ARTICLES

Because There Is No Money for the Monster's Ball

J. Alexandra Bruce*

Abstract

Many of the nation's most notorious serial killers—including Ted Kaczynski and The Green River Killer—escaped America's harshest penalty by merely accepting a guilty plea. Even those prosecutors who adamantly support the death penalty, seeking the sentence wherever available, demonstrate a willingness to abandon the sentence in exchange for a guilty plea, notwithstanding the magnitude of the offense.

Likewise, prosecutors throughout the United States acknowledge the continued practice of utilizing the death penalty to maintain leverage in plea negotiations. Nonetheless, the vast majority of counties overwhelmingly lack the resources death-penalty trials compel. This triggers constitutional concern in the light of the Constitution's prohibition on unfulfillable promises.

The United States Constitution bars involuntary confessions. Consequently, interrogations and plea negotiations must be maintained absent false threats to the accused. Accordingly, where threatening a defendant with the death penalty, while nonetheless lacking the resources to procure a death sentence, a prosecutor effectively encourages the plea through an impermissible false threat.

This Article is the first to scrutinize capital plea negotiations and concomitant fiscally burdensome death-penalty trials. The State cannot utilize the potentiality of a death sentence in capital-eligible plea negotiations, where fiscal limitations render the sentence effectively unattainable. This Article concludes constitutional validity is maintained only where prosecutors have the resources to proceed to the requisite capital trial in all actions where the death penalty is purportedly sought. The state effectively leverages plea negotiations with constitutionally-prohibited unfulfillable promises where it lacks the resources

* Associate, Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C. in New Orleans, Louisiana; judicial law clerk, Honorable Rhesa H. Barksdale of the United States Fifth Circuit Court of Appeals; J.D., 2017, University of Mississippi School of Law, *summa cum laude*. Foremost, the author acknowledges her father, James Bruce, who convinced her to pursue the career she enjoys today. Additionally, the author thanks Joseph A. Rychlak for tolerating the endless debates that materialize into these articles. Lastly, the author recognizes The Oxford Growler, where the majority of this Article was written, for providing a superb atmosphere which encourages academic success. © 2020, J. Alexandra Bruce.

necessary to obtain a death sentence in every case in which it purports to seek such penalty.

Plea bargaining is a cornerstone of the American criminal justice system, but death is different. Dissimilar from customary defense practice, legal ethics mandate capital-defense attorneys counsel defendants to accept any offer to avoid death. Consequently, capital plea negotiations result in the death penalty being contingent on the defendant's decision to plead, rather than their particular offense. This practice undermines the death penalty and triggers immense constitutional concern.

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INTRODUCTION

McCleskey v. Kemp endures as one of the Supreme Court's most significant death-penalty decisions.[1] Challenging Georgia's application of the penalty as racially discriminatory, Warren McCleskey—a Death Row inmate—claimed "persons who murder whites [were] more likely to be sentenced to death than persons who murder blacks, and black murderers [were] more likely to be sentenced to death than white murderers."[2]

The State of Georgia nonetheless maintained McCleskey failed to demonstrate any discriminatory practice in the State's application of the death penalty because his sentence was contingent on the commission of his crime rather than his race.[3] In that regard, the Court determined Georgia's application within the limitations of the Fourteenth Amendment.[4] The jury considered numerous factors with no inference to race, imposing the sentence based on the particularized facts of the crime.[5]

What the State failed to reveal, and the Court declined to scrutinize, is McClesky's death-penalty sentence resulted from neither his commission of the

1. *See* Eva Paterson, *25 Years Later, McCleskey Decision Still Fosters Racism by Ignoring It*, HUFFINGTON POST (2012), http://www.huffingtonpost.com/eva-paterson/mccleskey-versus-kemp_b_1439229.html [https://perma.cc/F3XJ-R49C]; *see also* McCleskey v. Kemp, 481 U.S. 279, 291 (1987).
2. *McCleskey*, 481 U.S. at 291.
3. *Id.*; *see also* DAVID M. OSHINSKY, CAPITAL PUNISHMENT ON TRIAL: FURMAN V. GEORGIA AND THE DEATH PENALTY IN MODERN AMERICA 102 (Univ. Press of Kansas 2010).
4. *McCleskey*, 481 U.S. at 291.
5. *Id.*

particular crime, nor his race.[6] The State sentenced McCleskey to death only after he refused to accept an offer to plead guilty to a life sentence.[7] Should McCleskey have simply accepted a guilty plea, one of the Court's most noteworthy death-penalty opinions would not exist. The prosecution gave McCleskey the option to plead guilty to a life term and avoid the possibility of death.[8] Neither the State nor the jury chose whether McCleskey's crime warranted a death sentence. McCleskey chose whether his crime was punishable by death. McCleskey alternatively chose to employ his Sixth Amendment right and proceed to trial.[9] His decision cost him his life.[10]

The *McCleskey* facts are not unique. Prosecutors throughout the United States acknowledge the common practice of using the death penalty as leverage in capital plea negotiations.[11] The Supreme Court held pleas made for the sole purpose of avoiding the possibility of death "represent[] a voluntary and intelligent choice among the alternative courses of action open to the defendant."[12] Accordingly, the Court ruled this method of encouraging the acceptance of guilty pleas through the legitimate threat of the possibility of a death penalty a constitutionally valid practice.[13]

Nonetheless, this practice of utilizing death sentences in those cases where defendants refuse a plea, renders death contingent on the defendant's willingness to plea,[14] rather than "the circumstances of the offense together with the character and propensities of the offender."[15] Moreover, prosecutors utilizing the death penalty as plea-negotiation leverage, although intending to seek the penalty only for those defendants refusing a plea, renders the sentence vulnerable as a false

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6. *See* OSHINSKY, *supra* note 3, at 93.

7. *Id.*

8. *Id.* at 102.

9. *McCleskey*, 481 U.S. at 291; *see* OSHINSKY*, supra* note 3, at 106–07; *see also* Paterson, *supra* note 1.

10. On September 25, 1991, McCleskey died in an electric chair. OSHINSKY, *supra* note 3, at 106.

11. Sherod Thaxton, *Leveraging Death*, 103 J. CRIM. L. & CRIMINOLOGY 475, 483 (2013); *see* OSHINSKY, *supra* note 3, at 102; *see also* Tina Rosenberg, *The Deadliest D.A.*, N.Y. TIMES, July 6, 1995 (statements from former homicide prosecutor, Michael McGovern: "You can hold the defendant without bail, and it gives you leverage in negotiating guilty pleas. The defense attorney has to sit down with the client and say, 'You're looking at a possible death penalty.' He may want to cut a deal."); Susan Ehrhard, *Plea Bargaining and the Death Penalty: An Exploratory Study*, 29 JUST. SYS. J. 313 (2008) (citing THE DEATH PENALTY IN AMERICA (Bedau, H.A. ed., Oxford Univ. Press 1982)) ("Defense attorneys and prosecutors felt that the option to file a death notice puts the prosecution in a unique position of strength and affects the defense's decision regarding a plea in ways that a potential sentence of life or life without parole does not. A majority of defense attorneys said the death penalty gives prosecutors great leverage and is a powerful tool at the prosecution's disposal. While few prosecutors said the death penalty was used as leverage in their own county, some speculated that it was used in this way in other counties.").

12. North Carolina v. Alford, 400 U.S. 25, 31 (1970).

13. *See id.*; *see also* Bordenkircher v. Hayes, 434 U.S. 357, 362 (1978); Chaffin v. Stynchcombe, 412 U.S. 17, 31 (1973); United States v. Mitchell, 30 F.3d 1493 (5th Cir. 1994) (citing United States v. Jackson, 390 U.S. 570 (1968)).

14. *See* Albert W. Alschuler, *Plea Bargaining and the Death Penalty*, 58 DEPAUL L. REV. 671 (2008).

15. Gregg v. Georgia, 428 U.S. 153, 189 (1976) (citing Pennsylvania v. Ashe, 302 U.S. 51, 55 (1937); Williams v. Oklahoma, 358 U.S. 576, 585 (1959); Williams v. New York, 337 U.S. 241, 247 (1949)).

promise. Notably, states' lack of financial resources exacerbates this vulnerability, exposing a real obstruction to the requisite death-penalty trials. This proves constitutionally problematic, especially in the light of capital defendants being disproportionately impacted by, *inter alia*, insufficient resources to hire their own legal counsel, low IQ levels, and mental illness.[16]

This Article scrutinizes the constitutional validity of capital plea negotiations in the framework of deficient resources limiting death-penalty trials.[17] Likewise, it identifies the improper false threat effected by prosecutors pursuing death sentences in various cases where lacking the resources necessary to procure the particular sentence in every action.[18] The Article argues that, to avoid constitutionally-prohibited false threats, prosecutors must maintain the realistic ability to obtain the sentence in all actions in which it is purportedly sought. Alternatively stated, the Constitution's bar on false threats requires states maintain adequate resources to proceed to the death-penalty trial in every action prosecutors threaten that penalty.

Part I considers the increased exploitation of the death penalty to obtain guilty pleas from capital defendants; the recognition of Alford Pleas to allow those defendants who maintain their innocence to plead guilty to avoid death; and executions contingent on defendants' refusals to plead guilty, rather than their commission of particular crimes.

Part II scrutinizes the likelihood the prosecutor overcomes the free will of the defendant by threatening to seek a death sentence while lacking the resources necessary to secure the penalty. The sizable resources essential to capital prosecution are further explored. Absent a reasonable ability to procure the sentence, the death penalty is effectively an impermissible false threat. Therefore, should the state lack the resources necessary to conduct capital trials in all capital-eligible cases, this Article argues that prosecutors are constitutionally prohibited from leveraging plea bargains with a possible death sentence.

Part III considers the practice of offering pleas to avoid the death penalty in almost all death-eligible cases. The practice results in the execution of only those defendants who choose to exercise their trial rights. And, although plea bargaining routinely centers on a defendant avoiding a more serious sentence through negotiations with the State, "death is different."[19] Distinct from the avoidance of a lengthier sentence, avoidance of death considerably alters the justness of these negotiations. Permitting any defendant to avoid execution through pleading to a

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16. *See* OSHINSKY, *supra* note 3, at 89.

17. *See generally* RICHARD C. DIETER, DEATH PENALTY INFORMATION CENTER, SMART ON CRIME: RECONSIDERING THE DEATH PENALTY IN A TIME OF ECONOMIC CRISIS 14 (Oct. 2009) [hereinafter SMART ON CRIME].

18. *See* United States v. Duvall, 537 F.2d 15, 25 (2d Cir. 1976); *see also* Parker v. North Carolina, 397 U.S. 790, 802 (1970); United States v. Bye, 919 F.2d 6, 10 (2d Cir. 1990).

19. *See Gregg*, 428 U.S. at 188 (stating the Court "recognize[s] that the penalty of death is different in kind from any other punishment imposed under our system of criminal justice").

lesser sentence effectively utilizes the harshest penalty, death, to penalize the exercise of constitutional rights, rather than the commission of particular crimes.

Part IV explores procedural and ethical modifications to prevent prosecutors from inducing guilty pleas with the threat of death. Plea bargaining is an essential aspect of the United States criminal justice system. And the Constitution authorizes the State's imposition of death as a punishment for certain criminal acts.[20] Nonetheless, any government actor's attempt to utilize the death penalty to maintain leverage in a plea negotiation undermines both the Constitution's limits on false threats and the death penalty's role in the United States criminal justice system.[21] Through eliminating plea bargaining solely where the prosecution pursues a death sentence, jurors are given the power to determine whether defendants accused of the most heinous crimes deserve the harshest sentence. Should capital plea bargaining be so limited, the death penalty would sustain constitutionality as retribution for extreme acts of violence, rather than the result of a failed plea negotiation.

I. BACKGROUND

Through the acceptance of a guilty plea, defendants waive vital Fifth and Sixth Amendment rights,[22] and, therefore, coerced pleas undermine the prosecution's role in seeking justice.[23] Accordingly, involuntary confessions and guilty pleas are constitutionally barred.[24] The Court recognizes the voluntariness doctrine to mandate voluntary pleas resulting from defendants' free and unburdened decisions.[25] Evidence demonstrating any government actor "threatened, tricked, or cajoled" a defendant into agreeing to a plea and waiving their rights proves the plea involuntary.[26]

Because free will is intended to govern all decisions surrounding the statements of the accused, constitutional safeguards extend to protect not only statements, but also silence.[27] An individual should suffer no penalty for remaining silent, and should be induced to speak only where it is "the unfettered exercise of his own will."[28]

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20. *Id.* at 177 ("It is apparent from the text of the Constitution itself that the existence of capital punishment was accepted by the Framers. At the time the Eighth Amendment was ratified, capital punishment was a common sanction in every State.").

