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Articles

Death Penalty Jurisprudence in New York 1995 to the Present: How Far Have We Come? Where Are We Headed?

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In 1995, following a twenty-one year hiatus, the New York State Legislature enacted death penalty legislation that was signed by Governor George Pataki. The subject of this paper will be an examination of the death penalty legislation enacted by the Legislature and the Governor as well as the cases decided by the trial courts and appellate courts of this State which have had to implement it.

Historical Background

In 1972, the United States Supreme Court in *Furman v. Georgia*[1] determined that the system of capital punishment, then in existence, violated the Eighth and Fourteenth Amend-

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1. Furman v. Georgia, 408 U.S. 238, 239-40 (1972).

ments of the Constitution of the United States. The Justices, in a series of plurality opinions, agreed that a system which allowed juries to impose it with unbridled discretion rendered the punishment both arbitrary and capricious.[2] The New York Court of Appeals, following the United States Supreme Court mandate in *Furman*, ruled that the existing law set forth in former sections 125.25 and 125.30 of the Penal Law[3] was unconstitutional.[4] In 1974, the Legislature attempted to rectify this by re-enacting legislation making capital punishment mandatory,[5] but this too was determined to be unconstitutional as the Supreme Court revisited the issue in 1976 in *Gregg v. Georgia*,[6] *Woodson v. North Carolina*,[7] and *Roberts v. Louisiana*.[8] In *Gregg,* the Court held that capital punishment for the crime of murder is not *per se* unconstitutional provided that the sentencing procedures are carefully drafted so that the sentencing authority is afforded sufficient information concerning aggravating and mitigating factors in order that the penalty not be imposed disproportionately rendering it arbitrary and capricious.[9] Concomitantly in *Woodson* and *Roberts*, the Court held that those statutes that provided for the mandatory infliction of death as a punishment likewise violated the Eight and Fourteenth Amendment prohibitions against cruel and unusual punishment.[10] The following year, the New York Court of Appeals, in *People v. Davis*, once again applied the Supreme Court's holdings in *Gregg*,[11] *Woodson*,[12] and *Roberts*,[13] deciding mandatory infliction of the death penalty violated the Eighth Amendment proscription against cruel and unusual punishment.[14] Interestingly, the court left open the issue of whether

2. *Id.* at 240-75.

3. N.Y. PENAL LAW § 125.25 (McKinney 1967) (amended 1974); N.Y. PENAL LAW § 125.30 (McKinney 1967) (repealed 1974).

4. People v. Fitzpatrick, 300 N.E.2d 139 (N.Y. 1973).

5. Laws of 1974, 1974 N.Y. Laws 367 (codified at former N.Y. PENAL LAW §§ 60.06, 125.27 (McKinney 1974)).

6. Gregg v. Georgia, 428 U.S. 153, 176-99 (1976).

7. Woodson v. North Carolina, 428 U.S. 280 (1976).

8. Roberts v. Louisiana, 428 U.S. 325 (1976).

9. *Gregg*, 428 U.S. at 153.

10. *Woodson*, 428 U.S. at 306; *Roberts*, 428 U.S. at 336.

11. *Gregg*, 428 U.S. 153.

12. *Woodson*, 428 U.S. 280.

13. *Roberts*, 428 U.S. 325.

14. People v. Davis, 371 N.E.2d 456 (N.Y. 1977).

this prohibition extended to the crime of murder committed by an inmate serving a life sentence charged in section 125.27(1)(a)(iii); however, this last vestige of section 125.27 was finally nullified by the New York Court of Appeals in 1984 in *People v. Smith*.[15] In 1995, the present law was enacted.[16]

The Statute

Section 125.27 of the Penal Law, defining murder in the first degree, requires that the killing be intentional and sets twelve aggravating factors for which the sentence of death may be imposed. Like its 1974 predecessor section, which elevated the killing of a police officer, a corrections officer, as well as a murder committed by one serving a life sentence to the crime of murder in the first degree,[17] the 1995 enactment also expanded the class of victims encompassed by the crime of murder in the first degree to include certain peace officers,[18] a witness to a crime or a member of the witness's immediate family who is killed to prevent the witness from testifying,[19] and judges.[20] It also expanded the kind of conduct covered by the statute to include "contract killings,"[21] felony murder, which now includes the felonies of murder in the second degree and attempted murder in the second degree,[22] causing the death of two or more persons in the same criminal transaction,[23] "torture killings,"[24] "serial killings,"[25] or killing in furtherance of an act of terror-

15. People v. Smith, 468 N.E.2d 879 (N.Y. 1984).

16. Laws of 1995, 1995 N.Y. Laws c. 1 § 7 (codified as amended at N.Y. PENAL LAW § 125.27 (McKinney 2003)).

17. *Compare* N.Y. PENAL LAW § 125.27(1)(a)(i)–(iii) (1974), *with* N.Y. PENAL LAW § 125.27(1)(a)(i), (iii), (iv) (1995).

18. N.Y. PENAL LAW § 125.27(1)(a)(ii).

19. *Id.* § 125.27(1)(a)(v).

20. *Id.* § 125.27(1)(a)(xii).

21. *Id.* § 125.27(1)(a)(vi).

22. *Id.* § 125.27(1)(a)(vii) (this section also imposes accessorial liability for the conduct of another under this provision but it is limited only to one who "commands" another to commit the killing).

23. N.Y. PENAL LAW § 125.27(1)(a)(viii).

24. *Id.* § 125.27(1)(a)(x).

25. *Id.* § 125.27(1)(a)(xi) (this section contains a specific definition of the conduct proscribed, i.e. killing two or more individuals in separate criminal transactions within the state within a twenty-four month period in a similar fashion or pursuant to a common scheme or plan).

ism.[26] Finally, similar to subdivision (iv) of this section, a provision was included to elevate murder to that of murder in the first degree where the defendant has been previously convicted of murder in this state or in another jurisdiction, and that prior offense would constitute a violation of section 125.27 or section 125.25 of the Penal Law.[27]

In re-enacting capital punishment, the State built a number of safeguards into the statute to avoid various constitutional challenges to it. It provided that the defendant in any prosecution must be eighteen years old.[28] In so doing, the Legislature and the Governor not only increased the age of criminal culpability under this statute by two years, but avoided those issues that were raised in *Thompson v. Oklahoma*,[29] and *Stanford v. Kentucky*,[30] in which the Court held that the Eighth Amendment prohibition against "cruel and unusual punishment" made it impermissible to execute fifteen year-olds but permissible to execute those who were sixteen years old and older. Like its predecessor legislation,[31] this section also provides for the affirmative defenses of "extreme emotional disturbance" and "assisting a suicide."[32]

Trial and Sentencing Procedures

The pre-trial, trial and sentencing procedures governing a capital prosecution are sprinkled throughout the Criminal Procedure Law. Section 250.40 of the Criminal Procedure Law requires the prosecution to serve and file a notice of intent to seek the death penalty within 120 days of the filing of an indictment charging murder in the first degree. The court may, for "good cause shown" extend the time for service and filing of the no-

26. *Id.* § 125.27(1)(a)(xiii) (this section, as well as that defining "an act of terrorism" contained in Article 490 of the Penal Law, was created and added by the Legislature on September 17, 2001, six days after the attack on the World Trade Center in New York City).

27. *Id.* § 125.27(1)(a)(ix).

28. N.Y. PENAL LAW § 125.27(1)(b) (this provision was included in N.Y. PENAL LAW § 125.27 (1974) but was not contained in its predecessor N.Y. PENAL LAW § 125.25 (1973)).

29. Thompson v. Oklahoma, 487 U.S. 815 (1988).

30. Stanford v. Kentucky, 492 U.S. 361 (1989).

31. N.Y. PENAL LAW § 125.25 (1973); N.Y. PENAL LAW § 125.27 (1974).

32. *Id.* § 125.27(2)(a)–(b) (McKinney 2003).

tice.[33] In the event such a notice is served and filed, the defendant is entitled to an additional sixty days to file new or supplemental motions.[34] The prosecution is only entitled to file one notice and if it is withdrawn, it may not be re-filed.[35]

Section 220.30(3)(vii) of the Criminal Procedure Law restricted the right of a defendant to enter a plea of guilty to the crime of murder in the first degree unless the sentence to be imposed is a non-capital one and both the court and the prosecution have consented to the entry of such a plea.[36] Prior to the restoration of capital punishment in 1995, this section barred entry of a guilty plea to the crime of murder in the first degree under any circumstances since the imposition of death under the previous scheme was mandatory.[37] This particular statute has been the subject of considerable litigation, which will be discussed later.

Because the statutory framework involves imposition of the death penalty, it contains several restrictions concerning the ability of a defendant to enter a guilty plea[38] and a prohibition against waiving a jury trial.[39] Both would become the subject of numerous challenges in the various courts of the State.

In addition to the other provisions contained in Article 270 of the Criminal Procedure Law, which govern the formation and conduct of a jury trial, there are two that particularly concern death penalty cases. Section 270.16 provides for the individual questioning of jurors to determine if they have any racial bias and section 270.20(1)(f) provides that a juror may be challenged for cause where:

> the crime charged may be punishable by death and the prospective juror entertains such conscientious opinions either against or in favor of such punishment as to preclude such juror from rendering an impartial verdict or from properly exercising the discre-

33. N.Y. CRIM. PROC. LAW § 250.40(2) (McKinney 2003).

34. *Id.* § 250.40(3) (McKinney 2003).

35. *Id.* § 250.40(4) (McKinney 2003).

36. *Id.* § 220.30(3)(vii) (McKinney 2003).

37. *Id.* § 220.30(3)(vii) (McKinney 1973).

38. N.Y. CRIM. PROC. LAW §§ 220.10(5)(e), 220.30(3)(a)(vii) (McKinney 2003).

39. *Id.* § 320.10 (McKinney 2003) (this is the statutory prohibition based upon art. 1, § 2, of the N.Y. CONST.). *See* N.Y. CONST. art. I § 2.

tion conferred upon such juror by law in the determination of a sentence pursuant to Section 400.27.[40]

Section 400.27 of the Criminal Procedure Law sets forth the procedures to be followed for determining the sentence to be imposed upon a guilty verdict for the crime of murder in the first degree where a notice of intent to seek the death penalty has been duly served and filed pursuant section 240.50 of the Criminal Procedure Law. This section provides for a separate sentencing procedure to determine whether the defendant shall be sentenced to death or life without parole.[41] It further allows the prosecution to abandon its right to seek the death penalty, abort the proceeding and allow the court to impose a sentence of life without parole or such other authorized indeterminate sentence pursuant to sections 70.00(2)(a)(i) and 70.00(3)(a)(i) of the Penal Law.[42] The section further allows the court to empanel a new jury for the sentencing proceeding but only "in extraordinary circumstances and upon a showing of good cause, which may include, but is not limited to, a finding of prejudice to either party."[43] Notwithstanding the special provisions contained in Article 270 of the Criminal Procedure Law concerning the selection of jurors previously discussed, this section provides the additional safeguard that the sentencing phase begin with a second voir dire conducted solely by the court, although the parties may submit proposed questions.[44] As both the statute and the *Practice Commentary* accompanying it suggest, the purpose of such a pre-penalty phase voir dire is to determine whether any juror has developed a prejudice or view from the evidence presented that would prevent the juror from rendering a fair and impartial sentencing determination.[45] If the court determines that any juror has developed such a bias, it must discharge the juror and replace the juror with the first alternate juror. If no alternate juror exists, it must discharge the jury and impanel a new jury.[46] Interestingly, if the court is required

40. N.Y. CRIM. PROC. LAW § 270.20(1)(f) (McKinney 2003).
41. *Id.* § 400.27(1).
42. *Id.*
43. *Id.* § 400.27(2).
44. *Id.*
45. N.Y. CRIM. PROC. LAW § 400.27(2) (McKinney 2003); Peter Preiser, Practice Commentary, N.Y. CRIM. PROC. LAW § 470.30 (McKinney Supp. 2003).
46. § 400.27(2); Preiser, *Practice Commentary* to § 400.27(2).

to select a new jury in either of the situations described in this section, it must do so in the same manner, utilizing the same procedures and safeguards previously discussed, contained in Article 270 of the Criminal Procedure Law.[47]

In order to avoid undue prejudice to the defendant during the sentencing proceeding, this section further provides that any of the aggravating factors proven during the trial are deemed to be established beyond a reasonable doubt and testimonial or physical evidence establishing them may not be presented again.[48] The only exception to this prophylactic rule is a provision that allows the prosecution to introduce evidence that during the previous ten years the defendant has been convicted in this state or another jurisdiction on two different occasions of another homicidal offense, a B level violent felony offense, or an offense involving the use of a deadly weapon or the infliction, attempted infliction or threatened infliction of serious physical injury as another aggravating factor.[49] The statute requires the prosecution to serve and file notice of its intent to offer such evidence prior to trial.[50] It further requires that such an aggravating factor must be established beyond a reasonable doubt and provides that the defendant may offer evidence in defense of it and each party may offer evidence in rebuttal.[51]

The section sets forth five specific mitigating factors that the defendant may introduce evidence for the jury to consider. These include, no significant history of violent criminal convictions,[52] evidence of mental retardation or mental impairment that does not rise to the level of a legal defense to the charges,[53] evidence of duress or domination that does not rise to the level of a defense to the charges,[54] evidence that participation in the offense was minor but not so minor that it constitutes a defense

47. *Id.*

48. N.Y. CRIM. PROC. LAW § 400.27(3).

49. *Id.* § 400.27(7)(a).

50. *Id.* § 400.27(7)(c).

51. *Id.* § 400.27(7)(b).

52. *Id.* § 400.27(9)(a).

53. N.Y. CRIM. PROC. LAW § 400.27(9)(b) (the issue of mental retardation is further dealt with in two distinct ways elsewhere in the section and will be discussed further).

54. *Id.* § 400.27(9)(c).

to the charge,[55] and evidence that the defendant was impaired by the use of alcohol or drugs but not to the degree that the impairment constitutes a defense.[56] Finally, it provides a general catch-all factor encompassing any circumstance concerning the crime, or anything in the defendant's background or condition or state of mind that might mitigate the punishment.[57]

Subdivision 10 of this section sets forth the reversed order of summations, allowing the defendant to have the last word with the jury.[58] Subdivision 11 mandates the procedure that the sentencing jury must follow in arriving at a verdict. It appears to track its predecessor legislation somewhat by requiring the jury to consider aggravating and mitigating factors.[59] In this regard, the jury must weigh those aggravating factors that have been proven beyond a reasonable doubt to determine if they substantially outweigh those mitigating factors that have been proven by a preponderance of the evidence. If the jury so agrees unanimously, it must then determine unanimously that a sentence of death or life imprisonment without parole may be imposed.[60] In reporting such a verdict it must specify, on the record, those aggravating and mitigating factors it considered and those mitigating factors proven by the defendant.[61] If the jury fails to unanimously agree upon a sentence, the court must sentence the defendant to an indeterminate life sentence having a minimum of twenty to twenty-five years imprisonment, and the jury must be instructed about this possibility.[62]

As noted previously, New York built into its statute certain safeguards concerning defendants who may be mentally retarded that prohibit the imposition of the death penalty. Subdivision 12 of the statute provides that prior to the commencement of the sentencing proceeding, the court, at the request of the defendant, shall conduct a hearing outside the

55. *Id.* § 400.27(9)(d).
56. *Id.* § 400.27(9)(e).
57. *Id.* § 400.27(9)(e).
58. N.Y. CRIM. PROC. LAW § 400.27(10).
59. *See* N.Y. PENAL LAW § 125.35 (1973).
60. N.Y. CRIM. PROC. LAW § 400.27(10).
61. *Id.* § 400.27(10).
62. *Id.* § 400.27(10), 11(c). Unlike the 1973 legislation, which allowed the court to empanel a second jury to decide the sentence if the first failed to agree, a jury under the present sentencing scheme is empanelled only once to decide a capital sentence. *Id.*

presence of the jury to determine whether the defendant is mentally retarded.[63] The burden of proof on this issue is borne by the defendant by a preponderance of the evidence. The court, at the conclusion of the hearing, reserves decision until the sentencing proceeding is concluded. If the jury reaches a non-capital verdict, no determination is made. In the event the jury decides to impose a capital sentence and the court concludes the defendant is mentally retarded, it must set aside the verdict of death and impose a non-capital sentence. However, should the court determine that the defendant is not mentally retarded, it may not disturb the sentence of death.[64] This provision does not apply where the defendant is convicted of murder in the first degree pursuant to section 125.27(1)(a) (iii) of the Penal Law, but the defendant may still introduce evidence of mental retardation as a mitigating factor during the sentencing proceeding.[65]

This particular statute also provides for the same type of proceeding upon written application prior to trial.[66] If the court finds, by a preponderance of the evidence, that the defendant is mentally retarded, it shall enter an order reciting that finding and the prosecution may appeal from it.[67] If the order is not reversed on appeal and the defendant is convicted of murder in the first degree, then no sentencing proceeding is conducted and the court shall impose a non-capital sentence. If the court finds that the defendant is not retarded, it has preclusive effect, vitiating a second hearing during the sentencing proceeding. The defendant, however, may still present evidence of mental retardation to the sentencing jury in mitigation of the sentence.[68] In addition to setting forth these procedures, the statute also defines the terms "mental retardation" and "psychiatric evidence," and sets forth a procedure for examination of the defendant and

63. *Id.* § 400.27(12)(a). However, with the consent of both parties, the hearing or a portion of it, may be conducted before the jury, contemporaneously with the sentencing proceeding.

64. N.Y. CRIM. PROC. LAW § 400.27(12)(b)–(c).

65. *Id.* § 400.27(12)(d).

66. *Id.* § 400.27(12)(e).

67. *Id.* § 400.27(12)(e)–(f).

68. *Id.* § 400.27(12)(e)–(f).

reciprocal discovery obligations by each party, as well as sanctions for failing to comply with these requirements.[69]

In adopting these proscriptions and procedures, New York, at first blush, appears to have been quite prescient. Only six years prior to this enactment, the United States Supreme Court in *Penry v. Lynaugh*[70] decided that executing the mentally retarded did not violate the Eighth Amendment prohibition against cruel and unusual punishment. The Court, however, revisited this issue on June 20, 2002, in *Virginia v. Atkins*,[71] and reversed *Penry*[72] holding that it did violate this proscription. Justice Stevens, writing for the majority, analyzed the issue utilizing the "evolving standards of decency" principle announced by Chief Justice Warren in *Trop v. Dulles*.[73] In conducting his analysis, Justice Stevens recounted the number of states that had outlawed the execution of the mentally retarded, including New York.[74] Of particular interest in the *Atkins* decision is that Justice Stevens took note of the fact that execution of the mentally retarded is not prohibited in New York where the conviction is for murder in the first degree pursuant to section 125.27(a)(iii) of the Penal Law.[75] Whether the provision allowing this set forth in Criminal Procedure Law section 400.27(12)(d) will survive a challenge under *Atkins*, in either the New York Court of Appeals or the United States Supreme Court remains to be seen.

As part of the re-enactment of the death penalty in 1995, the Criminal Procedure Law provisions governing the appeals in death penalty cases were substantially revised. Sections 450.70 and 470.30 of the Criminal Procedure Law have always governed the right to a direct appeal to the New York Court of Appeals of a death sentence in New York. A comparison of the current section of 450.70 of the Criminal Procedure Law and its predecessor, enacted in 1970,[76] reveal that they have identical

69. N.Y. CRIM. PROC. LAW § 400.27(12)(e), (13), (14).
70. Penry v. Lynaugh, 492 U.S. 302 (1989).
71. Virginia v. Atkins, 536 U.S. 304 (2002).
72. *Penry*, 492 U.S. at 302.
73. Trop v. Dulles, 356 U.S. 86, 100-01 (1958).
74. *Atkins*, 536 U.S. at 313.
75. *Id.* at 315 n.13.
76. N.Y. CRIM. PROC. LAW § 450.70 (1970), *amended by* Laws of 1995, 1995 N.Y. Laws c. 1 § 23.

provisions concerning those matters which are appealable directly to the New York Court of Appeals with the addition of an appeal from an order of the trial court setting aside a sentence of death as provided in section 400.27(11)(d) of the Criminal Procedure Law.[77] The addition of this particular provision was deemed necessary because the predecessor section of 470.30 of the Criminal Procedure Law, which set forth what remedial action the New York Court of Appeals could take, expressly provided that, "except that the New York Court of Appeals may not as a matter of discretion in the interest of justice set aside, reduce or change the sentence of death as being unduly harsh or severe."[78]

Since the new statutory scheme passed in 1995 was expressly designed to comport with the Supreme Court's holding in *Gregg v. Georgia*,[79] New York built additional safeguards into the New York Court of Appeals when it modified section 470.30 in 1995. The new statute left intact subdivision one of the predecessor statute which incorporates the corrective action embodied in sections 470.15 and 470.20 concerning determinations by the intermediate appellate courts of appeal.[80] The new law requires that when a sentence of death is imposed, the judgment and the sentence must be reviewed by the New York Court of Appeals on the record. This review cannot be waived.[81] Subdivision three of the new section sets forth three criteria by which each sentence must be scrutinized. These include whether the sentence was the product of prejudice or passion or other impermissible factor including the race of the victim or the defendant,[82] and whether the sentence is excessive or disproportionate to similar crimes and, at the request of the defendant, whether the race of either the victim or the defendant may have been a factor.[83] In his *Practice Commentary* accompanying this section, Professor Preiser comments:

> Although proportionality review is not required by the federal constitution, Supreme Court precedent appears to indicate that,

77. *Id.*
78. *Id.*
79. Gregg v. Georgia, 428 U.S. 153 (1976).
80. N.Y. CRIM. PROC. LAW § 470.30(1) (McKinney 2003).
81. *Id.* § 470.30(2).
82. *Id.* § 470.30(3)(a).
83. *Id.* § 470.30(3)(b).

> where the death penalty is at issue, there must be appellate review focusing upon the individual circumstances of each case in passing upon the sentence. Accordingly, the revisions eliminate the former restrictions upon altering the sentence in the interest of justice on the ground that it is unduly harsh or severe. Moreover, as can be seen by perusing the new provisions, they afford the defendant vastly broader grounds for attack upon the sentence than required by federal constitutional law.[84]

In fact, it appears that the Legislature and the Governor did more than simply follow *Pulley v. Harris*.[85] In crafting these particular features into the statute requiring the New York Court of Appeals to measure proportionality in the context of the race of the victim and the defendant, New York has provided for the type of review rejected by the United States Supreme Court in *McCleskey v. Kemp*.[86] In order to effectuate this process, the State enacted section 211-a of the Judiciary Law which requires that the New York Court of Appeals adopt a procedure to insure that the clerk of the trial court compile data about the crime and the defendant so that the New York Court of Appeals will have a data base that enables it to conduct the proportionality review.

The Case Law

At this writing, seven cases construing the statutory scheme and a single death sentence appeal have been reviewed by the New York Court of Appeals. Those cases are *Hynes v. Tomei*,[87] *People v. Mateo*,[88] *People v. Couser*,[89] *Matter of Francois v. Dolan*,[90] *People v. Edwards*,[91] *People v. Mower*,[92] and *People v. Harris*.[93]

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84. Peter Preiser, Practice Commentary, N.Y. CRIM. PROC. LAW § 470.30 (McKinney Supp. 2003) (citations omitted).

85. Pulley v. Harris, 465 U.S. 37, 53 (1984).

86. McCleskey v. Kemp, 481 U.S. 279 (1986).

87. Hynes v. Tomei, 706 N.E.2d 1201 (N.Y. 1998).

88. People v. Mateo, 712 N.E.2d 692 (N.Y. 1999).

89. People v. Couser, 730 N.E.2d 953 (N.Y. 2000).

90. Francois v. Dolan, 731 N.E.2d 614 (N.Y. 2000).

91. People v. Edwards, 754 N.E.2d 169 (N.Y. 2001).

92. People v. Mower, 765 N.E.2d 839 (N.Y. 2002).

93. People v. Harris, 779 N.E.2d 705 (N.Y. 2002).

Matter of Hynes v. Tomei

The first case that resulted in the New York Court of Appeals review, *Hynes v. Tomei*,[94] originated in Supreme Court, Kings County and grew out of the case of *People v. Hale*.[95] In *Hale,* the defendant, who was charged with murder in the first degree, challenged the constitutionality of sections 220.10(5)(e), 220.30(b)(vii) and 220.60(2)(a) of the Criminal Procedure Law, which only allowed him to avoid the death penalty by entering a plea of guilty, with the consent of the court and the prosecutor, thereby denying him his Sixth Amendment right to a trial by jury and his Fifth Amendment right against self- incrimination. Judge Tomei agreed with this proposition relying on *United States v. Jackson*.[96] In *Jackson* the Supreme Court struck down the death penalty provision of the Federal Kidnapping Act,[97] which authorized the imposition of the death penalty only after a jury trial. As Justice Tomei summarized the United States Supreme Court's decision, "[a]ccording to the court, the statute needlessly encouraged guilty pleas and effectively penalized the right to a jury trial by exposing the defendant to the risk of death only when he exercised his constitutional rights."[98] The court 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 crime charged may be punishable by death. Only if the defendant insists upon exercising his sixth amendment right to a jury trial and his fifth amendment privilege against self-incrimination does he risk death. Therefore, unless New York's law may be distinguished from the act in question in *Jackson*, this court is bound to find the plea provisions to be unconstitutional.[99]

94. Hynes v. Tomei, 706 N.E.2d 1201 (N.Y. 1998).
95. People v. Hale, 661 N.Y.S.2d 457 (Sup. Ct. 1997).
96. United States v. Jackson, 390 U.S. 570 (1968).
97. 18 U.S.C. § 1201 (1967).
98. *Hale*, 661 N.Y.S.2d at 479.
99. *Id.* at 479-80 (citations omitted).

Justice Tomei then compared the two statutes, noting that the defendant under the federal law could avoid the death penalty by seeking a bench trial but that under New York's this too was foreclosed. He went on to compare New York's statute with every other death penalty state, noting "and it appears that no other jurisdiction permits guilty pleas to capital murder, yet provides for the imposition of death only after the defendant contests his guilt before a jury, as New York does."[100]

The Judge cited *People v. Michael A.C.*[101] in which the New York Court of Appeals invalidated a section of the Code of Criminal Procedure that conditioned the granting of Youthful Offender status on the defendant waiving his right to a jury trial as being constitutionally impermissible.

The prosecution sought Article 78 relief from this portion of the trial court's ruling in the Appellate Division, Second Department by commencing the action *Hynes v. Tomei*,[102] in which it sought a writ of prohibition against enforcement of the Judge's order or a declaratory judgment that the statutes were constitutional. The Second Department reversed Justice Tomei, relying on the strong presumption that state statutes are constitutional and holding that the New York statutory scheme differed from the Federal Kidnapping Act in two respects. Unlike New York's law, the defendant was subjected to a unitary trial in which the sentence was decided by the jury without weighing aggravating factors or mitigating factors which was a process, which was invalidated in *Furman v. Georgia*.[103] Additionally, under the federal statute the defendant could plead guilty at any time, without the consent of the court or the prosecutor and avoid the death penalty. The New York State Supreme Court, Appellate Division apparently viewed the New York restrictions as a safeguard, as Judge Mangano wrote in *Hynes*:

> Of equal, if not greater, significance is that the defendant in *Jackson* had complete control of the plea process, i.e., he could plead guilty as of right to the capital kidnapping charge, and thus could avoid the death penalty by his own unilateral action, an option

100. *Id.* at 481.
101. People v. Michael A.C., 261 N.E.2d 620 (N.Y. 1970).
102. Hynes v. Tomei, 666 N.Y.S.2d 687 (App. Div. 1997).
103. Furman v. Georgia, 408 U.S. 238, 239-40 (1972).

