

CAPITAL PUNISHMENT: RACE, POVERTY & DISADVANTAGE

Yale University
Professor Stephen B. Bright

Class Six - Part Two Plea Bargaining & Leniency for Testimony

PLEA BARGAINING

The “criminal justice today is for the most part a system of pleas, not a system of trials.” *Missouri v. Frye*, 132 S.Ct. 1399, 1407 (2012) (quoting *Lafler v. Cooper*, 132 S.Ct. 1376, 1388 (2012)). Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas. *Frye*, 132 S.Ct. at 1407.

“To a large extent . . . horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it *is* the criminal justice system.” “[Defendants] who do take their case to trial and lose receive longer sentences than even Congress or the prosecutor might think appropriate, because the longer sentences exist on the books largely for bargaining purposes. This often results in individuals who accept a plea bargain receiving shorter sentences than other individuals who are less morally culpable but take a chance and go to trial”. In today’s criminal justice system, therefore, the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant.

Frye, 132 S.Ct. at 1407 (quoting Scott & Stuntz, *Plea Bargaining as Contract*, 101 YALE L. J. 1909, 1912 (1992), and Barkow, *Separation of Powers and the Criminal Law*, 58 Stan. L.Rev. 989, 1034 (2006)).

As previously noted, prosecutors decide, among other things, whether to charge, what to charge,

whether to charge in state or federal court or both. They may overcharge defendants, seek the death penalty or seek other enhanced penalties and mandatory minimum sentences in order to increase their bargaining power. Prosecutors may agree to reduce the charges, withdraw their notice to seek death or other enhanced sentences, agree to specific sentences, or make some other concession in exchange for the defendant’s entry of a guilty plea and waiver of a trial by jury and any appeals. Judges are often left with little or no sentencing discretion, and defense counsel may be relegated to the role of messenger.

Prosecutors may want more than a guilty plea in exchange for a less severe sentence. A plea offer may be conditioned on a defendant’s willingness to disclose information, to testify against a co-defendant or a defendant in another case (often about admissions the defendant in the other case made to the defendant), or otherwise assist the prosecution. In the federal courts, a defendant may receive a less severe sentence if prosecutors notify the sentencing judge that the defendant has rendered “substantial assistance” to the government.¹

The plea bargaining process is almost completely unregulated. The Supreme Court has held that guilty pleas must be made by defendants only if voluntary and with a full understanding of the consequences. It found that the threat of being sentenced to death coerced guilty pleas, but only

1. See 18 U.S.C. § 3553 (e); 28 U.S.C. § 994 (n); United States Sentencing Commission, GUIDELINES MANUAL, §5k1.1 (Nov. 2011).

under the federal kidnaping statute which required a jury to impose a death sentence thereby allowing defendants to avoid death by entering guilty pleas. However, the Court has upheld guilty pleas entered as part of a plea bargain to avoid imposition of the death penalty.

Edward Boykin, a 27-year-old black man was sentenced to death in Alabama after pleading guilty to armed robbery. The guilty plea made no sense because it exposed him to the death penalty. The Supreme Court granted review of the case. The Legal Defense Fund argued that Boykin understood what he was doing, that the sentencing was standardless and arbitrary. Of more than 200,000 robberies in 1967, Boykin was among a handful who had been sentenced to death. However, the Supreme Court did not address the arguments regarding the death penalty and decided the case on the narrowest grounds – that Boykin had not been adequately advised of his rights before his plea was accepted. *Boykin v. Alabama*, 395 U.S. 238 (1969).

The Court held that before accepting a plea a judge must advise the defendant of his constitutional rights, including the privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers. Observing that a "plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment[.]" the Court announced it would not presume a waiver of important federal rights from a silent record. The Court stated:

What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence. When the judge discharges that function, he leaves a record adequate for any review that may be later sought and forestalls the spin-off of collateral proceedings that seek to probe murky memories.

Such an inquiry was already required in federal cases by Rule 11 of the Federal Rules of Criminal Procedure. Most states now have similar rule, but the ritual of accepting guilty pleas is often done with such haste that defendants may have little comprehension of what is happening.

In *United States v. Jackson*, 390 U.S. 570 (1968), the Supreme Court held the federal kidnaping statute, 18 U.S.C. § 1201(a), was unconstitutional because it permitted imposition of the death sentence only upon a jury's recommendation and thereby made the risk of death the price of a jury trial. (A judge could not impose death if the defendant waived a jury and was tried before the judge or entered a guilty plea.) The Court held "that the death penalty provision * * * imposes an impermissible burden upon the exercise of a constitutional right" which discouraged assertion of the Fifth Amendment right not to plead guilty and exercise of the Sixth Amendment right to demand a jury trial.

The Supreme Court distinguished *Jackson* and held that the possibility of a death sentence did not coerce guilty pleas in *Brady v. United States*, 397 U.S. 742 (1970), and *Parker v. North Carolina*, 397 U.S. 790 (1970).

Brady, who was facing the death penalty, entered a guilty plea in exchange for a sentence of life imprisonment after learning that is co-defendant would plead guilty and be available to testify against him. He later sought habeas corpus relief claiming that his plea of guilty was not voluntarily given because the threat of the death penalty, impermissible pressure exerted upon him by his lawyer, and other reasons.