21. *Id.* at 183 ("The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders.").

22. *See* Hanson v. Phillips, 442 F.3d 789, 798 (2d Cir. 2006).

23. *See* STANDARDS FOR CRIMINAL JUSTICE, Pleas of Guilty, Standard 14-3.1 (AM. BAR ASS'N 1992); *see also* Berger v. United States, 295 U.S. 78, 88 (1935).

24. *E.g.*, Miranda v. Arizona, 384 U.S. 436 (1966).

25. *See* Parker v. North Carolina, 397 U.S. 790, 801 (1970) (citing Machibroda v. United States, 368 U.S. 487, 493 (1962)).

26. *Miranda*, 384 U.S. at 476.

27. *See* U.S. CONST. amend. V; *see also Miranda*, 384 U.S. at 440; Escobedo v. Illinois, 378 U.S. 478 (1964).

28. Malloy v. Hogan, 378 U.S. 1, 8 (1964).

The American legal system justifies this prohibition on coercive tactics, recognizing the inherent deprivation of the individual's free will.[29] Overcoming the accused's free will forces extreme deviations from the individual's established decision-making,[30] and, consequentially, undermines the very function of the criminal trial.[31] The use of involuntary confessions to decide criminal actions stands in direct conflict to the truth-seeking function of the criminal justice system.[32] Moreover, the government evades its vital role in proving the guilt of the accused when forcing the defendant to confess against his will.[33]

The voluntariness doctrine condemns not only "shocking" practices, but mandates government actors avoid all "threats or violence . . . direct or implied promises . . . [or the] exertion of any improper influence" when engaging with defendants.[34] Courts scrutinize the validity of methods by the "'totality of the circumstances surrounding the interrogation,' including an evaluation of the defendant's 'age, experience, education, background, and intelligence.'"[35] Voluntariness centers on the free will of the defendant.[36] The State holds the burden[37] of proving the defendant executed the plea "voluntarily, knowingly, and intelligently" while maintaining "sufficient awareness of the relevant circumstances and likely consequences."[38] Consequently, any pressure frustrating the defendant's free will renders the confession involuntary, and, therefore, constitutionally invalid.[39]

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29. *See* 22 AM. JUR. PROOF OF FACTS 2D § 1 (Originally published in 1980); *see also Miranda*, 384 U.S. at 476; Hanson v. Phillips, 442 F.3d 789, 799 (2d Cir. 2006).

30. It is impermissible for the accused to be "threatened, tricked, or cajoled into a waiver." *Miranda*, 384 U.S. at 476.

31. Justice White, in a dissenting portion of his opinion joined by three other justices, explained:

> [A]dmission of coerced confessions may distort the truth-seeking function of the trial upon which the majority focuses. More importantly, however, the use of coerced confessions, "whether true or false," is forbidden "because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth."

Arizona v. Fulminante, 499 U.S. 279, 293 (1991) (citing Rogers v. Richmond, 365 U.S. 534, 540–41 (1961)).

32. Blackburn v. Alabama, 361 U.S. 199, 206–07 (1960); *see also* Berger v. United States, 295 U.S. 78, 88 (1935) ("Thus, in cases involving involuntary confessions, this Court enforces the strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will.").

33. Chambers v. Florida, 309 U.S. 227, 235–38 (1940); *see also Blackburn*, 361 U.S. at 206–07; Watts v. Indiana, 338 U.S. 49, 54–55 (1949).

34. Malloy v. Hogan, 378 U.S. 1, 7 (1964) (citing Bram v. United States, 168 U.S. 532, 542 (1897)); *see also* Smith v. United States, 348 U.S. 147, 150 (1954); Ziang Sun Wan v. United States, 266 U.S. 1, 14–15 (1924); Hardy v. United States, 186 U.S. 224, 229 (1902).

35. People v. Dunbar, 958 N.Y.S.2d 764, 774–75 (2013), *aff'd*, 24 N.Y.3d 304 (2014) (quoting Fare v. Michael C., 442 U.S. 707, 725 (1979)).

36. *See* 22 AM. JUR. PROOF OF FACTS 2D § 2 (Originally published in 1980).

37. *See* Hardin v. Oklahoma, 649 P.2d 799, 801 (Okl. Crim. App. 1982).

38. Hanson v. Phillips, 442 F.3d 789, 798 (2d Cir. 2006) (citing Bradshaw v. Stumpf, 545 U.S. 175 (2005)).

39. *See* 22 AM. JUR. PROOF OF FACTS 2D § 2 (Originally published in 1980).

A. DEATH-PENALTY TRIALS ARE FISCALLY BURDENSOME

Although a death-row inmate's incarceration and execution are immensely costly, the greatest cost disparities between capital and non-capital sentences are inherent to the trial phase.[40] Capital trials' increased costs largely stem from the post-*Furman* regulation of capital sentencing.[41] The *Furman* court held "arbitrary infliction of severe punishments" unconstitutional to rule the death penalty a "cruel and unusual" punishment in the particular action.[42] As a result, the death penalty maintains constitutionality only where it is not arbitrarily or capriciously imposed.[43] This is best established through a bifurcated proceeding where the defendant's guilt is first determined, and the sentence is then considered independently.[44] After guilt is determined, the sentencing authority receives additional information relevant to the circumstances of the crime and the criminal to decide whether death is appropriate.[45]

These more stringent capital-sentencing guidelines prove fiscally burdensome.[46] As such, scrutiny of the expenses inherent to comparable capital and non-capital trials, in states authorizing the death penalty, demonstrates the monetary limitations severely obstructing the procurement of death sentences. By way of example, under Oregon law, anyone convicted of aggravated murder is eligible for the death sentence.[47] Yet, Oregon's death-penalty aggravated-murder trials cost an average of $1,117,265, whereas non-death aggravated-murder trials cost $315,159.[48] A death-penalty trial in Oklahoma costs approximately $700,000 more than a non-death murder trial.[49] Similarly, each death-penalty trial costs Nevada approximately $500,000 more than each non-death murder trial,[50] and Washington's death-penalty trials cost the state $1 million more than comparable non-death trials.[51]

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40. Carol S. Steiker & Jordan M. Steiker, *Part II: Report to the Ali Concerning Capital Punishment*, 89 TEX. L. REV. 367, 405 (2010).

41. Carol S. Steiker & Jordan M. Steiker, *Cost and Capital Punishment: A New Consideration Transforms an Old Debate*, 2010 U. CHI. LEGAL F. 117, 139 (2010).

42. Furman v. Georgia, 408 U.S. 238, 274 (1972).

43. Gregg v. Georgia, 428 U.S. 153, 188 (1976).

44. *Id*. at 195.

45. *Id*. at 191.

46. GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES, Guideline 9.1 (AM. BAR ASS'N 2003) [hereinafter ABA GUIDELINES].

47. OR. CONST. art I, § 40.

48. ALIZA B. KAPLAN ET AL., OREGON'S DEATH PENALTY: A COST ANALYSIS 41 (2016).

49. Samantha Vicent, *Costly Death Penalty Cases Strain State Recourses*, *Report Says*, TULSA WORLD (Apr. 29, 2017), https://www.tulsaworld.com/news/local/crime-and-courts/costly-death-penalty-cases-strain-state-resources-report-says/article_22ef00c3-e9c5-51f5-9166-e0aa79f8230d.html [https://perma.cc/D9HN-PBK2].

50. LEGISLATIVE AUDITOR, STATE OF NEVADA PERFORMANCE AUDIT: FISCAL COSTS OF THE DEATH PENALTY 10 (2014).

51. PETER A. COLLINS ET AL., AN ANALYSIS OF THE ECONOMIC COSTS OF SEEKING THE DEATH PENALTY IN WASHINGTON 4 (2015).

State and private entities' continued scrutiny of these costs demonstrate the understood effect on state budgets. The Northern California ACLU found records from a single death-penalty action in California demonstrating the trial costs exceeded $10 million.[52] Moreover, prior to Governor O'Malley's nullification of Maryland's death penalty, a study determined death-penalty trials cost Maryland $1.9 million more than comparable non-death trials.[53] An audit of the Kansas Department of Corrections demonstrated death-penalty appeals cost Kansas approximately twenty-one times more than non-death appeals.[54] It goes without saying, state actors remain aware of the negative monetary impact.

Fiscal strains extend beyond the costly trials to incarceration and execution costs, all of which burden the states' budgets.[55] By way of example, California's death penalty has been determined to cost the state $1.94 billion since 1978.[56] The state spends over $100 million annually on efforts to execute death-row inmates.[57] Florida's imposition of the death penalty has been determined to cost the state $51 million per year.[58]

Even in states where the death penalty maintains considerable support amongst the constituency, conducting the necessary capital trial in all death-eligible cases exceeds the particular county's resources.[59] In that regard, budgetary deficiencies forced Louisiana capital defendants to face death-penalty indictments in the absence of defense counsel.[60] Likewise, a rural Mississippi community of 10,500 people was forced to "raise[] taxes for three years and borrowed $150,000" in order to pay for defense counsel for two capital defendants.[61]

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52. NATASHA MINSKER, ACLU N. CALIF., THE HIDDEN DEATH TAX: THE SECRET COSTS OF SEEKING EXECUTION IN CALIFORNIA 1 (2008).

53. JOHN ROMAN ET AL., URBAN INST. JUSTICE POL'Y CTR, THE COST OF THE DEATH PENALTY IN MARYLAND 2 (2008).

54. LEGISLATIVE POST AUDIT COMMITTEE, STATE OF KANSAS LEGISLATIVE DIVISION OF POST AUDIT, PERFORMANCE AUDIT REPORT: COSTS INCURRED FOR DEATH PENALTY CASES: A KGOAL AUDIT OF THE DEPARTMENT OF CORRECTIONS 13 (2003).

55. "Prosecuting a death penalty case through a verdict in the trial court can cost the prosecution well over $1 million dollars (not to mention the expense incurred by the judiciary and the cost of defense counsel, which is almost always funded with taxpayer funds in a death penalty case)." Stan Garnett, *Death Penalty Not Practical in Colorado*, BOULDER DAILY CAMERA (Dec. 16, 2012), https://www.dailycamera.com/2012/12/14/da-death-penalty-not-practical-in-colorado/ [https://perma.cc/8ZHS-QBUV]; OSHINSKY, *supra* note 3, at 89.

56. Arthur L. Alarcón & Paula M. Mitchell, *Executing the Will of the Voters?: A Roadmap to Mend or End the California Legislature's Multi-Billion-Dollar Death Penalty Debacle*, 44 LOY. L.A. L. REV. S41, S69 (2011).

57. MINSKER, *supra* note 52.

58. S.V. Date, *The High Price of Killing Killers*, PALM BEACH POST, Jan. 4, 2000, at 1A.

59. *See* WELSH S. WHITE, LITIGATING IN THE SHADOW OF DEATH: DEFENSE ATTORNEYS IN CAPITAL CASES 146 (U. Mich. Press 2006).

60. Eli Hager, *Where the Poor Face the Death Penalty Without a Lawyer*, THE MARSHALL PROJECT (Nov. 28, 2017), https://themarshallproject.org/2017/11/28/where-the-poor-face-the-death-penalty-without-a-lawyer [https://perma.cc/D2L3-WMDN] (Louisiana leads the nation in wrongful convictions; since 2000, over 96% of the state's death sentences have been reversed).

61. Ronni Mott, *The Cost of Executions*, JACKSON FREE PRESS (Oct. 28, 2009), https://www.jacksonfreepress.com/news/2009/oct/28/mott-the-cost-of-executions/ [https://perma.cc/863T-Q46U].

The enormous monetary demands of capital trials lead to vast county-to-county sentencing disparities.[62] Death-row populations in Texas' three most populous counties (Harris, Dallas, and Bexar) are vastly inconsistent, though murder rates are similar.[63] Likewise, twenty-five percent of Ohio's death-sentences are secured in Hamilton County, where only nine percent of the state's murders occur.[64] Florida executes more criminals than almost any other state,[65] yet, seven of the twenty judicial districts impose the overwhelming majority of these death sentences.[66] Likewise, eighty-three percent of California's death-row population comes from three counties (Los Angeles, Riverside, and Orange).[67] Similarly, two Indiana counties produce more death sentences than all other counties combined.[68]

Decisions to seek the death penalty are made by county district attorneys.[69] These district attorneys continue to acknowledge the fiscal restraints obstructing their ability to secure death sentences.[70] Because the Constitution mandates death sentences be imposed through the appropriate capital-sentencing scheme,[71] where the county cannot afford the requisite capital trial, the death penalty is effectively impossible. Consequently, the death penalty is an impermissible false threat in counties lacking the resources for capital trials. Accordingly, capital plea negotiations maintain constitutional validity only where the county maintains the resources to conduct the necessary trials for every capital-eligible defendant.