> which the United States Supreme Court recognized would be difficult to resist. In contrast, the plea bargain provisions at bar prohibit a capital defendant from pleading guilty, as of right, to murder in the first degree; rather, they merely grant the People the discretion to enter into a plea bargain agreement with the capital defendant so as to remove the case from the capital punishment track.[104]

The court went on to cite various United States Supreme Court and New York Court of Appeals decisions, which recognized plea-bargaining as a vital component of the criminal justice process. In so holding, the court appeared to side-step Justice Tomei's conclusion that the only way a defendant could avoid the death penalty under the New York scheme was to give up the Fifth and Sixth Amendment rights against self-incrimination and a jury trial through a process that required the imprimatur of the prosecution and the court.

During this same period of time, a similar challenge arose in *Relin v. Connell*[105] in which the District Attorney sought identical Article 78 relief from an order of county court Judge John Connell which invalidated the same statutory provisions, also relying on *United States v. Jackson.*[106] The Fourth Department, citing the holding in *Hynes v. Tomei*,[107] adopted the Second Department's reasoning and reversed the lower court order. Both cases were appealed to the New York Court of Appeals.

The New York Court of Appeals, in a unanimous decision by Chief Judge Kaye, reversed both Appellate Division decisions.[108] At the outset of her decision, Judge Kaye initially 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. Indeed, every other death penalty State has fit its capital murder plea-bargaining procedures within the rationale of *Jackson*.[109]

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104. *Hynes*, 666 N.Y.S.2d at 691 (footnote omitted).
105. Relin v. Connell, 624 N.Y.S.2d 192 (App. Div. 1997).
106. United States v. Jackson, 390 U.S. 570 (1968).
107. *Hynes*, 666 N.Y.S.2d 687.
108. Hynes v. Tomei, 706 N.E.2d 1201 (N.Y. 1998).
109. *Id.* at 1203.

Judge Kaye, like Justice Tomei, went on to note that shortly after the Supreme Court had decided *Jackson*, the New York Court of Appeals invalidated those sections of the Code of Criminal Procedure that conditioned the granting of Youthful Offender treatment upon the defendant waiving the right to trial by jury, utilizing the same rationale as that applied in *Jackson*.[110] She next rejected the argument that since the statute required the consent of the court and the prosecutor to a change of plea, and the defendant had no unilateral right to change the plea to avoid the death penalty, it could not be said to "needlessly" encourage guilty pleas. Addressing this argument the Judge observed:

> The Supreme Court, however, has found approval of a trial court and a prosecutor irrelevant to the *Jackson* analysis. Defendants prosecuted under the Federal Kidnapping Act could not enter a plea of guilty as of right, since Federal Trial Judges had discretion to reject guilty pleas and jury trial waivers. This judicial involvement did not cure the constitutional problem: the statute's infirmity was not coercion of guilty pleas and jury waivers but needless encouragement of them. Even though not every guilty plea to a charge under the Act was necessarily involuntary, the statute still impermissibly burdened defendants' constitutional rights.[111]

Judge Kaye reiterated the importance of plea bargaining to the criminal justice system, but pointed out that the Supreme Court decision in *Corbitt v. New Jersey*,[112] which was central to the argument that the enactment was constitutional, was distinguishable from the New York scheme because, although a lesser plea could be afforded to a defendant that pled guilty, it was not guaranteed.[113] In striking down sections 220.10(5)(e) and 220.30(3)(b)(vii) of the Criminal Procedure Law, the New York State Court of Appeals held that the severability clause in the legislation allowed the remainder of the law to remain in effect.[114] In invalidating sections 220.10(5)(e) and 220.30(3)(b)(vii) of the Criminal Procedure Law, Judge Kaye

110. *Id.* at 1203; *see also* People v. Michael A.C., 761 N.E.2d 620 (N.Y. 1970).
111. *Hynes*, 706 N.E.2d at 1205 (citations omitted).
112. Corbitt v. New Jersey, 439 U.S. 212 (1978).
113. *Hynes*, 706 N.E.2d at 1207.
114. *Id.* at 1208.

recognized that the court had reached an anomalous result in which plea bargaining would, now, become more difficult than before since a defendant could not plead guilty while a notice of intent to seek the death penalty was pending.[115] On this point, she wrote:

> We realize this result will reduce the flexibility of both prosecutors and defendants who wish to plea bargain in capital cases. Indeed, our reversal in these cases may well have an ironic twist in that capital defendants will have fewer opportunities to avoid the possibility of the death penalty. 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.[116]

This would not be the last time the New York Court of Appeals would pass upon this issue.

People v. Mateo

As noted previously, *People v. Mateo* originated in Monroe County Court before the Honorable John Connell. Among the plethora of issues raised by the defendant, in addition to those decided by *Hynes*,[117] was the constitutionality of section 125.27(1)(a)(xi) of the Penal Law, which made it an aggravating factor to intentionally cause the death of two or more additional persons within the state, in separate criminal transactions within the state, within a period of twenty-four months when committed in a similar fashion or pursuant to a common scheme or plan.[118] In this prosecution, the indictment charged that the defendant acted in a "similar fashion" when he killed four separate victims. The defendant contended that the phrase "similar fashion" was unconstitutionally vague and overbroad under the

115. *Id.*
116. *Id.* at 1209.
117. *Hynes*, 706 N.E.2d 1201.
118. People v. Mateo, 664 N.Y.S.2d 981, 997 (Sup. Ct. 1997).

Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article 1, Sections 1, 2, 3, 4, 5, 6, 11, 12, and 14 of the New York State Constitution as well as Section 13 of the Civil Rights Law and Section 500 of the Judiciary Law.[119]

In denying this motion, Judge Connell conducted both a thorough and interesting analysis, pointing out what had been included and omitted from the various statutes comprising the death penalty enactment as well as pattern Criminal Jury Instructions. He then pointed out that the prosecution had not defined this term or the term "common scheme or plan" for the grand jury.[120] In order to shed some light on what was meant by the Legislature and the Governor, he referenced both the Assembly Codes Committee and the Governor's approval memorandum which indicated that the section was directed at "serial killers."[121] The court next parsed the meanings of the phrases "in a similar fashion" and "common scheme or plan" citing the various definitions other courts and Black's Law Dictionary have given to each phrase pointing out that "common scheme or plan" has been used interchangeably with *modus operandi*.[122] It then engaged in an analysis of the prosecution's position regarding this phrase as well as the term "serial killer," writing:

> The People maintain that similar "includes a spectrum of meanings between the poles of same and different" (Answering Affirmation, AM-9). The breadth of distance between *same* and *different* and the *bewildering variances* of rulings as described by *Wigmore* make it obvious that clear and objective standards providing specific and detailed guidance to a jury is questionable given the lack of clarity in this statute. Not lost on this Court is the significant absence in the Practice Commentaries to Penal Law § 125.27(1)(a)(xi) and the Criminal Jury Instructions of a recommended definition of *similar fashion*.
>
> The People urge that the term *similar fashion* has a *commonsense core of meaning* and is, therefore, easily understood by defendants and juries. The People also contend that the term *serial killer* does not require any more than a showing of a consecutive number of killings. Certainly the context in which the statute

119. *Id.*
120. *Id.* at 998.
121. *Id.*
122. *Id.*

was debated and passed by the Legislature, signed into law by the Governor and promoted by those two branches of government was aimed at protecting the public from the Son of Sam, Ted Bundy and Arthur Shawcross-type serial killers. They are generally defined as persons who commit several homicides, separated in time and frequently in different geographic locations. Most are serial sexual killers who are compelled to exercise absolute control, both physical and mental, before inflicting torture, pain and ultimate death. The manner in which death is inflicted is frequently characterized by a ritualistic signature aspect, i.e. mutilation, cannibalism, sexual contact. Firearms are the least common weapons used by such serial killers. Finally, the crime scenes of the killers tend to be similar, using the same method of killing and similar crime scene arrangements.

In alleging that the four murders set forth in Counts 11 & 12 were committed in a *similar fashion*, the People advance these similarities: All involved young men, shot with firearms to the left side of the head, on the west side of the City of Rochester, and in a cold-blooded fashion.

However, as the People also acknowledge, dissimilarities are important in analyzing the *serial murder* allegation: *Victims*: one victim was a 16 year old African-American male. Three were 19- to 20-year old male Hispanics. *Instrumentalities*: a .45 caliber hand gun, a .357 caliber hand gun, a .25 caliber handgun and a 12-gauge shotgun. *Motives*: One *contract* shooting that began as a *kneecapping* and resulted in a homicide; one unplanned victim who was a companion of the *contract* shooting victim; one *drive-by* shooting as a revenge for an earlier robbery committed by the victim and one shooting driven by the defendant's desire to locate a former girlfriend. *Defendant as Shooter*: The defendant is alleged to be the shooter of the companion to the *contract* shooting victim and in the *drive-by* shooting. An unindicted accomplice is alleged to have shot the *contract* victim. The People are unsure if the defendant shot or commanded the shooting of the 4th victim. *Wounds*: One with shotgun wounds to the neck in the *drive-by*; one with multiple gunshot wounds to the head, abdomen, chest and neck; one with multiple gunshot wounds to the head, chest and hip; and one with a single shot to the head whose head was thereafter covered with a plastic bag. *Location*: Two on a public sidewalk during the same incident; one as he sat in the car on a public street and one in the defendant's basement while handcuffed and blindfolded.

> The People argue that the common element of death by gunshot makes these four homicides serial killings of a *similar fashion*. They ask this Court to reject a *Molineux* standard in interpreting *similar fashion* and accept *a spectrum of meanings between the poles of same and different.*
>
> The reliance of the People on *People v. Condon* to support the position that *similarity* should not be confused with *modus operandi* is questionable. The *Condon* court specifically noted that the *signature*-type crime of a serial killer (i.e. Jack the Ripper) could establish such unique characteristics that proof of similar acts of the defendant would be probative of the fact that he committed the crime alleged.
>
> There is nothing so unique, ritualistic, *signature-like* about these homicides that would support the Grand Jury's decision to indict the defendant under this statute. Even the geographic similarities of the homicide locations proffered by the People are not obvious from a review of the Grand Jury minutes.
>
> To accept the examples of *similarity* presented by the People, a person who shoots the requisite number of victims within the city limits during the prescribed period, thereby causing their death, would fit the definition of a serial killer for the purposes of this statute. Clearly the Legislature did not intend such a result.[123]

Ultimately the court determined that the evidence before the grand jury was insufficient to support the theory that the homicides constituted "serial killings" since they lacked sufficient common characteristics that would render them "signature-like" in nature and it dismissed these counts of the indictment, however, not before expressing its reservations about the constitutionality of the statute, observing:

> While the vagueness of the law concerning *similar fashion* underscores "several difficult issues that remain to be resolved in its application," it does not appear to this Court that this portion of the statute should be struck down on constitutional grounds by a trial level judge at this point in the proceedings of this case.[124]

One of the most interesting features of Judge Connell's decision is his conclusion that this particular section of the statute is apparently aimed exclusively at "serial killers" despite the

123. *Mateo*, 664 N.Y.S.2d at 998-1000 (citations omitted).

124. *Id.* at 1000 (citations omitted).

fact that this term is not utilized in the statute itself nor defined as such. In the Practice Commentary accompanying the section, the author, William Donnino, characterizes the section as such but the only case law offered in support of this view is *People v. Fiore*.[125] A reading of *Fiore*,[126] however, reveals that it is not a case dealing with a homicide prosecution but rather one involving bribery in which the meaning of the phrase "common scheme or plan" is addressed. While some support for Judge Connell's view is found in the memoranda accompanying the legislation as cited by him in the opinion, the Fourth Department expressed a reluctance to adopt that view when the case came to it on appeal. On appeal the Appellate Division, Fourth Department, affirmed the dismissal based on the factual insufficiency before the grand jury, holding:

> In dismissing those counts, the court concluded that the People's evidence before the Grand Jury was insufficient to establish that the murders were committed "in a similar fashion". In reaching that conclusion, the court interpreted "in a similar fashion" to mean serial killings, i.e., unique, ritualistic or signature-like slayings. The People contend that the court should have given the phrase "in a similar fashion" its plain meaning and thus should have concluded that the evidence was legally sufficient.
>
> Even affording the phrase "in a similar fashion" its plain meaning, we conclude that the evidence before the Grand Jury was legally insufficient. The record establishes that the defendant's motive and method in each of the four murders were different and that the circumstances surrounding each of the murders were different. Because the murders did not adequately resemble each other with respect to motive, method and surrounding circumstances, they were not committed "in a similar fashion".[127]

The Supreme Court Appellate Didvision, however, declined to address the lower court's interpretation of the applicability to "serial killers" or the constitutionality of the section noting:

> In view of our determination, it is unnecessary to review the propriety of the court's conclusion that Penal Law § 125.27(1)(a)(xi) applies only to serial killings. In addition, because defendant

125. William C. Donnino, Practice Commentary, N.Y. PENAL LAW § 125.27(1)(a)(xi) (McKinney 1997).

126. People v. Fiore, 312 N.E.2d 174 (N.Y. 1974).

127. People v. Mateo, 672 N.Y.S.2d 594, 594 (App. Div. 1998).

does not argue before us that the phrase "in a similar fashion" is unconstitutionally vague, we do not address that issue.[128]

Leave to appeal to the New York Court of Appeals was granted by Chief Judge Kaye and the court affirmed the dismissal. Judge Wesley, writing for a unanimous bench, opined:

> We agree with the lower court determinations that the evidence presented to the Grand Jury was insufficient to establish that the killings at issue here were "committed in a similar fashion" pursuant to Penal Law § 125.27(1)(a)(xi) and therefore affirm.
>
> It is clear that the Legislature and the Governor intended the phrase "committed in a similar fashion" to include serial killings. Contrary to defendant's contention, however, this phrase does not have a well-settled legal meaning in our jurisprudence.
>
> In analyzing this phrase, County Court looked to our case law concerning the identity exception for the admission of uncharged crimes at trial, first articulated in *People v. Molineux*. This exception is used in limited circumstances, when the defendant employs some unique, unusual, or distinctive *modus operandi* in an uncharged crime that is relevant to proving his identity as the perpetrator of the crime charged. Although County Court correctly held that the proof fell short of establishing that the crimes were "committed in a similar fashion," we disagree with its conclusion that these cases establish a template for defining the phrase "committed in a similar fashion" under Penal Law § 125.27(1)(a)(xi). The precise phrase is not used in our *Molineux* line of cases, and nothing in the history of the death penalty statute suggests that the Legislature intended to adopt either rationale or the standards governing the identity evidentiary exception to define this classification of capital murder.[129]

In a footnote to this discussion in the opinion, the Judge wrote:

> Moreover, although County Court determined that there was "nothing so unique, ritualistic, [or] signature-like" about these homicides, it misinterpreted our *Molineux* jurisprudence in this regard. This Court has articulated the identity exception standard as "unique," "unusual" and "distinctive." However, in *Beam* we explicitly stated that in order to establish a modus operandi,

128. *Id.*

129. People v. Mateo, 712 N.E.2d 692, 694-95 (N.Y. 1999) (citations omitted).

"it is not necessary that the pattern be ritualistic for it to be considered unique."[130]

While the New York Court of Appeals confirmed that this particular section was meant to apply to "serial killings" it left open the question of whether it was exclusive to them, or whether "serial killings" were merely one subset of the class of homicides it embraced. Moreover, it expressly declined to offer any guidance on this subject or more precision to the phrase at issue, declaring:

> Both defendant and the People ask us to fashion a set of criteria to define the requirements of the statutory phrase at issue; they ask us to provide a calculus of "similarity" by which all future cases might be plotted. To do so, however, would ignore the relative nature and contextual considerations inherent in any analysis and application of the "similarity" element. For this reason, the typical process by which this Court fulfills its adjudicative responsibility in setting prospective, applied particularization does not lend itself to a more definite resolution of the nature of "similarity" beyond the determination of the facts presented in this case.[131]

People v. Couser

People v. Couser arose out of a prosecution for murder in the first degree in Onondaga County Court in 1977.[132] Unlike the prosecutions in both *Hale*[133] and *Mateo*,[134] no notice of intent to seek the death penalty had been filed. Among the theories in the indictment was a count charging the defendant with the offense of murder in the first degree pursuant to section 125.27(1)(a)(vii) of the Penal Law. The defendant moved to dismiss this count alleging that the statute was void for vagueness. In agreeing with this conclusion, the court began its analysis by reviewing the section itself, writing:

> In enacting this statute, the legislature sought to craft a felony murder provision like that set forth in § 125.25(3) of the Pe-

130. *Id.* at 695 n.2 (citations omitted).

131. *Id.* at 695.

132. The author was the Trial Court Judge in these proceedings and also the author of the two decisions reported at 674 N.Y.S.2d 887 (County Ct. 1998).

133. People v. Hale, 661 N.Y.S.2d 457 (Sup. Ct. 1997).

134. People v. Mateo, 664 N.Y.S.2d 981, 988-91 (Sup. Ct. 1997).

> nal Law, albeit with a significantly expanded list of predicate felonies. Moreover, while § 125.25(3)(a) of the Penal Law makes it an affirmative defense that the accused, "Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof", this section only imposes accessorial liability for the crime where the People have proven as an element that the accused ". . . commanded another person to cause the death of the victim or intended victim." (Penal Law § 125.27[1][a][vii]). Unfortunately, neither the legislature nor the courts have given any guidance about what constitutes a "command" under this statute.[135]

Citing *Zant v. Stephens*[136] and *Gregg v. Georgia*,[137] the court observed that the statute, to be constitutional, "[must contain] an aggravating circumstance [which] generally narrow[s] the class of persons eligible for the death penalty" and that the discretion afforded the sentencing body "must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."[138] The court went on to find, however that:

> While the section at issue initially appears to fulfill these requirements since it narrows the accomplice liability to a single concept, "command", and places the burden of establishing it on the People, the failure to define what constitutes a "command" either under § 20.00 or § 125.27(1)(a)(vii) of the Penal Law renders the statute impermissibly vague.[139]

The court took note of the fact that the same issue had been raised and decided in *People v. Mateo*,[140] in which Judge Connell wrote:

> The defendant also challenges the phrase "commanded another person" as being unconstitutionally vague. The defendant's argument is unpersuasive. The term "command" has been used in the Penal Law for many years under § 20.00. This phrase, under Penal Law § 125.27(1)(a)(vii), limits the application of accessorial liability to those situations where an individual commands an-

135. People v. Couser, 674 N.Y.S.2d 887, 888 (County Ct. 1998).
136. Zant v. Stephens, 462 U.S. 862 (1983).
137. Gregg v. Georgia, 428 U.S. 153 (1976).
138. *Couser*, 674 N.Y.S.2d at 888 (citing *Zant*, 462 U.S. at 877; *Gregg*, 428 U.S. at 189).
139. *Id.* at 888-89.
140. People v. Mateo, 664 N.Y.S.2d 981 (Sup. Ct. 1997).

other person to intentionally cause the death of another individual.

Here, the common sense meaning of "command" should be applied: "To direct, with authority. Power to dominate and control." (*Black's Law Dictionary* 267 [6th ed. 1990]). The use of the phrase "commanded another person" under the statute is sufficient to put the defendant on notice that it is a crime to order another person to intentionally cause the death of Juan Rodriguez-Matos. This phrase also limits the type of conduct that can be charged under this statute by law enforcement personnel because of the limited application of accessorial liability.[141]

The court, in declining to adopt this position, conducted a further analysis of that undertaken by Judge Connell, writing that:

The problem with the analysis in *Mateo, supra*, is that while Judge Connell correctly observes that the term has been included in § 20.00 of the Penal Law since 1965, and it limits the application of the type of accessorial liability which can be charged under this statute, it still begs the question of what constitutes a "command." Additionally, the utilization of the "common sense" meaning derived from Black's Law Dictionary 267 (6th Ed.) invites grand jurors and trial jurors throughout the state to apply their own personal subjective interpretation in determining the existence or non-existence of an aggravating factor in a capital ease [sic].[142]

In a footnote to this discussion, the Judge utilized Black's Law Dictionary to compare all of the terms set forth in section 20.00 of the Penal Law to demonstrate that they were so synonymous with one another as to make them interchangeable, "if not circular."[143] On appeal, the Appellate Division, Fourth Department reversed.[144] Judge Wisner, reviewing the body of capital case law jurisprudence, cited *Tison v. Arizona*,[145] as authority for the proposition that one who plays a major role in the underlying felony that leads to the death of another may be an appropriate candidate for the death penalty. He then went on to hold that the standard applied in the lower court analysis

141. *Id.* at 989.
142. *Couser*, 674 N.Y.S.2d at 889.
143. *Id.* at 889 n.1.
144. People v. Couser, 695 N.Y.S.2d 781 (App. Div. 1999).
145. Tison v. Arizona, 481 U.S. 137 (1987).

was an incorrect one, observing "The People argue that the court erred in analyzing the constitutionality of clause (vii) of Penal Law § 125.27(1)(a) from an Eighth Amendment perspective. We agree. Because this is not a death penalty case, defendant's vagueness argument should be measured by due process, not Eighth Amendment, standards."[146]

After reviewing the statute's procedural provisions requiring a bifurcated proceeding where the death penalty is sought, Judge Wisner continued his analysis:

> It is because each clause of Penal Law § 125.27(1)(a) defines not only a crime but also eligibility for the death penalty that the court measured the constitutionality of clause (vii) by Eighth Amendment standards. The issue, however, is not whether that clause is sufficiently definite to serve as an aggravating factor establishing eligibility for the death penalty. The issue is whether that clause is sufficiently definite to serve as the statutory definition of a crime. A determination that the clause is sufficiently definite to serve as the basis for a criminal prosecution would not be inconsistent with a determination that it is not sufficiently definite to serve as the basis for the imposition of the death penalty.[147]

The court, holding that the lower court erred in applying an Eighth Amendment analysis to the statute, stated the "[e]ighth Amendment analysis is an 'anomaly of the Supreme Court's death penalty jurisprudence. Simply put, death is different . . . . That difference creates a unique 'need for reliability on the determination that death is the appropriate punishment in a specific case.' Those concerns are not present here.' "[148]

The court thereupon, resting on the presumption of constitutionality, applied the test enunciated in *People v. Bright*,[149] that "[f]irst, the statute must provide sufficient notice of what conduct is prohibited; second, the statute must not be written in such a manner as to permit or encourage arbitrary and discriminatory enforcement . . . ."[150]

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146. *Couser*, 695 N.Y.S.2d at 785.

147. *Id.* (citations omitted).

148. *Id.* at 786 (quoting Holman v. Page, 95 F.3d 481, 487 (7th Cir. 1996); Zant v. Stephens, 462 U.S. 862, 884-85 (1983)).

149. People v. Bright, 520 N.E.2d 1355 (N.Y. 1988).

150. *Id.* at 1358.

It then adopted a definition similar to that proposed in *People v. Mateo*[151] "to direct authoritatively" that was taken from Webster Third International Dictionary.[152]

Ultimately, the New York Court of Appeals had the last word on this particular issue. In an opinion by Judge Bellacosa, the court held that the defendant had standing to challenge the statute on "a standard due process vagueness assertion."[153] Turning to the issue of the word "command," the Judge wrote:

> We are persuaded that, under a standard due process appraisal, the commonly accepted meaning of "command" for ordinary legal and constitutional purposes is "to direct authoritatively." It is also significant that a "command" is the only type of accomplice liability activity for which a confederate can become liable for murder in the first degree. This selective precision manifests the Legislature's confidence and understanding that the word "command" is a distinctive term that is different from "solicits," "requests," or "importunes."
>
> Further, there has been virtually no judicial churning concerning the term "command," despite its longevity in New York jurisprudence. Evidently, parsed interpretation of this ordinary word has not been deemed necessary. Indeed, it is notable that the term "commands" was retained throughout the development of the accomplice liability statute, while other terms have been recast. "Command" very likely did not have to be changed because it consistently "'"[sic] conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices."'"[sic][154]

The analysis by the Appellate Division, Fourth Department, perhaps, raises more questions than are answered. Most troubling is the apparent reliance on *Maynard v. Cartwright*,[155] to validate the statute recognizing that while "the clause is sufficiently definite to serve as the basis for a criminal prosecution" it may not be "sufficiently definite to serve as the basis for the imposition of the death penalty."[156] Recognizing that the

151. People v. Mateo, 664 N.Y.S.2d 981 (Sup. Ct. 1997).

152. *Couser*, 695 N.Y.S.2d at 787 (citing WEBSTER'S THIRD INT'L DICTIONARY 455).

153. People v. Couser, 730 N.E.2d 953, 955 (N.Y. 2000).

154. *Id.* at 956 (citations omitted).

155. Maynard v. Cartwright, 486 U.S. 356, 361-62 (1988).

156. *Couser*, 695 N.Y.S.2d at 785.

statute may be utilized in both non-capital cases, like *Couser*, as well as capital cases one is left to wonder whether the definition of "command" may then be more elastic in the former rather than the latter. Indeed, a reading of that portion of *Maynard v. Cartwright*,[157] cited by the Fourth Department, seems to compel the very opposite conclusion. There, Justice White, rejecting the State of Oklahoma's attempt to salvage the portion of the capital sentence which was attacked as also being vague, wrote:

> The difficulty with the State's argument is that it presents a Due Process Clause approach to vagueness and fails to recognize the rationale of our cases construing and applying the Eighth Amendment. Objections to vagueness under the Due Process Clause rest on the lack of notice, and hence may be overcome in any specific case where reasonable persons would know that their conduct is at risk. Vagueness challenges to statutes not threatening First Amendment interests are examined in light of the facts of the case at hand; the statute is judged on an as-applied basis. Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in *Furman v. Georgia*, 408 U.S. 238 (1972).[158]

By applying a standard due process analysis to a statute that could be utilized to impose the death penalty, both the Fourth Department and the New York Court of Appeals appear to have left open the prospect of an Eighth Amendment heightened due process challenge in the future.

Finally, it is obvious from a reading of both opinions, as well as *People v. Mateo*,[159] that no uniform, precise definition of "command" existed regardless of how much one was claimed. In *Mateo*, Judge Connell settled on "[t]o direct with authority. Power to dominate and control."[160] In *People v. Couser*, Judge

157. *Maynard*, 486 U.S. at 361-62.
158. *Id.* (citations omitted).
159. People v. Mateo, 664 N.Y.S.2d 981 (Sup. Ct. 1997).
160. *Id.* at 989 (citing BLACK'S LAW DICTIONARY 267 (6th ed. 1990)).