The Court rejected his claims, holding that "*Jackson* ruled neither that all pleas of guilty encouraged by the fear of a possible death sentence are involuntary pleas nor that such encouraged pleas are invalid whether involuntary or not." It concluded a plea of guilty is not invalid merely because entered to avoid the possibility of a death penalty, stating:

Insofar as the voluntariness of his plea is

concerned, there is little to differentiate Brady from (1) the defendant, in a jurisdiction where the judge and jury have the same range of sentencing power, who pleads guilty because his lawyer advises him that the judge will very probably be more lenient than the jury; (2) the defendant, in a jurisdiction where the judge alone has sentencing power, who is advised by counsel that the judge is normally more lenient with defendants who plead guilty than with those who go to trial; (3) the defendant who is permitted by prosecutor and judge to plead guilty to a lesser offense included in the offense charged; and (4) the defendant who pleads guilty to certain counts with the understanding that other charges will be dropped. In each of these situations, as in Brady's case, the defendant might never plead guilty absent the possibility or certainty that the plea will result in a lesser penalty than the sentence that could be imposed after a trial and a verdict of guilty. We decline to hold, however, that a guilty plea is compelled and invalid under the Fifth Amendment whenever motivated by the defendant's desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged.

* * *

* * * [W]e cannot hold that it is unconstitutional for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the State and who demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary.

In *Parker v. North Carolina*, Parker claimed that his guilty plea at age 15 which resulted in imposition of a sentence of life imprisonment was coerced because the State was seeking the death penalty, the police had coerced a confession from him, and members of his race had been

systematically excluded from the grand jury which indicted him.

The Court rejected the assertion that the confession had any influence on the decision to plead guilty:

[W]e cannot believe that the alleged conduct of the police during the interrogation period was of such a nature or had such enduring effect as to make involuntary a plea of guilty entered over a month later. * * * The connection, if any, between Parker's confession and his plea of guilty had "become so attenuated as to dissipate the taint."

The Court did not address the claim of underrepresentation of members of his race on the grand jury because the North Carolina Court of Appeals found that Parker had failed to raise his objection in timely fashion.

Justice Brennan, joined by Justices Douglas and Marshall dissented in *Parker* and concurred in the result in *Brady*. With regard to Parker, he noted:

Under North Carolina law * * *, the capital defendant had but two choices: he could demand a jury trial and thereby risk the imposition of the death penalty, or he could absolutely avoid that possibility by pleading guilty. * * * Parker is entitled to relief if he can demonstrate that the unconstitutional capital punishment scheme was a significant factor in his decision to plead guilty.

He explained:

We are dealing here with the legislative imposition of a markedly more severe penalty if a defendant asserts his right to a jury trial and a concomitant legislative promise of leniency if he pleads guilty. This is very different from the give-and-take negotiation common in plea bargaining between the prosecution and defense, which arguably possess relatively equal bargaining power. No such flexibility is built into the capital penalty scheme where the

government's harsh terms with respect to punishment are stated in unalterable form.

* * * [T]he penalty scheme presents a clear danger that the innocent, or those not clearly guilty, or those who insist upon their innocence, will be induced nevertheless to plead guilty. This hazard necessitates particularly sensitive scrutiny of the voluntariness of guilty pleas entered under this type of death penalty scheme.

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. * * *

With regard to Brady, Justice Brennan found:

* * * Although Brady was aware that he faced a possible death sentence, there is no evidence that this factor alone played a significant role in his decision to enter a guilty plea. Rather, there is considerable evidence * * * that Brady's plea was triggered by the confession and plea decision of his codefendant and not by any substantial fear of the death penalty. * * * Furthermore, Brady's plea was accepted by a trial judge who manifested some sensitivity to the seriousness of a guilty plea and questioned Brady at length concerning his guilt and the voluntariness of the plea before it was finally accepted.

The following year, the Court held that defendant were entitled to rely upon the promises made by prosecutors in plea offers in *Santobello v. New York*, 404 U.S. 257 (1971). Rudolph Santobello, who was initially charged with two gambling offenses, agreed to plead guilty to a lesser-included offense carrying a maximum prison sentence of one year. As part to the plea agreement, the prosecutor agreed to make no recommendation as to the sentence.

By the time of sentencing, a new prosecutor had replaced the prosecutor who had negotiated the plea. The new prosecutor argued for the maximum

one-year sentence. Santobello's lawyer immediately moved to withdraw the plea, but the trial judge denied it, saying that he would not be influenced by anything the prosecutor said. The judge then imposed the maximum sentence of one year. The sentence was affirmed on appeal. The Supreme Court reversed in a decision by Chief Justice Burger that stated:

* * * The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called "plea bargaining," is an essential component of the administration of justice. Properly administered, it is to be encouraged. If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.

Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons. It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pre-trial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned.

The Court held that the plea bargaining process "must be attended by safeguards to insure the defendant what is reasonably due in the circumstances" and that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." The Court held that even if the breach of the agreement was inadvertent, the prosecutors could not argue that it was immaterial. Accordingly, the Court remanded the case to the state courts to decide what relief to give Santobello – either specific performance of the

plea agreement at a resentencing before a different judge or allowing Santobello to withdraw his plea of guilty.

