution:

How Supreme is it ?

By

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In 1995, after a two decade hiatus, New York State returned to the fold of states that sanction capital punishment. During the next nine years the state's highest court, the Court of Appeals, would both invalidate and interpret various provisions of the 1995 legislation drawing on its own historical capital punishment jurisprudence, as well as that of the United States Supreme Court. In these decisions, it would faithfully bow to the Supremacy Clause of the United States Constitution[2] for the underpinnings of its determinations. This article will examine those decisions and the accuracy of those pronouncements up through its holding in *People v. Lavalle*[3] which brought an end to capital punishment in New York.

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[2]"This Constitution, And the laws of the United States, which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land, and the Judges in every State shall be bound Thereby, any Thing in the Constitution or Law of any State to the Contrary notwithstanding" Article VI, cl. 2, United States Constitution.

[3]3 N.Y. 3d 88.

History of the Supremacy Clause in New York Decisions

In 1972, the United States Supreme Court, in *Furman v. Georgia,*[4] abolished capital punishment in the United States after determining that it violated the Eighth Amendment prohibition against "cruel and unusual punishment."[5] The following year, the New York Court of Appeals adhering to the decision in *Furman* abolished the death penalty in New York.[6] In *Fitzpatrick*.[7] Chief Justice Fuld, after discussing the holding in *Furman*, wrote;

> "Since, then, the New York statute here challenged Penal Law section 125.35(5) leaves infliction, of the death penalty solely to the discretion of the jury, we conclude, in light of the Supreme Court's reading of the Eighth Amendment in *Furman* (408 U.S. 238, 92 S. Ct. 2726, 33 L.Ed. 2d 346 Supra), that we have no alternative but to hold that that penalty constitutes cruel and unusual punishment within the sense of that provision. The circumstance that the penalty is limited to those found guilty of killing police and other peace officers is irrelevant; it does not alter or affect the fact that the Legislature, instead of providing mandatory death sentences for all defendants who kill police officers, has vested juries with a discretion to decide, case by case, whether that ultimate punishment should be inflicted."(*id*., at 512-3)

In the wake of *Furman* a number of states re-enacted capital punishment statutes including New York, which made it mandatory in all Murder in the First Degree prosecutions.[8]

In 1976 the Supreme Court held that although capital punishment was not *per se*

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[4]408 U.S. 238 (1972).

[5]"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments be inflicted."

[6]*People v. Fitzpatrick*, 32 N.Y. 2d 499 (1973).

[7]32 N.Y. 2d 499 (1973).

[8]Laws of 1974, 1974 Laws 367 (codified at former N.Y. Penal law sections 60.06, 125.27 (McKinney 1974)).

unconstitutional, the mandatory schemes, like New York were, in fact, unconstitutional.[9] The following year in *People v. Davis*[10] the Court again struck down the death penalty recognizing that it contained the same infirmities identified by the Supreme Court in *Roberts v. Louisiana.*[11] Once again, the Court relied on the Supremacy Clause. Judge Cooke, writing for the majority, observed;

> "We approach our consideration of this issue with full recognition that the State statutes under scrutiny carry with them a strong presumption of constitutionality, that they will be stricken as unconstitutional only as a last resort and that courts may not substitute their judgment for that of the Legislature as to the wisdom and expediency of the legislation. As stated by Justice Blackmun in his dissent in *Furman v. Georgia*, 408 U.S. 238, 411, 92 S.Ct. 2726, 2815, 33 L.Ed 2d 346, "We should not allow our personal preferences as to the wisdom of legislative * * * action, or our distaste for such action, to guide our judicial decision in cases such as these. The temptations to cross that policy line are very great". At the same time, it must be kept firmly in mind that this court, as other State courts, is bound by rulings of the United States Supreme Court as to the validity of State statutes under the United States Constitution (*Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 438, 64 S. Ct. 208, 88 L.Ed. 2d 149; *Bourjois Sales Corp. v. Dorfman*, 273 N.Y. 167, 171, 7 N.E. 2d 30, 31)."(*supra*., at 31).