Wisner settled for " '[t]o direct authoritatively,' i.e., 'to give order or orders.' "[161]

In the New York Court of Appeals, Judge Bellacosa not only adopted both of them, but cited a 1907 case, *People v. Farmer*,[162] as an illustration of how it might have been viewed. With the exception of this single illustration, none of the courts that considered this term could cite a case in which it had been construed or defined. Moreover, the Judge touted the fact that "there has been virtually no judicial churning concerning the term 'command,' despite its longevity in New York jurisprudence."[163]

Neither has New York ever attempted to pin capital liability on a defendant utilizing this principle. Whether it will survive an Eighth Amendment analysis remains to be seen.

Matter of Francois v. Dolan

In *Matter of Francois v. Dolan*,[164] the New York Court of Appeals revisited the issue of when a defendant may enter a guilty plea to an indictment charging the crime of murder in the first degree pursuant to section 125.27 of the Penal Law.

This case arose in Dutchess County Court where the defendant was charged with eight counts of murder in the first degree pursuant to section 125.27(1)(a)(xi) of the Penal Law, the "serial killer" provision and lesser offenses.[165] The relevant facts were laid out by Judge Levine, who recounted:

> On October 8, 1998, a Dutchess County Grand Jury indicted petitioner Kendall Francois on eight counts of murder in the first degree, as defined under New York's 1995 death penalty legislation . . . . He was arraigned on the indictment and entered a plea of not guilty. Pursuant to CPL 250.40(2), Francois' arraignment marked the beginning of a 120-day period within which the District Attorney was authorized to serve a notice of intent to seek the death penalty. In November, the District Attorney wrote to the Capital Defender Office inviting the submission of any mitiga-

161. People v. Couser, 695 N.Y.S.2d 781, 787 (App. Div. 1999) (citing WEBSTER'S THIRD NEW INT'L DICTIONARY 455).

162. People v. Farmer, 89 N.E. 462 (N.Y. 1909).

163. People v. Couser, 730 N.E.2d 953, 956 (N.Y. 2000).

164. Francois v. Dolan, 731 N.E.2d 614 (N.Y. 2000).

165. *Id.* at 615.

> tion information the defense might request the prosecutor to consider in determining whether to seek the death penalty.
>
> On December 22, 1998, before the District Attorney either filed a notice of intent to seek the death penalty or announced his intention not to do so, this Court decided *Matter of Hynes v. Tomei,* 92 N.Y.2d 613, 684 N.Y.S.2d 177, 706 N.E.2d 1201, *cert. denied* 527 U.S. 1015, 119 S.Ct. 2359, 144 L.Ed.2d 254. . . .
>
> . . . .
>
> On December 23, the day following the decision . . . still before a death penalty notice had been filed by the District Attorney in this case, petitioner made an uncalendared appearance before County Court, Dutchess County, in which he offered to plead guilty to the entire indictment. The District Attorney opposed acceptance of the plea and, the following day, filed a death penalty notice. County Court reserved decision on the guilty plea offer and later rendered a decision refusing to accept the plea.[166]

Thereafter, the defendant commenced an Article 78 proceeding in the Appellate Division, Second Department seeking a writ of mandamus compelling Judge Dolan to accept his plea of guilty.[167] The court denied the petition and dismissed the writ, holding:

> "[P]rohibition is available only where there is a clear legal right, and then only when a court–in cases where judicial authority is challenged–acts or threatens to act either without jurisdiction or in excess of its authorized powers." The extraordinary remedy of mandamus will lie only to compel the performance of a ministerial act, and only when there exists a clear legal right to the relief sought.[168]

On appeal, the New York Court of Appeals affirmed the judgment holding that the more specific provision of section 250.40 of the Criminal Procedure Law, which allows the prosecution a 120-day period in which to decide whether to seek the death penalty, trumped the general plea provisions of the Criminal Procedure Law set out in sections 220.10(2) and 220.60(2) that allow a defendant to enter a plea to the whole indictment

166. *Id.* at 615-16.

167. Francois v. Dolan, 693 N.Y.S.2d 198 (App. Div. 1999).

168. *Id.* at 198-99 (quoting Rondon v. Kohm, 644 N.Y.S.2d 652 (App. Div. 1996)) (additional citations omitted).

as a matter of right.[169] Judge Levine, rejecting the Petitioner's argument, wrote:

> For several reasons we reject this argument and hold that until the completion of the statutorily provided deliberative process, either by the filing of a death penalty notice, announcement of an intention not to seek that sanction, or by the expiration of the statutory period to make that decision, a capital defendant does not have an unqualified right to plead guilty to the entire indictment. Thus to the extent that there is a conflict between sections 220.10(2) and 220.60(2), on the one hand, and the provision giving the District Attorney the authority to decide whether to seek the death penalty and a period to deliberate on that decision (*see,* CPL 250.40), the latter provisions prevails.[170]

While, at first blush, it appears that the court has given back to the prosecution what it took away in *Hynes v. Tomei*,[171] i.e., the right to block a defendant's entry of a guilty plea to an indictment to avoid the death penalty, it did so with some qualification. It may do so, only during the 120-day period allowed pursuant to section 250.40 and that power is curtailed by either of two events; the filing of the notice to seek the death penalty or the announcement that it will not be sought. In restoring this qualified right to the prosecution, Judge Levine emphasized the importance of two considerations enacted in the 1995 legislation:

> First, the defendant could thereby prevent the prosecution from pursuing the death penalty even *after* a notice of intent to seek the death penalty was filed under CPL 250.40(1). This is because there is no provision for impaneling a jury for the required death penalty sentencing stage after a guilty plea to capital murder. Thus, the only legal sentence upon a guilty plea would be either life imprisonment without parole or a term of years in prison. In order to avoid this result, in *Matter of Hynes v. Tomei*, we construed the statute, as a whole, not to permit a capital defendant to exercise an unqualified right to plead guilty to murder in the first degree while a death penalty notice was pending.
>
> Second, in entering a plea to capital murder, a defendant could preclude the District Attorney from even exercising the statutory right to consider, over time (weighing aggravating and miti-

169. *Francois*, 731 N.E.2d at 616 (citations omitted).
170. *Id.*
171. Hynes v. Tomei, 706 N.E.2d 1201 (N.Y. 1998).

> gating factors), whether to seek the ultimate sanction in a capital murder case.[172]

The court was not unmindful of the consequences of this holding, observing:

> Finally, we should not ignore the unintended and untoward effects of a contrary ruling. As this case illustrates, and County Court pointed out, it would inevitably result, in the most heinous and high profile cases, in an unseemly race to the courthouse between the defense and the prosecution to see whether a guilty plea or notice of intent to seek the death penalty will be filed first. The need for the precipitous action to file a death penalty notice before the plea was offered would undeniably preclude the thorough, fully deliberative decision making on whether to seek the death penalty that the Legislature contemplated, and one would hope a District Attorney would employ, in the exercise of that official's profound responsibilities conferred under the present death penalty statute.[173]

It is therefore clear, that despite the court's earlier invalidation of sections 220.10(5)(e) and 220.30(3)(b)(vii) of the Criminal Procedure Law, which purported to restrict the right of a defendant to enter a guilty plea, there is still no way for a defendant to avoid the death penalty that does not require the prosecution's consent. The ink was hardly dry on Judge Kaye's warning in *Hynes v. Tomei*, that "[w]e realize this result will reduce the flexibility of both prosecutors and defendants who wish to plea bargain in capital cases"[174] before the prosecution and defense tried to find ways around the holding in the trial courts. For example, less than one month later in Monroe County Court, Judge Marks authored a decision in *People v. Van Dyne*,[175] in which she set forth the willingness of the defendant to enter a plea of guilty to murder in the first degree and "[t]he district attorney specifically conditions the withdrawal of the notice of intent to seek the death penalty upon the entry of a plea of guilty and reserves the right to reinstate the notice if the plea is not entered or is withdrawn."[176]

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172. *Francois*, 731 N.E.2d at 616 (citations omitted).
173. *Id.* at 617.
174. *Hynes*, 706 N.E.2d at 1209.
175. People v. Van Dyne, 685 N.Y.S.2d 591 (County Ct. 1999).
176. *Id.* at 593.

The Judge went on to discuss the holding of *Hynes v. Tomei*, including the right of a defendant to plead guilty where no notice of intent to seek the death penalty is pending. Additionally she noted that the New York Court of Appeals had not invalidated the plea provisions of section 220.60(2)(a) of the Criminal Procedure Law, which allows a defendant to enter a plea of guilty to part of the indictment with the consent of the court and prosecution, and concluded:

> The defendant in this case has sought the Court's acceptance of a plea of guilty to Murder in the First Degree immediately after the withdrawal of the notice of intent to seek the death penalty. The defendant has set forth other valid reasons for the withdrawal of his not guilty plea.
>
> The Court therefore concludes that the plea may be accepted based upon the defendant's knowing, intelligent and voluntary waiver of rights and consistent with the recent decision of the Court of Appeals and thus so orders the acceptance of the plea.[177]

It is extremely doubtful that the District Attorney could have validly "reinstated" the notice of intent to seek the death penalty, had the defendant repudiated the agreement, given the prohibition in section 250.40(4) of the Criminal Procedure Law from doing so.

Indeed, this potential problem led to a different process being utilized several months later in *People v. Smelefsky*,[178] in Supreme Court, Queens County. There, Judge Fisher after reviewing the procedure followed in *Van Dyne*, wrote "[t]he Court rejected the District Attorney's proposal, first because conditional plea bargains are generally disfavored in New York, and second because a 'conditional' withdrawal seemed irreconcilable with the unambiguous statutory provision that 'once withdrawn [a] notice of intent to seek the death penalty may not be refiled.' "[179]

However, due to the unique circumstances of the case, the court was able to devise a procedure to accomplish the plea bargain. Smelefsky was charged with murder in the first degree and lesser included offenses in two indictments involving differ-

177. *Id.* at 594.

178. People v. Smelefsky, 695 N.Y.S.2d 689 (Sup. Ct. 1999).

179. *Id.* at 691 (quoting N.Y. CRIM. PROC. LAW § 250.40(4)) (additional citations omitted).

ent co-defendants and different victims. The court took the defendant through a complete allocution of the rights he was waiving in entering a plea of guilty to murder in the first degree on one indictment as well as a factual admission concerning his conduct:

> The Court then turned to the prosecutor who was apparently satisfied with the allocution. In one breath, he consented to the plea, withdrew the notice of intent to seek the death penalty, and joined in the defendant's application that the plea be accepted and entered. The Court immediately granted the application, and ordered the plea entered.[180]

The defendant was then allowed to enter pleas of guilty of murder in the second degree and other offenses to satisfy the second indictment and was sentenced consecutively to the life without parole that was the plea bargained sentence on the first indictment. In discussing the reasons the plea allocution did not run afoul of *Hynes v. Tomei*, Judge Fisher wrote:

> Although a notice of intent was pending against the defendant here, the parties did not violate *Matter of Hynes v. Tomei*, *supra*, by engaging in serious plea negotiations. Among other possibilities, they could have reached an agreement not involving a plea to first-degree murder and therefore not requiring the withdrawal of the notice of intent at all. Moreover, since a filed notice of intent may be withdrawn "at any time," a defendant must have the opportunity to persuade the prosecutor to withdraw it, whether or not the inducement includes a guilty plea.
>
> The agreement reached here involved a guilty plea to first-degree murder, and therefore it could not have been given effect while the notice of intent remained pending. To be sure, the notice could have been withdrawn before the plea was proffered by the defendant in court. But where the agreed-upon sentence is life without parole, many prosecutors are reluctant to withdraw the notice of intent prior to the plea and to rely simply upon the defendant's representation that he or she will thereafter plead guilty and accept that sentence. Because a withdrawn notice may never be re-filed, prosecutors understandably fear that, following an apparently irreversible withdrawal of the notice, the defendant will renege on the promise, renounce the bargain, and refuse to enter the plea.

180. *Id.* at 692 (footnote omitted).

> In the case at bar, because of that expressed concern, the prosecutor was permitted to withhold his consent to the plea and his withdrawal of the notice of intent until after the defendant had proffered his plea to the court and undergone a complete allocution. Because that sequence narrowed the window of opportunity for the defendant to renounce the bargain, it fortified the prosecutor's resolve to go forward with it. And since the defendant claimed also to be seeking the disposition, he could have no legitimate complaint that the sequence unfairly infringed upon his right to renege.
>
> Moreover, the procedure was not inconsistent with the Court of Appeals holding that "a defendant may not plead guilty to first degree murder while a notice of intent to seek the death penalty is pending."
>
> In New York, a guilty plea carrying a promised sentence cannot be entered without the permission of the Court, even where both the prosecution and defense recommend it. Thus, it is the acceptance by the Court, and not the proffer by the defendant, that makes a guilty plea cognizable. As the Court of Appeals has said, "there is no basis for judicial recognition of a plea bargain until it is concluded by entry on the record." And the Supreme Court itself has held that a guilty plea does not implicate any constitutionally protected interest of a defendant until it is "embodied in the judgment of a court."
>
> I hold, therefore, that a guilty plea to murder in the first degree is valid under *Matter of Hynes v. Tomei*, so long as no notice of intent to seek the death penalty is pending when the Court accepts and enters the plea.[181]

Like the procedure presented in *Van Dyne*, in which the court allowed a "conditional" withdrawal of the notice of intent to seek the death penalty, it is questionable whether this process would have been sanctioned by an appeals court had an appeal been taken. As the court implicitly recognized in a footnote,[182] section 250.40(4) of the Criminal Procedure Law requires "a written notice of withdrawal filed with the court and served on the defendant."[183] If this statutory provision were strictly applied then a violation of the holding in *Hynes v. Tomei*, clearly occurred. Moreover, while section 220.60 of the

181. *Id.* at 694-95 (citations omitted).

182. *Id.* at 692 n.3.

183. N.Y. CRIM. PROC. LAW § 250.40(4) (McKinney 2003).

Criminal Procedure Law sets forth the conditions under which a defendant may plead guilty to the offenses charged in an indictment, the cases construing its provisions suggest that the factual colloquy by the defendant admitting his culpability is just as much a part of the plea as the incantation, "I plead guilty." On this point the cases are legion that the factual admissions which accompany the plea may not be later utilized against a defendant where the plea is later vacated or withdrawn.[184] In *Smelefesky*, the court, in its written decision describing the procedure utilized, indicated that the defendant "described his participation in, and the circumstances surrounding, the Capobianco homicide"[185] *before* the notice was withdrawn, thereby further complicating the issue of whether *Hynes v. Tomei* was violated. Both decisions would become the subject of discussion in *People v. Edwards*.

People v. Edwards

In *People v. Edwards*,[186] the defendant was indicted for murder in the first degree pursuant to sections 125.27(1)(a)(vi) and (b) of the N.Y. Penal Law. On October 16, 1998, two months before *Hynes v. Tomei*[187] was decided, the defendant pled guilty to murder in the first degree in exchange for an indeterminate sentence of twenty-five years to life.[188] Following the decision in *Hynes* and prior to sentencing, he sought to withdraw his plea claiming that it was invalid. In denying the motion, Judge Bartlett wrote:

> Defendant Edwards has raised no issue regarding his plea except the alleged legal infirmity articulated in *Hynes v. Tomei.* He does not challenge his plea as involuntary or unknowing or unintelligent. Nor is there any indication, now or at the time of the

184. *See* People v. Moore, 489 N.E.2d 1295 (N.Y. 1985); People v. Latham, 689 N.E.2d 527 (N.Y. 1997).

185. *Smelefsky*, 695 N.Y.S.2d at 692.

186. People v. Edwards, 690 N.Y.S.2d 404 (County Ct. 1999).

187. Hynes v. Tomei, 527 U.S. 1015 (1999).

188. The defendant and one of his co-defendants had previously unsuccessfully challenged the provisions of CRIM. PROC. LAW § 270.20 (McKinney 2000), involving the life and death qualification of jurors and the death penalty pursuant to sections 125.27 of the Penal Law and 400.27 of the Criminal Procedure Law. *People v. Arroyo*, 674 N.Y.S.2d 885 (County Ct. 1998) (hereinafter discussed). As part of his plea bargain Edwards was required to testify against Arroyo and a third co-defendant, McKinley.

guilty plea, that the defendant believes he is innocent. The defendant's position is quite simply that *Hynes v. Tomei* automatically requires withdrawal of this otherwise valid plea.[189]

The court then went on to describe the procedure followed in which the defendant entered his plea. Initially it was contemplated that the plea would be entered while the notice of intent to seek the death penalty was pending and thereafter be withdrawn at the time of sentencing but:

After some discussion and a recess, during which the Defendant conferred with his attorney and the District Attorney considered his position, the District Attorney agreed to withdraw the notice of intent at the time of the plea and the plea agreement was amended accordingly.

Following the plea allocution by the defendant, the District Attorney withdrew the notice of intent to seek the death penalty. The Court then, after considering the plea allocution of the defendant and the withdrawal of the notice of intent, accepted the guilty plea and allowed it to be entered. Consequently, when the plea was entered, the notice of intent had been withdrawn with no conditions attached which would allow for reinstatement. At the very least, the plea was allocuted in conjunction with the withdrawal of the notice of intent.[190]

In discussing the propriety of the procedure followed, Judge Bartlett seized on language from *Hynes*, quoting:

Thus, while a defendant may not plead guilty to first degree murder while a notice of intent to seek the death penalty is pending, plea bargaining to lesser offenses even when a notice of intent is pending or to first degree murder in the absence of a notice of intent, remains unaffected. Consequently, the Court finds that Defendant's plea entered after the notice of intent was withdrawn, or entered in conjunction with the withdrawal of the notice of intent, remains valid under the precepts of *Hynes v. Tomei*.[191]

On appeal, the Appellate Division, Third Department took an entirely different view than that of the trial court and Judge

189. *Edwards*, 690 N.Y.S.2d at 405.

190. *Id.* at 405-06.

191. *Id.* at 406 (additional citations and emphasis omitted) (quoting Hynes v. Tomei, 706 N.E.2d 1201, 1209 (N.Y. 1998)).

Fisher in *People v. Smelefsky*. After describing the procedures used in both cases, the court held:

> We find this scheme flawed because it overlooks the essence of the *Hynes-Jackson* infirmity. That constitutional infirmity arises not from the *entry* of a guilty plea to murder in the first degree while a death notice is pending, but from the requirement placed upon a defendant *to choose* between pleading guilty to murder in the first degree or opting for trial while a death notice is pending. If a prosecutor who has served a death notice is permitted to delay its withdrawal until after a defendant's plea allocution, then the choice to plead guilty has been made under compulsion of the death notice and a defendant's 5th and 6th Amendment rights have been impermissibly burdened. In our view, the mere proffer of a plea bargain to murder in the first degree while a death notice is pending presents a capital defendant with the same unconstitutional choice faced by the defendants in *Matter of Hynes v. Tomei*, *supra* and *Matter of Relin v. Connell*, 92 N.Y.2d 613, 684 N.Y.S.2d 177, 706 N.E.2d 1201, namely, "exercise Fifth and Sixth Amendment rights and risk death, or abandon those rights and avoid the possibility of death" (*Matter of Hynes v. Tomei*, *supra*, at 626, 684 N.Y.S.2d 177, 706 N.E.2d 1201). Thus, we find that it is constitutionally impermissible for prosecutors to negotiate guilty pleas to murder in the first degree while a notice of intent to seek the death penalty is pending.[192]

The court reversed the defendant's conviction, vacated the plea and sentence and reinstated the notice of intent to seek the death penalty.[193] On further appeal, the New York Court of Appeals reversed and reinstated the defendant's conviction[194] cit-

192. People v. Edwards, 712 N.Y.S.2d 71, 75 (App. Div. 2000).

193. The court additionally decided that the defendant's waiver of appeal as part of the plea agreement did not deprive him of the right to have his case reviewed because the defendant could not have known of the constitutional infirmity of the statutory provisions pursuant to which his plea was entered and that "public policy" as well as "the integrity of the criminal justice system did not allow for such a waiver." *Id.* at 74.

194. On October 21, 1998, five days after the defendant had entered his plea pursuant to the previously described plea agreement, *see supra* note 192, Edwards' co-defendant, Arroyo, reached a plea agreement with prosecutors which allowed her to plead guilty to murder in the first degree and receive an indeterminate sentence of twenty-five years to life in exchange for her testimony against the remaining co-defendant, McKinley. Following McKinley's acquittal, Arroyo tried to withdraw her plea claiming that it violated *Hynes v. Tomei,* as well as having been entered while she was under the duress of a prospective capital prosecution. The motion was denied. *See* People v. Arroyo, 691 N.Y.S.2d 734 (County Ct. 1999).

ing *Brady v. United States*,[195] in which the Supreme Court held that guilty pleas entered prior to the decision in *United States v. Jackson*, were not required to be reversed.[196] At the outset of the opinion by Judge Levine, the New York Court of Appeals declined to pass upon whether the procedures used in the lower court violated *Hynes v. Tomei* reasoning:

> Because we agree that, under binding Supreme Court precedent, defendant's plea was *not* rendered invalid by *Jackson-Hynes*, we need not address whether the specific procedure employed in this case avoided any *Jackson* defect, nor whether defendant's waiver of his right to appeal precluded him from making his constitutional claims.[197]

The court went on to reject the defendant's claim that his plea was not voluntary or knowing because he could not have anticipated the holding in *Hynes v. Tomei*.[198] The Judge noted that the precise argument had been made in the Supreme Court by the appellant in *Brady* who had pled guilty to the statute invalidated in *Jackson* before it had been handed down; pointing out:

> The Supreme Court's outright rejection of that contention is directly applicable to the same argument here. "[A]bsent misrepresentation or other impermissible conduct by state agents, a voluntary plea of guilty intelligently made in light of the applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise." Accordingly, the "fact that Brady did not anticipate *United States v. Jackson*, *supra*, does not impugn the truth or reliability of his plea." Here, too, defendant's guilty plea was not rendered invalid merely because our subsequent *Hynes* decision may have shown "that the plea rested on a faulty premise."[199]

The court further applied the holding in *Brady* to defeat the appellant's argument that the *Jackson-Hynes* holdings made it impermissible to accept any pleas of guilty where it was the

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195. Brady v. United States, 397 U.S. 742 (1970).

196. People v. Edwards, 754 N.E.2d 169 (N.Y. 2001) (citing United States v. Jackson, 390 U.S. 570 (1968)).

197. *Id.* at 172.

198. Hynes v. Tomei, 706 N.E.2d 1201 (N.Y. 1998).

199. *Edwards*, 754 N.E.2d at 173 (citing *Jackson*, 390 U.S. 570 (1968)).

only means to avoid imposition of a capital sentence.[200] In response to this contention, Judge Levine wrote:

> *Brady*, however, expressly cautioned against the conclusion that a *Jackson* defect in the particular death penalty statute necessarily required invalidation of a guilty plea entered pursuant thereto that was otherwise valid (i.e., voluntary, knowing and intelligent):
>
> > Plainly, it seems to us, *Jackson* ruled neither that all pleas of guilty encouraged by the fear of a possible death sentence are involuntary pleas nor that such encouraged pleas are invalid whether involuntary or not. *Jackson* prohibits the imposition of the death penalty under [the defective statute], but that decision neither fashioned a new standard for judging the validity of guilty pleas nor mandated a new application of the test theretofore fashioned by courts and since reiterated that guilty pleas are valid if both "voluntary" and "intelligent."[201]

This opinion produced a dissent from Judge George Bundy Smith who saw the issues in starkly different terms siding with the New York Supreme Court, Appellate Division in its view of *Hynes v. Tomei*,[202] and also because he believed the acceptance of the plea violated not only constitutional principles but statutory provisions as well. On these points he wrote:

> In *Hynes*, this Court stated that because the provisions prohibited the imposition of the death penalty only on a plea of guilty to murder in the first degree, the sections needlessly encouraged defendants to forego trial in an effort to avoid a death penalty prosecution. Just as the applicable provisions chilled a defendant's exercise of Fifth and Sixth Amendment rights in *United States v. Jackson* and *Hynes v. Tomei*, the provisions, already declared unconstitutional, chill those rights in this case.[203]

Of even more interest was Judge Smith's view concerning the validity of the defendant's conviction which was not final until after the New York Court of Appeals' decision in *Hynes v. Tomei*.[204] Discussing this issue the Judge observed "[o]nce this Court declared the plea provisions unconstitutional, no judg-

200. *Id.*
201. *Id.* (quoting Brady v. United States, 397 U.S. 742, 747 (1970)).
202. Hynes v. Tomei, 527 U.S. 1015 (1999).
203. *Edwards*, 754 N.E.2d at 178 (Smith, J., dissenting).
204. Hynes v. Tomei, 706 N.E.2d 1201 (N.Y. 1998).

ment should have been entered pursuant to a plea of guilty under those provisions. When an applicable provision of law changes while a case is still on appeal, the new standard applies to that case."[205]

After discussing the New York cases which had also applied the changes in state law to cases on direct appeal, Judge Smith turned to his view of the relevance of the Supreme Court holding in *Brady* to the instant case, noting:

> [t]he majority's view that this case is governed by *Brady v. United States*, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 [sic] is simply incorrect. The *Jackson* case held the plea provisions of the kidnaping [sic] statute unconstitutional. It did not invalidate the entire statute, nor did it prevent pleas under the statute. Here, by contrast, the very statute authorizing defendant's plea has been declared unconstitutional. The issue in *Brady* was whether defendant's plea was voluntary when the reason for the plea was to avoid the death penalty. Here, voluntariness is not an issue. The issue is whether the plea is valid when the statutory provisions under which the plea was made are unconstitutional.[206]

The application of the holding in *Brady* to the instant case makes it crystal clear that the New York Court of Appeals is not about to retrospectively invalidate those pleas taken under the statute prior to or contemporaneously with the determination in *Hynes*,[207] irrespective of whether they run afoul of the spirit or the letter of that holding. The dissent in *Edwards* does however raise an interesting issue concerning the application of *Hynes* to that particular case.[208] Judge Smith makes a very cogent and compelling argument concerning the defendant's entitlement to the benefit in the change of the law during the trial court proceedings. Moreover this argument becomes even more persuasive when considered in the light of the procedural posture of the case at the time *Hynes*[209] was decided. The situation in *Edwards*[210] was not one where the law changed while the case was on direct appeal but one where the law changed be-

205. *Edwards*, 754 N.E.2d at 178 (Smith, J., dissenting) (citations omitted).
206. *Id.* at 178–79 (citations omitted).
207. Hynes v. Tomei, 706 N.E.2d 1201 (N.Y. 1998), *cert. denied*, 572 U.S. 1015 (1999).
208. *Edwards*, 754 N.E.2d at 176.
209. *Id.*
210. *Edwards*, 754 N.E.2d 169.

tween plea and sentencing, which is prior to the entry of final judgment in the lower court.[211]

While the court's decision in *Edwards*[212] seemed to, once and for all, put an end to challenges raised under *Hynes*[213] a more unique variation of the challenge would come to it in *People v. Mower*.[214]

People v. Mower

People v. Mower[215] originated in New York State Supreme Court, Otsego County.[216] As the Appellate Division, Third Department decision recounts:

> Defendant was indicted on two counts of murder in the first degree and two counts of murder in the second degree based on allegations that he intentionally shot and killed his parents on March 26, 1996 in the family's home in the Town of Richfield, Otsego County. . . . On October 4, 1996, the last day of the 120-day period for filing a notice of intent to seek the death penalty and without such notice having been filed, defendant entered a counseled plea of guilty of one count of murder in the first degree in satisfaction of the four murder charges, all other pending indictments and uncharged crimes in this State, and charges pending in Texas. Supreme Court subsequently sentenced defendant to life imprisonment without parole. Defendant then appealed this judgment. More than three years later, defendant moved to vacate his conviction pursuant to CPL 440.10 and Supreme Court denied the motion. Defendant's appeal of this denial has now been consolidated with his 1996 direct appeal.[217]

No explanation was set forth in the decision for the three-year delay in perfecting the defendant's appeal, nor why it was not perfected prior to the relief being sought under Article 440 of the Criminal Procedure Law.[218] Nevertheless, the defendant

211. Section 1.20(15) of the Criminal Procedure Law defines a "judgment" as "comprised of a conviction and the sentence imposed thereon and is completed by imposition and entry of the sentence." N.Y. CRIM. PROC. LAW § 1.20(15) (McKinney 2003).