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62. ROBERT C. DIETER, DEATH PENALTY INFORMATION CENTER, STRUCK BY LIGHTNING: THE CONTINUING ARBITRARINESS OF THE DEATH PENALTY THIRTY-FIVE YEARS AFTER ITS RE-INSTATEMENT IN 1976, at 23 (July 2011) [hereinafter STRUCK BY LIGHTNING]; Robert J. Smith, *The Geography of the Death Penalty and Its Ramifications*, 92 B.U. L. REV. 227, 228 (2012) (". . . [R]oughly 1% of counties in the United States returned death sentences at a rate of one or more sentences per year from 2004 to 2009.").

63. In 2005, there were 159 death-row inmates in Harris County, 49 in Dallas County, 37 in Bexar County, and re per-capita murder rates ranged from 7.3–8.4 murders per 100,000 people. RICHARD C. DIETER, DEATH PENALTY INFORMATION CENTER, THE 2% DEATH PENALTY: HOW A MINORITY OF COUNTIES PRODUCE MOST DEATH CASES AT ENORMOUS COSTS TO ALL 13 (2013) [hereinafter THE 2% DEATH PENALTY].

64. *Id.* (citing R. Willing & G. Fields, *Geography of the Death Penalty*, USA TODAY, Dec. 20, 1999).

65. Smith, *supra* note 62, at 231; DIETER, THE 2% DEATH PENALTY, *supra* note 63, at 4 ("Just four states (Texas, Virginia, Oklahoma, and Florida) have been responsible for almost 60% of the executions.")

66. Christopher Slobogin, *The Death Penalty in Florida*, 1 ELON L. REV. 17, 36 (2009).

67. ACLU NORTHERN CALIF., DEATH IN DECLINE '09: LOS ANGELES HOLDS CALIFORNIA BACK AS NATION SHIFTS TO PERMANENT IMPRISONMENT, at i (2010).

68. DIETER, STRUCK BY LIGHTNING, *supra* note 62.

69. *See also* ARIZ. R. CRIM. P. 15.1(i); NEV. SUP. CT. R. § 250(4)(c); WASH. REV. CODE § 10.95.040 (West 2015); IDAHO CODE ANN. § 18-4504A (West 2014). *See generally* Jonathan DeMay, *A District Attorney's Decision Whether to Seek the Death Penalty: Toward an Improved Process*, 26 FORDHAM URB. L.J. 767, 769 (1999).

70. "Prosecuting a death penalty case through a verdict in the trial court can cost the prosecution well over $1 million dollars . . . . my total operating budget for this office is $4.6 million and with that budget we prosecute 1,900 felonies, per year." Stan Garnett, *DA: Death Penalty Not Practical in Colorado*, BOULDER DAILY CAMERA (Dec. 16, 2012), https://www.dailycamera.com/2012/12/14/da-death-penalty-not-practical-in-colorado/ [https://perma.cc/8ZHS-QBUV].

71. Gregg v. Georgia, 428 U.S. 153, 191 (1976).

B. THE MOST HEINOUS CRIMINALS ESCAPE THE DEATH PENALTY THROUGH PLEADING GUILTY

The United States purportedly preserves the death penalty to penalize only the cruelest criminal actors[72] found deserving after a jury's careful consideration of "aggravating and mitigating circumstances."[73] Likewise, the penalty is not inherent to any particular category of crimes, but rather appropriately considered only where the crime is "so grievous an affront to humanity that the only adequate response may be the penalty of death."[74] Moreover, the Court holds pleas made for the sole purpose of avoiding death—even where a defendant maintains their innocence—a constitutional "voluntary and intelligent choice among the alternative courses."[75] In that regard, the Court interprets the Constitution to protect negotiations forcing the accused's life contingent on a guilty plea.[76]

Although the penalty is reserved for only the most dangerous offenders, many of the United States' most heinous criminals avoided execution by cooperating with the prosecution. Notably, Gary Leon Ridgeway—the Green River Killer—is one of the most prolific serial killers in American history.[77] He murdered forty-eight people and terrorized a community.[78] After taking dozens of lives, Ridgeway pled guilty, agreed to assist authorities in locating the remains of his victims, and, accordingly, incurred no threat of a jury sentencing him to death.[79]

Although notorious serial killer Ted Bundy was executed in 1990, he received a death sentence only after refusing to plead.[80] Likewise, "Unabomber" Theodore Kaczynski, who was responsible for widespread panic inherent to his sending bombs through the mail, avoided the death-penalty by accepting a plea to life-without-parole ("LWOP").[81] In the current system, killers like Ridgeway, Bundy, and Kaczynski are capable of avoiding the American criminal justice system's harshest penalty, despite the egregious nature of their crimes. Moreover, no jurors are involved in their sentencing. A few government actors determine the perpetrators' fate, circumventing the citizenry's right in the administration of this harsh sentence.

American media once considered Philadelphia's District Attorney, Lynne Abraham, the "deadliest D.A." in the country, due to her office's policy of

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72. OSHINSKY, *supra* note 3, at 40.

73. Tison v. Arizona, 481 U.S. 137, 157 (1987).

74. Enmund v. Florida, 458 U.S. 782, 797 (1982) (citing *Gregg*, 428 U.S. at 184).

75. *See* North Carolina v. Alford, 400 U.S. 25, 31 (1970) (citing Boykin v. Alabama, 395 U.S. 238, 242 (1969)); *see also* Machibroda v. United States, 368 U.S. 487, 493 (1962); Kercheval v. United States, 274 U.S. 220, 223 (1927).

76. *See Alford*, 400 U.S. at 31; *see also* Parker v. North Carolina, 397 U.S. 790, 795 (1970); Brady v. United States, 397 U.S. 742 (1970).

77. *See* Alschuler, *supra* note 14, at 675.

78. *See id.*

79. *See id.*

80. POLLY NELSON, DEFENDING THE DEVIL: MY STORY AS TED BUNDY'S LAST LAWYER 327 (1994).

81. William Glaberson, *Kaczynski Avoids a Death Sentence with a Guilty Plea*, N.Y. TIMES, Jan. 23, 1998, at A1.

seeking a death sentence in all capital cases.[82] Philadelphia prosecutors appeared willing to enforce the harshest sentence to penalize the harshest crimes.[83] Nonetheless, death penalties were seldom, if ever, imposed.[84] Pleas were negotiated in almost every case.[85] The "deadliest" prosecutors' utilization of guilty pleas to circumvent capital trials further demonstrates the pattern of executions contingent on defendants' choice to plead. Nonetheless, the penalty maintains constitutionality only as a punishment imposed by a sentencing authority given the "adequate information and guidance."[86]

Prosecutors working inside the office of Philadelphia's "deadliest D.A." assert "[e]very time [they] ask [for the death penalty], it's because [they] think it's appropriate."[87] The office was clear that the penalty was not sought unless the prosecutor "intend[ed] to get it."[88] Nonetheless, prosecutors contended they were willing to negotiate a plea in exchange for a lesser sentence in almost *every* case.[89] In short, prosecutors pursued the death penalty in almost every capital case which proceeded to trial, but the sentence proved avoidable so long as a guilty plea was accepted.[90]

As discussed above,[91] this capital-plea-bargaining structure effectively reserves death sentences for only those defendants who refuse to accept guilty pleas: those who proceed to trial.[92] Individuals are awarded with the escape of execution in exchange for pleading guilty. This effectively forces the death penalty to penalize only those defendants who refuse to plead guilty, rather than those who commit particularly heinous crimes.

C. FALSE CONFESSIONS AND FRAUDULENT TESTIMONY STEM FROM CAPITAL PLEA BARGAINING

Plea negotiations are customarily centered on offers of lesser sentences.[93] But death is different.[94] This remains true throughout the plea-bargaining process.[95]

82. White, *supra* note 59, at 147.
83. *See id.*
84. *See id.*
85. *See id.*
86. Gregg v. Georgia, 428 U.S. 153, 195 (1976).
87. Rosenberg, *supra* note 11.
88. *Id.*
89. With the exception of cases where the victim was a law enforcement agent, the office was willing to negotiate a plea with the defendant, resulting in only those defendants who did not accept a plea actually facing the death penalty. White, *supra* note 59, at 147.
90. *See id.* at 146–47.
91. *Supra* Part I, Section B.
92. Philadelphia prosecutors seek death in nearly all cases that go to trial but are willing to offer a lesser sentence in exchange for a plea. White, *supra* note 59, at 147.
93. *See* Kaplan, *supra* note 48, at 54.
94. *See* Gregg v. Georgia, 428 U.S. 153, 188 (1976) ("[T]he penalty of death is different in kind from any other punishment imposed under our system of criminal justice.").
95. "[T]he threat of a death penalty [i]s a factor to be given considerable weight in determining whether a defendant has deliberately waived his constitutional rights." Parker v. North Carolina, 397 U.S. 790, 809–10 (1970).

Evidence demonstrates innocent defendants are more likely to accept guilty pleas to avoid death, than to accept a guilty plea to merely escape a lengthier sentence.[96] Nonetheless, the Court holds defendants who maintain their innocence may plead guilty solely to avoid the possibility of death.[97]

Scrutiny of these particular pleas centers on the defendant's choice being "knowing and intelligent."[98] Therefore, defendant may constitutionally maintain his innocence, yet "knowingly and voluntarily" plead solely to avoid the possibility of death, "even if he is unwilling or unable to admit his participation in the acts constituting the crime."[99]

In 1998, a jury convicted John L. Lotter and his codefendant Thomas M. Nissen of murdering three individuals.[100] The Nebraska jury sentenced Lotter to death.[101] Conversely, Nissen cooperated with the prosecution to testify against Lotter, and he saved his own life.[102]

Nissen claimed Lotter was the defendant responsible for firing the fatal shot for each victim.[103] In order to furnish an appropriate sentence, the sentencing panel considered the evidence of Lotter's participation in the crime compared to Nissen's.[104] The panel found "Nissen's statements to investigators, as well as Nissen's agreement to testify against Lotter at trial, distinguished his conduct from Lotter's."[105] Further, the panel determined the death sentence appropriate for Lotter because—according only to Nissen's testimony—he fired the fatal shots.[106]

Nine years later, Nissen "signed an affidavit averring that his testimony in Lotter's trial regarding 'who fired the gun' was false."[107] In his recant, Nissen admitted he fired the shots killing the three victims.[108] In short, the sentencing panel unintentionally determined death was the appropriate sentence to penalize Lotter for Nissen's crimes. In denying Lotter's motion for post-conviction relief, the court stated, "[a] witness' testimony is not the result of unconstitutional coercion simply because it is motivated by a legitimate fear of a death sentence."[109]

96. *See* Ehrhard, *supra* note 11, at 313.

97. *See generally* North Carolina v. Alford, 400 U.S. 25, 39–40 (1970).

98. Miranda v. Arizona, 384 U.S. 436, 492 (1966).

99. *Alford*, 400 U.S. at 37 (holding that the choice was voluntary as the defendant "quite reasonably" chose to plead guilty to second-degree murder and receive a sentence of 30 years, rather than stand trial and the possibility of a death sentence).

100. *See* State v. Lotter, 771 N.W.2d 551, 555 (2009).

101. *See id.*

102. *See id.* at 555–56.

103. *See id.* at 556.

104. *See id.*

105. *See id.* at 556–57.

106. *See id.* at 555.

107. *Id.* at 558.

108. *See id.* at 558.

109. *Id.* at 565.

This case demonstrates the immense incentives for defendants to proffer perjured testimony in an attempt to save their own lives. Lotter would suffer the penalty for Nissen's wrongdoing. The penalty is execution. Defendants' attempts to avoid harsher sentences through accusing another are hardly a novel concept, but death is different.[110] Death is the harshest penalty of the criminal justice system, and it is absolute. The Court has consistently held the death penalty mandates the highest safeguards.[111] As such, capital plea negotiations require more stringent procedures.

II. LIMITED FINANCIAL RESOURCES RENDER THE DEATH-PENALTY AN IMPERMISSIBLE FALSE THREAT

Prosecutors maintain significant discretion over determining whether to pursue a death sentence in any particular case.[112] Prosecutors intending to pursue a death sentence are customarily required to file a concomitant notice of the intention to seek death.[113] Wielding the jury's power to proffer a death sentence in order to obtain a guilty plea is inappropriate,[114] but the Court does not hold pleas involuntary merely because a defendant was motivated by the fear of greater punishment—even where that greater punishment is execution.[115] Therefore, plea-bargaining is constitutionally and ethically permitted, post the filing of the notice of the intention to seek death.