More specifically addressing the holding in *Roberts* and its application to the case at bar, he wrote;

> "Any doubt concerning the question of constitutionality, however, has now been removed and has been firmly resolved by the Supreme Court in *Roberts (Harry) v. Louisiana* (431 U.S. 633. It is decisive."(*ibid*., at 32)

Seven years later, the Court was again called upon to review a death sentence that had

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[9]See, *Gregg v. Georgia*, 428 U.S. 153; *Woodson v. North Carolina*, 428 U.S. 280; *Roberts v. Louisiana*, 428 U.S. 325 (1976).

[10]43 N.Y. 2d 17 (1977).

[11]428 U.S. 325 (1977).

been imposed on a defendant convicted of Murder in the First Degree[12]. This case involved the killing ofa prison guard, while the defendant was serving a life sentence for murder.[13] During her discussion of the prior case law on this issue, Judge Kaye noted that this particular subdivision of the death penalty statute was unsettled;

> "But the issue on this appeal cannot be so readily resolved. The Supreme Court has repeatedly, without explication, stated that it was not deciding whether the Eighth Amendment forbids a mandatory death penalty for murder committed by a person serving a life term of imprisonment *Lockett v. Ohio*, 438 U.S. 586, 604 n.11, 98 S.Ct 2954, 2964, n.11 57 L. Ed 2d 973, supra; *Roberts [Harry] v. Louisiana* 431 U.S.633, 637, n.5 97 S.Ct. 1993, *supra*; *Roberts [Stanislaus] v. Louisiana*, 428 U.S.325, 344 n.9 96 S.Ct. 3001, 3006 n.9 49 L. Ed. 2d 974, *supra*; *Woodson v. North Carolina*, 428 U.S. 280, 287 n.7, 292, n.25, 96 S. Ct. 2978, 2983, n.7, 2985 n. 2549 . Ed. 2d 944, *supra*; *Gregg v. Georgia*, 428 U.S. 153, 186, 96 S. Ct.29099, 2931, 49 L.Ed. 2d 859 *supra*). This court also has expressly left the question open *People v. Davis*, 43 N.Y. 2d, at p.34, n.3, 400 N.Y. S. 2d 735, 371 N.E. 2d 456)."63 N.Y. 2d 41, 75)

After reviewing the foregoing cases and the Supreme Court's more recent decisions,[14] she went on to hold the statute unconstitutional expressly relying on the Eighth Amendment to the United States Constitution and expressly declining to consider Article 1, section 5 the New York State Constitution, writing;

> "In sum, New York's mandatory death penalty is constitutionally infirm as applied to this defendant because of its failure to provide for the consideration of individual circumstances, one of the three deficiencies of a mandatory death penalty articulated in the plurality opinion in *Woodson*. In view of our conclusion that New York's statute contravenes the Federal Constitution, we do not reach the issue of the State Constitution's similar prohibition of cruel and unusual

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[12]See Fn. 7.

[13]*People v. Smith*, 63 N.Y. 2d 41 (1984).

[14]*Lockett v. Ohio,438* U.S. 586 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

> punishments(art 1, Section5), or defendant's additional arguments that a mandatory death penalty for life-term inmates suffers from the other two deficiencies of a mandatory death statute identified in *Woodson*."(*supra*., at 78-9)

Thus, in 1984 it was clear beyond cavil that death penalty jurisprudence in New York was governed by the Supremacy Clause of the United States Constitution.

The 1995 Statute

In 1995 New York's capital punishment hiatus came to an end. The New York State legislature passed a comprehensive capital punishment scheme designed to meet all possible constitutional objections and infirmities.[15] Included in the legislation were two provisions which would generate considerable judicial discussion. The first was embodied in Sections 220.10(5)(e), 220.30(b)(vii), and 220.60(2)(a) of the Criminal Procedure Law, which only allowed a defendant to avoid the death penalty by entering a plea of guilty with the consent of the court and the prosecutor. The second was the "anticipatory deadlock" instruction set forth in Criminal Procedure Law Section 400.27 (10).