212. *Edwards*, 754 N.E.2d 169.

213. *Hynes*, 706 N.E.2d 1201.

214. People v. Mower, 765 N.E.2d 839 (N.Y. 2002).

215. *Id.*

216. People v. Mower, 719 N.Y.S.2d 780, 781 (App. Div. 2001).

217. *Id.* at 781 (citations omitted).

218. N.Y. CRIM. PROC. LAW § 440.10 (McKinney 2003).

raised a number of issues on appeal. Among them were whether: (1) the decision in *Hynes v. Tomei*[219] had the effect of invalidating "the statutory authorization for a court to impose a sentence of life without parole except after conviction by a jury;"[220] (2) the failure to define the terms "same criminal transaction"[221] contained in section 125.27(1)(a)(vii)[222] and "more than eighteen years old"[223] in section (1)(b) of the Penal Law[224] rendered the statutes void for vagueness, and (3) he was entitled to "a heightened due process"[225] analysis during the sentencing phase of his case in the trial court.

In disposing of each of these contentions, the appellate division ruled at the outset of its opinion that the defendant, in relying on the language of section 70.00(5) of the Penal Law,[226] had "overlooked" the provisions of section 400.27 of the Criminal Procedure Law.[227] Writing for a unanimous bench, Judge Rose observed:

> Although CPL 400.27 sets forth the procedure for a separate proceeding for the jury to consider the death penalty where a defendant was convicted by a jury and the prosecution had timely filed a notice of intent to seek the death penalty, defendant's argument overlooks the provision that "[n]othing in this section shall be deemed to preclude the people at any time from determining that the death penalty shall not be sought in a particular case, in which case the separate sentencing proceeding shall not be conducted and the court may sentence such defendant to life imprisonment without parole." As Supreme Court had the statutory authority to sentence defendant to life imprisonment without parole, and since the prohibition against pleas and plea negotiations during the pendency of a death penalty notice is not implicated

219. Hynes v. Tomei, 706 N.E.2d 1201 (N.Y. 1998).

220. *Mower*, 719 N.Y.S.2d at 781.

221. *Id.* at 782.

222. N.Y. PENAL LAW § 125.27(a)(vii) (McKinney 2003).

223. *Id.*

224. *Id.* § 1(b).

225. *Mower*, 719 N.Y.S.2d at 783.

226. *See* N.Y. PENAL LAW § 70.00(5) (reciting in pertinent part: "A defendant may be sentenced to life imprisonment without parole only upon conviction for the crime of murder in the first degree as defined in section 125.27 of this chapter and in accordance with the procedures provided by law for imposing a sentence for such crime").

227. N.Y. CRIM. PROC. LAW § 400.27 (McKinney 2003).

here because no such notice was filed in this case, we find defendant's argument to be without merit.[228]

Rejecting the defendant's claim that the phrase "same criminal transaction" was unconstitutionally vague, the court adopted the view the Appellate Division of the Second Department took on the same challenge in *People v. Reed*.[229]

In *Reed*, a non-capital prosecution for murder in the first degree, the defendants, on appeal, contended that the phrase "same criminal transaction"[230] set forth in section 125.27(1)(a)(viii) of the Penal Law[231] was void for vagueness.[232] There, the court determined that the definition set forth in section 40.10(2) of the Criminal Procedure Law[233] would suffice. Judge Miller, the author of the court's opinion, noted that this definition had been incorporated by reference into a variety of other statutes as well as defined in numerous other decisions. The Judge went on to take note of a split in the lower courts concerning the application of this definition to the statute, observing:

> [i]n *People v. Harris*, a first degree murder prosecution, the court applied the definition of criminal transaction provided by CPL 40.10(2) in considering a multiplicity challenge in a case against a multiple murderer. The *Harris* court concluded that a definition pertinent to double jeopardy considerations was applicable, distinguishing *People v. Fernandez*, where the court expressly declined to apply the definition of criminal transaction as set forth in CPL 40.10(2) to the multiple killings provision of the first degree murder statute. In *People v. Fernandez*, the court defined the term "criminal transaction" pursuant to its "ordinary meaning" as a process of carrying out a series of criminal activities from beginning to end, reasoning that "[w]hen a statute pro-

228. *Mower*, 719 N.Y.S.2d at 782 (quoting N.Y. CRIM. PROC. LAW § 400.27(1)).

229. *Id.* (adopting the holding of People v. Reed, 705 N.Y.S.2d 592 (App. Div. 2000)). *Reed* will be discussed hereinafter in greater detail.

230. *Reed*, 705 N.Y.S.2d at 594.

231. N.Y. PENAL LAW § 125.27(1)(a)(viii) (McKinney 2003).

232. *Reed*, 705 N.Y.S.2d at 594.

233. *See* N.Y. CRIM. PROC. LAW § 40.10(2) (McKinney 2003) (providing that:

> 'Criminal transaction' means conduct which establishes at least one offense, and which is comprised of two or more or a group of acts either (a) so closely related and connected in point of time and circumstance of commission as to constitute a single incident' or (b) so closely related in criminal purpose or objective as to constitute elements or integral parts of a single criminal venture).

vides a definition, and expressly states that the definition is applicable to a specific article, the definition is inapplicable to other articles." However, we do not agree with the conclusion of the court in *People v. Fernandez* and neither *People v. McNamara* nor *People v. Neumann*, upon which the *Fernandez* court relied, stand for the proposition that definitions can never be borrowed from one criminal statute for application in another. Furthermore, neither case considered this issue in the context of a constitutional challenge to a statute on vagueness grounds. The New York Court of Appeals evidently determined that under the circumstances of those cases, definition borrowing was inappropriate. No case (other than *Fernandez)* has ever cited *McNamara* or *Neumann* as authority for any blanket prohibition against borrowing a statutory definition for application in a prosecution under a different statute, and any such rule would appear to go against the authorities cited previously which permit the practice so that an undefined term should "be given its 'precise and well settled legal meaning in the jurisprudence of the state.'"[234]

The Judge went on to declare:

[t]he facts of these cases present multiple and nearly simultaneous shootings by the two defendants, clearly acting in concert to kill two rival drug dealers. Under these facts, there is no genuine vagueness problem, since Penal Law § 125.27(1)(a)(viii) unambiguously proscribes multiple killings, which is "specific conduct easily avoided by the innocent-minded. It should present no difficulty for a citizen [or citizens] to comprehend that he [or they] must refrain from [multiple killings]."[235]

The New York Supreme Court, Appellate Division easily disposed of Mower's challenge to section 125.27(1)(b)[236] of the statute in which he contended the phrase "more than eighteen years old" was unconstitutionally vague, holding:

It is well understood that an individual concludes the "first eighteen years of life" on his or her eighteenth birthday and begins the "nineteenth year of life" on that day. Accordingly, the statutory phrase "more than eighteen years old" is not unconstitutionally vague and includes persons such as defendant, who was 18 years

234. *Reed*, 705 N.Y.S.2d 592, 600 (citations omitted).

235. *Id.* at 601.

236. N.Y. PENAL LAW § 400.27 (McKinney 2003) (citations omitted).

and 11 months old at the time of the events charged in the indictment here.[237]

After rejecting a challenge to the grand jury presentation, the court concluded that the defendant was not entitled to a "heightened due process" analysis because it was a non-capital case, relying on *People v. Couser*.[238]

On appeal, the New York Court of Appeals affirmed the appellate division, addressing only the issues involving the challenge to the sentencing provisions and the validity of his plea under *Hynes v. Tomei*.[239]

Judge Graffeo, writing for a unanimous bench reviewed the statutory provisions of sections 60.06[240] and 70.00[241] of the Penal Law as well as 400.27 of the Criminal Procedure Law[242] and wrote:

> We are obligated, of course, to interpret these statutes in a manner that effectuates the intent of the Legislature. In this case, we can accomplish this goal without looking beyond the language employed in each of the pertinent provisions. The phrase "at any time" demonstrates that CPL 400.27(1) applies to cases in which the People have declined to seek a death sentence, whether before or after expiration of the 120-day period for filing the CPL 250.40 notice. If the People do not pursue a death sentence, the sentencing authority that would otherwise be vested in the jury remains with the trial court (*see* CPL 400.27[1]), which is specifically authorized to impose a sentence of life imprisonment without the possibility of parole (*see* Penal Law §§ 60.06, 70.00[5]). Like Penal Law §§ 60.06 and 70.00(5), CPL 400.27 applies to a first degree murder "conviction." Because that term is defined in CPL 1.20(13) as "the entry of a plea of guilty to, or a verdict of guilty upon, an accusatory instrument other than a felony complaint, or to one or more counts of such instrument," it is clear that the authority to impose a sentence of life imprisonment without parole exists whether a defendant's conviction is by guilty plea or jury verdict.[243]

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237. People v. Mower, 719 N.Y.S.2d 780, 782 (App. Div. 2001).

238. *Id.* at 783 (citing People v. Couser, 730 N.E.2d 953, 955 (N.Y. 2000)).

239. *See* People v. Mower, 765 N.E.2d 839 (N.Y. 2002); Hynes v. Tomei, 527 U.S. 1015 (1999).

240. N.Y. PENAL LAW § 60.06 (McKinney 2003).

241. *Id.* § 70.00.

242. N.Y. CRIM. PROC. LAW § 400.27 (McKinney 2003).

243. *Mower*, 765 N.E.2d at 843 (citations omitted).

The New York Court of Appeals went on to address the issue of the defendant's plea. In rejecting this claim, Judge Graffeo noted; "Defendant also contends that his first degree murder conviction was affected by a mistake of law because he pleaded guilty pursuant to the statutory provisions later invalidated by this Court in *Hynes* and this rendered his negotiated guilty plea invalid."[244]

As noted previously, this particular challenge appears to be a unique variation of those previously rejected by the New York Court of Appeals in *Edwards*,[245] but upon examining the procedural posture of this case it is clear why it was raised in this way. Unlike the situations presented in *Hynes v. Tomei*[246] and *People v. Edwards*,[247] in the instant case no notice of intent to seek the death penalty had been filed pursuant to section 250.40 of the Criminal Procedure Law.[248] Thus, since the defendant was not in jeopardy of being sentenced to death, the issue of his being coerced into giving up his Fifth and Sixth Amendment rights was not implicated. Although he sought to assert it as a "voluntariness"[249] issue in the New York Court of Appeals, the situation in the trial court was not lost on the court when it rejected the argument, holding:

> [a]lthough defendant couches his argument as a "voluntariness" challenge, he presents an issue of law founded on a federal constitutional principle established more than a quarter-century ago. Yet defendant did not raise this alleged constitutional infirmity before he pleaded guilty or was sentenced by Supreme Court, and it is therefore unpreserved.[250]

The New York Court of Appeals went on to note that the defendant abandoned his arguments concerning the issues involving "same criminal transaction," "multiple murder" and "more than eighteen years old."[251]

That the court viewed this argument as a matter of "preservation" is an interesting development since this is the first time

244. *Id.*
245. People v. Edwards, 754 N.E.2d 169 (N.Y. 2001).
246. Hynes v. Tomei, 527 U.S. 1015 (1999).
247. *Edwards*, 754 N.E.2d 169.
248. N.Y. CRIM. PROC. LAW § 250.40 (McKinney 2003).
249. *Mower*, 765 N.E.2d at 843 (citations omitted).
250. *Id.* (citations omitted).
251. *Id.* at 844.

that it invoked that doctrine despite the fact that the defendant's conviction was not final when he sought to withdraw his plea under *Hynes v. Tomei.*[252] Nonetheless, it does appear that relief under *Hynes v. Tomei*[253] would appear to be unavailing since the defendant was not in jeopardy of being put to death at the time his plea was accepted.

People v. Harris

On July 9, 2002, the New York Court of Appeals decided the first death penalty case to come to it on direct appeal under the statute. The defendant, Darrel Harris, was convicted of six counts of murder in the first degree in Supreme Court, Kings County as the result of multiple killings that took place in a Brooklyn social club on December 7, 1996.[254]

The case had been the subject of pre-trial litigation that was reported in *People v. Harris.*[255] In the trial court, the defendant had challenged the constitutionality of section 270.20(1)(f) of the Criminal Procedure Law[256] contending:

> that permitting pretrial challenges for cause in capital cases precludes formation of a jury which could "properly exercise discretion in determining the appropriate sentence in a capital case" and compromises defendant's right to a fair and impartial tribunal. Specifically, defendant argues that a jury chosen pursuant to CPL § 270.20(1)(f) would be likely to convict, that such a jury would not represent a fair cross-section of the community, and that questioning jurors prior to a guilt determination concerning their death penalty views undermines the presumption of innocence.[257]

Justice Feldman began her resolution of this claim by first noting that a state law carries a strong presumption of constitutionality and that "Defendant thus must sustain a heavy burden to overcome this presumption, demonstrating the statute is unconstitutional beyond a reasonable doubt."[258]

252. *See id.* at 842; Hynes v. Tomei, 527 U.S. 1015 (1999).
253. *Hynes*, 527 U.S. 1015.
254. People v. Harris, 779 N.E.2d 705, 709-10 (N.Y. 2002).
255. People v. Harris, 675 N.Y.S.2d 740 (Sup. Ct. 1998).
256. N.Y. CRIM. PROC. LAW § 270.20(1)(f) (McKinney 2000).
257. *Harris*, 675 N.Y.S.2d at 741.
258. *Id.* (citing Fenster v. Leary, 229 N.E.2d 426 (N.Y. 1967)).

After quoting from the statute itself, Justice Feldman went on to discuss its application, noting:

> [t]he statute thus excludes from the venire two classes of jurors, those so irrevocably opposed and those so irrevocably in favor of the death penalty that they would be unable to follow the law on sentencing. Defendant's papers characterize the voir dire as aimed at selecting only 'death qualified' jurors. In fact, as the prosecution points out, the voir dire process seeks to identify those jurors who can follow the court's instructions on punishment which would include both life and death qualified jurors.
>
> "The proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment . . . is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " This standard was applied by the Supreme Court both to death qualification and life qualification jurors and is consistent with CPL § 270.20(1)(f)."[259]

After discussing the *Lockhart* holding, in which the United States Supreme Court validated an Arkansas statute which required the trial court to determine "death qualification" prior to trial but rejected a challenge to the inclusion of only "death qualified" jurors, the Judge turned to the defendant's argument that *Lockhart* did not apply to section 400.27(2) of the Criminal Procedure Law[260] and rejected this argument also.[261]

> Defendant's contention that *Lockhart* does not apply to the recently enacted Capital Offender Law (L.1995, ch. 1) of this State is based on a strained reading of CPL 400.27(2). Under that provision a new jury for the sentencing phase of the trial will be impanelled after a conviction "only in extraordinary circumstances and upon a showing of good cause." (CPL § 400.27(2)). Because the two conditions are referred to in the conjunctive it is clear that the Legislature intended to maintain the continuity of the jury between the guilt and sentencing phases except in the most uncommon and unavoidable circumstances. "It is envisioned that in most cases, the jurors who sat at the guilt phase of the trial will remain at the sentencing phase. A juror might be replaced if the

259. *Harris*, 675 N.Y.S.2d at 741–42 (quoting Wainwright v. Witt, 469 U.S. 417 (1985)) (additional citations omitted).

260. N.Y. CRIM. PROC. LAW § 400.27(2) (McKinney 2003).

261. *Harris*, 675 N.Y.S.2d at 742.

juror became grossly unqualified for further service, had legally improper contact during the guilt phase proceedings or was otherwise legally barred from continuing. However, a juror's reluctance or discomfort with performing the weighty duty of determining whether the death penalty should be imposed should not be grounds for replacing that juror with an alternate juror." (New York State Assembly Codes Committee Memorandum, 1995 N.Y.Legis.Ann., at 6). Thus *Lockhart* is controlling here.[262]

In addition to the foregoing, the defendant raised two issues directed at the constitutionality of section 400.27 of the Criminal Procedure Law.[263] The first issue raised was a claim that section 400.27(3)[264] was unconstitutional because it did not allow for a direct challenge to the aggravating factors, and fails to guarantee individualized sentencing and improperly limited the accused's right to present mitigating evidence.[265] In rejecting this challenge, Justice Feldman, after citing the provisions of section 400.27(9)(f) of the Criminal Procedure Law,[266] (the "catch all" provision which allows the presentation of any relevant mitigating evidence to challenge the existence of the aggravating factors) went on to observe "Defendant has no constitutional right to relitigate the aggravating factors in order to create a lingering doubt in the jurors' minds."[267]

After reviewing the mitigating factors enumerated in section 400.27(9),[268] Justice Feldman went on to discuss the Eighth Amendment requirements established by the United States Supreme Court in *McCleskey v. Kemp*,[269] *Lowenfield v. Phelps*,[270] *Gregg v. Georgia*,[271] and *Jurek v. Texas*,[272] as they discussed the need for narrowing the class of death-eligible defendants and insuring individualized sentencing, and held:

[t]he New York statutory scheme fulfills both of these requirements. Penal Law § 125.27(1) narrows the class of death-

262. *Id.*
263. People v. Harris, 676 N.Y.S.2d 440, 440 (Sup. Ct. 1998).
264. N.Y. CRIM. PROC. LAW § 400.27(3) (McKinney 2003).
265. *Harris*, 675 N.Y.S.2d at 741.
266. N.Y. CRIM. PROC. LAW § 400.27(9)(f) (McKinney 2003).
267. *Harris*, 676 N.Y.S.2d at 441.
268. N.Y. CRIM. PROC. LAW § 400.27(9) (McKinney 2003).
269. McClesky v. Kemp, 481 U.S. 279, 305 (1987).
270. Lowenfield v. Phelps, 484 U.S. 231, 244 (1988).
271. Gregg v. Georgia, 428 U.S. 153, 189 (1976).
272. Jurek v. Texas, 428 U.S. 262, 271 (1976).

eligible persons by delineating twelve separate aggravating factors, each of which contains a specific aggravating factor which raises the particular crime above the vast majority of murders. Only these enumerated aggravators, if proven at trial, are incorporated as established into the sentencing phase. As to the requirement that sentencing be imposed on an individual basis, the statute provides for a wide range of mitigators, allowing the sentencing jury to consider "any aspect of a defendant's character or record and circumstances of the offense that the defendant proffers as a basis for a sentence of death" (*Lockett v. Ohio*, 438 U.S. 586, 604; 98 S.Ct. 2952, 57 L. Ed.2d 973).

Defendant's argument that banning relitigation of the aggravating factors is constitutionally impermissible misinterprets the role of aggravating factors as articulated by the Supreme Court in *Lowenfield v. Phelps*, *supra*. There the Court upheld Louisiana's sentencing scheme which provided that an aggravating factor which duplicated an element of the offense of which the defendant had been convicted could form the basis of eligibility for a death sentence determination. In so holding the court said:

> Here, the 'narrowing function' was performed by the jury at the guilt phase . . . The fact that the sentencing jury is also required to find the existence of an aggravating circumstance in addition is no part of the constitutionally required narrowing process. . . . [The state statutory] scheme narrows the class of death-eligible murderers and then at the sentencing phase allows for the consideration of mitigating circumstances and the exercise of discretion. The Constitution requires no more. (*Id.* at 246, 108 S.Ct. 546)

The sentencing scheme in New York goes beyond the threshold requirement of *Lowenfield*. New York employs a weighing system which mandates that the aggravating factor or factors must substantially out weigh the mitigating evidence before a death sentence can be considered.[273]

After noting that the defendant had misinterpreted *Stringer v. Black*,[274] Justice Feldman concluded "Defendant's claim that denying him the right to directly challenge the aggravators deprives him of his right to an individualized sentencing determination is not persuasive. The statute imbues the

273. People v. Harris, 676 N.Y.S.2d 440, 442-43 (Sup. Ct. 1998) (quoting *Lowenfield*, 484 U.S. at 246).

274. Stringer v. Black, 503 U.S. 222 (1992).

jury with considerable discretion to evaluate a broad range of mitigation evidence and therefore provides individualized sentencing."[275]

The court finally addressed one of the most interesting challenges made to the sentencing scheme up to that point, noting:

> Defendant also urges that he has a right to cultivate a residual or lingering doubt in the jurors' minds concerning his guilt by formally presenting evidence intended to challenge the aggravating factors. This argument is overreaching.
>
> In *Lockhart v. McCree*, the Supreme Court recognized that under statutes where a single jury considers both defendant's guilt and sentence there exist the "possibility that, in at least some capital cases, the defendant might benefit at the sentencing phase of the trial from the jury's residual doubts about the evidence presented at the guilt phase." However, "*Lockhart* did not endorse capital sentencing schemes which permit such use of 'residual doubts,' let alone suggest that capital defendants have a right to demand jury consideration of 'residual doubts' in the sentencing phase."
>
> Residual doubt is of course part of human nature. However, because it is not a fact about the defendant or the circumstance of the crime it cannot be considered to be a mitigating circumstance. It is instead "a lingering uncertainty about facts—a state of mind that exists somewhere between 'beyond a reasonable doubt' and 'absolute certainty'." Complying with defendant's request that he be permitted to contest the adequacy of aggravating factors at the penalty phase would effectively raise the prosecution's burden from proof beyond a reasonable doubt to proof with absolute certainty. While no court can expunge instinctive human behavior from the minds of members of a jury there is no constitutional basis for requiring it to allow defendant to relitigate the finding of his guilt to establish a residual doubt.[276]

The defendant also brought a challenge to New York Criminal Procedure Law section 400.27(ii)(a),[277] contending that it was vague and standardless, thereby creating a risk of arbitrary and capricious sentencing. He took particular aim at the second

275. *Harris*, 676 N.Y.S.2d at 443.

276. *Id.* (quoting Franklin v. Lynaugh, 487 U.S. 164, 173, 188 (1988)) (additional citations omitted).

277. N.Y. CRIM. PROC. LAW § 400.27(ii)(a) (McKinney 2003).

sentence of the paragraph[278] claiming that it was unconstitutionally permissive. Once again, Justice Feldman rejected a challenge to the statute,[279] writing "Defendant's argument is rejected. When viewed conjunctively this statutory provision meets constitutional standards and appropriately reflects a sentencing jury's power to exercise considerable discretion."[280]

In conducting its analysis of this particular point, the court reviewed the Supreme Court decisions *McClesky*, *Lowenfield*, *Gregg* and *Jurek*[281] concerning the need to narrow the class of death eligible defendants and providing for individualized sentencing. The court then went on to observe:

> While the Supreme Court has held that such a weighing process may lead directly and mandatorily to the imposition of a death sentence the conjunctive clause at issue here provides an additional safeguard for a defendant facing the death penalty. The requirement that the jury then unanimously determine whether death is the appropriate sentence affords the jury the opportunity to confront both the morality of a death sentence under the circumstances of a particular case and to grapple with the issue of mercy. It allows the jury to reject its own weighing determination if it so chooses.[282]

Justice Feldman ultimately held:

> In sum, the statutory scheme in New York State meets constitutionally required standards. Above and beyond these standards, CPL 400.27(11)(a) empowers the jury to exercise its mercy function and decline to impose the death penalty even if it has found after weighing aggravating and mitigating factors that death would be warranted.[283]

Following the defendant's conviction in the trial court, these issues as well as a multitude of others were raised on the

278. *Id.* § 400.27(11)(a) (providing "The jury may not direct imposition of a sentence of death unless it unanimously finds beyond a reasonable doubt that the aggravating factor or factors substantially outweigh the mitigating factor or factors established, if any, *and unanimously determines that the penalty of death should be imposed.*" (emphasis added)).

279. *Harris*, 676 N.Y.S.2d 458.

280. *Id.* at 459.

281. *Harris*, 676 N.Y.S.2d 458.

282. *Id.* at 460 (citations omitted).

283. *Id.* (citations omitted).

direct appeal.[284] At the outset of the decision, Judge Wesley and the court embraced the standard that heightened due process applied by quoting from *People v. Harris*,[285] "We begin with the recognition that 'death is different.' "[286] The Judge then went on to point out the many different obligations and procedures mandated by the statute.

> The statutory scheme that makes the penalty a possibility imposes many standards and procedures that are different from other criminal proceedings. For our part, the statute confers a unique set of appellate responsibilities on this Court (CPL 470.30). In addition to the powers of an intermediate appellate court (CPL 470.15, 470.20) we are required to review the factual basis for the conviction and the sentence (*see* CPL 470.30[1], [2]: NY Const, art VI, § 3[a]). We are also directed to examine whether the death sentence was imposed "under the influence of passion, prejudice, or any other arbitrary or legally impermissible factor including whether the imposition of the verdict or sentence was based upon the race of the defendant or a victim of the crime for which the defendant was convicted" (CPL 470.30[3][a]). We must determine whether the death sentence is excessive or disproportionate to the penalties imposed in similar cases (CPL 470.30[3][b]) and whether the decision to impose the sentence of death was against the weight of the evidence (CPL 470.30[3][c]). *By its very nature a capital case requires the most meticulous and thoughtful attention. A mistake discovered years later may not be correctable.*[287]

The first issue raised by the appellant and addressed by the court was a challenge to the constitutionality of New York Penal Law section 125.27(1)(a)(vii)[288] the felony-murder provision of murder in the first degree. In framing the issue posed by the appellant, Judge Wesley wrote:

> According to defendant, the felony-murder provision irrationally includes some felonies rendering them death-eligible while excluding others.
>
> . . . .

284. Judge Wesley noted in the court's opinion that "Defendant has briefed over 28 issues and over 60 sub-issues seeking reversal of his conviction, vacatur of his sentence and other relief." People v. Harris, 779 N.E.2d 705, 711 (N.Y. 2002).

285. Furman v. Georgia, 408 U.S. 238, 306 (1972).

286. *Harris*, 779 N.E.2d at 711 (citing *Furman*, 408 U.S. at 306).

287. *Harris*, 779 N.E.2d at 711–12 (emphasis added).