NORTH CAROLINA
v.
Henry C. ALFORD.

Supreme Court of the United States
400 U.S. 25, 91 S.Ct. 160 (1970).

White, J., delivered the opinion of the Court. Black, J., concurred in the judgment and in substantially all of the opinion. Brennan, J., filed a dissenting opinion in which Douglas and Marshall, JJ., joined.

Mr. Justice WHITE delivered the opinion of the Court.

On December 2, 1963, Alford was indicted for first-degree murder, a capital offense under North Carolina law. The court appointed an attorney to represent him, and this attorney questioned all but one of the various witnesses who appellee said would substantiate his claim of innocence. The witnesses, however, did not support Alford's story but gave statements that strongly indicated his guilt. Faced with strong evidence of guilt and no substantial evidentiary support for the claim of innocence, Alford's attorney recommended that he plead guilty, but left the ultimate decision to Alford himself. The prosecutor agreed to accept a plea of guilty to a charge of second-degree murder, and on December 10, 1963, Alford pleaded guilty to the reduced charge.

Before the plea was finally accepted by the trial court, the court heard the sworn testimony of a police officer who summarized the State's case. Two other witnesses besides Alford were also heard. Although there was no eyewitness to the crime, the testimony indicated that shortly before the killing Alford took his gun from his house, stated his intention to kill the victim, and returned home with the declaration that he had carried out

the killing. After the summary presentation of the State's case, Alford took the stand and testified that he had not committed the murder but that he was pleading guilty because he faced the threat of the death penalty if he did not do so. In response to the questions of his counsel, he acknowledged that his counsel had informed him of the difference between second- and first-degree murder and of his rights in case he chose to go to trial. The trial court then asked appellee if, in light of his denial of guilt, he still desired to plead guilty to second-degree murder and appellee answered, "Yes, sir. I plead guilty on – from the circumstances that [his attorney] told me." After eliciting information about Alford's prior criminal record, which was a long one, the trial court sentenced him to 30 years' imprisonment, the maximum penalty for second-degree murder.

Alford sought post-conviction relief * * *. * * *

* * * That he would not have pleaded except for the opportunity to limit the possible penalty does not necessarily demonstrate that the plea of guilty was not the product of a free and rational choice, especially where the defendant was represented by competent counsel whose advice was that the plea would be to the defendant's advantage. * * *

* * * Ordinarily, a judgment of conviction resting on a plea of guilty is justified by the defendant's admission that he committed the crime charged against him and his consent that judgment be entered without a trial of any kind. * * *

* * *

* * * Although denying the charge against him, [Alford] nevertheless preferred the dispute between him and the State to be settled by the judge in the context of a guilty plea proceeding rather than by a formal trial. Thereupon, with the State's telling evidence and Alford's denial before it, the trial court proceeded to convict and sentence Alford for second-degree murder.

* * *

The issue in *Hudson v. United States*, 272 U.S. 451 (1926), was whether a federal court has power to impose a prison sentence after accepting a plea of *nolo contendere* [no contest], a plea by which a defendant does not expressly admit his guilt, but nonetheless waives his right to a trial and authorizes the court for purposes of the case to treat him as if he were guilty. The Court held that a trial court does have such power[.] * * * Implicit in the *nolo contendere* cases is a recognition that the Constitution does not bar imposition of a prison sentence upon an accused who is unwilling expressly to admit his guilt but who, faced with grim alternatives, is willing to waive his trial and accept the sentence.

* * * [W]hile most pleas of guilty consist of both a waiver of trial and an express admission of guilt, the latter element is not a constitutional requisite to the imposition of criminal penalty. An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime.

Nor can we perceive any material difference between a plea that refuses to admit commission of the criminal act and a plea containing a protestation of innocence when, as in the instant case, a defendant intelligently concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt. * * * Because of the overwhelming evidence against him, a trial was precisely what neither Alford nor his attorney desired. Confronted with the choice between a trial for first-degree murder, on the one hand, and a plea of guilty to second-degree murder, on the other, Alford quite reasonably chose the latter and thereby limited the maximum penalty to a 30-year term. * * * In view of the strong factual basis for the plea demonstrated by the State and Alford's clearly expressed desire to enter it despite his professed belief in his innocence, we hold that the trial judge did not commit constitutional error in accepting it.

* * * The prohibitions against involuntary or unintelligent pleas should not be relaxed, but neither should an exercise in arid logic render those constitutional guarantees counterproductive and put in jeopardy the very human values they were meant to preserve.

* * *

[**Mr. Justice BLACK**, concurred in the judgment and in substantially all of the opinion in this case.]

Mr. Justice BRENNAN, with whom Mr. Justice DOUGLAS and Mr. Justice MARSHALL join, dissenting.

* * * Today the Court makes clear that its previous holding [in *Brady v. United States* and *Parker v. North Carolina*] was intended to apply 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.