Matter of Hynes v. Tomei[16]

Hynes v. Tomei originated in Supreme Court of Kings County as an outgrowth of *People v. Hale*.[17] In *Hale* the defendant was charged with Murder in the First Degree and challenged the

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[15]Laws of 1995 c.1, Section 7(codified as amended at N.Y. Penal law 125.27 (McKinney 2003) For a fuller discussion of the statutes see the author's article entitled *Death Penalty Jurisprudence In New York 1995 to the Present: How Far Have We Come ? Where Are We Headed ?* Pace Law Review Vol. 24, fall 2003.

[16]92 N.Y. 2d 613.

[17]173 Misc. 2d 140.

constitutionality of Sections 220.10(5)(e), 220.30(b)(vii), and 220.60(2)(a) of the Criminal Procedure Law. The defendant argued that those plea restrictions violated his Fifth Amendment right against self-incrimination and his Sixth Amendment right to trial by jury pursuant to the Constitution of the United States. Justice Tomei in *Hale supra*, agreed relying upon *United States v. Jackson*[18] in which the United States Supreme Court struck down the death penalty provision in the Federal Kidnaping Act[19] which permitted the imposition of the death penalty only after a jury trial. As Justice Tomei summarized the holding in *Jackson*, he noted;

> "According to the Court, the statute needlessly encouraged guilty pleas and effectively penalized the defendant to the risk of death only when he exercised his constitutional rights."[20]

Comparing the statute in *Jackson* to the New York scheme, he went on to observe;

> "It is apparent that New York's death penalty statute, likewise provides for the imposition of the death penalty only upon recommendation of the jury; the provisions governing pleas in capital cases in New York expressly forbid the imposition of the death penalty upon a plea of guilty, and a defendant may not waive a jury trial where the charged crime may be punishable by death. Only if the defendant insists upon exercising his Sixth Amendment right to a jury trial and his Fifth Amendment right against self-incrimination does he risk death. Therefore unless New York's law may be distinguished from the Act in question in *Jackson* (*supra*) this court is bound to find the plea provisions to be unconstitutional."[21]

Upon Justice Tomei's finding that the questioned provisions were unconstitutional, the prosecution sought Article 78 relief in the Appellate Division Second Department of New York

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[18]390 U.S. 570 (1968).

[19]18 U.S.C. 1201(a).

[20]173 Misc. 2d at 179.

[21]*Ibid*.

State Supreme Court.[22] That Court reversed Tomei's decision and granted a writ of prohibition against enforcement of the justice's order.

During this same time period, a similar challenge arose in *Relin v. O'Connell.*[23] In response to Judge O'Connell's decision to invalidate the same plea provisions in reliance on *Jackson*, the Appellate Division Fourth Department likewise reversed the Judge's decision and granted a writ of prohibition against enforcement of the Judge's order.

Both cases were appealed to the New York Court of Appeals.

In a unanimous decision, reversing both Appellate Division decisions, the Court found that the plea provisions did, indeed, run afoul of the United States Supreme Court holding in *Jackson.*[24] At the outset of her opinion, Chief Judge Kaye observed;.

> "Despite the passage of three decades, a plethora of decisions involving the death penalty and a sea change in plea bargaining, the Supreme Court has never overruled *Jackson*, which binds this Court."[25]

Thus, Judge Kaye was clearly bowing to the Supremacy Clause in declaring that *Jackson* controlled the result.

After discussing the applicability of *Jackson* to the plea provisions in question, as well as the importance of plea bargaining to the judicial system, she acknowledged that the result reached by the Court would reduce the flexibility in plea bargaining. She went on to note that, although the Court was invalidating these provisions of the capital punishment scheme, the

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[22]237 A.D. 2d 52 (1997).

[23]251 A.D. 2d 1041 (1998).

[24]92 N.Y. 2d 613.

[25]*Supra*., at 620.

severability provision in the legislation would allow the remainder of it to survive. Nonetheless, she closed the Court's opinion with a further reaffirmation of the binding nature of the Supremacy Clause, writing;

> "we are also aware that the Supreme Court has not revisited *Jackson* and its progeny in 20 years, and that these cases might be decided differently today in light of the increased significance of plea bargaining and substantial changes in the administration of capital punishment. The fact remains, however, that although the Supreme Court itself may revisit its interpretation of federal constitutional provisions, State Courts are bound under the federal Constitution to follow the controlling Supreme Court precedent, and *Jackson* compels the result here."[26]

While the Court would interpret the provisions of New York's capital punishment scheme[27] and decide two death penalty cases[28] that came to it in the ensuing years, it would not invoke the provisions of the New York State Constitution and detour from the Supremacy Clause until it invalidated the "anticipatory" deadlock instruction provided for in Section 400.27(10) of the Criminal Procedure Law[29].