288. N.Y. PENAL LAW § 125.27(1)(a)(vii) (McKinney 2003).

> Defendant contends that the statute fails to include a capital sentence for murders committed in the course of and in furtherance of many felonies that the Legislature has classified as among the state's most serious crimes. Defendant submits that the classification of felony murder is not only underinclusive in that equally serious crimes are treated unequally but it is perverse in treating lesser crimes more harshly than serious ones.[289]

This precise argument had been raised and rejected in *People v. Hale*,[290] in which Justice Tomei cited *Zant v. Stephens*,[291] and *Gregg v. Georgia*,[292] in reaching the conclusion that:

> It is not for the courts to second-guess the legislature's determination of which factors set apart certain killings as particularly atrocious, so long as that determination limits the application of the death penalty to a subclass of defendants convicted of murder, and the definitions of the aggravating factors are not unconstitutionally vague. *See Tuilaepa v. California*, 512 U.S. 967, 972, 114 S.Ct. 2630, 2635, 129 L.Ed.2d 750 (1994).
>
> Upon reviewing P.L. § 125.27, the court concludes that the statute passes constitutional muster. The statute limits death penalty eligibility to a subclass of murders. None of the aggravators is unconstitutionally vague. In particular, the aggravating factors with which the defendant is charged—robbery and kidnapping in the first degree—are quite clear.
>
> Furthermore, the court cannot say that in defining the felony aggravating factors, the legislature acted irrationally in choosing some felonies and exempting others. All of the felony crimes included by the legislature as aggravating factors are crimes involving violence or potential violence, and substantial risk of physical injury. The defendant's argument that some felonies of a lesser class are included while others of a greater class are left out misses the point.[293]

Citing *Hale*, the court adopted Justice Tomei's reasoning and went on to hold:

> The Legislature made the assessment that the predicate felonies for first-degree felony murder should be those that are potentially

289. *Harris*, 779 N.E.2d at 713 (citations omitted).
290. People v. Hale, 661 N.Y.S.2d 457, 466 (Sup. Ct. 1997).
291. Zant v. Stephens, 462 U.S. 862, 877 (1983).
292. Gregg v. Georgia, 428 U.S. 153, 175 (1976).
293. *Hale*, 661 N.Y.S.2d at 466.

> the most violent and involve a substantial risk of physical injury.
> . . .
> The Legislature's decision to exclude felonies of a similar grade, but lacking the inherent potential for violence and physical injury, was therefore rational.[294]

The court next considered the challenge to the constitutionality of New York Criminal Procedure Law section 270.10(1)(f)[295] which had been raised in the trial court. At the outset of this portion of the court's decision, Judge Wesley declared that "defendant has failed to overcome the presumption of constitutionality with respect to CPL 270.20(1)(f)."[296]

Unlike the position in the court below, where the defendant maintained that *Lockhart v. McCree*[297] did not apply to the statute, here he maintained that the court should strike down the section under the state's constitution. The court, however, declined to do so, holding:

> Defendant concedes that *Lockhart* informs our inquiry here. Nevertheless, he maintains that independent state constitutional treatment of the issue requires a contrary result. He suggests that pretrial death qualification nullifies our state's historic commitment to diversity and nondiscriminatory jury-selection procedures. He also contends that this Court has regularly recognized the significance of a defendant's right to an impartial jury and argues that pretrial death qualification undermines this right because the process conditions jurors toward a guilty verdict by requiring them to assume defendant's guilt prior to trial. Moreover, he relies on studies that purport to show that the surviving jury is more conviction-prone, possesses pro-prosecution attitudes and is thus poisoned by the process.
>
> Defendant's challenge is really no different than that made in *Lockhart*. At least one New York court has rejected similar claims by another capital defendant.[298] Nothing in the language of the

294. *Harris*, 779 N.E.2d at 713-14.
295. N.Y. CRIM. PROC. LAW § 270.10(1)(f) (McKinney 2003).
296. *Harris*, 779 N.E.2d at 714 (citation omitted).
297. Lockhart v. McCree, 476 U.S. 162 (1986).
298. In *People v. Hale*, Justice Tomei went so far as to hold that:

> [E]ven if death qualification resulted in the disproportionate exclusion of constitutionally cognizable groups such as women and African Americans, the motion must still be denied. If a violation of the fair cross-section requirement is established, the state may show a "significant state interest" which must "be manifestly and primarily advanced by those aspects of the

> state's constitutional counterpart of the Sixth Amendment right to a jury trial (N.Y. Const., art. I § 2) or our jurisprudence suggests that defendant is entitled to greater protection here on state constitutional grounds. Defendant also overlooks New York's history of ensuring that juries are death qualified. Thus, we see no state constitutional impediment to CPL 270.20(1)(f).[299]

The court went on to validate the use of group voir dire, rejecting the Defendant's claim that N.Y. Criminal Procedure Law section 270.10(1)[300] only permitted individual voir dire, holding:

> CPL 270.16(1) directs that the court permit the parties on motion "to examine the prospective jurors individually and outside the presence of the other prospective jurors regarding their qualifications to serve as jurors." CPL 270.15(1)(c) states that the court shall permit both parties to examine the prospective jurors "individually or collectively" regarding their qualifications to serve as jurors. There is nothing to suggest that in adding CPL 270.16, the Legislature intended to supersede CPL 270.15.[301]

Moreover, the court expressly determined that the word "preclude" contained in New York Criminal Procedure Law section 270.20(1)(f)[302] is no different than "prevent or substantially impair" enunciated by the United States Supreme Court in *Wainwright v. Witt*,[303] in measuring whether a juror's feeling or views about the penalty disqualify them from serving. Rejecting the defendant's claim that "preclude" sets a higher threshold for excusal, the court first noted that the section "expressly mandates that a single standard be used to challenge

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> jury-selection process, such an exemption criteria, that result in the disproportionate exclusion of a single group." *Duren v. Missouri*, 439 U.S. 357, 367-368, 99 S.Ct. 664, 670, 58 L.Ed.2d 579 (1979).

This test is satisfied here. "Exclusion of jurors based on their ability to perform their duties and carry out their oaths advances an important goal, and does not discriminate on the basis of membership in a cognizable group, per se." *Hale*, 661 N.Y.S.2d at 486.

299. *Harris*, 779 N.E.2d at 715-16 (citations omitted).

300. N.Y. CRIM. PROC. LAW § 270.10(1) (McKinney 2000).

301. *Harris*, 779 N.E.2d at 717 (citations omitted). The issue in *People v. Santiago* was even more novel. There, the court rejected a claim that section 270.16 authorized "examination of prospective jurors to be done solely by counsel without participation by the court." People v. Santiago, 708 N.Y.S.2d 269, 269 (County Ct. 2000).

302. N.Y. CRIM. PROC. LAW § 270.20(1)(f) (McKinney 2000).

303. Wainwright v. Witt, 469 U.S. 412 (1985).

prospective jurors who entertain 'such conscientious opinions *either against or in favor of*' capital punishment."[304]
It then continued:

> We understand the word "preclude" to relate to the ability of a prospective juror to perform his or her duty to act impartially and to follow a court's instructions in accordance with the law and not as a measurement of the strength or sincerity of an individual's feelings on the death penalty. As the Supreme Court cases tell us, the focus is on the jurors' ability to serve impartially and not on how the death penalty affects them generally. Thus, the word "preclude" must be understood as an embodiment of the *Wainwright* "prevent or substantially impair" standard.[305]

Among other issues addressed was the trial court's refusal to allow the defendant to call an expert witness in rebuttal on the issue of extreme emotional disturbance, which had been raised as an affirmative defense. While ruling that the trial judge had been technically correct, the court cautioned, "[t]his was a lengthy trial in which two experts testified extensively about defendant's mental and emotional state. We are careful to note, however, that capital trial courts should exercise great caution in making discretionary determinations such as this. The stakes are high for all involved."[306]

The New York Court of Appeals also disposed of two additional errors under the "harmless error" rule.[307] The first involved testimony of several of the homicide victims' family members who were purportedly called to identify the deceased but whose testimony went beyond this subject and into their background. In passing upon this issue, Judge Wesley wrote:

> The admission of this type of evidence is problematic. We have long held that testimony about victims' personal backgrounds that is immaterial to any issue at trial should be excluded. The testimony here is indistinguishable from that in *Miller* and *Caruso*. Although family information about a victim is an important aspect of the victim's life, generally, it has no bearing on the defendant's guilt or innocence. We are not unmindful of a prosecutor's desire to convey to the jury the seriousness of the loss of a

304. *Harris*, 779 N.E.2d at 719 (alteration in original) (citations omitted).
305. *Id.* (citing *Wainwright*, 469 U.S. 412 (1985); Adams v. Texas, 448 U.S. 38 (1980)).
306. *Harris*, 779 N.E.2d at 723.
307. People v. Crimmins, 326 N.E.2d 787, 791 (N.Y. 1975).

life. However, our case law is clear that testimony of this type should not be used for that purpose.[308]

The other issue that was treated in this fashion was the prosecution's eliciting testimony from two witnesses that the defendant "smiled" and "smirked" at them during their appearances on the stand and commenting on it during summation.[309] Again, the court cautioned:

> We have recognized that admitting evidence of a smile as circumstantial evidence of consciousness of guilt is error. "A smile . . . can convey many different states of mind—for example, relief, bewilderment, nervousness, exasperation or happiness." Though not reversible error here, this type of evidence is of questionable and limited probative value; we caution against its admission.[310]

Ultimately the court struck down the death sentence that had been imposed because the defendant had been convicted under the statutory scheme that had been invalidated in *Hynes v. Tomei*.[311] In doing so, the court declined to retreat from its holding in that case, writing:

> 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 the 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 §§ 60.06 and 70.00(5). In light of that determination, we decline to comment on the propriety of the sentencing proceedings at this juncture.[312]

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308. *Harris*, 779 N.E.2d at 724 (citing People v. Miller, 160 N.E.2d 74 (N.Y. 1959); People v. Caruso, 159 N.E. 390 (N.Y. 1927)).

309. *Id.*

310. *Id.* at 725. (quoting People v. Basora, 556 N.E.2d 1070, 1071 (N.Y. 1990) (additional citations omitted)).

311. Hynes v. Tomei, 706 N.E.2d 1201 (N.Y. 1998).

312. *Harris*, 779 N.E.2d at 728.

Having modified the defendant's sentence, the court was unwilling to go any further and either reverse the conviction or entertain a challenge to the death penalty under the state constitution, holding:

> Finally, defendant urges that we address the issue whether the entire death penalty scheme is unconstitutional pursuant to the State Constitution's Cruel and Unusual Punishment Clause (N.Y. Const., art. I, § 5). The People claim that defendant's inability to demonstrate any as-applied harm necessarily precludes him from bringing a facial challenge. Defendant, on the other hand, relies on various Supreme Court cases including *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 and notes that the Supreme Court examined facial claims irrespective of the defendants' lack of an as-applied challenge.
>
> Despite the success of defendant's *Jackson* challenge to his sentence, his conviction remains. Defendant's situation is distinguishable from the petitioners in *Gregg*, *Profitt* and *Jurek*, who were not sentenced under *Jackson*-violative statutory schemes and were facing the death penalty. Because the disposition of this constitutional issue is not necessary to this appeal, we need not decide it at this time.[313]

Judge Smith concurred in part and dissented in part. While he agreed with the court that the sentence had to be vacated pursuant to *Hynes v. Tomei*,[314] he would have reversed the defendant's conviction based upon the trial court's refusal to apply heightened scrutiny to all issues affecting sentencing, the refusal to permit the defendant's expert rebuttal testimony, and the failure to grant the defendant a challenge for cause with respect to a prospective juror.[315]

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313. *Id.* (citations omitted). In footnote 23 to this portion of the decision, the court noted:

> [w]e need not reach the defendant's contention that New York's capital punishment statute permits the district attorneys to select capital defendants arbitrarily, inconsistently and discriminatorily. [Criminal Procedure Law] section 250.40 authorizes the prosecutor to seek death as a sentence. Because the sentence is vacated, there is no need to address the viability of the statute at this time.

Id. n.23.

314. *Hynes*, 706 N.E.2d 1201.

315. *Harris*, 779 N.E.2d 705.

The decision in *People v. Harris*[316] contains a number of interesting features worthy of comment. Paramount among these, of course, is the court's unanimous determination not to retreat from its holding in *Hynes v. Tomei*.[317]

At the outset of discussing the other aspects of the decision, it is noteworthy that the New York Court of Appeals has determined that it will utilize "heightened due process" scrutiny in its analysis to those death penalty cases that come before it. Notwithstanding that more exacting scrutiny, the court is not reluctant to apply the "harmless error" doctrine as it did in its analysis of the evidentiary issues involving the testimony of the expert rebuttal witness, while at the same time cautioning "that capital trial courts should exercise great caution in making discretionary determinations"[318] because "the stakes are high for all involved."[319] Indeed in this case the court applied the rule not only to claims of prosecutorial misconduct (whether the defendant's "smile" or "smirk" was consciousness of guilt), but also to "victim-survivor" testimony as well the limitation of the defendant's rebuttal case previously mentioned.

In deciding the issue of the permissibility of the "victim-survivor" testimony, the court also departed from the standard allowed by the United States Supreme Court and applied the more limited rule utilized in New York.

Prior to 1991, the Supreme Court had banned the use of victim impact testimony as a consideration during the sentencing phase of a capital case.[320] In 1991, the Court revisited this issue in *Payne v. Tennessee*,[321] holding:

> We are now of the view that a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant. "[T]he State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be

316. *See generally id.*
317. *Id.*
318. *Id.* at 723.
319. *Id.*
320. *See* Booth v. Maryland, 482 U.S. 496 (1987); South Carolina v. Gathers, 490 U.S. 805 (1989).
321. Payne v. Tennessee, 501 U.S. 808 (1991).

> considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family." By turning the victim into a "faceless stranger at the penalty phase of a capital trial," *Gathers*, 490 U.S., at 821, 109 S.Ct. at 2216 (O'Connor, J., dissenting), *Booth* deprives the State of the full moral force of its evidence and may prevent the jury from having before it all the information necessary to determine the proper punishment for a first-degree murder.[322]

To be sure, the issue before the New York Court of Appeals was different than that posed in *Payne*. In *Harris*, the evidence about the victims offered through the survivors was being offered on the issue of the identification of the victims and not as an "aggravating" factor or in rebuttal to "mitigating" evidence in the penalty phase of the proceedings. Thus treatment of it under the "harmless error" rule may well have been the appropriate determination, particularly in light of the voiding of the defendant's sentence. Nonetheless, the court might have found the evidence to be both relevant and permissible under *Payne*, given its professed adherence to Supreme Court precedent that it has repeatedly expressed in the past.[323]

Finally, by voiding the defendant's death sentence under *Hynes v. Tomei*,[324] the court was not required to engage in the proportionality review or otherwise pass upon any issues raised in the sentencing proceeding. Trial courts will have to wait for future cases to arrive on the court's docket to get any guidance from the State's highest court concerning the provisions of section 400.27 of the Criminal Procedure Law. The same is true of any challenge to the death penalty under article 1, section 5 of the New York State Constitution.[325]

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322. *Id.* at 825 (quoting *Booth*, 482 U.S. at 517 (White, J., dissenting)).

323. *See, e.g.*, People v. Fitzpatrick, 300 N.E.2d 139 (N.Y. 1973); People v. Davis, 371 N.E.2d 456 (N.Y. 1977); Hynes v. Tomei, 706 N.E.2d 1201 (N.Y. 1998).

324. *Hynes*, 706 N.E.2d 1201.

325. N.Y. CONST. art. I, § 95. This provision entitled "Bail; fines; punishments; detention of witnesses," reads as follows; "Excessive bail shall not be required nor excessive fines imposed, nor shall cruel and unusual punishments be inflicted, nor shall witnesses be unreasonably detained."

Lower Court Decisions

As noted earlier, the Appellate Division of the Second Department in *People v. Reed*,[326] in a non-capital prosecution, rejected a challenge to the phrase "same criminal transaction" set forth in section 125.27(1)(a)(viii) of the Penal Law. That, however, was not the only issue addressed by the court in *Reed*. There, the defendant additionally claimed that a conviction for multiple murders pursuant to section 125.27(1)(a)(viii) of the Penal Law could not be predicated on accessorial liability because the statute expressly referred only to the "actor." Preliminarily to rejecting this challenge, the court declined to impose "heightened due process" scrutiny to the claim because the defendants were not being subjected to capital punishment. The court then went on to note that section 35 of the General Construction Law expressly authorized words utilized in the singular to also be treated in the plural. It next pointed out that numerous cases had held that one could be liable for murder in the second degree in violation of section 125.25 of the Penal Law as an accessory, despite the fact that the statute also speaks to the actor in the singular.[327] Judge Miller then addressed the appellants' arguments concerning these issues in the context of the murder in the first degree statute:

> The defendants argue that had the Legislature intended multiple killers to be convicted of first degree murder via accessorial liability, it would have expressly done so. To support this proposition the defendants note that the Legislature created special rules of accessorial liability in the first degree felony murder and contract killing provisions. The defendants posit that the Legislature could have also expressly created special rules for accessorial liability in the multiple killers provision. However, the defendants' arguments clearly miss the mark and run contrary to established canons of statutory construction.
>
> A defendant can be convicted of second degree felony murder as an accessory for participating in a designated felony (*see,* Penal

326. People v. Reed, 705 N.Y.S.2d 592 (App. Div. 2000).

327. *See, e.g.*, People v. Ficarrota, 691 N.E.2d 1017 (N.Y. 1997); People v. Allah, 522 N.E.2d 1029 (N.Y. 1988); People v. Whatley, 505 N.E.2d 620 (N.Y. 1987); People v. Brathwaite, 472 N.E.2d 29 (N.Y. 1984); People v. Ortega, 685 N.Y.S.2d 446 (App. Div. 1999); People v. Woodbourne, 656 N.Y.S.2d 891 (App. Div. 1997); People v. Adams, 586 N.Y.S.2d 298 (App. Div. 1992); People v. Gonzalez, 532 N.Y.S.2d 934 (App. Div. 1988); *Reed*, 705 N.Y.S.2d 592.

> Law § 125.25[2]) with the requisite intent to commit the underlying felony and the knowledge that death could result. In sharp contrast, the Legislature expressly limited accessorial liability in first degree felony murder cases so that a non-shooter can be convicted of first degree felony murder only if, during the perpetration of a designated felony, the non-shooter expressly "commanded" the shooter to kill. Contrary to the defendants' sophistic contentions, the fact that the Legislature created separate rules for first degree felony murder limiting accessorial liability gives rise to the inference that the Legislature did not intend to limit normal rules of accessorial liability in the multiple killings paragraph of the first degree murder statute.[328]

The court cited Judge Donnino's *Practice Commentary* concerning section 125.27 of the Penal Law which expressly stated that this limitation on accessorial liability applied to this provision alone.[329] After citing several other sections governing statutory construction,[330] the court honed in on the legislation itself and the accompanying memoranda noting:

> The Legislative Bill Jacket accompanying the enactment of the first degree murder statute contains no express discussion of accessorial liability for accomplice killers. However, in Governor Pataki's approval memorandum, he pointed out that a defendant's "extent of participation in the murder" is a mitigating factor that a jury can consider in the sentencing phase of the case (Governor's Mem approving L. 1995, ch. 1, 1995 N.Y. Legis. Ann., at 2). In furtherance thereof, the statutorily-mandated mitigating factors which a jury must consider include that "[t]he defendant was criminally liable for the present offense of murder *committed by another* but his participation in the offense was relatively minor, although not so minor as to constitute a defense to prosecution" (CPL 400.27[9][d] [emphasis added]). This eliminates any doubt that the Legislature intended to permit first degree murder prosecutions to be brought against accessorially-liable defendants, leaving their degree of participation for the determination of the sentencing jury. As such, the defendants' arguments that an accessory may not be convicted of first degree murder for multiple killings are clearly wrong.[331]

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328. *Reed*, 705 N.Y.S.2d at 597 (citations omitted).

329. William C. Donnino, Practice Commentary, N.Y. PENAL LAW § 125.27 (McKinney 2003).

330. N.Y. STAT. LAW §§ 74, 240 (McKinney 2000).

331. *Reed*, 705 N.Y.S.2d at 597–98.

The *Reed* court additionally rejected this claim on constitutional grounds brought under *Furman v. Georgia*.[332] The court also cited *Enmund v. Florida* and *Tison v. Arizona*, in which the Supreme Court held that a defendant could be executed where the liability for murder was accessorial depending on the degree of participation in the crime.[333]

When one considers the New York Court of Appeals ultimate affirmance in *People v. Couser*, and its reliance on Supreme Court precedent in the area of capital jurisprudence, it appears to be highly unlikely that any aspect of this decision would have been disturbed on appeal.[334]

In the almost seven years since the death penalty has been re-instituted, the various trial courts throughout the State have grappled with a wide variety of issues.

One of the earliest decisions came in *People v. Rodriguez*,[335] in which the court rejected a claim that "heightened due process" was required at the grand jury stage. There, Justice Altman observed:

> At the core of many arguments presented by defendants is their oft repeated thesis that those who are charged with capital offenses are deserving of "heightened due process" at every stage of the proceeding against them. This premise finds no support in either federal or state case law. The Supreme Court has recognized no more than that "the qualitative difference of death from all punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination. . . . the Court's principal concern has been more with the *procedure* by which the State imposes the death sentence . . . once it has been determined that the defendant falls within the category of persons eligible for the death penalty" (*California v. Ramos*, 463 U.S. 992, 998-999, 103 S.Ct. 3446, 3452, 77 L.Ed.2d 1171 (underscore added)).
>
> Stricter scrutiny of a capital case is, thus, limited to the penalty phase of the proceeding. Additionally, nowhere has this greater scrutiny been equated with "heightened due process." The concept is also alien to the case law of this jurisdiction, however much defendants would have it otherwise. Defendants are

332. *Id.* (citing Furman v. Georgia, 408 U.S. 238 (1972)).

333. *Reed*, 705 N.Y.S.2d at 597 (citing Enmund v. Florida, 458 U.S. 782 (1982); Tison v. Arizona, 481 U.S. 137 (1987)).

334. *See* People v. Couser, 730 N.E.2d 953 (N.Y. 2000).

335. People v. Rodriguez, 647 N.Y.S.2d 350 (Sup. Ct. 1996).

incorrect in arguing that *People v. Johnson*, 69 N.Y.2d 339, 514 N.Y.S.2d 324, 506 N.E.2d 1177 stands for the proposition that a defendant facing the death penalty is deserving of other than "ordinary" due process. That is not to say that these defendants do not enjoy every constitutional protection, only that there are no due process protections peculiar to them which are unavailable to others. The Constitution does not require that they be exempted from any provision of the Criminal Procedure Law so long as it otherwise complies with due process, merely because they may ultimately be found to be subject to the death penalty.[336]

This reasoning was embraced by the trial court in *People v. Chinn*,[337] decided in County Court, Onondaga County. In *Chinn*, Judge Mulroy may have made the first trial court determination that the New York death penalty statute did not run afoul of the Eighth Amendment relying on *Gregg v. Georgia*, as well as passing upon the plea provisions which were later invalidated in *Hynes v. Tomei*.[338]

The defendant argues that the provisions of the death penalty statute which prohibit a defendant from entering a plea of guilty to the crime of Murder in the First Degree except with the consent of the People and the permission of the Court are unconstitutional. The defendant argues that this provision violates due process and equal protection because the classification of capital defendants results in different treatment. The defendant has, however, argued throughout his papers that capital defendants are in fact a special classification entitled to different treatment in other contexts due to the nature of the charges against them.

It is clear that the basis of the prohibition against a plea of guilty in a capital case is to ensure that defendants in capital cases are not deprived of their fundamental right to a jury trial. Based on the extensive appellate review of capital cases, the State also has an interest in ensuring that a full record of all facts and circumstances leading to the imposition of a sentence of death are part of the record which will be reviewed. A jury trial is the most effective way to ensure that the facts of the case are fully litigated and that a complete record is established.

In any event, this Court wholly rejects the defendant's arguments that he is entitled to plead guilty as charged. Again, only

336. *Id.* at 352 (emphasis omitted).

337. People v. Chinn, N.Y. L.J., Nov. 19, 1996, at 31, col. 3 (N.Y. County Ct. Nov. 19, 1996).

338. *Id.* (relying on Gregg v. Georgia, 428 U.S. 153 (1976)).

the right to a jury trial in a criminal case is a fundamental right. The statutory scheme in New York State requires a jury trial with proof of the aggravating factors supporting the charge of Murder in the First Degree and, as the statutory scheme does not affect any fundamental right, and is rationally related to the State's interest in assuring that full disclosure of the facts in capital cases is had, and that no capital defendant enters an improvident plea of guilty, there is no basis for this Court to declare those provisions unconstitutional. Nor does this Court find that the restrictions imposed by these sections of the Criminal Procedure Law limit, as defendant argues, the defendant's ability to present mitigating evidence. As such, the defendant's motion in regard to the plea limitations is DENIED.[339]

The issue of "heightened due process" next arose in *People v. Prater*, in which Justice Feldman ruled that it did not require application to the selection of grand jurors or to the discovery statutes.[340] Justice Feldman noted that "heightened due process . . . was used by the Supreme Court only with reference to the verdict or sentencing aspects of a capital."[341] Notwithstanding this observation, Justice Feldman, recognizing the gravity of a potential death penalty prosecution, imposed an additional burden on the prosecution during the grand jury phase of the case, writing:

The court does however believe than in one respect the district attorney's discretion in presenting a potential death penalty case to the grand jury should be circumscribed. The Capital Offender's Law is unique not only because it carries with it the potential of death but also because of the unprecedented power it places in the district attorney's office. The statute provides that once the Grand Jury returns an indictment of murder in the first degree the only permissible sentences are death, life without parole, or incarceration for a minimum period of 20 to 25 years and a maximum of life. Should a defendant wish to plead guilty in a case where the prosecution is seeking the death penalty the court may accept the plea and impose a lesser sentence only with the consent of the district attorney who also would appear to have ultimate control over the sentence even if the death penalty is not being sought.

339. *Chinn*, N.Y. L.J., Nov. 19, 1996, at 31, col. 3.
340. People v. Prater, 648 N.Y.S.2d 228 (Sup. Ct. 1996).
341. *Id.* at 230 (citations omitted).

> By comparison, where the highest charge in an indictment is murder in the second degree, not only is the range of authorized sentences far greater (PL § 70.00(2)(a) and (3)(a)(i)) but the trial judge may accept a guilty plea and impose sentence over the prosecution's objection.
>
> In view of these stringent statutorily imposed plea bargaining limitations and in the interest of avoiding an unnecessary prosecution for murder in the first degree, a departure from existing law governing a Grand Jury presentation is warranted in one respect. Where a defendant offers evidence of "[an] extreme emotional disturbance for which there [is] a reasonable explanation or [cause]" the Grand Jury should be instructed as to the impact of such evidence (PL § 125.27(2)(a)). Thus the Grand Jury should be made aware that extreme emotional disturbance constitutes an affirmative defense which precludes a charge of murder in the first degree (PL § 125.27(2)(a)).
>
> Notwithstanding the decisions in *People v. Lancaster*, *supra*, and *People v. Valles*, 62 N.Y.2d 36, 476 N.Y.S.2d 50, 464 N.E.2d 418, where the Court of Appeals held that the prosecution was not required to instruct a Grand Jury concerning affirmative defenses which would not completely preclude prosecution, this court believes such an instruction should be given here.[342]

It is hard to see how directing the district attorney to go beyond the holdings in *Lancaster* and *Valles*, solely because of the special considerations involved in the plea bargaining restrictions in a death eligible case, is anything other than "heightened due process" despite the disclaimer that it is inapplicable except in the penalty phase of the case.