The Constitution mandates the State provide defendants the opportunity to consider their circumstances and form "a voluntary and intelligent choice among the alternative courses of action."[116] The Court in *Brady* held that voluntariness prohibited pleas induced through "misrepresentations (including unfulfilled or

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110. *See* Gregg v. Georgia, 428 U.S. 153, 188 (1976).

111. *See id.*

112. Nicci Lovre-Laughlin, *Lethal Decisions: Examining the Role of Prosecutorial Discretion in Capital Cases in South Dakota and the Federal Justice System*, 50 S.D. L. REV. 550, 562 (2005) (citing Monroe Freedman, *Prosecutor's Discretion: Opting Against Death*, LEGAL TIMES (Oct. 16, 1995)).

113. 18 U.S.C. § 3593(a) (2018); ARIZ. R. CRIM. P. 15.1(i) (Arizona requires prosecutors file a notice of their intention to seek death within 60 days of the defendant's arraignment); GA. R. UNIFIED APP. P. II(C)(1) (2000) (district attorney must provide written notification to defendant of the intention to seek death and a copy of the written notification must be filed with the clerk of the superior court, who must provide a copy to the Georgia Supreme Court); NEV. SUP. CT. R. § 250(4)(c) (2014) ("No later than 30 days after the filing of an information or indictment, the state must file in the district court a notice of intent to seek the death penalty."); WASH. REV. CODE ANN. § 10.95.040 (West 2019) ("[T]he prosecuting attorney shall file written notice of a special sentencing proceeding to determine whether or not the death penalty should be imposed when there is reason to believe that there are not sufficient mitigating circumstances to merit leniency"); IDAHO CODE ANN. § 18-4504A (West 2019) ("A sentence of death shall not be imposed unless the prosecuting attorney filed written notice of intent to seek the death penalty with the court and served the notice upon the defendant or his attorney of record no later than thirty (30) days after entry of a plea.")

114. *See* United States v. Jackson, 390 U.S. 570, 592 (1968) (Marshall, J., dissenting).

115. *See* Corbitt v. New Jersey, 439 U.S. 212 (1978).

116. North Carolina v. Alford, 400 U.S. 25, 31 (1970) (citing Boykin v. Alabama, 395 U.S. 238, 242 (1969); Machibroda v. United States, 368 U.S. 487, 493 (1962); Kercheval v. United States, 274 U.S. 220, 223 (1927)).

unfulfillable promises)."[117] Threats of unlikely sentences likewise demonstrate an impermissible interference with the defendant's choice to plea.[118] This causes courts to grapple with the ethically troublesome practice of centering plea negotiations on the possibility of a death sentence.[119]

The influence of a possible death sentence holds "considerable weight" in determining whether or not a defendant voluntarily waived their rights.[120] Nonetheless, the Court has maintained that guilty pleas offered for the sole purpose of avoiding death do not "necessarily demonstrate that the plea of guilty was not the product of a free and rational choice."[121] The defendant maintains the free choice to either accept the prosecution's plea and guarantee life, or proceed to trial and incur the inherent risk of death.

A. SCARCE RESOURCES PROVE DEATH SENTENCES OVERWHELMINGLY UNATTAINABLE

In the light of the immense State resources required for capital trials, in the vast majority of death-eligible cases, it is effectively impossible for the prosecutor to actually obtain the death sentence at a capital trial.[122] Currently, the Court holds pleas proffered by defendants seeking to avoid the possibility of execution maintain constitutional validity.[123] The pleas are voluntary when "induced by the defendant's desire to limit the possible maximum penalty to less than that authorized if there is a jury trial."[124] This permits prosecutors to obtain pleas through negotiations leveraged by "hold[ing] the defendant without bail" and communicating to the defendant that their refusal to plead guilty will trigger a death-penalty trial.[125] The Court holds this method of obtaining guilty pleas from capital defendants constitutionally voluntary: a free choice of the defendant.[126]

When scrutinizing plea negotiations centered on avoiding death, the Court holds the State's threat of execution will not "necessarily" render the plea constitutionally involuntary.[127] The Constitution permits pleas motivated by the fear of

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117. Saxon v. Lempke, No. 09 Civ. 1057, 2014 WL 1168989, at *7 (S.D.N.Y. Mar. 21, 2014) (citing Brady v. United States, 397 U.S. 742, 755 (1970), *aff'd*, 618 F. App'x 10 (2d Cir. 2015)).

118. *See* United States v. Duvall, 537 F.2d 15, 25 (2d Cir. 1976).

119. *See* Alford v. North Carolina, 405 F.2d 340, 344 (4th Cir. 1968), *vacated sub nom.*, 400 U.S. 25 (1970); *see also* Brady v. United States, 397 U.S. 742, 751 (1970); Jackson, 390 U.S. at 592; United States v. Mitchell, 30 F.3d 1493 (5th Cir. 1994).

120. Parker v. North Carolina, 397 U.S. 790 (1970) (citing Tehan v. United States *ex rel.* Shott, 382 U.S. 406, 416 (1966); Johnson v. New Jersey, 384 U.S. 719, 727–29 (1966); Linkletter v. Walker, 381 U.S. 618 (1965)).

121. *Alford*, 400 U.S. at 31.

122. *See* White, *supra* note 59, at 146.

123. *See Alford*, 400 U.S. at 31.

124. *Parker*, 397 U.S. at 795; *see also Brady*, 397 U.S. at 751.

125. Rosenberg, *supra* note 11.

126. *Brady*, 397 U.S. at 755 ("[A] plea of guilty is not invalid merely because entered to avoid the possibility of a death penalty"); *see also Parker*, 397 U.S. at 795; *Alford*, 400 U.S. at 40.

127. *See Parker*, 397 U.S. at 795; *see also Brady*, 397 U.S. at 755.

greater punishment: a fear of a death sentence.[128] Nonetheless, constitutional voluntariness requires defendants maintain "sufficient awareness of the relevant circumstances and *likely* consequences."[129] To that end, constitutional "involuntariness" is demonstrated through the "surrender of constitutional rights influenced by considerations that the government *cannot properly* introduce."[130]

The prosecution's threats of particularly harsh sentences—especially where the sentence is improbable—convey an impermissible interference with the defendant's choice to plea.[131] The Court's *Brady* opinion recognized the State must demonstrate "a plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats . . . [, or] misrepresentations (including unfulfilled or unfulfillable promises)."[132] In that regard, prosecutors' admissions that insufficient resources impede their ability to try capital cases further demonstrates the constitutional difficulties triggered by plea negotiations leveraged with a potential death sentence.[133] In the light of the *Brady* Court's prohibition on "unfulfillable promises," prosecutors coerce pleas through asserting their pursuit of the death penalty, while lacking the resources necessary to proceed to the requisite death-penalty trial.[134]

The Court currently holds pleas proffered for the sole purpose of limiting the possible penalty—a possible death sentence—will not necessarily "demonstrate that the plea of guilty was not the product of a free and rational choice."[135] This interpretation fails to validate prosecutorial uses of the death penalty in the majority of plea negotiations.

Ethical guidelines prohibit prosecutors from threatening defendants with a sentence they do not reasonably believe will be brought.[136] Moreover, the Department of Justice explicitly bars prosecutorial efforts to seek or "threaten to seek" the death penalty "for the purpose of obtaining a more desirable negotiating position."[137] Consequently, a defendant does not offer a voluntary plea where a prosecutor influences that defendant's guilty plea acceptance with the threat of execution, but lacks the resources to advance a death-penalty trial.[138]

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128. Corbitt v. New Jersey, 439 U.S. 212, 223 (1978).

129. Hanson v. Phillips, 442 F.3d 789, 798 (citing *Bradshaw*, 545 U.S. at 175) (quoting *Brady*, 397 U.S. at 748) (internal quotation marks omitted) (emphasis added).

130. *Parker*, 397 U.S. at 802 (emphasis added).

131. *See id.*; *see also* United States v. Bye, 919 F.2d 6, 10 (2d Cir. 1990); United States v. Duvall, 537 F.2d 15, 25 (2d Cir. 1976).

132. Saxon v. Lempke, No. 09 Civ. 1057, 2014 WL 1168989, at *7 (S.D.N.Y. Mar. 21, 2014) (citing *Brady*, 397 U.S. at 755), *aff'd*, 618 F. App'x 10 (2d Cir. 2015).

133. White, *supra* note 59, at 146.

134. *Saxon*, 2014 WL 1168989, at *7.

135. North Carolina v. Alford, 400 U.S. 25, 31 (1970).

136. *See* STANDARDS FOR CRIMINAL JUSTICE § 14-3.1 (AM. BAR ASS'N 2018).

137. U.S. ATTORNEYS' MANUAL § 9-10.120 (U.S. DEP'T OF JUSTICE 2014).

138. *See* Parker v. North Carolina, 397 U.S. 790, 802 (1970) (Brennan, J., concurring) ("Thus the legal concept of 'involuntariness' has not been narrowly confined but refers to a surrender of constitutional rights influenced by considerations that the government cannot properly introduce.").

Scrutiny of the death penalty's role in the plea-bargaining process exposes coveted "financial savings" attributable to prosecutors' procuring guilty pleas in cases where a death sentence is purportedly sought.[139] Because death-penalty trials' costs substantially strain state budgets—outweighing the costs of non-death trials by as much as a $1 million[140]—the plea-bargaining process is overwhelmingly employed to enable prosecutors to avoid costly death-penalty trials while exploiting the sentence as a threat.[141]

Along that line, district attorneys have gone so far as to admit life without parole sentences provide "an additional prosecutorial weapon."[142] Extensive death-penalty trials "may be avoided if a murderer plea bargains for life-without-parole instead of risking the death penalty at trial."[143] Consequently, these LWOP pleas center on the defendant fearing the outcome of a trial the prosecution seeks to avoid.

In these negotiations, prosecutors and defense attorneys advise defendants that pleading is the sole remedy to avoid death.[144] But where prosecutors threaten to pursue death sentences in multiple plea negotiations, while lacking the resources necessary to proceed to the requisite capital trial in all subject cases, the threat is false.[145] Therefore, the lacking State resources render many of these pleas coerced by the false threat of an unattainable sentence.

Improper coercion manifests in the prosecutorial practice of improperly introducing a threat to induce defendants' acceptance of guilty pleas where the promise is unfillable.[146] But death is different.[147] In Texas, the state with the overwhelming majority of executions, prosecutors admit the financial burden of capital cases compels their willingness to offer pleas "in even the most aggravated cases."[148] In the same way, Philadelphia prosecutors reserve scarce resources through requesting the death penalty in almost every capital case tried, but removing the possibility for almost all defendants agreeing to plead guilty.[149]

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139. DIETER, SMART ON CRIME, *supra* note 17, at 16 (citing Scheidegger, *infra* note 212, at 13); *see also* WHITE, *supra* note 59, at 154.

140. *See* DIETER, STRUCK BY LIGHTNING, *supra* note 62, at 15 (citing ROMAN, *supra* note 53, at 2).

141. DIETER, SMART ON CRIME, *supra* note 17, at 16; *see also* WHITE, *supra* note 59, at 154.

142. Julian H. Wright, Jr., *Life-Without-Parole: An Alternative to Death or Not Much of A Life at All?*, 43 VAND. L. REV. 529, 549 (1990) (citing Telephone Interview with Robert Field, District Attorney for the Seventh Judicial District of Alabama (Feb. 8, 1989)).

143. *Id.*

144. DIETER, SMART ON CRIME, *supra* note 17, at 16; *see also* White, *supra* note 59, at 154.

145. "[T]he use of false information by police during an interrogation is deceptive and is a relevant factor indicating a possibility that the defendant's statements were made involuntarily." Commonwealth v. Monroe, 35 N.E.3d 677, 686 (2015) (citing Commonwealth v. Selby, 651 N.E.2d 843, 848 (1995)); *see also* United States v. Bye, 919 F.2d 6, 10 (2d Cir. 1990); United States v. Duvall, 537 F.2d 15, 25 (2d Cir. 1976).

146. *See Duvall*, 537 F.2d at 25; *see also Bye*, 919 F.2d at 10.

147. Gregg v. Georgia, 428 U.S. 153, 188 (1976).

148. WHITE, *supra* note 59, at 148.

149. *Id.* at 147 (discussing the Philadelphia prosecutorial practice of allowing any defendant absent those accused of killing a police officer to plead guilty in exchange for life without parole).

Unlike defendants, prosecutors are conscious of the improbability cases will proceed to trial, and fully understand the inadequate resources available to try every capital defendant.[150] This deceptive practice overcomes the defendant's intelligent decision-making power, rendering the plea involuntary.[151] In short, to maintain constitutional validity, prosecutors must maintain the resources to proceed to a death-penalty trial in every instance they have purported to pursue the sentence. Otherwise, the sentence is a false threat for the vast majority of defendants for whom the State could never afford to obtain a death sentence.