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[26]*Id.*, at 629.

[27]See, *People v. Mateo*, 93 N.Y. 2d 327 (1999); *People v. Couser*, 94 N.Y. 2d 631 (2000); *Matter of Francois v. Dolan*, 95 N.Y. 2d 33 (2000); *People v. Edwards*, 96 N.Y. 2d445 (2001); and *People v. Mower*, 97 N.Y. 2d 239 (2002). For a fuller discussion of these decisions, see the author's article *Death Penalty Jurisprudence in New York: How Far Have We Come ? Where Are We Headed ?* 24 Pace Law Review No. 1.

[28]See, *People v. Harris*, 98 N.Y. 2d 705 (2002) and *People v. Cahill*, 2 N.Y. 3d 14 (2003).

[29]Section 400.27 (10) of the Criminal Procedure Law reads in pertinent part; "At the conclusion of all the evidence...the court shall deliver a charge to the jury...In its charge, the court must instruct the jury that with respect to each count of murder in the first degree the jury should consider whether or not a sentence of death should be imposed and whether a sentence of life imprisonment without parole should be imposed, and that the jury must be unanimous with respect to either sentence. The court must also instruct the jury that in the event the jury fails to reach a unanimous agreement with respect to the sentence, the court will sentence the defendant

People v. Lavalle[30]

The *Lavalle* case came directly to the Court of Appeals after the defendant was convicted of Murder in the First Degree in violation of Section 125.27(1)(a)(vii) of the Penal Law in Supreme Court, Suffolk County and was sentenced to death. Among the issues raised on appeal was the constitutionality of Section 400.27(10) of the Criminal Procedure Law, the "anticipatory" deadlock instruction. Challenges to this instruction had been raised and disposed of in different ways by a variety of different courts.[31] The only court to find it unconstitutional was the trial court in *People v. Harris*.[32] In *Lavalle*, Justice George Bundy Smith, writing for the majority, observed;

> "...New York's deadlock provision is unique in that the sentence required after a deadlock is less severe than the sentences the jury is allowed to consider. No other death penalty scheme in the country requires judges to instruct jurors that if they cannot unanimously agree between two choices the judge will sentence the defendant to a third more lenient choice."(3 N.Y. 3d 88, 116-7)

He next went on to describe the danger, he believed, that was inherent in the instruction,

> "The deadlock instruction interjects the fear that if jurors do not reach unanimity, the defendant may be paroled in 20 years and pose a threat to society in the future. Yet, in New York a defendant's future dangerousness is not a statutory aggravator the jury may consider.

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to a term of imprisonment with a minimum term of between twenty and twenty-five years and a maximum term of life."

[30]3 N.Y. 3d 88 (2004).

[31]See the author's article *Death Penalty Jurisprudence in New York* set forth in Fn.24 at p 93-5.

[32]177 Misc. 2d 170 [Supreme Court, Kings County (1998)].

> By interjecting future dangerousness, the deadlock instruction gives rise to an unconstitutionally palpable risk that one or more jurors who cannot bear the thought that a defendant again after serving 20 or 25 years will join jurors favoring death in order to avoid the deadlock sentence....For jurors who are inclined toward life without parole, the choice is between death and life without parole, a Hobson's choice in light of the juror's likely concerns over defendant's future dangerousness. The choice of death results not through ' a comparison of views, and arguments among the jurors themselves,' but through fear and coercion (*Jones v. United States*, 527 US 373, 382 [1999], quoting *Allen v. United States*, 164 US 492, 501 [1986]). New York's statute is unique in its coercive effect."(3 N.Y. 3d 88 at 118-119)

Certainly one could argue that a juror confronted with this dilemma might be equally moved to change their vote from death to life imprisonment without parole in order to avoid the result posited by Judge Bundy Smith above, although the speculative nature of this conjecture does not necessarily eliminate the possibility that a death verdict might not, in certain cases, be coerced.[33]