Among the many issues that confronted trial courts once the statutory scheme was effective, was what factors a sentencing court should weigh when a defendant is convicted of murder in the first degree but a non-capital sentence is being sought. In *People v. Bell*, Judge Donalty decided to conduct a hearing similar to that authorized under section 400.27 of the Criminal Procedure Law in which each side could provide information concerning aggravating and mitigating factors.[343] While acknowledging that no hearing was required and that the section recites it shall not be held when the death penalty is not to be imposed, the Judge, nevertheless, reasoned "[g]iven the gravity

342. *Id.* at 230-31.

343. People v. Bell, 656 N.Y.S.2d 162 (County Ct. 1997).

of that decision (particularly in light of the age of this defendant) this court determined that a hearing consistent with one required pursuant to CPL 400.27 would be prudent, and in the exercise of its discretion, order the same."[344]

In contrast, Justice Alan Marrus expressly took issue with this procedure in *People v. Johnson*, observing:

> With all due deference to the Oneida County Court judge who ordered this special hearing, this court is of the view that such a hearing is not authorized by the statute and is not necessary for the court to carry out its sentencing function in a fair and thoughtful manner.[345]

The issue of "heightened due process" was again raised in *People v. Shulman*.[346] In that case the defendant was charged under the "serial killer" provision of section 125.27(10)(a)(xi) of the Penal Law.[347] The defendant challenged this portion of the statute contending that it violated the prohibition against ex post facto laws in the United States Constitution because two of the killings that comprised part of this charge were committed before the effective date of the statute. In rejecting this challenge Judge Pitts held:

> The Supreme Court of the United States has stated that the *ex post facto* clause prohibits any penal statute which (1) punishes as a crime an act previously committed which was innocent when done, (2) makes more burdensome the punishment for a crime after its commission, or (3) deprives one charged with a crime a defense which was available by law at the time the act was committed. Excluded by definition, therefore, are those statutes which permit the enhancement of punishment for a present crime based upon a prior crime, even where the prior crime occurred before enactment of the penalty enhancing statute.[348]

After discussing the various decisions concerning this issue in other states, Judge Pitts concluded:

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344. *Id.* at 163.

345. People v. Johnson, 655 N.Y.S.2d 327, 328 (Sup. Ct. 1997).

346. People v. Shulman, 658 N.Y.S.2d 794 (County Ct. 1997).

347. *Id.* at 794.

348. *Id.* at 797 (citations omitted). An identical result, adopting this rationale, was reached by Judge Connell in *People v. Mateo*, 664 N.Y.S.2d 981, 991-92 (County Ct. 1997).

> Under clause (xi) of Penal Law § 125.27(1)(a), a defendant cannot be deemed to have committed murder in the first degree until after he or she commits the third killing. "A statute is not retroactive . . . when made to apply to future transactions, merely because such transactions relate to and are founded upon antecedent events."[349]

Rejecting the defendant's claim that because his case was potentially a capital one, "heightened due process" should apply, the court noted "[a]s this court and [many] others have concluded, however, capital cases do not require an "enhanced" level of due process."[350]

In *People v. McIntosh*, which arose in Dutchess County Court, the defendant brought a variety of challenges to the statutory scheme.[351] In its initial decision the court addressed a challenge to section 270.20(1)(f) of the Criminal Procedure Law in which the defendant sought to have the statutory language (which provided for a challenge for cause to a juror whose views about the death penalty would preclude them from rendering an impartial verdict), expanded to recite "preclude or substantially impair." Citing *Wainwright v. Witt*, Judge Marlow observed:

> [T]he court held that "the proper standard for determining when a prospective juror may be excluded for cause because of his views on capital punishment is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" While the federal disqualification standard is broader, the language of the New York Statute is essentially consistent with that upheld by the Supreme Court in *Wainwright v. Witt, supra*, and indeed the New York Statute renders it more difficult for prosecutors to excuse for cause potential jurors who have reservations against applying the death penalty. As noted, such jurors could not be excused unless their views "precluded" adherence to the law and thus this court finds that such a standard passes scrutiny under both the federal and state constitutions. However, to the extent that the statutory language may be construed to deny a defendant's challenge for cause to a prospective juror whose views in favor of the death pen-

349. *Shulman*, 658 N.Y.S.2d at 798 (citations omitted).

350. *Id.* (citing People v. Rodriguez, 647 N.Y.S.2d 350 (Sup. Ct. 1996)).

351. People v. McIntosh, 662 N.Y.S.2d 212 (County Ct. 1997) (citing Wainwright v. Witt, 469 U.S. 412 (1985)).

> alty might substantially impair his or her ability to perform as a juror in accordance with law, the court would, of course, be constrained to determine such a challenge based upon the prevailing constitutional standard to insure defendant's right to be tried by a fair and impartial jury, i.e., "jurors who will conscientiously apply the law and find the facts".
>
> The *Adams* Court recognized the limitations on the state's power to exclude jurors on grounds broader than those permitted under the Sixth and Fourteenth Amendments as construed in *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776.
>
> While New York can clearly afford greater protection to a defendant than is required by Federal law, it cannot give less.
>
> . . . .
>
> Therefore, in accordance with the prevailing constitutional standards, this court will grant valid defense challenges for cause when advanced against those prospective jurors whose views in favor of the death penalty would preclude *or substantially impair* those jurors' ability to perform as a juror in accordance with law.[352]

In a later decision in the same case, Judge Marlow addressed a challenge brought against the plea provisions of the statute identical to that made in *People v. Hale* and *People v. Chinn*, and ultimately decided in *Hynes v. Tomei*.[353] In rejecting this challenge, Judge Marlow distinguished the plea provisions adopted by New York from those involved in *United States v. Jackson*,[354] finding that the requirement that a plea be entered only with the approval of the court and the consent of the District Attorney as one which safeguarded the rights of all parties, including society, writing:

> By adopting this safeguard for the People through their elected district attorney to insure that a jury will decide in certain selected cases whether a death sentence is warranted—rather than allowing a defendant to make that decision unilaterally as was the case in Jackson, under the Federal Kidnapping Act—the

352. *McIntosh*, 662 N.Y.S.2d at 213-14 (citations omitted).

353. People v. McIntosh, 662 N.Y.S.2d 214, 215 (County Ct. 1997); *see* People v. Hale, 661 N.Y.S.2d 457 (Sup. Ct. 1997); People v. Chinn, N.Y. L.J., Nov. 19, 1996, at 31, col. 3 (N.Y. County Ct. Nov. 19, 1996); Hynes v. Tomei, 706 N.E.2d 1201 (N.Y. 1998).

354. United States v. Jackson, 390 U.S. 570 (1968).

> state has established a way of protecting its policy of controlling when the death penalty may, and when it may not, be imposed.
>
> In mandating this procedure, New York has eliminated the needless encouragement of a defendant's waiver of his/her Fifth and Sixth Amendment rights—i.e., the infirmity which was targeted and condemned by the Supreme Court in *Jackson*. Now, in New York, in order to avoid the death penalty, a defendant must strike an agreement with the People (with the court's approval), a process which New York believes is necessary to assure that certain especially heinous crimes will be considered for death penalty treatment.[355]

Four months later, in *People v. Shulman*, Judge Pitts citing both *People v. Hale* and *People v. McIntosh*, sided with Judge Marlow holding that the plea restrictions embodied in Criminal Procedure Law sections 220.10(5)(e), 220.30(b)(vii) and 220.60(2), did not violate the defendant's Fifth and Sixth Amendment rights by coercing a plea of guilty.[356] In agreeing with Judge Marlow, Judge Pitts wrote:

> This court is in agreement with Judge Marlowe [sic]. While defendant notes that a plea of guilty remains the only sure way of avoiding a potential sentence of death, defendant merely argues that a plea of guilty may be a favorable option. However, the Court in Jackson did not hold that plea provisions must exclude all incentive to plead guilty. That a plea bargain results from a desire to limit ones sentence does not render it involuntary. Moreover, "a State may encourage a guilty plea by offering substantial benefits, notwithstanding the fact that every such instance is bound to have the concomitant effect of discouraging a defendant's assertion of his trial rights." The "evil" in the Kidnaping Act, was rather the "needless encouragement" of waiving such rights.
>
> Viewed in that light, it becomes apparent that the accused's unilateral right to yield to overwhelming temptation, plead guilty and thereby escape all possibility of death was the element upon which the Jackson decision was hinged. While, in New York, the incentive to plead might remain, the absolute right to do so does not. In Jackson, it was, in fact, suggested that limiting defen-

355. *McIntosh*, 662 N.Y.S.2d at 216.

356. *Shulman*, 658 N.Y.S.2d 794 (citing People v. Hale, 661 N.Y.S.2d 457 (N.Y. Sup. Ct. 1997); *McIntosh*, 662 N.Y.S.2d 212).

dant's right to avoid death would remedy the constitutional defect. . . .[357]

The New York State Supreme Court, Suffolk County denied the defendant's motion.[358]

In *People v. Gordon*, Justice Demakos adopted the reasoning in *People v. Hale*, and *People v. Chinn* that "heightened due process" was not required at every phase of a potential capital prosecution.[359] In rejecting this standard of scrutiny, the Judge made the interesting observation that "[t]o assume that a capital case requires such a 'heightened' standard in pre-trial proceedings would invariably conclude that defendants in non death penalty cases would warrant a lesser standard of due process."[360]

The Judge also rejected a challenge to various counts of the indictment charging murder in the first degree pursuant to section 125.27(1)(a)(vii), "felony murder" which alleged a different felony offense against the same victims. The defendant contended that they were multiplicitous because the killing involved the same person. In rejecting this claim Judge Demakos observed:

> In this case, each of the various counts charging Murder in the First Degree requires proof that the alleged killing of the victim occurred during the furtherance of a different felony. The defendant was properly charged with respect to different counts of Murder in the First Degree as to each of the three decedents because his alleged conduct, though emanating from one set of acts involving each victim, violated various sections of the Penal Law. The mere fact that the Legislature chose to list a series of felonies together within one of the twelve subparagraphs of the aggravating factors (paragraph vii) cannot be taken to mean that they intended to allow only one count of intentional murder during the

357. People v. Shulman, N.Y. L.J., Dec. 4, 1997, at 35, col. 6 (N.Y. County Ct. Dec. 4, 1997) (citations omitted) (emphasis omitted).

358. In *Shulman,* 658 N.Y.S.2d 794, the defendant was subsequently convicted of murder in the first degree and sentenced to death. In light of the New York Court of Appeals decision in People v. Harris, 779 N.E.2d 705 (N.Y. 2002), it appears extremely unlikely that the sentence of death will survive similar scrutiny.

359. People v. Gordon, 667 N.Y.S.2d 626 (Sup. Ct. 1997) (citing *Hale*, 661 N.Y.S.2d 457; People v. Chinn, N.Y. L.J., Nov. 19, 1996, at 31, col. 3 (N.Y. County Ct. Nov. 19, 1996)).

360. *Gordon*, 667 N.Y.S.2d at 628.

course of a felony to be charged, even if a defendant committed an intentional killing in the furtherance of multiple felonies.[361]

The first divergence of opinion concerning the need for "heightened due process" in New York capital jurisprudence came in *People v. Arthur*.[362] Despite the fact the proceedings were still in the discovery phase, Justice Kahn held:

> The parties agree that a heightened standard of due process pertains in capital cases. Defendant asserts that this standard should be applied at all stages of a capital case, based upon legislative intent, state constitutional law, decisions rendered under the predecessor statute, and federal constitutional law. The People, on the other hand, argue that a heightened standard of due process applies only at a capital sentencing proceeding and not at pretrial or trial stages, citing *California v. Ramos* and other cases. They also note that numerous courts of coordinate jurisdiction in this state have rejected the application of heightened due process in a capital case prior to the sentencing proceeding.
>
> Defendant's initial arguments merit only brief discussion while the Legislature, in reinstating the death penalty, enacted special protections for capital defendants, e.g., specially trained and appointed counsel (Jud.L. § 35-b), additional time for pretrial motions (CPL § 250.40[3]), individual *voir dire* of prospective jurors (CPL § 270.16), and direct appeals as of right to the Court of Appeals (CPL § 450.80[3]), there is no specific legislative provision requiring a trial court to apply heightened scrutiny or more exacting substantive standards to every aspect of a capital case. The Legislature's express amendment of certain provisions of existing law, taken together with its failure to modify other provisions creates an inference of a legislative intent to leave such existing provisions intact.[363]

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361. *Id.* at 629 (footnotes omitted).

362. People v. Arthur and Hart, 673 N.Y.S.2d 486 (Sup. Ct. 1997).

363. In *Heard*, Justice Rothwax citing *California v. Ramos*, 463 U.S. 992 (1983), held:

> the Supreme Court recognized only that "the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the sentencing determination . . . The Court's principal concern has been more with the procedure by which the State imposes the death sentence . . . once it has been determined that the defendant falls within the category of persons eligible for the death penalty." Therefore, there are no due process protections peculiar to the defendant and others facing a possible first degree murder indictment that are not available to other defendants.

> To the extent that defendant seeks an interpretation of the New York State Constitution as requiring an expansion of defendant's due process rights during the guilt phase, this court is without authority to make such a determination. A trial court is constrained not to announce new, noninterpretative, policy-driven constructions of the State Constitution, for to do so would impinge upon "the policy and rulemaking function traditionally perceived as the exclusive domain of the Court of Appeals."[364]

Despite this apparent rejection of the defendant's argument, Justice Kahn went on to conduct a further analysis, observing "[d]efendant's argument concerning the implications of the federal Constitution, however, requires closer attention. Because I believe both sides here have misapprehended the teachings of the Supreme Court as to the higher standard to be applied in capital cases, I find it necessary to examine those decisions in some detail."[365]

The Judge then proceeded to conduct a thorough, if not exhaustive, analysis of the Supreme Court decisions which discussed "heightened due process" as well as when such scrutiny is appropriate along with its constitutional underpinnings, ultimately holding:

> Thus in my view, the Supreme Court's decisions applying heightened scrutiny, as well as the inherent structure of New York's unique capital punishment legislation, support defendant's position to the extent that he urges that the higher procedural standards designed to assure greater reliability of a capital sentencing decision are not cabined strictly within the capital sentencing proceeding authorized by CPL § 400.27. Any aspect of a capital case which directly affects the reliability of the fact-finding process regarding sentencing should be subject to heightened scrutiny. While certain stages of capital litigation would rarely, if ever, present such a circumstance (e.g., grand jury proceedings or arraignment), the same cannot be said of the discovery process. For example, the inability of the defense in a capital case to have access prior to trial to information bearing directly on either aggravating or mitigating factors, whether or not such information was exculpatory, and to pursue its own investigation of such in-

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People v. Heard, N.Y. L.J., May 17, 1996, at 26, col. 6 (N.Y. Sup. Ct. May 17, 1996).

364. People v. Arthur, 673 N.Y.S.2d 483, 493-94 (Sup. Ct. 1997) (citations omitted).

365. *Id.* at 494.

> formation in advance of trial, could prevent the jury from considering evidence which could be dispositive of its sentencing determination in a given case, or, at the very least, from "hav[ing] before it all relevant information about the individual whose fate it must determine."[366]

While the court declined to enter a blanket order applying "heightened due process" to all stages of the proceedings, it did apply it in determining the defendant's discovery demands thereby becoming the first and only trial court in the State to require such.

Slightly over one year after its initial decisions in *People v. McIntosh*, New York County Court in Dutchess County, following the defendant's conviction on four counts of capital murder, was called upon to address two challenges to section 400.27 of the Criminal Procedure Law.

The first *People v. McIntosh* involved a claim that section 400.27(11) was unconstitutional:[367]

> [T]o the extent that the second clause of this provision provides for a vague and standardless determination by a capital sentencing jury whether to impose a sentence of death or a sentence of life in prison without parole on a defendant.[368]
>
> Defendant contends that this provision is inconsistent with the exacting standards and heightened protections associated with the death penalty law, and violates state and federal law. Specifically, defendant argues that Criminal Procedure Law § 400.27(11) will impermissibly penalize his right to be free from cruel and unusual punishment, his fundamental right to life, his right to equal protection, his right to confrontation, his right to due process, and other rights safeguarded under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution; Article I, Sections One, Two, Three, Four, Five, Six, Eleven, Twelve, and Fourteen of the New York State

366. *Id.* at 498 (footnote omitted) (citation omitted).

367. People v. McIntosh, 682 N.Y.S.2d 795 (County Ct. 1998).

368. In a footnote to its decision, the court set out the relevant portion of the statute:

> Criminal Procedure Law 400.27(11)(a) provides in relevant part: "The jury may not direct imposition of a sentence of death unless it unanimously finds beyond a reasonable doubt that the aggravating factor or factors substantially outweigh the mitigating factor or factors established, if any, *and unanimously determines that the penalty of death should be imposed.*"

Id. at 796 n.1 (alteration in original).

Constitution; Civil Rights Law, Section 12; and Criminal Procedure Law, Section 400.27.[369]

In dealing with the defendant's challenge, Judge Marlow reviewed the various requirements laid down by the Supreme Court in *Gregg*, *Furman*, *McCleskey*, *Lowenfield*, *Jurek* and *Godfrey*, which mandated that the states narrow the class of death eligible defendants appropriately.[370] He then cited *Ramos* and *McCleskey* which require the states to allow the jury to consider a "myriad of factors," without limiting the jury's consideration of any relevant circumstance in mitigation of the penalty.[371] Analyzing the New York statute in light of these considerations, he concluded that it passed constitutional muster.[372] In particular, the Judge noted that the statute's two-step process: (1) involving the weighing of aggravating factors against mitigating factors, and (2) allowing the defendant to raise any relevant mitigating factor including reliable hearsay, satisfied the requirements laid down by the Supreme Court.[373] In addressing the challenge to the particular language contained in Criminal Procedure Law section 400.27(11), Judge Marlow opined:

> The New York statute permits a jury to decide that the aggravating circumstances, substantially and beyond a reasonable doubt, outweigh the mitigating circumstances, *but, nevertheless decline* to impose the death penalty. *See* CPL § 400.27(11). This court sees nothing wrong with permitting—for a defendant's benefit—a narrow window through which human mercy can fit.[374]

The second *McIntosh* decision, which was an amplification of the court's oral ruling, addressed a challenge that the defendant had made to Criminal Procedure Law section 400.27(10).[375] The decision was amplified after a jury had de-

369. *McIntosh*, 682 N.Y.S.2d at 796.

370. *Id.* (discussing Lowenfield v. Phelps, 484 U.S. 231 (1988); McCleskey v. Kemp, 481 U.S. 279 (1987); California v. Ramos, 463 U.S. 992 (1983); Godfrey v. Georgia, 446 U.S. 420 (1980); Jurek v. Texas, 428 U.S. 262 (1976); Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238 (1972)).

371. *McIntosh*, 682 N.Y.S.2d at 797 (citing *McCleskey*, 481 U.S. at 306; *Ramos*, 463 U.S. at 1008).

372. *Id.* at 797.

373. *Id.*

374. *Id.* at 798 (emphasis added).

375. *Id.* at 791.

termined that the defendant should be sentenced to life without parole. Judge Marlow framed the challenge the following way:

> Defendant challenges CPL § 400.27(10) on the ground that it may coerce those jurors at the penalty phase, who believe that defendant should be sentenced to life in prison without parole, into abandoning their position and, instead, voting for death based on their knowledge that a jury's non-unanimity would result in an indeterminate sentence of 20 to 25 years to life.[376]

The Judge noted at the outset of his discussion of this point that, "it appears that this provision is unique in mandating that the court impose a sentence less severe than either of the options available to the jury if they are deadlocked."[377]

After citing the decisions of the New Jersey Supreme Court in *State v. Ramseur* and *State v. Bey*, which upheld an analogous statute in that State, Judge Marlow went on to observe:

> Defendant's argument that the New York statute is unconstitutional, as unduly coercive, is based on unwarranted speculation that jurors who are otherwise disposed to a life sentence without parole will ignore the instructions which this court will give, forsake their life sentence positions, and instead vote for a death sentence, only to prevent what may be in their minds, an unacceptable third alternative, i.e., an indeterminate sentence with eligibility for parole consideration after 20 to 25 years. Certainly, the converse is more likely—that is, a juror who might otherwise favor a death sentence may be willing to accede to the lesser penalty of life in prison without parole in order to avoid the possibility of parole.[378]

In resolving the challenge, Judge Marlow, at the outset of his analysis, noted that the defendant had cited no controlling federal authority for his position.[379] He then adopted the reasoning of the court in *Shulman*.[380] In *Shulman*, the trial court

376. *McIntosh*, 682 N.Y.S.2d at 793. In particular issue was the language in Criminal Procedure Law section 400.27(10) which recites, "The court must also instruct the jury that in the event the jury fails to reach unanimous agreement with respect to the sentence, the court will sentence the defendant to a term of imprisonment with a minimum term of between twenty and twenty-five years and a maximum term of life." *Id.* at 793.

377. *Id.*

378. *Id.* at 793-94.

379. *Id.* at 793.

380. *McIntosh*, 682 N.Y.S.2d at 794.

rejected a similar challenge analogizing the instruction to that required by Criminal Procedure Law section 300.10(3), which advises a jury that commitment proceedings to the Department of Mental Health will result where a defendant is found "Not Responsible" pursuant to New York Penal Law section 40.15.[381] Judge Marlow also noted that, "the language of [section] 400.27(10) is mandatory and this statute, like all others, carries with it a strong presumption of validity, to be stricken as unconstitutional only as a last resort."[382]

Like many of the other trial court judges that were asked to invalidate portions of the death penalty scheme, Judge Marlow invoked the statutory proscription against trial courts declaring legislative enactments unconstitutional.[383] Ultimately he concluded that:

> In the absence of controlling federal authority to the contrary, and because CPL § 400.27(10) is at least arguably valid, this court sees no basis whatsoever to strike this section as unconstitutional. This issue is best left for the State's highest court to address should it ever properly come before that body.[384]

As noted previously, challenges to Criminal Procedure Law section 270.20(1)(f) and the constitutionality of the death penalty itself were raised in *People v. Arroyo*, in Schoharie County Court, prior to the cases being resolved by plea bargaining.[385]

Judge Bartlett, in deciding the initial challenge to Criminal Procedure Law section 270.20(1)(f) at the outset noted that there is a strong presumption of constitutionality afforded state legislative enactments.[386] He then wrote:

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381. *See* People v. Shulman, N.Y. L.J., Jan. 30, 1998, at 35, col. 4 (N.Y. County Ct. 1998). In *Shulman,* Judge Pitts cited *Mateo* in which Judge Connell also adopted the reasoning of the New Jersey appellate courts approving this instruction. *Id.*

382. *McIntosh*, 682 N.Y.S.2d at 795.

383. *Id.* "A statute should not ordinarily be set aside as unconstitutional by a court of original jurisdiction unless such conclusion is inescapable. Courts of first instance should not exercise transcendent power of declaring an act of the Legislature unconstitutional except in rare cases involving life and liberty . . . ." N.Y. STAT. LAW § 150 (McKinney 2003); *see also* People v. McIntosh, 662 N.Y.S.2d 214, 220 (County Ct. 1997)

384. *McIntosh*, 682 N.Y.S.2d at 795.

385. *See* People v. Arroyo, 679 N.Y.S.2d 885 (County Ct. 1998); 683 N.Y.S.2d 788 (County Ct. 1998).

386. *Arroyo*, 679 N.Y.S.2d at 886.

> This subdivision of the "challenge for cause" statute is part of the comprehensive death penalty legislation. The aim of the statute is to preclude the selection of jurors who would automatically vote *for or against* the death penalty because of their own strongly held personal beliefs and to ensure that all jurors selected will be able to set their personal beliefs aside and follow the Court's instructions on the law at the sentencing phase of the trial.[387]

After citing the various Supreme Court decisions which mandate these standards, the Judge turned to the New York State precedent citing *People v. DiPiazza*.[388] Ultimately he held:

> The Court, having determined that the "challenge for cause" provision satisfies both the state and federal constitutions, further determines that it is neither necessary nor statutorily authorized that the *voir dire* scheme enacted by the legislature be replaced at this juncture by the alternate relief requested by the defendants, e.g., empaneling separate juries for the guilt and sentencing phases of the trial, or that all *voir dire* on the life and death qualification standard be deferred to just prior to the sentencing phase of the trial.
>
> Nor is it necessary to deviate from the prescribed order of *voir dire* set forth in CPL § 270.16(1). A plain reading of the statute requires that on motion of either party, each individual juror be questioned commencing with questions by the prosecutor. The Court will diligently monitor the *voir dire* process to ensure that this phase of the trial does not influence the jurors for or against conviction or the death penalty.[389]

One of the interesting features of this decision was the court's reliance on the decisions of other trial courts, which had addressed this issue since the death penalty had been re-enacted.[390] In addition to *DiPiazza*, Judge Bartlett also cited *Hale*, *McIntosh*, *Harris*, and *Chinn*, as authority for the determination that Criminal Procedure Law section 270.20(1)(f) was constitutional.[391]

The defendants' challenge to the constitutionality of the death penalty met with a similar result. In raising this chal-

387. *Id.*
388. *Id.* at 887 (citing People v. DiPiazza, 248 N.E.2d 412 (N.Y. 1969)).
389. *Arroyo*, 679 N.Y.S.2d at 887.
390. *See generally Arroyo*, 679 N.Y.S.2d 885.
391. *Id.* at 887.

lenge, the defendants contended that New York Penal Law section 125.27 and Criminal Procedure Law section 400.27, "constitute cruel and unusual punishment, violate the defendants' fundamental right to life, and invite the arbitrary and discriminatory, including racially discriminatory, imposition of the death penalty."[392]

Judge Bartlett began his decision regarding this claim by noting, as he did in his previous decision, that State statutes enjoy a presumption of constitutionality.[393] He then went on to cite *Gregg* for having approved a bifurcated proceeding for individualized sentencing, like New York's.[394] Turning to New York Law, he observed:

> The State Constitution infers the constitutionality of capital punishment in that the need for certain special procedures for crimes punishable by death is referred to in several sections of Article I. In *Matter of Hynes v. Tomei*, the Appellate Division, Second Department, stated: "This Court has previously observed that 'any inquiry into the existence of enhanced protection by the State Constitution . . . [is better left] to the Court of Appeals . . . as the State's policy-making tribunal.'" Therefore, this Court declines to determine whether or not the "cruel and unusual punishment" clause of Article I, § 5 prohibits what other sections of Article I clearly accommodate, and provides constitutional protections greater than those required by the United States Constitution.[395]

The defendants had made a very interesting and unique challenge to the statutes, as applied to them individually, based on their race and gender, which Judge Bartlett took up next:

> Defendant Edwards argues that the death penalty has been sought in his case because he is white and the prosecutor needs white conviction statistics to balance the number of black convictions. Defendant Arroyo argues that the death penalty is sought against her because she is a woman and conviction statistics for women are needed to balance those for men; and also, that the death penalty is sought most frequently in cases in which a white person, in this case a white Hispanic, is the victim.[396]

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392. *Arroyo*, 683 N.Y.S.2d at 789.
393. *Id.*
394. *Id.* (citing Gregg v. Georgia, 428 U.S. 153, 191 (1976)).
395. *Arroyo*, 683 N.Y.S.2d at 789 (citations omitted).
396. *Id.* at 790.