I adhere to the view that, in any given case, the influence of such an unconstitutional threat “must necessarily be given weight in determining the voluntariness of a plea.” And, without reaching the question whether due process permits the entry of judgment upon a plea of guilty accompanied by a contemporaneous denial of acts constituting the crime, I believe that at the very least such a denial of guilt is also a relevant factor in determining whether the plea was voluntarily and intelligently made. With these factors in mind, it is sufficient in my view to state that the facts set out in the majority opinion demonstrate that Alford was “so gripped by fear of the death penalty” that his decision to plead guilty was not voluntary but was “the product of duress as much so as choice reflecting physical constraint.” * * *

**Don BORDENKIRCHER, Superintendent,
Kentucky State Penitentiary, Petitioner,**
v.
Paul Lewis HAYES.

Supreme Court of the United States
434 U.S. 357, 98 S.Ct. 663 (1978).

Stewart, J., delivered the opinion of the Court. Blackmun, J., filed a dissenting opinion, in which Brennan and Marshall, JJ., joined. Powell, J., filed dissenting opinion.

Mr. Justice STEWART delivered the opinion of the Court.

* * *

The respondent, Paul Lewis Hayes, was indicted by a Fayette County, Ky., grand jury on a charge of uttering a forged instrument in the amount of \$88.30, an offense then punishable by a term of 2 to 10 years in prison. After arraignment, Hayes, his retained counsel, and the Commonwealth's Attorney met in the presence of the Clerk of the Court to discuss a possible plea agreement. During these conferences the prosecutor offered to recommend a sentence of five years in prison if Hayes would plead guilty to the indictment. He also said that if Hayes did not plead guilty and "save[d] the court the inconvenience and necessity of a trial," he would return to the grand jury to seek an indictment under the Kentucky Habitual Criminal Act¹ which would subject Hayes to a mandatory sentence of life imprisonment by reason of his two prior felony convictions. Hayes

1. While cross-examining Hayes during the subsequent trial proceedings the prosecutor described the plea offer in the following language:

"Isn't it a fact that I told you at that time [the initial bargaining session] if you did not intend to plead guilty to five years for this charge and . . . save the court the inconvenience and necessity of a trial and taking up this time that I intended to return to the grand jury and ask them to indict you based upon these prior felony convictions?"

chose not to plead guilty, and the prosecutor did obtain an indictment charging him under the Habitual Criminal Act. * * *

A jury found Hayes guilty on the principal charge of uttering a forged instrument and, in a separate proceeding, further found that he had twice before been convicted of felonies. As required by the habitual offender statute, he was sentenced to a life term in the penitentiary. * * *

* * *

II

* * * While the prosecutor did not actually obtain the recidivist indictment until after the plea conferences had ended, his intention to do so was clearly expressed at the outset of the plea negotiations. Hayes was thus fully informed of the true terms of the offer when he made his decision to plead not guilty. This is not a situation, therefore, where the prosecutor without notice brought an additional and more serious charge after plea negotiations relating only to the original indictment had ended with the defendant's insistence on pleading not guilty. As a practical matter, in short, this case would be no different if the grand jury had indicted Hayes as a recidivist from the outset, and the prosecutor had offered to drop that charge as part of the plea bargain.

* * *

IV

This Court held in *North Carolina v. Pearce*, 395 U.S. 711, 725, that the Due Process Clause of the Fourteenth Amendment "requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." The same principle was later applied to prohibit a prosecutor from reindicting a convicted misdemeanant on a felony charge after the defendant had invoked an appellate remedy, since in this situation there was also a "realistic likelihood of 'vindictiveness.'" *Blackledge v. Perry*, 417 U.S., at 27.

In those cases the Court was dealing with the State's unilateral imposition of a penalty upon a defendant who had chosen to exercise a legal right to attack his original conviction – a situation “very different from the give-and-take negotiation common in plea bargaining between the prosecution and defense, which arguably possess relatively equal bargaining power.” * * *

To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort * * * But in the “give-and-take” of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer.

Plea bargaining flows from “the mutuality of advantage” to defendants and prosecutors, each with his own reasons for wanting to avoid trial. Defendants advised by competent counsel and protected by other procedural safeguards are presumptively capable of intelligent choice in response to prosecutorial persuasion, and unlikely to be driven to false self-condemnation. Indeed, acceptance of the basic legitimacy of plea bargaining necessarily implies rejection of any notion that a guilty plea is involuntary in a constitutional sense simply because it is the end result of the bargaining process.* * *

While confronting a defendant with the risk of more severe punishment clearly may have a “discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable” – and permissible – “attribute of any legitimate system which tolerates and encourages the negotiation of pleas.” * * *

It is not disputed here that Hayes was properly chargeable under the recidivist statute, since he had in fact been convicted of two previous felonies. In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion. Within

the limits set by the legislature's constitutionally valid definition of chargeable offenses, “the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation” so long as “the selection was [not] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.” * * * Moreover, a rigid constitutional rule that would prohibit a prosecutor from acting forthrightly in his dealings with the defense could only invite unhealthy subterfuge that would drive the practice of plea bargaining back into the shadows from which it has so recently emerged.