Of particular interest is the reference to *Jones v. United States*, 527 U.S. 373 (1999) as authority for the Court to invalidate the instruction under the provisions of the State Constitution, given the Court's historical fealty to the Supremacy Clause. In *Jones supra* the Supreme Court quite clearly declared that there was no constitutional right to a deadlock instruction. As Justice Thomas declared in that case;

> "Nevertheless, the Eighth Amendment does not require that the jurors be instructed as to the consequences of their failure to agree."(527 U.S. 373, 381)

Additionally the Court went to hold that it would not use its supervisory powers to require one.[34]

The Court not only deviated from its long-held deference to the Supremacy Clause in

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[33]Indeed, this point was made by Judge Rosenblatt in his concurrence at p.132-3.

[34]527 U.S., at 383.

deciding this issue but had harsh criticism for the holding in *Jones*. Discussing its merits, Judge Bundy Smith observed;

> "In this case, we regard *Jones v. United States* (527 U.S.373 [1999]) as unfaithful to the often repeated principle that death is qualitatively different and thus subject to a heightened standard of reliability (*see Gregg v. Georgia*, 428 US 153 [1976]; *Woodson, supra; Beck, supra*)."(*ibid*., at 127)

The Court not only went on to invalidate the instruction under the Due Process Clause of the State Constitution[35] but additionally held that, unlike the holding in *Jones*, our State Constitution would require some type of deadlock instruction before capital prosecutions could be resumed. Addressing this issue the Judge declared;

> "We further conclude that the absence of any instruction is no better than the current instruction under our constitutional analysis, and thus we decline to adopt *Jones*. Like the flawed deadlock instruction, the absence of an instruction would lead to death sentences that are based on speculation as the Legislature apparently feared when it decided to prescribe the instruction. As the studies previously cited indicate, jurors might fear that the failure to reach a unanimous verdict would lead to a defendant's release, retrial or sentence to an even lesser term than the one currently prescribed in the deadlock scenario."(*id*., at 128).

Amplifying this point, Judge Bundy Smith wrote;

> "As noted, the *Jones* court held that ' the Eighth Amendment [to the Federal Constitution] does not require that the jurors be instructed as to the consequence of their failure to agree' (527 US at 381). It bears reiterating here that 'on innumerable occasions this [C]ourt has given [the] State Constitution an independent construction, affording the rights and liberties of the citizens of this State even more protections than may be secured under the United States Constitution' (*Sharrock v. Dell Buick-Cadillac*, 45 N.Y. 2d at 159). We hold that in this case the Due Process Clause of the New York Constitution requires a higher standard of fairness than the Federal Constitution as interpreted by the *Jones* majority (see N.Y. Const. Art. I, section 6['No person shall be deprived of life liberty or property without due process of law']"(*infra*., at 129)

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[35]Art. 1, Section 6 reads in pertinent part, "No person shall be deprived of life, liberty or property without due process of law."

He went on to further observe;

> "Now recognizing the gravity of capital punishment and the concomitant need for greater certainty in the outcome of capital jury sentences, we hold that providing no deadlock instruction in th course of capital sentencing violates our Due Process Clause. Our conclusion is buttressed by the clear legislative intent that there be a jury instruction on the consequences of a deadlock."(*supra*, at 130)

At first blush the remedy for this defect in the instruction appears simple. A jury need only be instructed that if it could not unanimously agree on a verdict of death, the court would sentence the defendant to life imprisonment without parole, thus making the non-capital alternative the minimum sentence that could be imposed in a capital case upon the failure to agree. Such an instruction could, in no way, be construed as coercing a verdict of death. Rather than supply this remedy, however, the Court declined to take this corrective action. Instead, it sent the problem back to the Legislature to take corrective action, commenting;

> "We cannot, however, ourselves craft a new instruction, because to do so would usurp legislative prerogative. We have the power to eliminate an unconstitutional sentencing procedure, but we do not have the power to fill the void with a different procedure, particularly one that potentially imposes a greater sentence than the possible deadlock sentence that has been prescribed. As the Court noted in *People v. Gersewitz* (294 NY 163, 169 [1945]) we have 'no power to supply even an inadvertent omission of the Legislature.' We thus conclude that under the present statute, the death penalty may not be imposed. Cases in which death notices have been filed may go forward as noncapital first degree murder prosecutions."(3 N.Y. 3d, at 131)