B. WHEN LACKING THE REQUISITE RESOURCES FOR A CAPITAL TRIAL, PROSECUTORS' INTENTION TO SEEK DEATH IS A CONSTITUTIONALLY-PROHIBITED FALSE THREAT

Prosecutorial schemes orchestrated to utilize the death penalty primarily to induce pleas, though common, are constitutionally invalid.[152] These actions convey an inappropriate interference with the defendant's choice to plead,[153] suggesting the plea should not meet the standards of the voluntariness doctrine and be withdrawn.[154]

The Constitution prohibits courts and government actors from obtaining or further using coerced confessions.[155] The State is required to prove all statements voluntary, free of coercion, and a product of the accused's free will.[156] Decisions to plead must establish the "free exercise of the defendant's will."[157]

Coercion undoubtedly manifests through physical violence and torture.[158] Nonetheless, actual violence is not required to prove coercion.[159] The court

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150. *Duvall*, 537 F.2d at 25 ("The prosecutor must have known, as the defendant did not, that no judge would impose indeed that no prosecutor would seek a sentence for the crimes here charged remotely approaching a hundred years, and that a hundred-year sentence thus was not 'possible,' in any real sense. Yet a defendant might fear at least that the prosecutor would ask for a very long sentence if he did not 'cooperate.'"); *see also Bye*, 919 F.2d at 10.

151. *See Duvall*, 537 F.2d at 25; *see also* North Carolina v. Alford, 400 U.S. 25, 31 (1970) (holding a plea voluntary where it "represents a voluntary and intelligent choice among the alternative courses of action open to the defendant"); United States v. Lester, 247 F.2d 496, 501 (2d Cir. 1957).

152. Parker v. North Carolina, 397 U.S. 790, 808 (1970) ("If a particular defendant can demonstrate that the death penalty scheme exercised a significant influence upon his decision to plead guilty, then, under Jackson, he is entitled to reversal of the conviction based upon his illicitly produced plea.") (citing United States v. Jackson, 390 U.S. 570, 584–85 (1968)).

153. *Id*. at 802 (citing Machibroda v. United States, 368 U.S. 487, 493 (1962)).

154. *Lester*, 247 F.2d at 501–02.

155. *See* Miranda v. Arizona, 384 U.S. 436, 462 (1966).

156. *See id.*; *see also* Hanson v. Phillips, 442 F.3d 789, 799 (2d Cir. 2006).

157. *Parker*, 397 U.S. at 803 (citing Haley v. Ohio, 332 U.S. 596, 606 (1948)).

158. A voluntary statement is one that is "the product of a 'rational intellect' and a 'free will,' and not induced by physical or psychological coercion." Commonwealth v. Monroe, 35 N.E.3d 677, 683 (2015) (quoting Commonwealth v. LeBlanc, 433 Mass. 549, 554 (2001)) (citing Commonwealth v. Tremblay, 460 Mass. 199, 207 (2011)).

159. Arizona v. Fulminante, 499 U.S. 279, 287 (1991); Culombe v. Connecticut, 367 U.S. 568, 574–75, (1961); Reck v. Pate, 367 U.S. 433, 440–41 (1961); Rogers v. Richmond, 365 U.S. 534, 540 (1961); Blackburn v. Alabama, 361 U.S. 199, 206 (1960); Payne v. Arkansas, 356 U.S. 560, 561 (1958); Watts v. Indiana, 338 U.S. 49, 52 (1949).

recognizes and prohibits psychological coercion.[160] Consequently, a "credible threat" of violence is sufficient to prove a statement coerced.[161] But death is different.[162] Confessions coerced through violence or threats of violence are constitutionally invalid,[163] yet the Court refuses to find a constitutional bar on guilty pleas induced by a threatened death sentence.[164]

The Fifth and Sixth Amendments' clear suppression of coercive tactics generates great controversy in the reasonableness of plea negotiations conducted in death-eligible cases.[165] Constitutionality is vulnerable where prosecutors influence the defendant's choice with the threat of execution, specifically to induce a guilty plea.[166] Pleas accepted through plea bargaining where a prosecutor utilizes the death penalty only to maintain leverage "unfairly burdens" the defendant's decision-making.[167] The threat of the death penalty along with promises of leniency may create an "atmosphere of intimidation" severely impacting the defendant's decision-making.[168] Demonstrating the defendant made a conscious choice to accept a particular guilty plea fails to prove the plea was constitutionally voluntary.[169] Should the threat of death overcome "the will of the defendant," it is properly considered outside the limits of the Constitution.[170]

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160. *Monroe*, 35 N.E.3d at 683.

161. *Fulminante*, 499 U.S. at 287 ("Our cases have made clear that a finding of coercion need not depend upon actual violence by a government agent; a credible threat is sufficient."); *see also Blackburn*, 361 U.S. at 206 ("[C]oercion can be mental as well as physical, and . . . the blood of the accused is not the only hallmark of an unconstitutional inquisition.").

162. *See* Gregg v. Georgia, 428 U.S. 153, 188 (1976).

163. *See* United States v. Jackson, 390 U.S. 570, 583 (1968) ("Congress cannot impose [the death] penalty in a manner that needlessly penalizes the assertion of a constitutional right.").

164. Brady v. United States, 397 U.S. 742, 747 (1970); Parker v. North Carolina, 397 U.S. 790, 795 (1970); North Carolina v. Alford, 400 U.S. 25, 40 (1970) (Brennan, J., dissenting).

165. *See* Ehrhard, *supra* note 11; *see also Alford*, 400 U.S. at 40 (Brennan, J., dissenting) ("[A] plea of guilty may validly be induced by an unconstitutional threat to subject the defendant to the risk to death . . . [this applies] even when the record demonstrates that the actual effect of the unconstitutional threat was to induce a guilty plea from a defendant who was unwilling to admit his guilt."); *Jackson*, 390 U.S. at 582 (stating "[t]he goal of limiting the death penalty to cases is [sic] which a jury recommends it is an entirely legitimate one. But that goal can be achieved without penalizing those defendants who plead not guilty and demand jury trial."); Alschuler, *supra* note 14; *Brady*, 397 U.S. at 742; *Parker*, 397 U.S. at 795.

166. *See Parker*, 397 U.S. at 802 (Brennan, J., concurring in part) ("[I]t has long been held that certain promises of leniency or threats of harsh treatment by the trial judge or the prosecutor unfairly burden or intrude upon the defendant's decision-making process. Even though the defendant is not necessarily rendered incapable of rational choice, his guilty plea nonetheless may be invalid."); *see also* WILLIAM E. RINGEL, SEARCHES AND SEIZURES ARRESTS AND CONFESSIONS § 25:5: Police conduct affecting voluntariness—Promises or threats to obtain cooperation (2d ed. 2019).

167. *Parker*, 397 U.S. at 802 (Brennan, J., concurring in part).

168. People v. Edwards, 274 A.D.2d 754, 759 (N.Y. App. Div. 2000), rev'd, 754 N.E.2d 169 (2001).

169. *Parker*, 397 U.S. at 803 (citing Haley v. Ohio, 332 U.S. 596, 606 (1948)).

170. Jimmie E. Tinsley, *Involuntary Confession: Psychological Coercion*, 22 AM. JUR. PROOF OF FACTS 2D 539 (1980).

The method of leveraging plea negotiations with the threat of execution[171] is psychologically coercive, hindering the exercise of free will like physical torture.[172] The Court condemns any practices proving "likely to exert such pressure upon an individual as to disable him from making a free and rational choice."[173] Nonetheless, the lack of limitations on this practice forces many capital defendants to face a difficult choice: either risk death through proceeding to trial, or waive constitutional rights by pleading guilty.[174]

The capital-defense attorney's role centers on counseling their client to accept any offer to avoid death.[175] And the coupling of two criminal justice tools—plea bargaining and the purported pursuit of a death sentence—has led prosecutors to utilize the death penalty to "force pleas and to force them quickly."[176] Because legal ethics mandate capital-defense attorneys take any action necessary to save their client's life,[177] defense attorneys are forced to counsel clients—post the filing of a death notice—to accept a plea and maintain the guilty plea "knowingly, freely, and voluntarily" in order to avoid death.[178] These pleas remain constitutionally valid.[179] As such, the death penalty is manipulated into a prosecutorial tool beneficial for encouraging and even pressuring defendants to plead guilty, rather than a penalty imposed by an informed jury.[180]

C. DEATH-LEVERAGED PLEA NEGOTIATIONS INCREASE WRONGFUL CONVICTIONS

Improperly employing the death penalty as a prosecutorial bargaining chip unreasonably pressures innocent defendants to plead guilty.[181] Accused parties are encouraged to plead guilty for the sole purpose of saving their lives.[182] And this problem is well understood. In *North Carolina v. Alford*, the Court held pleas voluntary even where defendants maintain their innocence while pleading guilty

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171. Rosenberg, *supra* note 11.

172. People v. Richter, 221 N.W.2d 429, 432 (1974).

173. Miranda v. Arizona, 384 U.S. 436, 464–65 (1966) (citing Lisenba v. California, 314 U.S. 219, 241 (1941); Ashcraft v. Tennessee, 322 U.S. 143 (1944); Malinski v. New York, 324 U.S. 401 (1945); Spano v. New York, 360 U.S. 315 (1959); Lynumn v. Illinois, 372 U.S. 528 (1963); Haynes v. Washington, 373 U.S. 503 (1963)).

174. Alford v. North Carolina, 405 F.2d 340, 344 (4th Cir. 1968), *vacated sub nom.*, 400 U.S. 25 (1970).

175. *See generally* ABA GUIDELINES, *supra* note 46, Guideline 4.1; *see also* White, *supra* note 59, at 146–63.

176. Ehrhard, *supra* note 11, at 316.

177. *See* ABA GUIDELINES, *supra* note 46, at 1008, 1010.

178. *Id.*

179. Brady v. United States, 397 U.S. 742, 751 (1970) (holding pleas made solely to avoid the death penalty as constitutionally valid).

180. Corbitt v. New Jersey, 439 U.S. 212 (1978).

181. Parker v. North Carolina, 397 U.S. 790, 809 (1970) (discussing the "clear danger that the innocent, or those not clearly guilty, or those who insist upon their innocence, will be induced nevertheless to plead guilty").

182. *Id.*

in an effort to escape the threat of execution.[183] Unsurprisingly, a possible death sentence encourages defendants to both falsely confess and furnish false testimony.[184]

Plea bargaining in death penalty cases is defined by the life or death choice.[185] Even should the facts and evidence guide the defense attorney to advise their client against the acceptance of a plea, where death is sought, the defense counsel is ethically mandated to advise his client to accept any offer, notwithstanding the reasonableness of the particular penalty, in order to save their client's life.[186]

Recent exonerations of individuals who confessed in order to avoid the possibility of a death sentence are indicative of the increase in false confessions and wrongful convictions inherent to employing the death penalty as leverage during plea negotiations.[187] This further undermines the penalty's true purpose and effectiveness.

III. LIFE VULNERABLE TO EXERCISE OF CONSTITUTIONAL RIGHTS

The Constitution assures all criminal defendants the right to trial by an unbiased jury of their peers.[188] But through the plea-bargaining process, a defendant waives his right to a jury trial,[189] pleads guilty to the accused crime, and receives a lesser sentence.[190] The trial insulates the fact-finding portion of the criminal justice process for a jury's determination,[191] whereas plea bargaining absolves the Government's responsibility to prove the defendant's wrongdoing beyond a reasonable doubt.[192]

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183. *See* Joseph L. Hoffmann, et. al., *Plea Bargaining in the Shadow of Death*, 69 FORDHAM L. REV. 2313, 2324 (2001) (citing *Alford*, 400 U.S. at 30).

184. Thaxton, *supra* note 11, at 483 (citing Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 544–46 (2005); Paul Hammel, *'Beatrice 6' Cleared; '100 Percent Innocent,'* OMAHA WORLD-HERALD, Jan. 27, 2009, at B1); *see also* State v. Lotter, 771 N.W.2d 551, 556–57 (Neb. 2009).

185. *See* Ehrhard, *supra* note 11, at 314.