There is no doubt that the breadth of discretion that our country's legal system vests in prosecuting attorneys carries with it the potential for both individual and institutional abuse. And broad though that discretion may be, there are undoubtedly constitutional limits upon its exercise. We hold only that the course of conduct engaged in by the prosecutor in this case, which no more than openly presented the defendant with the unpleasant alternatives of forgoing trial or facing charges on which he was plainly subject to prosecution, did not violate the Due Process Clause of the Fourteenth Amendment.

Mr. Justice BLACKMUN, with whom Mr. Justice BRENNAN and Mr. Justice MARSHALL join, dissenting.

* * *

* * * [I]n this case vindictiveness is present to the same extent as it was thought to be in *Pearce* and in *Perry*; the prosecutor here admitted, that the sole reason for the new indictment was to discourage the respondent from exercising his right to a trial. Even had such an admission not been made, when plea negotiations, conducted in the face of the less serious charge under the first indictment, fail, charging by a second indictment a more serious crime for the same conduct creates “a strong inference” of vindictiveness. * * *

It might be argued that it really makes little

difference how this case, now that it is here, is decided. The Court's holding gives plea bargaining full sway despite vindictiveness. A contrary result, however, merely would prompt the aggressive prosecutor to bring the greater charge initially in every case, and only thereafter to bargain. The consequences to the accused would still be adverse, for then he would bargain against a greater charge, face the likelihood of increased bail, and run the risk that the court would be less inclined to accept a bargained plea. Nonetheless, it is far preferable to hold the prosecution to the charge it was originally content to bring and to justify in the eyes of its public.

Mr. Justice POWELL, dissenting.

* * *

No explanation appears in the record for the prosecutor's decision to escalate the charge against respondent other than respondent's refusal to plead guilty. The prosecutor has conceded that his purpose was to discourage respondent's assertion of constitutional rights, and the majority accepts this characterization of events.

It seems to me that the question to be asked under the circumstances is whether the prosecutor reasonably might have charged respondent under the Habitual Criminal Act in the first place. The deference that courts properly accord the exercise of a prosecutor's discretion perhaps would foreclose judicial criticism if the prosecutor originally had sought an indictment under that Act, as unreasonable as it would have seemed. But here the prosecutor evidently made a reasonable, responsible judgment not to subject an individual to a mandatory life sentence when his only new offense had societal implications as limited as those accompanying the uttering of a single \$88 forged check and when the circumstances of his prior convictions confirmed the inappropriateness of applying the habitual criminal statute. I think it may be inferred that the prosecutor himself deemed it unreasonable and not in the public interest to put this defendant in jeopardy of a sentence of life imprisonment.

* * *

* * * Here, any inquiry into the prosecutor's purpose is made unnecessary by his candid acknowledgment that he threatened to procure and in fact procured the habitual criminal indictment because of respondent's insistence on exercising his constitutional rights. We have stated in unequivocal terms * * *: "if the only objective of a state practice is to discourage the assertion of constitutional rights it is 'patently unconstitutional.'" * * *

The plea-bargaining process, as recognized by this Court, is essential to the functioning of the criminal-justice system. It normally affords genuine benefits to defendants as well as to society. And if the system is to work effectively, prosecutors must be accorded the widest discretion, within constitutional limits, in conducting bargaining. This is especially true when a defendant is represented by counsel and presumably is fully advised of his rights. Only in the most exceptional case should a court conclude that the scales of the bargaining are so unevenly balanced as to arouse suspicion. In this case, the prosecutor's actions denied respondent due process because their admitted purpose was to discourage and then to penalize with unique severity his exercise of constitutional rights. * * *

For consideration and discussion

What was the "give and take" in the plea discussions involving counsel for Paul Hayes and the prosecutor?

Is there a line between bargaining and blackmail? If so, when is it crossed?

What moral, ethical, professional and legal factors should inform a prosecutor's threat to seek a greater sentence if the defendant refuses to accept a lesser sentence which the prosecutor finds to be an acceptable punishment for a crime? Is there a difference when the greater sentence threatened is the death penalty?

Plea practices in Capital Cases in Federal Courts

From *United States Attorney's Manual*:

9-10.120 Conditional Plea Agreements

The death penalty may not be sought, and no attorney for the Government may threaten to seek it, *solely* for the purpose of obtaining a more desirable negotiating position. Absent the authorization of the Attorney General, the United States Attorney or Assistant Attorney General may not enter into a binding plea agreement that precludes the United States from seeking the death penalty with respect to any defendant falling within the scope of this Chapter. [emphasis added]

The United States Attorney or Assistant Attorney General, however, may agree to submit for the Attorney General's review and possible approval, a plea agreement relating to a capital-eligible offense or conduct that could be charged as a capital-eligible offense. At all times, the United States Attorney or Assistant Attorney General must make clear to all parties that the conditional plea does not represent a binding agreement, but is conditioned on the authorization of the Attorney General. The United States Attorney or Assistant Attorney General should not inform the defendant, court, or public of whether he or she recommends authorization of the plea agreement.

For proposed plea agreements that precede a decision by the Attorney General to seek or not to seek the death penalty, the United States Attorney or Assistant Attorney General should send a request for approval to the Assistant Attorney General for the Criminal Division through the Capital Case Section as early as possible. Absent unavoidable circumstances, the United States Attorney or Assistant Attorney General must send the request no later than 90 days prior to the date on which the Government would be required * * * to file a notice that it intends to seek the death penalty. (Proposed plea agreements that would require withdrawing a previously filed notice of intent to seek the death penalty should follow the

procedures described in [USAM 9-10.160](#)).