Deference to legislative prerogative aside, it is impossible to see how the Legislature could craft a deadlock instruction in which any other lesser sentence than life without parole could be imposed without running afoul of the holding in *Lavalle*.[36] Moreover, the Court's holding that the defect in the deadlock instruction is not severable, not only runs afoul of the

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[36]Judge R.S. Smith in his dissent made this very point, 3 N.Y. 3d 88 at 148.

language of the statute itself but counter to its holding in *Hynes v. Tomei.*[37] As noted previously, the Court had held in *Hynes v. Tomei* that, despite the invalidation of the plea bargaining restriction, the remainder of the statutory scheme was saved.[38] The application of the severability clause in *Hynes* clearly commanded the result in *People v. Harris*.[39]

In *Harris*, the Court invalidated the defendant's death sentence because he was prosecuted at a time when the plea-bargaining restrictions invalidated in *Hynes* were in effect. In doing so, however, Judge Wesley, apparently taking note of the severability provision, observed;

> "The People and the Attorney General urge us to review *Hynes* and "modify" our holding to restore the sections we declared unconstitutional. Neither offers a new argument for a different result. Both acknowledge that if *Hynes* remains the law, defendant's death sentence must be vacated. All seven of us have concluded that there is no reason to retreat from *Hynes* all of us agree that the statute at the time of defendant's trial impermissibly discouraged defendant's assertion of his Fifth and Sixth Amendment rights. Accordingly, the trial court could not constitutionally impose the sentence of death on this defendant. The appropriate remedy is to vacate his death sentence and to remit his case to Supreme Court pursuant to CPL 470. 30(5)(c) for resentencing in accordance with Penal Law Sections 60.06 and 70.05."(*supra*., at 496)[40]

There is, of course, the issue of whether a deadlock instruction is either required or needed at all. As noted above, the Supreme Court in *Jones* held that there is no constitutional right to a deadlock instruction under the Eighth Amendment to the United States Constitution. The majority in *Lavalle* has commanded that the New York State Constitution's Due Process

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[37]92 N.Y. 2d 613.

[38]*Ibid*., at 628-9.

[39]98 N.Y. 2d 452 (2002).

[40]Ironically, Justice Feldman, the trial judge in *Harris*, had held the deadlock instruction to be unconstitutional. (See, 177 Misc. 160, 162-4 [Sup. Ct. NY County, 1998]). Since the Court never reached the penalty phase of Harris's appeal, the issue went unresolved.

Clause requires one. Clearly, the risk of instructing a capital jury that a failure to reach a unanimous verdict of death will result in a sentence of life imprisonment without parole puts into the hands of a single hold-out juror the ability to determine that a non-capital sentence will be imposed. Nonetheless, Judge R.S. Smith's observation in his dissent, that;

> "...the majority's opinion seems to leave only one possible deadlock instruction for the legislature to 'craft'. Logically, the only instruction that can eliminate the danger of the majority is concerned about - -a juror's fear of the possibility of a defendant's release- -is one that tells the jury that no possibility exists. Thus, it seems that the only deadlock instruction the majority would uphold is one that tell the jury that a deadlock would result in life without parole- - and the majority is, in effect, telling the Legislature that the death penalty cannot be enforced until such an instruction is enacted."[41]

has some validity.

The majority belief that absent a deadlock instruction a capital jury could speculate that a defendant convicted of a capital offense might "...fear that the failure to reach a unanimous verdict, would lead to a defendant's release, retrial or sentence to an even lesser term than the one currently prescribed in the deadlock scenario."[42] does seem a bit far-fetched, notwithstanding the "studies previously cited".[43] It is hard to believe that a juror in this day and age, deliberating on the question of whether a defendant's life should be taken or spared in the penalty phase of a capital trial would believe that the failure to agree on this issue would result in a defendant going free, despite having been convicted of a capital offense. The decision not to instruct them on this issue and leaving the trial court to sentence the defendant to life without parole versus instructing

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[41] 3 N.Y. 3d 88 at 148.