The court, however, rejected these novel challenges as being both unpersuasive and premature.[397] Further, the court noted the conduct of the offense satisfied the elements of New York Penal Law section 125.27(1)(a)(vii), and there was no evidence of the prosecutor engaging in discrimination based on race or gender.[398] He went on to observe:

> However, it should be noted that New York's capital punishment scheme ensures a standard and uniform application by including an extra protection for the defendant: review of the defendant's case in the context of all other similar cases. Whenever a sentence of death is imposed, the Court of Appeals is mandated to review the judgement [sic] and sentence; the scope of review includes determining whether a death sentence was imposed under the influence of passion, prejudice, or any other arbitrary or legally impermissible factor including the race of the defendant or a victim of the crime; and whether the death sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the circumstances of the crime and of the defendant.[399]

Finally, Judge Bartlett rejected an Eighth Amendment challenge to the death penalty in which the defendants claimed it violated society's prevailing standards of decency, writing:

> The Court has considered the defendants' argument that the death penalty runs counter to prevailing societal standards of decency and finds this argument erroneous in light of the United States Supreme Court acceptance of capital punishment and in light of this State's significant and persistent history of death penalty legislation.[400]

Like he did in his previous decision, Judge Bartlett sought refuge in the decisions of the other trial courts, which had dealt with this issue, citing *Harris*, *Shulman*,[401] *Chinn* and *McIntosh*.[402]

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397. *Id.*

398. *Id.*

399. *Id.* (citing N.Y. CRIM. PROC. LAW § 470.30(3)).

400. *Arroyo*, 683 N.Y.S.2d at 790 (citations omitted).

401. *See* People v. Shulman, N.Y. L.J., Sept. 26, 1997, at 35, col. 5 (N.Y. County Ct. Sept. 26, 1997). Like Judge Barlett, Judge Pitt in *Shulman* cited both *Hale* and *Chinn* for authority that this statute comported with Eighth Amendment guarantees. *Id.*

402. *Arroyo*, 683 N.Y.S.2d at 790.

An extremely novel question was presented in *People v. Lavalle*, in which the defendant sought to waive his right to present mitigating evidence in the sentencing phase of his trial.[403] Compounding the complexity of this issue was the fact that the Capital Defender's office, which represented the defendant, opposed the defendant's request.[404] In addressing this situation, Judge Mullen observed:

> One of the arguments of defense counsel is that there is a "public interest" here, a societal interest, as it were, which overrides a defendant's right to waive the opportunity to offer mitigation. The defense claims that to allow the defendant, Stephen Lavalle, to forego any mitigation would, in effect, result in a court-assisted suicide.
>
> In support, the defense attorneys rely on the holding of the highest court in New Jersey in *State v. Koedatich*, 112 N.J. 225, 548 A.2d 939 (1988); see also, *Lenhard v. Wolff*, 444 U.S. 807, 808, 100 S.Ct. 29, 62 L.Ed.2d 11 (1979) (Marshall, J., dissenting). While this Court agrees that *Koedatich* does support defense counsel's argument, I conclude it *does not* control the situation at bar, because the New Jersey death penalty statute is essentially different from New York's. For one thing, the New Jersey statute allows a defendant facing a murder, first degree, prosecution to waive his right to a jury trial, and/or plead guilty to murder, first degree, and still face the possibility of the death penalty. That cannot happen in New York.
>
> Further, the New Jersey statute provides that "the defendant *shall* have the burden of producing evidence of the existence of any mitigating factor set forth in paragraph (5) of this subsection . . . ." (N.J. Stat. Ann. § 2C:11-3[c][2][a] [emphasis added]).
>
> In contrast, the New York statute provides ". . . the defendant *may* present any evidence relevant to any mitigating factor set forth in subdivision nine of this section . . . ."[405]

The Judge then proceeded to analyze the statutory scheme of both states, pointing out a variety of differences in the various rights and responsibilities that each party bore in each state, before concluding "that under the New York statute, and case law, defendant Stephen Lavalle has the right to waive the

403. *See* People v. Lavalle, 697 N.Y.S.2d 241, 242 (Sup. Ct. 1999).

404. *See generally id.*

405. *Id.* at 242 (citing N.Y. CRIM. PROC. LAW § 400.27(6)).

opportunity to offer mitigating factors at his sentencing proceeding."[406]

At first blush, it seems somewhat anomalous that a defendant can waive his or her right to present mitigating evidence during what is arguably the most critical and outcome determinative phase of the capital proceedings, but cannot waive appellate review pursuant to Criminal Procedure Law section 470.30(2).[407] As noted earlier, this statute was amended in 1995 to make appellate review mandatory and non-waivable. Although no explicit reason was provided for the addition of this restriction, in the various memoranda that accompanied and discussed this enactment, the Governor, in his approval Memorandum, took pains to point out the constitutional protections included in the enactment, saying:

> The legislation I approve today will be the most effective of its kind in the nation. It is balanced to safeguard defendants' rights while ensuring that our state has a fully credible and enforceable death penalty statute. . . .
>
> . . . .
>
> Constitutional concerns and the infirmities contained in prior New York State law are fully met in this bill. . . .[408]

Thus, it seems that including this particular safeguard, along with the other protections, was to enhance the prospect that the scheme would survive constitutional attack, as well as guard against a defendant committing "court-assisted suicide" as defense counsel argued in *Lavalle*.[409]

People v. Owens, which arose in New York State Supreme Court, Monroe County, initially dealt with the constitutionality of Criminal Procedure Law section 320.10(1), which prohibits a defendant from waiving a jury when charged with murder in the first degree.[410] At the outset of its decision rejecting this challenge, Justice Egan noted that the claim was brought,

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406. *Id.*

407. *See generally* N.Y. CRIM. PROC. LAW § 470.30(2) (McKinney 2003).

408. Governor's Approval Memorandum on "Death Penalty," S.2850 (Volker); A.4843 (Vitaliano) Memoranda, *reprinted in* 1995 NEW YORK STATE LEG. ANNUAL 23.

409. *Lavalle,* 697 N.Y.S.2d at 242.

410. *See* People v. Owens, 710 N.Y.S.2d 790, 791 (Sup. Ct. 2000) (citing N.Y. CRIM. PROC. LAW § 320.10 (McKinney 2003)).

"[u]nder the guise of 'heightened due process' . . . ."[411] Justice Egan, like almost all of the other trial courts which construed this statutory scheme, ultimately rejected this approach noting, "Defendant's claim of heightened due process does not warrant rewriting the death penalty statutes."[412]

While the court did find that his indictment brought the defendant within the ambit of the challenged statute, it, nonetheless, found that the challenge was premature since the defendant has not requested a bench trial.[413] Nevertheless, citing *McIntosh* and *Mateo*, Justice Egan held that the defendant had failed to demonstrate that neither the statute nor article I, section 2 of the New York State Constitution had been proven beyond a reasonable doubt to be unconstitutional.[414] The Justice also rejected the argument that depriving a capital defendant of a bench trial was a deprivation of equal protection of the law.[415]

In *Hale*, Justice Tomei wrote:

> Since the notion that "death is different" has otherwise pervaded the defendant's motion papers, it is ironic that he argues that his equal protection rights are violated because the provisions of the New York Constitution and C.P.L. § 320.10(1) treat capital defendants differently than other accused persons. In any event, capital defendants may not be considered a suspect class for the purpose of equal protection analysis. Moreover, there is a rational basis for requiring that, in all trials in which the charged crime may be punishable by death, rather than leaving the defendant's fate to the judgment of a single individual, the decision should be made by a jury of twelve persons reflecting the conscious and moral judgment of the community.[416]

The court was next confronted with a challenge to the felony murder provision of Penal Law section 125.27(1)(a)(vii), based upon the contention that it was under-inclusive in that it did not encompass the commission of all serious felonies in this

411. *Owens*, 710 N.Y.S.2d at 791.

412. *Id.* at 792.

413. *Id.* at 791-92.

414. *Id.* at 792 (citing People v. McIntosh, 682 N.Y.S.2d 791 (County Ct. 1998); People v. Mateo, 664 N.Y.S.2d 981 (County Ct. 1997)).

415. *Owens*, 710 N.Y.S.2d at 792 (citing *Hale*, 661 N.Y.S.2d at 484).

416. *Hale*, 661 N.Y.S.2d at 484 (citations omitted).

sub-section.[417] In denying this challenge, Justice Egan observed:

> Defendant's argument is incongruous in the context of this case. Defendant does not argue that an intentional murder committed during the course of a rape should not be sanctionable by death, just that murders committed during other forms of sexual abuse merit the same sanction. Defendant claims that this purported inconsistency renders the statute arbitrary.
>
> A capital punishment statute need only "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." This court declines to thrust itself into the role of the legislature and determine which murders warrant the sanction of death.[418]

As noted earlier, this challenge was determined to be without merit by the New York Court of Appeals in *Harris*.[419] Following his conviction by a jury for murder in the first degree, the defendant sought to be allowed to give an unsworn allocution *following* summations during the penalty phase.[420] Justice Egan denied this request holding that the defendant had no constitutional right to do so.[421] In denying this request, Justice Egan expressly disagreed with the decisions in *Harris* and *Shulman*.[422] These holdings are set forth in *Shulman* as follows:

> Nevertheless, the court is persuaded by the reasoning of Justice Feldman in *People v. Harris*, who states:
>
> > The question for us is not what the Constitution commands but what our civilization commends. Under our system of capital punishment, a jury of men and women forms the essential link between society and the defendant before the court. Each capital jury expresses the collective voice of society in making the individualized determination that a defendant shall live or die. Whatever the constitution permits, it bespeaks our common humanity that a defendant not be sen-

417. *See* People v. Owens, 713 N.Y.S.2d 256, 258 (County Ct. 2000).

418. *Id.* (quoting Zant v. Stephens, 462 U.S. 862, 877 (1983)) (additional citations omitted).

419. *See* People v. Harris, 779 N.E.2d 705, 714 (N.Y. 2002).

420. *See* People v. Owens, 729 N.Y.S.2d 285, 285 (Sup. Ct. 2001).

421. *Id.* (citing McGautha v. California, 402 U.S. 183 (1971)).

422. *Id.*

> tenced to death by jury "which never heard the sound of his voice." (cite omitted).
>
> Justice Feldman permitted Harris to address the sentencing jury prior to summation "but only to plead for mercy and leniency or to express his remorse." The court directed further that in the event defendant attempted to stray from these parameters "to either advance or dispute facts in evidence or to offer facts or reasons to exculpate himself," he invited an admonishment in the presence of the jury which would further be delivered to disregard the extraneous matter.
>
> Accordingly, defendant's motion is granted solely to the extent permitted in *Harris*.[423]

As noted above, Owens requested to address the jury *after* summations rather than *before* as was allowed in *Harris* and *Shulman*.[424] Notwithstanding this distinction, it appears that Justice Egan's ruling would not have been any different given his determination that there was no statutory or constitutional authority for it.[425]

While the foregoing is not an exhaustive review of the decisions rendered by the trial courts in capital cases, it is a representative look at the wide variety of issues they have been confronted with since the resurrection of the death penalty. Of particular interest in analyzing them is the extent to which they were almost unanimous in their approach to certain issues, such as "heightened due process"[426] and challenges to the constitutionality of the legislative scheme.[427] Indeed, as previously discussed, not only was there near unanimity among the trial courts in resolving these challenges, but as the history of death penalty litigation has progressed, the trial courts that

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423. People v. Shulman, N.Y. L.J., May 6, 1999, at 35, col. 3 (N.Y. County Ct. May 6, 1999).

424. *See Owens*, 729 N.Y.S.2d at 285.

425. *See generally id.*

426. *Compare* People v. Chinn, N.Y. L.J., Nov. 19, 1996, at 31, col. 3 (N.Y. County Ct. Nov. 19, 1996), People v. Rodriguez, 647 N.Y.S.2d 350 (Sup. Ct. 1996), *Shulman*, N.Y. L.J., May 6, 1999, at 35, col. 3, People v. McIntosh, 662 N.Y.S.2d 212 (County Ct. 1997), People v. Hale, 661 N.Y.S.2d 457 (Sup. Ct. 1997), People v. Mateo, 664 N.Y.S.2d 981 (County Ct. 1996), *and* People v. Gordon, 667 N.Y.S.2d 626 (Sup. Ct. 1997), *with* People v. Prater, 648 N.Y.S.2d 228 (Sup. Ct. 1996), *and* People v. Arthur, 673 N.Y.S.2d 486 (Sup. Ct. 1997).

427. *See, e.g.*, People v. Arroyo, 679 N.Y.S.2d 885 (County Ct. 1998).

have been resolving challenges later in the cycle have not hesitated to cite their brethren who decided earlier claims.[428]

Future Issues

At this writing, the New York Court of Appeals has four statements of issues likely to be raised on appeal [hereinafter, *Statements*] filed with it, along with the Appellant's Brief in *Cahill*.[429] These cases, in addition to *Cahill*, are *Lavalle*, *Mateo* and *Shulman*. The non-binding *Statements* in these cases set forth a total of 225 potential issues, which may be raised on appeal.[430] While many of the issues raised in the *Statements* filed in each case are unique to the particular trial proceedings, the *Statements* also contain some common issues.

In each of the cases in which such *Statements* have been filed, four issues have been raised which are identical. These are the: (1) constitutionality of Penal Law section 125.27; (2) exclusion of mitigation evidence during the sentencing proceedings; (3) constitutionality of Criminal Procedure Law section 400.27(10) which concerns the "anticipatory deadlock instructions;" and (4) the method of execution.[431]

In *Mateo*, *Cahill* and *Shulman*, each of the trial Judges are reported to have passed upon the challenges to Penal Law section 125.27.[432] In *Mateo*, Judge Connell denied the defendant's motion to declare Penal Law section 125.27 to be unconstitutional, finding that it was neither vague and overbroad, nor that it failed to narrow the class of persons eligible for the death pen-

428. *Compare* People v. Shulman, N.Y. L.J., Jan. 30, 1998, at 35, col. 4 (N.Y. County Ct. Jan. 30, 1998), *and Shulman*, N.Y. L.J., May 6, 1999, at 35, col. 3, *with Owens*, 729 N.Y.S.2d 285.

429. Brief for Defendant-Appellant, People v. Cahill, __ N.Y.2d __, 2003 N.Y. Slip. Op. 18881 (Nov. 25, 2003) No. 123); Appellant's non-binding Statement of Issues Likely to be Raised on Appeal (on file with author).

430. Brief for Defendant-Appellant, *Cahill* (No. 123) (194 potential issues remain for possible consideration by the New York Court of Appeals at this writing since the Appellant in *Cahill* chose to brief only thirty-eight of the sixty-nine issues set forth in his non-binding Statement of Issues Likely to be Raised on Appeal).

431. Appellant's non-binding Statement of Issues Likely to be Raised on Appeal (on file with author).

432. *See generally* People v. Mateo, 664 N.Y.S.2d 981 (County Ct. 1997); *Cahill*, No. 123, slip. op. at 18881; People v. Shulman, N.Y. L.J., Sept. 26, 1997 at 35, col. 5 (N.Y. County Ct. Sept. 26, 1997).

alty.[433] In *Cahill*, Judge Burke, citing *Mateo*, adopted this reasoning.[434] In *Shulman*, Judge Pitts addressed a challenge to Criminal Procedure Law section 400.27, holding that it was not unconstitutionally vague.[435] He then went on to note:

> The same result must be afforded Penal Law §125.27(1)(a)(xi). Initially, it must be noted that the phrase "serial murder," while employed in the practice commentaries, is not used in the statute. Moreover, the phrase "common scheme or plan" is commonly used and has long been the subject of judicial construction. Crucially, nothing in the statute is beyond the ken of the ordinary person.[436]

As discussed previously, almost all of the lower courts that have addressed challenges to the statute have determined it passes constitutional muster.[437] Likewise, the New York Court of Appeals in *Harris* not only rejected a challenge to the constitutionality of Penal Law section 125.27(1)(a)(vii),[438] but demonstrated a willingness to consider the holdings of the lower courts as reflected in its citing the reasoning in *Hale*.[439] Notwithstanding the court's recognition that "heightened due process" applies to its examination of death penalty verdicts, there is little reason to expect that it will not subject the challenges to the constitutionality of the various parts of the statutory scheme to the same exacting scrutiny that was undertaken by the courts below it.

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433. *See Mateo*, 664 N.Y.S.2d at 987-91.

434. *Cahill* is an unreported decision available on the New York State Office of Court Administration "Legal Scholar" Program (on file with author).

435. *See Shulman*, N.Y. L.J., Sept. 26, 1997, at 35, col. 5 (citing Tuilaepa v. California, 512 U.S. 967 (1994); People v. Nelson, 506 N.E.2d 907 (N.Y. 1987)).

436. *Shulman*, N.Y. L.J., Sept. 26, 1997 at 35, col. 5 (citations omitted). The defendant subsequently made a more precise attack on this subsection of Penal Law section 125.27, but the court refused to entertain it because it was not in compliance with motion schedule set by the court and referred back to the above quoted decision. *See Shulman*, N.Y. L.J., Nov. 14, 1997 at 25, col. 1 (N.Y. County Ct. Nov. 14, 1997).

437. *See* People v. Arroyo, 683 N.Y.S.2d 788 (County Ct. 1998); People v. Harris, 676 N.Y.S.2d 798 (Sup. Ct. 1998); People v. Chinn, N.Y. L.J., Nov. 19, 1996, at 31, col. 3 (N.Y. County Ct. Nov. 19, 1996); People v. Gordon, 667 N.Y.S.2d 626 (Sup. Ct. 1997).

438. *See* People v. Harris, 779 N.E.2d 705, 713 (citing Gregg v. Georgia, 428 U.S. 153 (1976); Godfrey v. Georgia, 446 U.S. 420 (1980)).

439. *Id.* at 714 (citing People v. Hale, 661 N.Y.S.2d 457 (Sup. Ct. 1997)).

Before the New York Court of Appeals can reach the issues of exclusion of mitigating evidence, the constitutionality of Criminal Procedure Law section 400.27(10), and the method of execution in *Cahill*,[440] *Mateo*[441] and *Shulman*,[442] it will once again have to grapple with the issue of whether these convictions are impacted by its holding in *Tomei*.[443]

The issue concerning the impact of *Tomei* in *Cahill* appears to be somewhat different than in *Mateo* and *Shulman*.[444] The defendant in *Cahill* was indicted for murder in the first degree on November 19, 1998, and entered a plea of not guilty the following day.[445] On December 22, 1998, the New York Court of Appeals decided *Tomei*,[446] invalidating the plea provisions set forth in Criminal Procedure Law sections 220.10(5)(e) and 220.30(3)(b)(vii).[447] The prosecution did not file a notice of intent to seek the death penalty pursuant to Criminal Procedure Law section 250.40 until December 30, 1998.[448] Thus the defendant had a window of opportunity, albeit a small one, to enter a plea of guilty to the charge of murder in the first degree. This would not have coerced him to give up his constitutional rights against self-incrimination and trial by jury in order to avoid the death penalty,[449] which he failed to avail himself of. Thus, *Tomei* may have no application to the defendant's case.

In *Mateo* and *Shulman*, by contrast, the death penalty notice had been filed at the time each of the defendants had moved to challenge the plea provisions and, as such, neither defendant was ever in a position to plead guilty to the indictments without

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440. People v. Cahill, __ N.Y.2d __, 2003 N.Y. Slip. Op. 18881 (Nov. 25, 2003).

441. People v. Mateo, 664 N.Y.S.2d 981 (County Ct. 1997).

442. People v. Shulman, N.Y. L.J., Sept. 26, 1997 at 35, col. 5 (N.Y. County Ct. Sept. 26, 1997).

443. Hynes v. Tomei, 706 N.E.2d 1201 (N.Y. 1998).

444. *See generally Cahill*, __ N.Y.2d __, 2003 N.Y. Slip Op. 18881.

445. *See id.*

446. *Tomei*, 706 N.E.2d 1201 (N.Y. 1998).

447. *See generally id.*

448. *Cahill*, __ N.Y.2d __, 2003 N.Y. Slip. Op. 18881 at *4.

449. *See* Francois v. Dolan, 731 N.E.2d 614 (N.Y. 2000) (holding a defendant could not enter a plea of guilty to a potentially capital indictment during the 120 day period statutorily provided to the prosecution to file a notice of intent to seek the death penalty. This was not decided until May 18, 2000).

running afoul of the proscription of *Tomei*.[450] As a result, the New York Court of Appeals may have to set aside the death sentences in those cases as it did in *Harris*. The appellant in *Cahill* has tried to shoehorn his case into *Tomei* by arguing:

> At the time Mr. Cahill was indicted on first-degree murder charges, the New York death penalty statute unconstitutionally burdened a capital defendant's Fifth Amendment right to plead not guilty and Sixth Amendment right to a jury trial. Because Mr. Cahill pled not guilty and exercised his right to a jury trial under the unconstitutional statutory scheme, and the jury ultimately imposed the death penalty, his sentences must be vacated.[451]

The New York Court of Appeals made it clear in both *Tomei* and *Harris*[452] that because the plea provisions were severable from the rest of the legislation, it was not necessary to invalidate the statutory scheme, and the court may conduct its analysis of this claim accordingly.[453]

The issues presented in each of the cases involving the exclusion of mitigating evidence may offer a more mixed set of outcomes. Indeed the results, with the exception of the ruling in *Lavalle*,[454] may turn upon the nature of the evidence excluded and its relevance in the sentencing phase of the proceedings. In *Cahill*, the appellant contends that it was error to exclude testimony from the deputy sheriffs who supervised him in the county jail that he would be a positive influence in state prison.[455] In *Mateo*,[456] it is contended that the court erred in

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450. *See generally* People v. Mateo, 664 N.Y.S.2d 981 (County Ct. 1997); People v. Shulman, N.Y. L.J., Sept. 26, 1997, at 35, col. 5 (N.Y. County Ct. Sept. 26, 1997).

451. Brief for Defendant-Appellant at 683, People v. Cahill, __ N.Y.2d __, 2003 N.Y. Slip. Op. 18881 (Nov. 25, 2003) (No. 123) (citations omitted). At this writing the Respondent's Brief has not been filed with the New York Court of Appeals.

452. *See Tomei*, 706 N.E.2d at 1207; People v. Harris, 779 N.E.2d 705, 747-48 (N.Y. 2002).

453. Indeed, in *Tomei*, Judge Kaye expressly noted:

> While reducing the flexibility of plea bargaining in capital cases, *excision of the unconstitutional provisions does not prevent pleas of guilty to first degree murder when no notice of intent to seek the death penalty is pending, since defendants in that situation face the same maximum sentence regardless of how they are convicted.*

Tomei, 706 N.E.2d at 1209 (emphasis added).

454. People v. Lavalle, 697 N.Y.S.2d 241 (Sup. Ct. 1999).

455. Brief for Defendant-Appellant at 583, *Cahill*, (No. 123).

refusing to allow evidence to be presented about the defendant's mother without notice of intent to offer psychiatric evidence and an evaluation by the prosecution's expert, as well as the defendant's childhood hospital records.[457] The defense in *Shulman*,[458] like *Cahill* sought to offer testimony from a former deputy warden at San Quentin Prison that the defendant could adjust successfully and make a positive contribution to prison life while serving a life sentence.[459]

As noted previously, Criminal Procedure Law section 400.27, which sets forth the mitigating factors to be considered by the sentencing jury, contains a catch-all provision at subsection (9)(f) which recites, "[a]ny other circumstance concerning the crime, the defendant's state of mind or condition at the time of the crime, or the defendant's character, background or record that would be relevant to mitigation or punishment for the crime shall be considered."[460]

Both Justice Feldman in *Harris*, and Judge Marlow in *McIntosh*, drew attention to this provision in their determinations that the sentencing scheme embodied in Criminal Procedure Law section 400.27 was constitutional.[461] Moreover, while the New York Court of Appeals declined to pass upon the propriety of the appellant's sentencing proceedings in *Harris*, it did admonish that "capital trial courts should exercise great caution in making discretionary determinations such as this. The stakes are high for all involved."[462]

Thus it appears that, while an error may be deemed harmless during the guilt phase of a trial, such as was done in *Harris*, the court may not be willing to view it as such during the sentencing phase.[463] Analyzed in this context, the appellant in *Mateo*, whose proposed testimony appears to fall into the catch-

456. People v. Mateo, 664 N.Y.S.2d 981 (County Ct. 1997).

457. Appellant's non-binding Statement of Issues Likely to be Raised on Appeal (on file with author).

458. *Shulman*, N.Y. L.J., Sept. 26, 1997, at 35, col. 5 (N.Y. County Ct. Sept. 26, 1997).

459. Appellant's non-binding Statement of Issues Likely to be Raised on Appeal (on file with author).

460. N.Y. CRIM. PROC. LAW § 400.27(9)(f) (McKinney 2003).

461. *See* People v. Harris, 676 N.Y.S.2d 440, 441 (Sup. Ct. 1998); People v. McIntosh, 682 N.Y.S.2d 795, 796 (County Ct. 1998).

462. People v. Harris, 779 N.E.2d 705, 723 (N.Y. 2002).

463. *See id.* at 452.

all provision embodied in Criminal Procedure Law section 400.27(6)(f), may have success in urging error.[464] The proffered testimony in *Cahill* also appears to fall clearly within the class of mitigating evidence allowed under *Lockett*,[465] and the Supreme Court has ruled that its exclusion requires reversal of a death sentence.[466] Absent first hand knowledge by the witness of the appellant's jail house behavior in *Shulman*,[467] the trial court may have been within its discretionary power to exclude it as being speculative, although the admonition quoted above from *Harris*[468] by the New York Court of Appeals makes this a close question.

As noted previously, the defendant in *Lavalle* successfully persuaded the trial court to allow him to forego presenting any mitigating evidence over the objection of his counsel.[469] Following his conviction, the appellant moved for assignment of new counsel on appeal contending that he had "an irreconcilable conflict" with his attorney.[470] The trial court denied the motion but directed the defendant be allowed "to file a supplemental pro se brief [to] insure[ ] that all issues defendant wishe[d] to raise [were], in fact, [raised]."[471] Presumably, this conflict will continue as this issue is litigated in the New York Court of Appeals.