Unless a potential capital defendant's testimony is necessary to indict the remaining offenders or other circumstances warrant separate consideration (see [USAM 9-10.070](#)), review of the case against a prospective cooperator should occur simultaneously with the review of the cases against the remaining offenders who would be indicted for the offenses at issue. In submissions in support of requests for approval of plea agreements under this section, the prosecution memorandum must include an explanation of why the plea agreement is an appropriate disposition of the charges, a death penalty evaluation form for each capital-eligible offense that has been or could be charged against the prospective cooperator, and a non-decisional information form. The [Attorney General's] Capital Review Committee will review requests for authorization to enter into a plea agreement under this subsection and, if a submission from defense counsel is not included with the submission, may request such a submission and schedule the case for a Committee conference.

For further information on practices by United States Attorneys in plea bargaining, see *United States Attorney's Manual*, Chap. [9-27.400](#), www.justice.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm#9-27.400.

Notable Plea Bargains

Even some of the most aggravated capital cases have been resolved with plea bargains.

Jared Loughner shot and severely injured U.S. Representative Gabrielle Giffords, his target, and killed six people, including Chief U.S. District Court Judge John Roll and a 9-year-old child, and injured 13 other people on January 8, 2011. He was diagnosed him as paranoid schizophrenic and found incompetent to stand trial. Upon later being found competent in August 2012, Loughner entered into a plea agreement with federal prosecutors who agreed to not to pursue the death

penalty in exchange for his pleas of guilty to 19 charges of murder and attempted murder and imposition of sentences of life imprisonment without the possibility of parole.

Mental health and legal issues have contributed to the resolution of other cases through plea bargains. The United States agreed to a plea disposition in the case of the Unabomber, Theodore Kaczyski, during jury selection as his trial was starting in January, 1998 due to concern about legal issues and his mental state. Kaczyski was to be tried for mailing explosives to people between 1978 and 1995, killing three and injuring others. Kaczyski, who had been diagnosed as a paranoid schizophrenic was insistent that his lawyers not put on any evidence regarding his mental health. When the lawyers refused, Kaczyski attempted to discharge his lawyers and represent himself. The District Court denied the requests, but those denial were subject to question due to the Supreme Court's decision in *Faretta v. California*, 422 U.S. 806 (1975), recognizing the right of a defendant to represent himself. As the case spun out of control, the Department of Justice agreed to a plea disposition which spared Kaczyski the death penalty. Kaczyski later sought unsuccessfully to withdraw his plea.

Defendants may obtain a plea offer and avoid death if they have something to give the government in exchange for its agreement to no longer seek death. Gary Ridgeway, known in Seattle as the Green River killer, was allowed to plea guilty to 48 counts of murder in November 2003 and avoid the death sentence in exchange for providing detectives with information on 23 other murders that he had committed. "In return for the plea, and the information necessary to solve and charge the crimes, we agreed not to seek the death penalty," said Norm Maleng, the King County Prosecutor. "To the public," Maleng said, "this isn't about the death penalty, it's about justice and mercy for the families."

Similarly, Charles Cullen, a career nurse with a history of mental illness who killed at least 29 patients in New Jersey and Pennsylvania, was

allowed to enter a plea in each of those states and avoid the death penalty in exchange for identifying all his victims. He estimated that he killed 40. Before being sentenced in Pennsylvania, Cullen spent 30 minutes repeating, "Your honor, you need to step down" hundreds of times to the judge.

White supremacist Eric Rudolph avoided the death penalty by disclosing the location of explosives in North Carolina as part of a plea bargain. Rudolph entered guilty pleas to various crimes associated with the bombing of an abortion clinic in Birmingham that killed an off-duty police officer, the bombing at the 1996 Olympics in Atlanta that killed one and injured many, two bombings an hour apart in 1997 at a women's clinic in suburban Atlanta that provided abortions; and a bombing at a lesbian nightclub in February that same year. His guilty pleas were accepted and he was sentenced to life imprisonment without possibility of parole in April 2005.

Other defendants who have no victim, explosives or anything else to give up in exchange for a life sentence may not be able to avoid the death penalty even though they did not commit nearly as many crimes or commit crimes as heinous as these defendants.

STATE of North Carolina

v.

Luther Ray WILSON, Jr.

Supreme Court of North Carolina.
311 N.C. 117, 316 S.E.2d 46 (1984)

FRYE, Justice [for a unanimous court].

Defendant was charged in bills of indictment, proper in form, with the armed robbery and murder of Leonard Alexander Teel on or about 22 October 1981. Upon defendant's plea of not guilty, a jury found defendant guilty of robbery with a firearm, guilty of murder in the first degree based upon the felony-murder rule, and not guilty of murder in the first degree based upon

premeditation and deliberation. After a sentencing hearing, the jury recommended that defendant be sentenced to life imprisonment on the conviction of murder in the first degree. * * * Pursuant to the jury's recommendation, Judge Seay sentenced defendant to life imprisonment.