[42] 3 N.Y. 3d 88 at 128.

[43] *Ibid*.

them that the defendant will be sentenced to life without parole, the only option the majority appears to leave open, seems to be a negligible one.

At this writing, the Legislature has failed to craft a deadlock instruction and Murder in the First Degree prosecutions are exclusively non-capital cases. The Court of Appeals in *People v. Shulman,*[44] its most recent capital appeal, reaffirmed this status. In the coming term the Court may revisit the issue again in *People v. Taylor*.[45] There, the trial judge denied a motion to strike the notice of intent to seek the death penalty and declare the death penalty unconstitutional on the claim that the deadlock provision was unseverable from the rest of the statute. In rejecting the claim the judge held that the section was "strongly presumed to be constitutional" and that the defendant had not made the requisite showing that it was invalid beyond a reasonable doubt.[46] Notwithstanding this ruling, the judge instructed the jury that if they deadlocked during the penalty phase that he would be required to sentence the defendant indeterminately. However, he further instructed them that in that event, he would impose consecutive sentences on the six counts of Murder in the First Degree that the defendant had been found guilty of, thereby imposing a minimum sentence of 175 years.[47] In considering this point on appeal, the Court,

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[44]6N.Y. 3d 1 (2005)

[45]Nonbinding Statement of Issues Likely to be Raised on Appeal;www.ny.courts.gov/courts/appeals/news/nottobar/Taylor042105.pdf,#6, __N.Y. 3d__.

[46]__N.Y.S. 2d__, 2002 WL310664487 (N.Y. Sup.) 2002 N.Y. Slip op.(50367(U) Surrogate Court, Queens Co. 9/4/2002.

[47]A portion of the Brief for the Appellant p.3, in *People v. Taylor* provided to the author courtesy of the Queens County District Attorney.

which will have at least two new members, and possibly a third[48] could revisit the issue, particularly in light of the Legislature's inaction. It could affirm the sentence finding that the deadlock instruction given in the court below ameliorated the danger highlighted in *Lavalle*. Such a finding, although highly unlikely, could open the way to the Court affirming its first death sentence. More likely, is that the Court will do what it did in *Harris*. It will invalidate the death sentence because it was imposed at a time when the instruction was part of the statute and remand the case for re-sentencing.

The decision in *Lavalle*, however, raises a more interesting question. Judge R.S. Smith in his dissent contended that the majority's decision did nothing more than "...elevate[s] judicial distaste for the death penalty over the legislative will."[49] Such a claim bears examination. It can hardly be gainsaid that the detour away from the Supremacy Clause of the United States Constitution and the imposition of greater guarantees to those prosecuted capitally in New York under the State Constitution is a dramatic turn. Critics of the Court's jurisprudence in this area could take note of the fact that the Court has been quick to invoke the Supremacy Clause *post-Furman* and *Gregg* to invalidate the death penalty in New York when the situation was ripe to do so. It would not be a stretch to make the argument that it quickly seized upon the holding in *Jackson* and used it to reach the obverse result that the Supreme Court did, i.e. invalidating the plea provisions rather than the death penalty itself. Such an application has permitted the Court to vacate the death sentences under the 1995 legislation without having to take on the more

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[48]Judge George Bundy Smith has been replaced by the Hon. Eugene Piggott. Judge Albert Rosenblatt is scheduled to retire on December 31, 2006. Chief Judge Judith Kayes term expires in 2007 and faces mandatory retirement in 2008.

[49]3 N.Y. 3d 88 at 149.

controversial task of addressing the constitutionality of the death penalty itself

It thus leaves us with the question, that if the Court of Appeals does indeed have a judicial distaste for the death penalty, why not hold that the New York State Constitutional prohibition against the imposition of cruel and unusual punishments[50] afford greater protection than that enshrined in the Eighth Amendment to the United States Constitution, and ban capital punishment in New York altogether ?

[50]Article 1 Section 5, New York State Constitution provides "Excessive bail shall not be required nor excessive fines imposed, nor shall cruel and unusual punishments be inflicted, nor shall witnesses be unreasonably detained."