The issue of the constitutionality of the "anticipatory deadlock" instruction contained in Criminal Procedure Law section 400.27(10) was addressed by the trial courts in *Cahill*, *Mateo* and *Shulman*.[472] In *Cahill*, Judge Burke denied a motion to invalidate "a portion of CPL 400.27(10) requiring the court to instruct the jury on the consequence of a deadlock."[473] The court

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464. *See generally* People v. Mateo, 664 N.Y.S.2d 981 (County Ct. 1997).

465. *See* Lockett v. Ohio, 438 U.S. 586 (1978).

466. *See* Skipper v. South Carolina, 476 U.S. 1 (1986).

467. People v. Shulman, N.Y. L.J., Sept. 26, 1997, at 35, col. 5 (N.Y. County Ct. Sept. 26, 1997).

468. *See* People v. Harris, 779 N.E.2d 705, 723 (N.Y. 2002).

469. People v. Lavalle, 697 N.Y.S.2d 241, 242 (Sup. Ct. 1999).

470. People v. Lavalle, 770 N.E.2d 1004, 1004 (N.Y. 2002).

471. *Id.*

472. *See* People v. Cahill, __ N.Y.2d __ 2003 N.Y. Slip. Op. 18881, *4 (Nov. 25, 2003); People v. Mateo, 664 N.Y.S.2d 981 (County Ct. 1997); *Shulman*, N.Y. L.J., Sept. 26, 1997, at 35, col. 5.

473. People v. Cahill is an unreported decision available on the New York State Office of Court Administration "Legal Scholar" Program (on file with author).

also rejected a request to merely tell the jury the court would impose sentence in the event of a deadlock.[474] In *Mateo*, Judge Connell rejected the claim that the instruction would have a coercive effect on the jury and render a death verdict more likely, relying on a decision of the New Jersey Supreme Court, *State v. Brown*.[475] As noted previously, Judge Pitt in *Shulman* analogized the instruction to that required under Criminal Procedure Law section 330.10(3) where the defendant has presented a defense of mental disease or defect.[476] He likewise adopted the reasoning of Judge Connell in *Mateo*.[477]

In *Owens*, Justice Egan, rejecting a challenge to this section, observed, "[t]he courts of New York have almost uniformly rejected the notion that Criminal Procedure Law section 400.27(10) is unconstitutional."[478] The Justice went on to list all of the decisions published and unpublished which had rejected this argument.[479] He noted, however, that the one exception to this was Justice Feldman, who found it unconstitutional in *Harris*.[480] In doing so, Justice Feldman held:

> While the legislative history of the Capital Offenders Law does not reflect the venomous intent defendant attributes to proponents of CPL 400.27(10), the instruction nevertheless has the unforeseen but likely practical effect of deliberately injecting uncertainty into the sentencing proceedings. The deadlock instruction alerts the jurors to the possibility that if they do not reach a unanimous verdict defendant may within 20 or 25 years be released from custody. "A capital sentencing jury is made up of individuals placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice. . . . [T]hey are given only partial guidance as to how their judgment should be exercised, leaving them with substantial discretion." In choosing between death and a term of imprisonment "a defendant's future dangerousness bears on all sentencing determinations made in our criminal justice system". "[A]ny sentencing authority must predict a convicted person's probable future conduct when it en-

474. *Id.*

475. *See Mateo*, 664 N.Y.S.2d at 1001-03 (citing State v. Brown, 651 A.2d 19 (N.J. 1994)).

476. *Shulman*, N.Y. L.J., Sept. 26, 1997, at 35, col. 5.

477. *Id.*

478. People v. Owens, 727 N.Y.S.2d 275, 276 (Sup. Ct. 2001).

479. *Id.*

480. *See* People v. Harris, 677 N.Y.S.2d 659, 660 (Sup. Ct. 1998).

> gages in the process of determining what punishment to impose." Thus, in exercising their discretion, the jurors, having been made aware of the sentence the judge will impose in the event of a deadlock, may conclude that the imposition by the judge of a sentence of twenty to twenty-five years to life could lead to parole for the defendant.
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> . . . .
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> Here, the court, in delivering the required instruction under CPL 400.27(10), would be implicitly placing the possibility of defendant's future liberty in the jury's mind. Jurors favoring life without parole may relinquish their conscientiously held views and join the majority in voting to impose the death penalty to avoid the possibility of a potentially lighter sentence if they see as a real prospect defendant's eventual return to society. While the People argue correctly that such pressure could also lead to a verdict of life without parole there is simply no way of predicting in what configuration the jury would be deadlocked and it is thus impossible to anticipate which way the added weight of the deadlock instruction would fall. Under such circumstances the mandated instruction has the strong potential of acting as a "thumb . . . [on] death's side of the scale."[481]

As Justice Feldman noted, New York is the only state that has enacted an "anticipatory deadlock" instruction.[482] The New York Court of Appeals, because it invalidated the appellant's death sentence in *Harris*,[483] pursuant to its holding in *Tomei*,[484] never reached this issue. Clearly, it will have a case of first impression before it, should it be required to pass upon the sentencing proceedings in one of these cases.

The trial courts in *Cahill and Mateo* were called upon to address the issue of whether lethal injection authorized by Corrections Law section 658 constituted cruel and unusual punishment.[485] In *Cahill*, Judge Burke declined to find that it constituted cruel and unusual punishment.[486] Judge Connell in *Mateo* declined to entertain whether the procedures of the De-

481. *Id.* at 661-62 (citations omitted).

482. *Id.* at 661 (citations omitted).

483. People v. Harris, 675 N.Y.S.2d 740 (Sup. Ct. 1998).

484. Hynes v. Tomei, 706 N.E.2d 1201 (N.Y. 1998).

485. *See* People v. Cahill, __ N.Y.2d __, 2003 N.Y. Slip. Op. 18881 (Nov. 25, 2003); People v. Mateo, 664 N.Y.S.2d 981 (County Ct. 1997).

486. People v. Cahill is an unreported decision available on the New York State Office of Court Administration "Legal Scholar" Program (on file with author).

partment of Correctional Services were valid or adequate.[487] It would seem likely that this issue will be subsumed into the larger question of whether capital punishment in New York constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution and Article I, Section 5 of the New York State Constitution.

Among other issues which are likely to be raised in the four cases pending in the New York Court of Appeals are whether the defendants were entitled to a separate sentencing jury, the admission of victim impact testimony, the constitutionality of Criminal Procedure Law section 250.40 which grants to the District Attorney the discretion to file a notice of intent to seek the death penalty, whether a capital defendant has the right to allocute to the jury during the penalty phase of the proceedings, and the constitutionality of the instruction embodied in Criminal Procedure Law section 400.27(11) concerning whether the death penalty "should be imposed."

In the appellant's brief in *Cahill*, he not only raises the issue of the trial court's refusal to empanel a separate sentencing hearing, as does *Shulman*, but also claims the trial court failed to conduct, "an adequate mid-trial voir dire which deprived Mr. Cahill of his right to due process, a fair and impartial jury and a fair and reliable sentencing determination."[488]

The demand for a separate jury for the sentencing phase of trial proceedings has been rejected by every trial court in which it has been made.[489] In *Harris*, Justice Feldman, after rejecting a request that death qualification of the jurors be delayed until just before the start of the penalty phase, noted:

> Defendant's alternative suggestion that this court, in the exercise of its discretion, alter the statutory procedure for jury selection is also rejected. The statutory framework only allows for the impanelling of a separate sentencing jury under extraordinary circumstances for good cause shown (CPL § 400.27(2)). Because no such circumstances face this court it has no power to depart from the statute.[490]

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487. *See generally Mateo*, 664 N.Y.S.2d 981.

488. Appellant's Brief at 525, Point XXIV, People v. Cahill, slip op. 18881, 2003 WL 22770167 (N.Y. Nov. 25, 2003).

489. *See, e.g., Harris*, 675 N.Y.S.2d 740.

490. *Id.* at 743.

Likewise, Judge Bartlett rejected an identical request in *Arroyo*, holding:

> The Court, having determined that the "challenge for cause" provision satisfies both the state and federal constitutions, further determines that it is neither necessary nor statutorily authorized that the *voir dire* scheme enacted by the legislature be replaced at this juncture by the alternative relief requested by the defendants, e.g., empaneling separate juries for the guilt and sentencing phases of the trial, or that all *voir dire* on the life and death qualification standard be deferred to just prior to the sentencing phase of the trial.[491]

Finally, Justice Egan disposed of a claim for a separate sentencing jury together with an attempt to waive a jury, in *Owens*, observing:

> Defendant further claims CPL § 320.10 is anachronistic since the recently enacted death penalty statutes provide for a bifurcated trial. A defendant's waiver of a jury at the guilt phase now no longer precludes a jury from sentencing him. Defendant's claim of heightened due process does not warrant rewriting the death penalty statutes. Although providing for bifurcation, CPL § 400.27(2) envisions the use of a distinct jury for sentencing only in "extraordinary circumstances" and for "good cause [shown]."[492]

Given the uniformity of this interpretation by the trial courts and the plain language of the statute, it appears unlikely that the New York Court of Appeals will hold differently absent a showing of "extraordinary circumstances" and "good cause" in any of the cases that come before it.

The issue of "victim impact" testimony during the penalty phase of the proceedings has been identified directly in the "Statements of Issues Likely to be Raised on Appeal" in both *Lavalle* and *Shulman* and has been raised indirectly in the appellant's brief in *Cahill*.[493] As noted previously, the New York Court of Appeals cautioned against the use of this type of testimony in its opinion in *Harris* in which it applied the "harmless

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491. People v. Arroyo, 679 N.Y.S.2d 885, 887 (County Ct. 1998).

492. *See* People v. Owens, 710 N.Y.S.2d 790, 792 (Sup. Ct. 2000) (citation omitted).

493. Brief for Defendant-Appellant at 631-43, Point XXIX, People v. Cahill, __ N.Y.2d __, 2003 Slip. Op. 18881, (Nov. 25, 2003) (No. 123).

error" rule to the conduct in that instance.[494] It will be interesting to see in these instances whether it will find the admission of the evidence to be reversible error because it occurred during the penalty phase or, bowing to the Supremacy Clause, that it is admissible under *Payne*.

The initial challenge to the constitutionality of Criminal Procedure Law section 250.40, which vests the District Attorney with the discretion to file a notice of intent to seek the death penalty, was made in *Hale*.[495] There, the defendant contended that filing the notice violated his right to equal protection because the decision to do so was impermissibly affected by his race.[496] Justice Tomei, in rejecting this claim, noted the many factors which are part of the decision to seek the death penalty including the strength of the case, the grievousness of the harm, the various aggravating factors and the presence or absence of mitigating factors.[497] Moreover, he went on to observe:

> Nor may it be said that the discretion left to the District Attorney violates any constitutional prerogatives. It is well-established that the prosecutor may be entrusted with charging decisions, and the exercise of that discretion in the context of capital cases, unless proved to be for an invidious purpose, is not unconstitutional.[498]

Judge Bartlett, in *Arroyo*, came to the same conclusion on this point.[499]

Whether a defendant in the penalty phase of a capital prosecution should be allowed to allocute to the jury is another issue that the New York Court of Appeals will be confronted with in *Cahill*.[500] Although Criminal Procedure Law section 400.27 makes no provision for this allocution, as discussed previously, two of the trial courts, *Harris* and *Shulman*, allowed the defen-

494. *See* People v. Harris, 779 N.E.2d 705, 734 (N.Y. 2002).

495. *See* People v. Hale, 661 N.Y.S.2d 457, 471 (Sup. Ct. 1997).

496. *Id.* at 477.

497. *Id.* at 477-78 (citing McClesky v. Kemp, 481 U.S. 279 (1987)).

498. *Id.* at 478 (citations omitted).

499. *See* People v. Arroyo, 683 N.Y.S.2d 788, 790 (County Ct. 1998) (citing *McClesky*, 481 U.S. at 296; Gregg v. Georgia, 428 U.S. 153, 199 (1976); Bordenkircher v. Hayes, 434 U.S. 357 (1978)).

500. Brief for Defendant-Appellant at 619, Point XXVIII, People v. Cahill, __ N.Y.2d __, 2003 N.Y. Slip. Op. 18881, (Nov. 25, 2003) (No. 123).

dant to do so.[501] Justice Egan did not allow it in *Owens*,[502] but that situation is conceptually distinguishable since the defendant sought to do so *after* summations. Interestingly, Criminal Procedure Law section 380.50 provides the defendant with the right to allocution before sentence is pronounced.[503] The section does not distinguish between a capital or non-capital case nor was it amended in any way at the time Criminal Procedure Law section 400.27 was enacted setting forth the procedures to be followed in a capital case. Thus, one could argue that since sentence is to be determined and imposed as a result of the proceeding conducted pursuant to Criminal Procedure Law section 400.27, the defendant should be afforded the right mandated by Criminal Procedure Law section 380.50 prior to the time sentence is determined, particularly if "heightened due process" scrutiny applies. Moreover, in *Green*, a non-capital federal prosecution, Justice Frankfurter observed:

> [W]e see no reason why a procedural rule should be limited to the circumstances under which it arose if reasons for the right it protects remain. None of these modern innovations lessens the need for the defendant, personally, to have the opportunity to present to the court his plea in mitigation. The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself.[504]

The issue of the right to allocute before the sentencing jury, in light of these considerations, will present an interesting question for the New York Court of Appeals.

The *Cahill* appeal will also confront the New York Court of Appeals with a challenge to the "second step" procedure embodied in Criminal Procedure Law section 400.27(11)(a) which directs the jury in pertinent part that it "may not direct the imposition of a sentence of death unless it unanimously finds beyond a reasonable doubt that the aggravating factor or factors substantially outweigh the mitigating factor or factors es-

501. *See generally* N.Y. CRIM. PROC. LAW § 400.27 (McKinney 2003); *see also* People v. Harris, 779 N.E.2d 705 (N.Y. 2002); People v. Shulman, N.Y. L.J., May 6, 1999, at 35, col. 3 (N.Y. County Ct. May 6, 1999).

502. *See* People v. Owens, 729 N.Y.S.2d 285, 285 (Sup. Ct. 2001).

503. N.Y. CRIM. PROC. LAW § 380.50 (McKinney 2003).

504. Green v. United States, 365 U.S. 301, 304 (1961).

tablished, if any, *and unanimously determines that the penalty of death should be imposed.*"[505]

In challenging the instructions on this point, the appellant contends that it allows the jury to consider "nonstatutory aggravating circumstances."[506] As noted previously, both of the trial courts which have dealt with this issue, *Harris* and *McIntosh*, found that this second step was an additional prophylactic which safeguarded the defendant from the death penalty.[507] Since *McIntosh* resulted in a non-capital sentence being imposed[508] and *Harris's* sentence was invalidated in light of *Tomei*,[509] the issue remains ripe for review.

The other issue that will present an interesting question may be raised in *Mateo*, where the defendant has again raised the "command" issue to determine whether it has a different meaning now that "heightened due process" applies to the review of his conviction.[510]

The appellants in *Cahill*, *Mateo* and *Shulman* have again called into question the constitutionality of Criminal Procedure Law section 270.20(1)(f) providing for "death qualification" of jurors as well as the propriety of various challenges to individual jurors in each case.[511] As discussed previously, the New York Court of Appeals has determined in *Harris* that this provision of the death penalty scheme is constitutional and is likely to do so again.[512] The challenges involving the various jurors and whether they affect the outcome of the case will, of course, turn upon the unique facts of the voir dire of each juror.

Probably the most awaited determination by all who are interested in death penalty jurisprudence in New York is how the New York Court of Appeals will determine whether capital pun-

505. *See* N.Y. CRIM. PROC. LAW § 400.27(11)(a) (McKinney 2003) (emphasis added); People v. Cahill, __ N.Y.2d __, 2003 N.Y. Slip. Op. 18881 (Nov. 25, 2003).

506. Brief for Defendant-Appellant at 546, Point XXV, People v. Cahill, __ N.Y.2d __, 2003 N.Y. Slip. Op. 18881 (Nov. 25, 2003) (No. 123).

507. *See* People v. Harris, 676 N.Y.S.2d 440, 443 (Sup. Ct. 1998); People v. McIntosh, 682 N.Y.S.2d 795, 798 (County Ct. 1998).

508. *See* People v. McIntosh, 682 N.Y.S.2d 791, 792 (County Ct. 1998).

509. *See* People v. Harris, 779 N.E.2d 705, 728 (N.Y. 2002).

510. People v. Mateo, 664 N.Y.S.2d 981 (County Ct. 1997).

511. *See* People v. Cahill, __ N.Y.2d __, 2003 N.Y. Slip. Op. 18881 (Nov. 25, 2003); *Mateo*, 664 N.Y.S.2d at 987; People v. Shulman, N.Y. L.J., Sept. 26, 1997, at 35, col. 5 (N.Y. County Ct. Sept. 26, 1997).

512. *See Harris*, 779 N.E.2d at 715.

ishment violates the Eighth Amendment to the United States Constitution and Article I, Section 5 of the New York State Constitution. This issue has been raised in *Cahill*, *Shulman*, and *Mateo*.[513] For a multitude of reasons, it appears very unlikely that the New York Court of Appeals will decide that the death penalty scheme violates either the Eighth Amendment to the United States Constitution or article I, section 5 of the New York State Constitution.

A review of the death penalty scheme enacted in 1995 reveals that it meets the requirements laid down by the United States Supreme Court in *Gregg*, *Woodson*, and *Roberts*.[514] It sets forth not only a sufficient class of clearly defined aggravating and mitigating factors for the jury to weigh, but also contains a catch-all provision which allows the jury to consider any circumstance concerning the crime or the defendant's background which might mitigate the punishment.[515] The enactment sets a higher age threshold for a defendant to be death-eligible and prohibits the execution of the mentally retarded.[516] The sentencing procedure not only requires the jury to weigh and set forth its findings concerning the aggravating and mitigating factors, but also requires it to take a second step and determine whether death should still be imposed.[517] As noted previously, the appellate process requires the State's highest court must not only review the facts as well as the law, but must also conduct a proportionality review, which includes considering the race of the parties in arriving at a determination whether the sentence is excessive or disproportionate to that imposed in other cases.[518]

In summary, the death penalty scheme in New York not only comports with the Supreme Court's requirements, but exceeds them in some respects through the inclusion of additional safeguards involving death eligibility, sentencing procedures

513. *See generally Cahill*, __ N.Y.2d __, 2003 N.Y. Slip. Op. 18881; People v. Shulman, N.Y. L.J., Jan. 30, 1998, at 35, col. 4 (N.Y. County Ct. Jan. 30, 1998); *Mateo*, 664 N.Y.S.2d at 994.

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

515. N.Y. CRIM. PROC. LAW § 400.27(3), (9) (McKinney 2001).

516. *Id.* § 400.27(12)(b).

517. *Id.* § 400.27(11)(a).

518. *Id.* § 470.30(3)(b).

and appellate review. While opponents of capital punishment pin their hopes on a determination by the New York Court of Appeals that the death penalty violates Article I, section 5 of the State Constitution, both the long standing precedent and recent holdings in its capital punishment decisions by the court suggest that this is extremely unlikely. The court has been unyielding in its position that it is bound by the Supremacy Clause in following the precedents of the Supreme Court. In 1973, in *Fitzpatrick*, the court abolished capital punishment in New York based upon the Supreme Court decision in *Furman*.[519] In 1978, in *Davis,* it did so again, based upon the Supreme Court's holding in *Gregg*, *Woodson* and *Roberts*.[520] More recently, in *Tomei*, it invalidated the plea provisions of the current legislative enactment based upon a Supreme Court holding that was thirty years old, *Jackson*.[521] In doing so, Judge Kaye wrote, "Despite the passage of three decades, a plethora of decisions involving the death penalty and a sea of change in plea bargaining, the Supreme Court has never overruled *Jackson*, which binds this Court."[522]

Unlike its decisions concerning Fourth Amendment and the Sixth Amendment, the court has declined to find greater protection under the New York State Constitution than that afforded by the Supreme Court holdings interpreting the Eighth Amendment. This fact was noted by Judge Marlow, in *McIntosh*, in which he observed, "[w]hile New York can clearly afford greater protection to a defendant than is required by Federal Law, it cannot give less.[523]

Notwithstanding the power of the court to expand the protection afforded by Article I, section 5 of the State Constitution, to do so would require the court to take a 180 degree turn in its longstanding approach to the Eighth Amendment and precedent, which seems, at best, unlikely.

Treatment of this issue by the trial courts which have considered it, including at least two currently pending before the

519. *See* People v. Fitzpatrick, 300 N.E.2d 139, 145-46 (N.Y. 1973).

520. *See* People v. Davis, 371 N.E.2d 456, 466-47 (N.Y. 1977).

521. *See* Hynes v. Tomei, 706 N.E.2d 1201 (N.Y. 1998).

522. *Id.* at 1203.

523. People v. McIntosh, 662 N.Y.S.2d 212, 214 (citations omitted); *see also* People v. Griminger, 524 N.E.2d 409 (N.Y. 1988); People v. Samuels, 400 N.E.2d 1344 (N.Y. 1980).

New York Court of Appeals, also offer little hope for those seeking its abolition under the State Constitution. Perhaps the most in-depth, comprehensive analysis of the issue took place in *Hale*, in which Justice Tomei undertook both an "interpretive" and "non-interpretive" examination of the issue.[524] In conducting his "interpretive" analysis, Justice Tomei compared Article I, section 5 of the State Constitution to the Eighth Amendment to see if there were textual differences in which the State Constitution recognized broader rights than the United States Constitution.[525] In comparing the two, Justice Tomei concluded:

> Insofar as the cruel and unusual punishment clause is concerned, it mirrors the eighth amendment of the United States Constitution, "and in this form it first appears in the Constitution of this state adopted in 1846." *People ex rel. Kemmler v. Durston*, 119 N.Y. 569, 576, 24 N.E. 6 (1890). Because the relevant text of Article I, § 5 is the same as that of the eighth amendment, and arose from the same historical context, interpretive analysis leads to the conclusion that the text of Article I, § 5 provides no basis for interpreting New York's prohibition against cruel and unusual punishment any differently from that of the eighth amendment.[526]

Justice Tomei then went on to conduct a "non-interpretive" analysis dismissing the claim, holding that it was an issue of first impression, once again, citing *People ex rel. Kemmler v. Durston*.[527] He similarly rejected the argument that the death penalty runs counter to this State's "contemporary values" by engaging in a lengthy historical analysis in which he demonstrated that capital punishment was more prevalent throughout New York's history and would have been more so but for the various vetos of two recent Governors.[528] He likewise rejected arguments that capital punishment would result in "invidious

524. *See* People v. Hale, 661 N.Y.S.2d 457, 472 (Sup. Ct. 1997).

525. *Id.*

526. *Id.* at 472 (footnote omitted). In footnote 18 to this portion of his opinion, the Justice observed, "[b]oth constitutional provisions [were] borrowed from an English statute passed in the first year of the reign of William and Mary, entitled, 'An act declaring the rights and liberties of the subject, and settling the succession of the crown,' commonly known as the English Bill of Rights of 1689." *Id.* at 473 n.18 (citations omitted).

527. People *ex rel* Kemmler v. Durson, 24 N.E. 6 (N.Y. 1890).

528. *See Hale*, 661 N.Y.S.2d at 473.

racial discrimination" noting the various safeguards inherent in the statute as well as the New York Court of Appeals review.[529] Ultimately he pointed out that it was for the legislature to determine whether capital punishment comported with the State's contemporary standards of decency and concluded, "There is nothing in the text of the New York Constitution or the history and practices of this State that leads the court to conclude that the punishment of death is so grossly disproportionate to the crimes enumerated in P.L. § 125.27 as to render the statute unconstitutional."[530]

Justice Tomei also dismissed what he termed the "fundamental right to life claim," Observing:

> It is enough to say that there is no support in the federal or state constitution, or any other Anglo-American law, for the claim that the convicted perpetrator of a particularly atrocious murder enjoys an unqualified right to life, notwithstanding the legislature's rational determination that the only appropriate sanction for the defendant's egregious conduct is death.[531]

In *Shulman*,[532] Judge Pitts, after reviewing Supreme Court holdings, cited *Hale*[533] and *Chinn*[534] in determining that section 400.27 of the Criminal Procedure Law withstood Eighth Amendment scrutiny. The court then undertook a "non-interpretive" analysis similar to that done in *Hale*, ultimately concluding that:

> No system can detect, in every case, all honest mistakes, incidents of neglect, or outright acts of misconduct which may taint the process. New York's statute has nevertheless been drafted with punctilious concern for individualized consideration and for the rights of the accused. Accordingly, this branch of defendant's motion must be denied.[535]

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529. *See id.* at 474.

530. *Id.* at 476.

531. *Id.* at 476-77 (citations omitted).

532. People v. Shulman, N.Y. L.J., Sept. 26, 1997, at 36, col. 5 (N.Y. County Ct. Sept. 26, 1997).

533. *Hale*, 661 N.Y.S.2d at 457.

534. People v. Chinn, N.Y. L.J., Nov. 19, 1996, at 31, col. 3 (N.Y. County Ct. Nov. 19, 1996).

535. *Shulman*, N.Y. L.J., Sept. 26, 1997, at 36, col. 5.

The court likewise found no constitutional authority or support for an "Inalienable Right to Life" claim.[536]

While Judge Bartlett in *Arroyo*[537] declined to expressly rule on this claim, he suggested that he would not have done so favorably, writing:

> The State Constitution infers the constitutionality of capital punishment in that the need for certain special procedures for crimes punishable by death is referred to in several sections of Article 1. In *Matter of Hynes v. Tomei*, the Appellate Division, Second Department stated: "This Court has previously observed that 'any inquiry into the existence of enhanced protection by the State Constitution . . . [is better left] to the New York Court of Appeals . . . as the State's policy-making tribunal.' " Therefore, this Court declines to determine whether or not the "cruel and unusual punishment" clause of Article I, § 5 prohibits what other sections of Article I clearly accommodate, and provides constitutional protections greater than those required by the United States Constitution.[538]

Thus it would appear that history, precedent and the weight of authority are such that it is highly unlikely that the New York Court of Appeals will decide that the death penalty is barred by the Eighth Amendment to the United States Constitution or Section 5 of Article I of the New York State Constitution should it ultimately take up the question.

It is, of course, possible that none of the cases pending on the court's docket will provide a vehicle for this determination. The court, as it did in *Harris*,[539] could find a flaw in each of the trial court proceedings which requires it to invalidate the death sentences pursuant to *Hynes v. Tomei*[540] or it could further find another error in the penalty phase itself, thereby vitiating the need to address the constitutionality of capital punishment until some future time. In either case, it appears likely that death penalty jurisprudence in New York is an area ripe for further evolution.

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536. *Id.* (alteration in original) (citations omitted).
537. People v. Arroyo, 683 N.Y.S.2d 788 (County Ct. 1998).
538. *Id.* at 789.
539. *See* People v. Harris, 675 N.Y.S.2d 740 (Sup. Ct. 1998).
540. Hynes v. Tomei, 706 N.E.2d 1201, 2001 (N.Y. 1998).