* * *

II.

Defendant first assigns as error the trial court's denial of his motion to bar prosecution for murder in the first degree. Defendant contends that the district attorney has unbridled discretion in determining who will be prosecuted for murder in the first degree and thereby subject to the death penalty. He argues that this discretionary power "amounts to a denial of due process and equal protection rights guaranteed by the Fourteenth Amendment of the United States Constitution." Defendant also argues that "he was the only person to be tried for his life in Randolph County within recent memory." Therefore, defendant contends that the district attorney's decisions are arbitrary.

In support of his contentions, the defendant presented evidence at a pretrial hearing that the district attorney's office in the Nineteen-B Judicial District did not have a written policy concerning which defendants would be charged and prosecuted for murder in the first degree. Defendant's evidence showed that during the administration of District Attorney Garland N. Yates, in eight out of nine cases where the defendant had been charged with murder in the first degree (exclusive of defendant's case), the defendant was subsequently allowed to plead guilty to a lesser-included offense or the defendant had been tried on a lesser-included offense. Defendant contends that his case was treated differently because the victim's family wanted him to be tried for murder in the first degree and subject to the death penalty.

During the pretrial hearing, Mr. Yates testified that no written guidelines existed as to which defendants would be charged and prosecuted for

murder in the first degree and thereby subject to the death penalty. However, he stated that the various facts and circumstances of each case were determinative in deciding that question. Additionally, in response to a question posed by defense counsel concerning why the death penalty was being sought against defendant, Mr. Yates responded, "Mr. Browne, I'm trying him for first degree murder. I consulted with the family. It's their feeling that they want to pursue first degree murder. Only if the family wanted a plea to second degree murder would it be possible for that plea to be entered." Mr. Yates also stated that he always, if possible, consulted with the victim's family to consider their feelings about the case. However, he stated that the wishes of the family were only one of many factors that he and his staff considered. Based primarily on the above evidence, defendant asserts that the State should have been barred from prosecuting him for murder in the first degree. We disagree.

* * * [T]his Court [has] recognized that the district attorney may not, "during the exercise of his discretion, transcend the boundaries of the Fourteenth Amendment's guarantee of equal protection." However, this Court stated:

District attorneys have wide discretion in performing the duties of their office. This encompasses the discretion to decide who will or will not be prosecuted. In making such decisions, district attorneys must weigh many factors such as 'the likelihood of successful prosecution, the social value of obtaining a conviction as against the time and expense to the State, and his own sense of justice in the particular case.' The proper exercise of his broad discretion in his consideration of factors which relate to the administration of criminal justice aids tremendously in achieving the goal of fair and effective administration of the criminal justice system. . . .

Even if all other cases had been dismissed, defendant has still not sufficiently alleged a denial of equal protection. A defendant must show more than simply that discretion has been

exercised in the application of a law resulting in unequal treatment among individuals. He must show that in the exercise of that discretion there has been intentional or deliberate discrimination by design.

Additionally, in *Oyler v. Boles*, 368 U.S. 448 (1962), a case which challenged, *inter alia*, the allegedly selective enforcement of West Virginia's habitual criminal statute on equal protection grounds, the United States Supreme Court stated that in order to allege grounds supporting a finding of a denial of equal protection, it must be stated "that the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification."

Based upon the foregoing, it is quite clear that defendant has failed to meet his burden in this case. Defendant's allegations and evidence fail to show that the district attorney's decision to prosecute him for murder in the first degree and seek the death penalty was based upon "an unjustifiable standard such as race, religion, or other arbitrary classification." We find nothing impermissible about the district attorney's consideration of the wishes of the family as one factor in determining which defendants will be prosecuted for murder in the first degree and thereby subjected to the death penalty.

We also find that the district attorney's lack of written guidelines for determining who will be charged and prosecuted for murder in the first degree defendant's right to equal protection of the laws. As is quite apparent, every murder case and every defendant are different. Neither the federal constitution, our state constitution, nor the statutory or case law of this State require that district attorneys establish such guidelines.

Basically, all the defendant has shown in this case is that the district attorney has exercised his discretion concerning the application of the law which has resulted in different cases being treated differently. Such a result necessarily follows from the exercise of a discretionary power. "[T]he

conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation." Defendant's assignment of error is rejected.

For further study

[The Plea](http://www.pbs.org/wgbh/pages/frontline/shows/plea/view/), a PBS Frontline Documentary, www.pbs.org/wgbh/pages/frontline/shows/plea/view/, examines resolution of four cases through plea bargains providing the perspectives of defendants, prosecutors, judges, victims' families, and defense lawyers. It shows the pressures and inequities that may result from the plea bargaining process, with comments and criticisms by various commentators. It is highly recommended.

Peter K. Daniel, *State v. Wilson: The Improper Use of Prosecutorial Discretion in Capital Punishment Cases*, 63 N.C. L. REV. 1136 (1985).

Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CAL. L. REV. 1117 (2011).

Richard Klein, *Due Process Denied: Judicial Coercion in the Plea Bargaining Process*, 32 HOFSTRA L. REV. 1349 (2004).