186. *Id.*

187. *See, e.g.*, Catherine Huddle & Joe Duggan, *Five in '85 murder case granted pardons*, LINCOLN JOURNAL STAR (Jan. 27, 2009), *available at* https://journalstar.com/news/local/five-in-murder-case-granted-pardons/article_d796e601-22b1-57b3-bef6-75066bdf3c62.html [https://perma.cc/VQR9-BTHM] ("What bothers many outside observers is the idea that five people would plead guilty to a crime they didn't commit. All now say they cut deals with the prosecution to avoid death sentences or long prison terms."); *see also* Alanna Durkin Richer, *Norfolk Four Pardoned in Rape and Killing*, ASSOCIATED PRESS (Mar. 21, 2017), *available at* https://www.mercurynews.com/2017/03/21/norfolk-four-pardoned-in-rape-and-killing-sailors-confessions-coerced/ [https://perma.cc/7DPQ-9E74] (Four former members of the U.S. Navy referred to as the "Norfolk Four" falsely confessed in the intent to avoid the possibility of a death sentence. The men were pardoned after DNA evidence proved their innocence.).

188. U.S. CONST. amend. VI; *see also* Duncan v. Louisiana, 391 U.S. 145, 159–62 (1968).

189. *See* United States v. Jackson, 390 U.S. 570, 583 (1968).

190. Sarah Breslow, *Pleading Guilty to Death: Protecting the Capital Defendant's Sixth Amendment Right to a Jury Sentencing After Entering a Guilty Plea*, 98 CORNELL L. REV. 1245, 1259 (2013) (citing Timothy Sandefur, *In Defense of Plea Bargaining*, 26 REGULATION 28 (2003)).

191. *Id.* at 1249.

192. *See* Arizona v. Fulminante, 499 U.S. 279, 293–94 (1991) (citing Rogers v. Richmond, 365 U.S. 534, 540–41 (1961)).

Prosecutors are prohibited from "reward[ing] [a defendant] for waiving a fundamental constitutional right, or impos[ing] a harsher penalty for asserting it."[193] Death is different.[194] In the vast majority of capital cases in exchange for a guilty plea and forgone trial rights, the State rewards defendants with the eradication of the death penalty.[195] Approximately seventy-five percent of defendants executed in the past forty years would have avoided the penalty, not by abstaining from their criminal activity, but instead by merely accepting the prosecution's offer to plead guilty.[196]

A. DEFENDANTS OVERWHELMINGLY AVOID EXECUTION THROUGH PLEADING GUILTY; THE SENTENCE IS EFFECTIVELY A PENALTY FOR PROCEEDING TO TRIAL

The death sentence as a penalty for murder has an extensive history.[197] The concept of a capital punishment scheme within the American criminal justice construct was designed and accepted by the Framers of the Constitution.[198] During the period in which the Constitution was ratified, the death penalty was a common-sanction practice in every state in the union.[199] For all that, the Constitution demands the sentence be "reserved for the worst of crimes" and "limited in its instances of application."[200]

The current approach to death sentencing, by even adamant supporters, suggests its retributive value overwhelmingly defunct. As discussed above,[201] Lynne Abraham led the Philadelphia D.A.'s office to pursuing the death penalty in almost every death-eligible case as she believed the sentence to be "manifestly correct."[202] Abraham considered the death penalty "the appropriate response to horrible crime, and the right thing to do for the families of murder victims."[203] Yet, her office was willing to forgo the [death] sentence in exchange for a guilty plea in almost all of her office's cases.[204] While Abraham served as D.A., Pennsylvania failed to have the greatest number of death row inmates, but rather had the largest percentage of inmates serving a life sentence without the possibility

193. Hynes v. Tomei, 706 N.E.2d 1201, 1204 (N.Y. 1998) (citing People v. Michael A.C., 261 N.E.2d 620, 625 (1970)). *But cf.* Chaffin v. Stynchcombe, 412 U.S. 17, 31 (1973) (holding plea negotiations constitutional even where the bargaining affects a defendant's exercise of constitutional rights by causing lengthier sentences to result from the refusal to plead guilty).

194. *See* Gregg v. Georgia, 428 U.S. 153, 188 (1976).

195. *See* Alschuler, *supra* note 14.

196. *Id.* at 672.

197. *See id.* at 671–72.

198. *Gregg*, 428 U.S. at 154.

199. *Id.* at 177.

200. Kennedy v. Louisiana, 554 U.S. 407, 446–47 (2008).

201. *See supra* note 81.

202. Rosenberg, *supra* note 11.

203. *Id.*

204. WHITE, *supra* note 59, at 147.

of parole.[205] In like manner, New Mexico tried approximately half of the 211 death penalty cases filed from July 1, 1979, through December 31, 2007.[206] The remaining defendants avoided a death sentence by accepting a guilty plea.[207]

Although these LWOP sentences effectively end the defendants' free life, [208] none of the death-penalty safeguards apply.[209] Exonerated Orleans Parish death-row inmate John Thompson stated he "was blessed to be on Death Row because it gave [him] access to attorneys, who eventually proved [his] innocence."[210] Thompson further stated that if he had not been "given a death sentence, [he]'d still be in Angola."[211]

A guilty plea severely limits the defendant's ability to appeal.[212] Moreover, following a guilty plea, sentencing decisions often rest in the hands of a judge rather than a jury.[213] The Court has instituted a multitude of safeguards for defendants sentenced to death.[214] But, where capital defendants avoid the death penalty through pleading guilty,[215] these safeguards are not triggered.[216]

After pleading guilty, the defendant loses the right to the automatic appeal inherent to a death sentence.[217] A case considering a criminal activity deserving of death and therefore mandating further consideration is exempted simply because

205. *See* Rosenberg, *supra* note 11.

206. Marcia J. Wilson, *The Application of the Death Penalty in New Mexico, July 1979 through December 2007: An Empirical Analysis*, 38 NEW MEX. L. REV. 255, 268 (2008) (101 of the 203 cases (49.7%) were resolved by plea bargains).

207. *Id.*

208. *See* Graham v. Florida, 560 U.S. 48, 69 (2010) ("As for the punishment, life without parole is 'the second most severe penalty permitted by law.'") (quoting Harmelin v. Michigan, 501 U.S. 957, 1001 (1991)).

209. *See* Furman v. Georgia, 408 U.S. 238, 274 (1972) (holding the death penalty is constitutional only when particular safeguards are in place); *see also* Hoffmann, *supra* note 183, at 2318.

210. Jed Lipinski, *Death Row Exoneree Files Request For Federal Investigation Of Orleans DA's Office*, TIMES PICAYUNE, NOLA.COM (Aug. 2, 2016), https://www.nola.com/news/crime_police/article_32f0da3b-bde7-5938-9a76-8761aa817a16.html [https://perma.cc/APY8-ENTF].

211. *Id.*

212. Kent S. Scheidegger, *The Death Penalty and Plea Bargaining to Life Sentences* 14 (Criminal Justice Legal Found., Working Paper No. 09-01, 2009) (citing LaFave, W. R. et al., CRIMINAL PROCEDURE (3d ed. 2007)).

213. *See* Breslow, *supra* note 190, at 1264 (citing Va. Code. Ann. § 19.2-264.2); *see also* Thomas W. Traxler, Jr., Comment, *Reconciling the South Carolina Death Penalty Statute with the Sixth Amendment*, 60 S. C. L. REV. 1031, 1031–32 (2009).

214. "When a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed." Gregg v. Georgia, 428 U.S. 153, 187 (1976) (discussing the safeguards against "arbitrariness and caprice") (citing Powell v. Alabama, 287 U.S. 45, 71 (1932); Reid v. Covert, 354 U.S. 1, 77 (1957)).

215. WHITE, *supra* note 59, at 156 (discussing the challenging decision to choose between the possibility of death or avoiding death and serving a life sentence without parole).

216. *See* Breslow, *supra* note 190, at 1264.

217. *See Gregg*, 428 U.S. at 204–06, 222–24; Proffitt v. Florida, 428 U.S. 242, 258–59 (1976); ABA STANDARDS FOR CRIMINAL JUSTICE, The Defendant's Right to Appeal From Conviction in a Criminal Case, Standard 21-1.1 (AM. BAR ASS'N 1980).

that defendant chooses to forego the capital trial.[218] Moreover, in death-eligible cases, this plea is regularly for a life sentence without the possibility of parole.[219] The defendant whom prosecutors seek a death sentence against avoids death through plea negotiations, forcing him to accept a similarly life-altering sentence,[220] yet waives all protections.[221] Unsurprisingly, LWOP sentences have grown rapidly and continue to lack oversight.[222]

The Court recognized constitutional difficulties inherent to procuring pleas contingent on the avoidance of a death sentence in *United States v. Jackson*.[223] There, the Court struck down the death provision of the Federal Kidnapping Act as unconstitutional, finding the "imposition of the death sentence only upon a jury's recommendation" effectively made "the risk of death the price of a jury trial."[224]

In that regard, the only way to guarantee plea agreements do not force defendants to exchange their Sixth Amendment rights for life is for plea negotiations to be limited to only those circumstances where death is not sought. Alternatively stated, a constitutional safeguard requiring capital-eligible cases be resolved through trial, post prosecutors' pursuit of death, proscribes improper plea-bargaining in death-eligible cases. Otherwise, any death-eligible plea negotiation potentially renders "the risk of death the price of a jury trial."[225]

B. DEFENDANTS' CONSTITUTIONAL RIGHTS ARE UNREASONABLY BURDENED BY THE IMPERMISSIBLE FALSE THREAT OF EXECUTIONS

The Constitution prohibits plea bargaining methods that encourage the forfeiture of constitutional rights in exchange for mitigating the harshness of a particular sentence.[226] The court further bars Government actors utilizing methods that effectively "offer[] an individual a reward for waiving a fundamental constitutional right, or impose[] a harsher penalty for asserting it."[227] Nonetheless, Warren McCleskey, defendant from the landmark Supreme Court case

218. Graham v. Florida, 560 U.S. 48, 102 (2010) ("The Constitution gives special protection to capital defendants because the death penalty is a uniquely severe punishment that must be reserved for only those who are 'most deserving of execution.'").

219. *See generally* Hoffmann, *supra* note 183, at 2322.

220. *See Graham*, 560 U.S. at 69 (holding "life without parole sentences share some characteristics with death sentences that are shared by no other sentences").

221. Breslow, *supra* note 190, at 1264 ("When a defendant pleads guilty, he or she loses access to many of these procedural safeguards.").

222. "[T]he number of LWOP sentences tripl[ed] from 12,453 in 1992 to over 41,000 presently." William W. Berry III, *Life-with-Hope Sentencing: The Argument for Replacing Life-Without-Parole Sentences with Presumptive Life Sentences*, 76 OHIO ST. L.J. 1051, 1054–55 (2015).

223. *See generally* United States v. Jackson, 390 U.S. 570 (1968).

224. Brady v. United States, 397 U.S. 742, 746 (1970) (citing *Jackson*, 390 U.S. at 582).

225. *Id.*

226. *See Jackson*, 390 U.S. at 582.

227. Hynes v. Tomei, 706 N.E.2d 1201, 1204 (N.Y. 1998) (citing People v. Michael, 261 N.E.2d 620 (N.Y. 1970)).

McCleskey v. Kemp, would have never had his case heard by the Court had he accepted the prosecution's earlier offer to plead to life without parole.[228]

McCleskey demonstrates the Sixth Amendment violations inherent to these particular plea negotiations. Even where a defendant is determined to have knowingly and voluntarily accepted a plea with the intention of avoiding a death sentence,[229] the plea negotiation remains constitutionally invalid under the Sixth Amendment. Constitutional restraints on plea negotiations extend to suppress not merely coercion, but any practice which "needlessly encourages" defendants to plea and waive their constitutional rights to a jury trial.[230] Any government attempt to entice defendants to waive a constitutional right is "plainly invalid."[231] Nonetheless, should McCleskey have simply accepted the prosecution's offer and forgone his right to a trial, he would have been rewarded with his life.[232]

The Constitution prohibits the States' imposing a penalty for the exercise of constitutional rights.[233] As a result, the prosecution accepting a defendant's waiver to a right to a jury trial to rule out any possible death sentence forces an "impermissible burden" on the defendant's exercise of constitutional rights.[234] The practice "needlessly chill[s] the exercise of basic constitutional rights," rendering it impermissible.[235]

1. UNREASONABLE BURDENS

Constitutional rights have very little effective power where a citizen's life is vulnerable to their implementation.[236] Constitutional validity of plea negotiations in capital cases is not determined by whether the suppression of constitutional rights is "'incidental' rather than intentional."[237] The scrutiny rests on the necessity of the effect.[238] If it is unnecessary, it is excessive, and, therefore, constitutionally invalid.[239]

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228. *See* OSHINSKY, *supra* note 3, at 106.

229. Parker v. North Carolina, 397 U.S. 790, 795 (1970); *see also Brady*, 397 U.S. at 754–57 (discussing the intelligent and voluntary decision of the defendant to choose to plea rather than a death penalty trial).

230. *See Jackson*, 390 U.S. at 582; *see also Hynes*, 706 N.E.2d at 1205; Alford v. North Carolina, 405 F.2d 340, 344, *vacated sub nom.*, 400 U.S. 25 (1970).

231. *See* United States v. Mitchell, 30 F.3d 1493, at *5 (5th Cir. 1994).

232. *See* OSHINSKY, *supra* note 3, at 106.

233. *See* Griffin v. California, 380 U.S. 609, 614 (1965); *see also* Hoffmann, *supra* note 183, at 2318.

234. *See Jackson*, 390 U.S. at 583 (citing Laboy v. New Jersey, 266 F. Supp. 581, 584 (D.N.J. 1967); *Griffin*, 380 U.S. at 614) ("A procedure need not be inherently coercive in order that it be held to impose an impermissible burden upon the assertion of a constitutional right.").

235. *Jackson*, 390 U.S. at 582.

236. Alschuler, *supra* note 14, at 674.

237. Commonwealth v. Brown, 26 A.3d 485, 505 (Pa. Super. Ct. 2011).

238. *Id.* (citing *Jackson*, 390 U.S. at 582).

239. *Id.*

Plea bargaining is an accepted practice:[240] a cornerstone of the American criminal justice system.[241] The plea negotiation process unavoidably pressures defendants to abandon their rights and plead guilty. The government is constitutionally permitted to encourage pleas with beneficial offers.[242] Nonetheless, the practice is absolved of all constitutionality where the plea negotiation forces an unnecessary burden on the defendant's rights.[243]

Defendants in counties where prosecutors utilize death sentences to maintain leverage in plea negotiations face a challenging decision: risk their lives and proceed to trial, or accept the prosecution's offer to plead guilty.[244] Plea negotiations where execution is a condition inherent to the jury trial unnecessarily "deter[s] the exercise of the right to a jury trial guaranteed by the Sixth Amendment."[245] The negotiation is overly burdensome on the defendant's constitutional rights and therefore constitutionally invalid.[246]

2. DISCOURAGING THE EXERCISE OF CONSTITUTIONAL RIGHTS

The Court is consistent in holding plea negotiations a constitutionally valid process.[247] Presenting defendants with beneficial alternatives possibly discourages the exercise of constitutional rights.[248] That being said, it is an inevitable feature of any legal system that facilitates plea negotiations.[249] Nonetheless, prosecutors are prohibited from enabling a defendant to avoid the threat of execution by "abandoning his right to contest his guilt before a jury."[250]

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240. Hynes v. Tomei, 706 N.E.2d 1201, 1206 (1998); *see also Jackson*, 390 U.S. at 570.

241. *See* Breslow, *supra* note 190, at 1259 (2013) ("Ninety-four percent of those sentenced as felony offenders in state court plead guilty to the crimes with which they are charged. The criminal justice system relies on guilty pleas to function efficiently and effectively."); *see also* Bordenkircher v. Hayes, 434 U.S. 357, 362 (1978); Blackledge v. Allison, 431 U.S. 63, 71 (1977).

242. U.S. v. Mezzanatto, 513 U.S. 196, 209–10 (1995); *see also* Corbitt v. New Jersey, 439 U.S. 212, 222–23 (1978).

243. *Hynes*, 706 N.E.2d at 1206; *see also Jackson*, 390 U.S. at 582.

244. Alford v. North Carolina, 405 F.2d 340, 344 (1968), *vacated sub nom.*, 400 U.S. 25 (1970); *cf.* United States v. Mitchell, 30 F.3d 1493, 1493 (1994) (holding it an impermissible burden on the defendant's constitutional rights to "expose the defendant to the death penalty *only* upon conviction by a jury") (emphasis added).

245. *Alford*, 405 F.2d at 344.

246. *Jackson*, 390 U.S. at 572.

247. *See, e.g.*, Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978); Brady v. United States, 397 U.S. 742, 751 (1970).

248. *See* Chaffin v. Stynchcombe, 412 U.S. 17, 31 (1973); *see also Hayes*, 434 U.S. at 364; *cf. Mitchell*, 30 F.3d at 1493 ("[A] defendant cannot trade his right to a jury trial to safeguard his life, neither can he barter away his rights to protect his liberty.").

249. *See Chaffin*, 412 U.S. at 31; *see also Hayes*, 434 U.S. at 364; *cf. Mitchell*, 30 F.3d at 1493 ("[A] defendant cannot trade his right to a jury trial to safeguard his life, neither can he barter away his rights to protect his liberty.") (citing *Jackson*, 390 U.S. 570).

250. *See Mitchell*, 30 F.3d at 1493; *see also Jackson*, 390 U.S. at 572. *But see Chaffin*, 412 U.S. at 31 (discussing the "discouraging effect on the defendant's assertion of his trial rights" inherent to the likelihood of lengthier sentences contingent on the refusal to waive the right to a jury trial and plead guilty as an "inevitable attribute of any legitimate system which tolerates and encourages the negotiation of pleas") (citing *Brady*, 397 U.S. at 751); *Brady*, 397 U.S. at 748–49 (holding a plea constitutionally valid where the defendant "preferred to

Along that line, the *Jackson* Court struck down the application of the death penalty where it "needlessly encourages" defendants to plead guilty and waive their constitutional rights to a jury trial.[251] The Court interpreted the approach as impermissible because it "discourage[d] assertion of the Fifth Amendment right not to plead guilty and [] . . . deter[ed] exercise of the Sixth Amendment right to demand a jury trial."[252] Though the practice did not necessarily result in coerced pleas, the mere effect of encouraging defendants to plead guilty and waive vital constitutional rights, rendered the pleas constitutionally invalid.[253]

Plea negotiations centered on the avoidance of death are improperly subjected to the scrutiny of coercive tactics.[254] It is insufficient to convey constitutionality by proving the defendant and his counsel freely bargained for the guilty plea.[255] A negotiation—free of coercion—is nonetheless constitutionally invalid where the government impermissibly burdens the defendant's exercise of constitutional rights.[256] Therefore, it is imperative constitutional safeguards are implemented for capital plea negotiations. To maintain constitutionality, these negotiations need be limited to only those circumstances where the prosecution adequately and honestly conveys death is not being sought.

IV. LIMITING PLEAS FOR LIFE: PROHIBITING PLEA BARGAINING IN DEATH-PENALTY CASES

LWOP sentences have tripled in the United States since 1992.[257] New Mexico, for example, convicts about half of capital defendants through plea negotiations, rather than jury trials.[258] And those defendants who avoid a trial by pleading guilty avoid any possibility of a death sentence.[259] Consequently, the likelihood

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plead guilty and thus limit the penalty to life imprisonment rather than to elect a jury trial which could result in a death penalty").

251. *See Jackson*, 390 U.S. at 583.

252. *See id*. at 581.

253. *See id*.; *see also* Joseph G. Cook, CONSTITUTIONAL RIGHTS OF THE ACCUSED § 16:5 (3d ed. 2019). *But see Brady*, 397 U.S. at 750 (holding the plea maintained constitutional validity even if it were determined the defendant plead guilty solely to avoid the death penalty as it was merely "a 'but for' cause of his plea").

254. *See Mitchell*, 30 F.3d at 1493.

255. *Id*.; *see also Jackson*, 390 U.S. 570 at 571–74. *But see* North Carolina v. Alford, 400 U.S. 25, 37, 38 (1970); *Chaffin*, 412 U.S. at 31; Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978).

256. *See Mitchell*, 30 F.3d at 1493; *see also Jackson*, 390 U.S. 570 at 571–74. *But see Brady*, 397 U.S. at 758 (holding that "[a]lthough Brady's plea of guilty may well have been motivated in part by a desire to avoid a possible death penalty, we are convinced that his plea was voluntarily and intelligently made and we have no reason to doubt that his solemn admission of guilt was truthful"); *Hayes*, 434 U.S. at 364; *Alford*, 400 U.S. at 37; *Chaffin*, 412 U.S. at 31.

257. Berry, *supra* note 222, at 1054–55.

258. Marcia J. Wilson, *The Application of the Death Penalty in New Mexico, July 1979 through December 2007: An Empirical Analysis*, 38 NEW MEX. L. REV. 255, 268 (2008); White, *supra* note 59, at 145.

259. *See generally* White, *supra* note 59, at 147 (discussing the Philadelphia prosecutorial practice of allowing any defendant absent those accused of killing a police officer to avoid the death penalty through a plea negotiation).

of execution is determined primarily by the method in which the defendant's case is handled—an accepted guilty plea or a jury trial—rather than the particular crime committed.[260]

Capital plea negotiations effectively demand capital defendants choose between forgoing their constitutional rights and pleading guilty, or proceeding to a trial while a death notice has been filed.[261] The Constitution prohibits a criminal justice procedure that enforces the penalty of death on only those defendants who exercise particular rights.[262] The prosecution's withdrawal of a death sentence notice following the defendant's guilty plea burdens a defendant's Sixth Amendment rights.[263] The prosecutor effectively changes the sentence sought in exchange for the defendant relinquishing his Sixth Amendment trial rights.

Because the Court traditionally distinguishes death from other penalties, the modification of plea bargaining in death-penalty cases is appropriate.[264] Although the prosecution's use of more substantial sentences as leverage customarily fails to render a defendant's plea coerced,[265] death is different.[266] Faced with the harshest of sentences, pressure to forego trial rights is unavoidable.[267]

A. PREVENT FALSE DEATH-PENALTY THREATS THROUGH PROCEDURALLY BARRING ALL PLEA BARGAINING IN CAPITAL CASES

The seriousness of the offense or the sufficiency of the evidence to convey proof of guilt appropriately govern prosecutorial decisions to seek death.[268] This system should parallel a jury's decision to avoid a death sentence because the offense lacks the seriousness necessary to mandate a death sentence, or the evidence does not demonstrate guilt beyond a reasonable doubt.[269]

Prohibiting all plea bargaining post the death notice's filing proscribes the penalty's use as plea bargaining leverage. Because current state laws customarily require prosecutors file a notice of the intention to seek death when anticipating a

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260. *Id.* (discussing the Philadelphia D.A.'s willingness to negotiate a plea with all capital defendants against whom they have sought a death penalty against—barring cases in which a police officer is the victim). *But see Mitchell*, 30 F.3d at 1493 (discussing the constitutionally invalid practice of allowing capital defendants to "escape the threat of execution merely by abandoning his right to contest his guilt before a jury").

261. *See* People v. Edwards, 274 A.D.2d 754, 757–58 (N.Y. App. Div. 2000), *rev'd*, 754 N.E.2d 169 (2001).

262. *See* Hynes v. Tomei, 706 N.E.2d 1201, 1205 (N.Y Ct. App. 1998). *But cf. Brady*, 397 U.S. at 751 (holding pleas accepted for the sole purpose of avoiding the threat of execution to maintain constitutional validity).

263. *See Edwards*, 274 A.D.2d at 757–58.

264. *See* Parker v. North Carolina, 397 U.S. 790, 810 (1970) ("The penalty schemes involved here are also distinguishable from most plea bargaining because they involve the imposition of death—the most severe and awesome penalty known to our law. This Court has recognized that capital cases are treated differently in some respects from noncapital cases."); *see also* Gregg v. Georgia, 428 U.S. 153, 225 (1976).

265. *Brady*, 397 U.S. at 742; *see also* Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978).

266. *Gregg*, 428 U.S. at 188.

267. *See* Arizona v. Fulminante, 499 U.S. 279, 287–88 (1991) (holding because "there was a credible threat of physical violence . . . [the defendant's] will was overborne in such a way as to render his confession the product of coercion"); *see also* Blackburn v. Alabama, 361 U.S. 199, 206 (1960).

268. *See Gregg*, 428 U.S. at 225.

269. *See id.*

death sentence,[270] prosecutorial practices in capital cases may be only slightly altered to alleviate the constitutional concerns stemming from capital plea bargaining. Proscribing plea negotiations in these circumstances limits death to a penalty solely "reserved for the worst of crimes,"[271] and excludes the unconstitutional use of the sentence as leverage.

States' approaches to remedy the constitutional burdens inherent to plea negotiations in death-eligible cases demonstrate the practicability of safeguarding the plea-bargaining process and simultaneously preserving the constitutional rights burdened by plea negotiations in death-eligible cases.[272] The New York Supreme Court held pleas to a sentence less than death—where a death notice is filed—constitutionally invalid.[273] Relying on the *Jackson* decision, the court determined plea negotiations forcing the defendant's choice between accepting a plea and proceeding to a trial in which a death sentence was possible proved to unreasonably burden the defendant's Fifth and Sixth Amendment rights.[274] Consequently, the State of New York prohibits prosecutors' continued bargaining with defendants following a pending notice to seek death.[275] The State of New York mandates prosecutors file a "notice of intent to seek the death penalty" in order for a death sentence to be imposed.[276] Once the notice has been filed, plea negotiations are barred.[277]

This approach does not bar all plea negotiations in capital-eligible cases.[278] Where the prosecutor restrains from filing the intent to seek death, the defendant may plead guilty.[279] Those defendants not facing the possibility of death may plead to a sentence of life-without-parole.[280]

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270. ARIZ. R. CRIM. P. 15.1(h)(i)(1)(A) (Arizona requires prosecutors file a notice of their intention to seek death within 60 days of the defendant's arraignment); NEV. SUP. CT. R. § 250(4)(c) (2014) ("No later than 30 days after the filing of an information or indictment, the state must file in the district court a notice of intent to seek the death penalty."); WASH. REV. CODE § 10.95.040 (2015) ("[T]he prosecuting attorney shall file written notice of a special sentencing proceeding to determine whether or not the death penalty should be imposed when there is reason to believe that there are not sufficient mitigating circumstances to merit leniency."); IDAHO CODE ANN. § 18-4504A (West 2014) ("A sentence of death shall not be imposed unless the prosecuting attorney filed written notice of intent to seek the death penalty with the court and served the notice upon the defendant or his attorney of record no later than thirty (30) days after entry of a plea.").

271. Kennedy v. Louisiana, 554 U.S. 407, 447 (2008).

272. *See* People v. Edwards, 754 N.E.2d 169, 179 (N.Y. Ct. App. 2001) ("Since the plea here was made while the intent to seek the death penalty was pending, defendant's plea is invalid. This is a matter not of Federal law but of State statutory interpretation and State procedure in guilty pleas.").

273. *See* Hynes v. Tomei, 706 N.E.2d 1201, 1209 (N.Y. Ct. App. 1998); *see also Edwards*, 754 N.E.2d at 179.

274. *Hynes*, 706 N.E.2d at 1205; *see also* Hoffmann, *supra* note 183, at 2347; *Edwards*, 754 N.E.2d at 179.

275. *See Hynes*, 706 N.E.2d at 1209; *see also Edwards*, 754 N.E.2d at 179.

276. N.Y. CRIM. PROC. LAW § 250.40 (McKinney 2019).

277. *See Hynes*, 706 N.E.2d at 1209; *see also Edwards*, 754 N.E.2d at 179.

278. *See, e.g.*, People v. Mower, 765 N.E.2d 839, 839 (N.Y. Ct. App. 2002).

279. *See id.*

280. *See id.*

Currently, political and financial components vastly impact the prosecution's pursuit of a death sentence in various states.[281] Procedurally narrowing prosecutors' ability to plea bargain post the pursuit of death suppresses the improper and coercive use of the penalty in negotiations. The modification would further mandate the State seek a death sentence only in instances where the prosecution has a reasonable belief the sentence could be obtained from a jury.

B. PREVENT FALSE PROMISES TO SEEK A DEATH SENTENCE THROUGH ETHICAL LIMITATIONS ON LEVERAGING PLEA NEGOTIATIONS WITH DEATH

Prosecutorial pressure on the defendant is inherent to plea bargaining.[282] In almost every criminal action, a defendant faces a greater penalty than the one offered in the plea negotiation.[283] But death is different.[284] Pressure is not without limits.[285]

Plea bargaining, centered on the avoidance of death, is appropriately prohibited by barring the prosecutorial practice of leveraging negotiations with a perceived threat of execution.[286] Ethically barring all plea negotiations after the pursuit of a death sentence procures false death-penalty threats.

A New York State court has considered the constitutionality of prosecutorial attempts to leverage plea negotiations with the threat of the death penalty forcing life contingent on the defendant's acceptance of the prosecution's plea deal.[287] The court ruled merely withdrawing a notice to seek the death penalty prior to entering the defendant's plea raises similar constitutional concerns as bargaining with a defendant facing a pending death notice.[288]

Though the State of New York barred particular plea bargaining practices in cases where the prosecution conveyed an intent to seek a death penalty, courts do not go so far as to consider the pleas "*per se* invalid."[289] Courts continue to center their analyses of the constitutionality of pleas in death-eligible cases on whether

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281. *See* White, *supra* note 59, at 151 ("[O]nce somebody has a political bent on killing our client, it's tough to get a plea bargain.").

282. *See* STANDARDS FOR CRIMINAL JUSTICE, Responsibilities of the Prosecuting Attorney, Standard 14-3.1 (AM. BAR ASS'N 3d ed. 1999).

283. Aliza B. Kaplan et. al., *Oregon's Death Penalty: A Cost Analysis* 54 (Nov. 16, 2016), *available at* https://ssrn.com/abstract=2926131 [https://perma.cc/BA3M-Q7QH].

284. Gregg v. Georgia, 428 U.S. 153, 188 (1976).

285. *See id.*

286. *See* Hoffmann, *supra* note 183, at 2389–90.

287. *See* People v. Edwards, 274 A.D.2d 754, 757–58 (N.Y. App. Div. 2000), *rev'd*, 754 N.E.2d 169 (2001).

288. *See id.* at 757; *see also* Hoffmann, *supra* note 183, at 2315.

289. Williamson v. Smith, 2009 WL 466626, at 7 (N.D.N.Y. 2009). *But cf. Edwards*, 274 A.D.2d at 757–58, *rev'd*, 754 N.E.2d 169 ("[I]t 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.").

the defendant's plea proved to be a "voluntary and intelligent choice among the alternative courses of action."[290]

Prohibiting plea negotiations after the filing of a notice to seek death preserves the limitation on prosecutors' utilization of the death penalty as pressure in plea negotiations.[291] Additionally, prosecutors need to be ethically barred from attempts to facilitate negotiations contingent on the withdrawal of the filing.[292] These procedural and ethical modifications would appropriately suppress prosecutorial utilization of the threat of a death sentence as leverage.[293]

C. ALTER THE DEFENSE COUNSEL'S APPROACH TO CAPITAL PLEA BARGAINING

The imposition of the death penalty vastly alters the defense counsel's role in advising clients.[294] The defense attorney's role in death-penalty cases centers on effectively assisting the client to avoid death.[295] In that regard, the Court holds defendants maintain "the ultimate authority to determine whether to plead guilty,"[296] and guilty pleas must be based on "express affirmations made intelligently and voluntarily."[297] Likewise, the ABA maintains, "[t]here is no decision more fundamental in a criminal case than the decision whether to admit or contest guilt."[298] Nonetheless, the Court holds defense counsel's actions to concede the defendant's guilt absent expressed consent of that defendant may be reasonable in a capital case.[299] And, ABA Guidelines require capital-defense attorneys to "persuad[e] a client to accept a plea to a sentence less than death."[300] This conflict presents a complex challenge for capital-defense counsels.[301]

Any offer allowing the defendant to avoid death is considered favorable.[302] Therefore, as prosecutors are well aware, in every capital case, legal ethics

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290. *See Williamson*, 2009 WL 466626, at *7.

291. *See* Hoffmann, *supra* note 183, at 2389–90.

292. Limiting the prosecutions' ability to utilize death as a threat to encourage pleas requires limiting their ability to exchange the withdrawal of a plea for the acceptance of a guilty plea. *See* U.S. Dep't of Justice, U.S. ATTORNEY'S MANUAL § 9-10.120 (1995–3 Supp.).

293. *See* Hoffmann, *supra* note 183, at 2389–90.

294. *Id.*

295. *See generally* ABA GUIDELINES, *supra* note 46, at 960; *see also* White, *supra* note 59, at 146–63.

296. Florida v. Nixon, 543 U.S. 175, 187 (2004) (quoting Jones v. Barnes, 463 U.S. 745, 751 (1983); Wainwright v. Sykes, 433 U.S. 72, 93, n.1 (1977) (Burger, C.J., concurring)) (internal quotation marks omitted).

297. *Nixon*, 543 U.S. at 185 (citing Boykin v. Alabama, 395 U.S. 238, 242–43 (1969)).

298. Brief for ABA as Amicus Curiae Supporting Petitioner at 3, McCoy v. Louisiana, 2017 WL 5714609 (2017) (No. 16-8255).

299. *Id.* at 560–63.

300. ABA GUIDELINES, *supra* note 46, at 960.

301. *See Nixon*, 543 U.S. at 188–89 (holding counsel may concede defendant's guilt absent expressed consent in capital trials); McCoy v. Louisiana, No. 16-8255, 2018 WL 2186174, at *3 (May 14, 2018) ("[D]efendant has the right to insist that counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty.").

302. *See* White, *supra* note 59, at 147.

demand capital-defense counsel encourage defendants to accept anything the State offers in avoidance of death. Along that line, where capital-defense attorneys are unable to persuade their clients to accept a plea, they are encouraged to bring in a third party.[303] This is often family members who will attempt to convey the importance of the defendant's life in order to persuade the defendant to accept a guilty plea.[304] After the prosecutions' pursuit of the death penalty, the crux of the process lies in the avoidance of death.[305]

Most notably, the defense remains focused on avoidance of death at all costs, even where defendants are unwilling to admit guilt.[306] Ethical guidelines direct defense attorneys to seek *Alford* pleas[307] where a defendant is "reluctan[t] to admit guilt."[308] The *Alford* plea is a unique plea agreement where the defendant accepts a guilty plea, but does not actually admit commission of the crime.[309] Defense attorneys often request the assistance of close family members to convince clients to accept a plea that allows defendants to remain in prison indefinitely.[310] The defendant's family members and loved ones urge the defendant to plead and avoid death, even while asserting their innocence.[311]

In the Court's *McCoy* opinion, although the defendant "vociferously insisted that he did not engage in the charged acts and adamantly objected to any admission of guilt,"[312] defense counsel conceded defendant's guilt in an effort to save McCoy's life, as mandated by legal ethics.[313] On appeal, the State asserted ethical standards prohibited defense counsel's adhering to McCoy's objective of maintaining innocence and conversely demanded counsel "zealously attempt to keep McCoy off death row."[314] Consequently, the Court's ruling that "defendant has the right to insist that counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty,"[315] generates greater ethical uncertainty.

Currently, the prosecution's introduction of the death penalty completely alters the defense counsel's approach to the plea-bargaining process.[316] Defense attorneys are merely left to employ any means necessary to allow their client to

303. *See* White, *supra* note 59, at 159.
304. *Id*. at 159–60.
305. *See generally* ABA GUIDELINES, *supra* note 46; *see also* White, *supra* note 59, at 158–60.
306. White, *supra* note 59, at 158–60.
307. The Supreme Court recognizes the Alford plea to allow defendants to plead guilty without admitting responsibility for the commission of the crime in which they are accused. North Carolina v. Alford, 400 U.S. 25, 37 (1970).
308. White, *supra* note 59, at 157.
309. *Alford*, 400 U.S. at 37–40.
310. *See* White, *supra* note 59, at 158–60.
311. *See Alford*, 400 U.S. at 28 n.2.
312. McCoy v. Louisiana, No. 16-8255, 2018 WL 2186174, at *3 (May 14, 2018).
313. State v. McCoy, 218 So. 3d 535, 616 (La. 2016), *rev'd and remanded*, 138 S. Ct. 1500 (2018).
314. Brief for Respondent at 36, McCoy v. Louisiana, 2017 WL 6524500 (2017) (No. 16-8255).
315. McCoy v. Louisiana, No. 16-8255, 2018 WL 2186174, at *3 (May 14, 2018).
316. *See generally* ABA GUIDELINES, *supra* note 46.

live.[317] Modifying prosecutors' ability to leverage plea negotiations with the possibility of execution, and, therefore, absolving the defense's obligation to employ any means necessary to encourage the client to accept a plea, will curtail improper plea bargaining. Moreover, modifying capital-defense ethics to compel defense counsel to respect the defendant's authorization of conceding guilt will further curb oppressive practices in capital cases.

CONCLUSION

Death is different. It is the harshest penalty administered by the American Government. It is absolute. In the current plea-bargaining scheme, capital defendants are vulnerable to coercion. Through capital plea bargaining, regardless of the particular crime, the defendant may simply avoid the possibility of death by accepting a guilty plea. Nonetheless, in the light of the State lacking resources to procure death sentences in the majority of the cases in which the sentence is purportedly sought, prosecutors are overwhelmingly leveraging capital plea negotiations with a false threat of death. This undermines the purpose of the death penalty, and, further, eradicates the government's obligation to prove their case.

The continued acceptance of plea bargaining leveraged with the threat of death stands in direct contrast to constitutional limitations on involuntary confessions and the death penalty's intent. Safeguarding the integrity of the Constitution and the American criminal justice system requires complete abandonment of these pleas for life.

317. *See generally id.*