William J. Stuntz, *Plea Bargaining and the Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548 (2004)

Hoffman, Kahn & Fisher, *Plea Bargaining in the Shadow of Death*, 69 FORDHAM L. REV. 2313 (2001).

Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909 (1992)

Mike McConville & Chester L. Mirsky, *JURY TRIALS AND PLEA BARGAINING: A TRUE HISTORY* (2005) (a history of plea bargaining based primarily on nineteenth century New York City,

taking issue with George Fisher, listed next, in some regards).

George Fisher, *PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA* (2003) (a history of plea bargaining, particularly in Massachusetts, and an analysis of the allocation of power between prosecutor, judge and defendant that results from plea bargaining)

TRADING LENIENCY FOR TESTIMONY

Justice Robert Jackson, writing for the Supreme Court in a 5-4 decision in *On Lee v. United States*, 343 U.S. 747 (1952), warned that “[t]he use of informers, accessories, accomplices, false friends, or any of the other betrayals which are ‘dirty business’ may raise serious questions of credibility,” *id.*, at 757, but held that “no good reason of public policy occurs to us why the Government should be deprived of the benefit of On Lee’s admissions [to an old acquaintance and former employee which were secretly recorded by law enforcement agents] because he made them to a confidante of shady character.” *Id.* at 756.

Justice Jackson noted that “the theory of the common law was to admit to the witness stand only those presumably honest, appreciating the sanctity of an oath, unaffected as a party by the result, and free from any of the temptations of interest[.]” but the more recent trend was to admit such evidence and leave it to the jury to determine “the credibility of the witness[.]” *Id.* at 757 (quoting *Funk v. United States*, 290 U.S. 371, 376 (1933)). Otherwise, the prosecution would be “arbitrarily penalized for the low morals of its informers.” 343 U.S. at 757.

Justice Frankfurter dissented:

Loose talk about war against crime too easily infuses the administration of justice with the psychology and morals of war. It is hardly conducive to the soundest employment of the judicial process. Nor [is] * * * talk about a

criminal prosecution’s not being a game in which the Government loses because its officers have not played according to rule. Of course criminal prosecution is more than a game. But in any event it should not be deemed to be a dirty game in which “the dirty business” of criminals is outwitted by “the dirty business” of law officers. The contrast between morality professed by society and immorality practiced on its behalf makes for contempt of law. Respect for law cannot be turned off and on as though it were a hot-water faucet.

343 U.S. at 758-59.

In *Hoffa v. United States*, 385 U.S. 293 (1966), the Supreme Court affirmed a bribery conviction even though it was based in part upon the testimony of an informant who was compensated by the government for his assistance. In return for his assistance, the informant’s wife received four monthly installment payments of \$300 from government funds, and the state and federal charges against the informant were either dropped or not actively pursued. *Id.* at 298. The Court rejected the argument that the receipt of these benefits created an impermissible risk that the informant might perjure himself. *Id.* at 311.

The Court of Appeals for the Fifth Circuit later summarized the admissibility of such testimony:

No practice is more ingrained in our criminal justice system than the practice of the government calling a witness who is an accessory to the crime for which the defendant is charged and having that witness testify under a plea bargain that promises him a reduced sentence. It is difficult to imagine a greater motivation to lie than the inducement of a reduced sentence, but courts uniformly hold that such a witness may testify so long as the government’s bargain with him is fully ventilated so that the jury can evaluate his credibility. A witness * * * who is paid a fee for his services has less of an inducement to lie than witnesses who testify with promises of

reduced sentences. It makes no sense to exclude the testimony of [paid] witnesses * * * yet allow the testimony of informants * * * who are testifying with the expectation of receiving reduced sentences. * * * [T]he compensated witness and the witness promised a reduced sentence are indistinguishable in principle and should be dealt with in the same way. * * * As in the case of the witness who has been promised a reduced sentence, it is up to the jury to evaluate the credibility of the compensated witness.

United States v. Cervantes-Pacheco, 826 F.2d 310, 315 (5th Cir. 1987).

The Fourth Circuit upheld admissibility of testimony by an informant who was entitled to a bonus of “up to \$100,000” contingent upon the informant’s testimony against the defendants and “the outcome of this case, including whether convictions * * * were obtained.” *United States v. Levenite*, 277 F.3d 454, 458 (4th Cir. 2002). An FBI agent stated that after the case was over, she would send a report to FBI headquarters that would be used to determine the amount of the payment. *Id.* at 460. Acknowledging that the use of paid informants “create[s] a fertile field from which truth bending or even perjury could grow, threatening the core of a trial’s legitimacy[,] the Court said such testimony was admissible “only within a structure of procedural safeguards.” *Id.* at 461.

First, a witness-fee payment arrangement must be disclosed to each defendant against whom the witness will testify before the proceeding at which the witness testifies. * * * Second, the defendant must be afforded an opportunity to cross-examine the witness about the fee arrangement. * * * Third, the court must instruct the jury about the heightened scrutiny to be given testimony provided under a fee payment arrangement. * * * And finally, there can be no indication that the government is sponsoring or suborning perjury. * * * In addition, when the payment of a fee, “salary,” or “bonus” is contingent on the content or nature of testimony given, the court must

ascertain (1) that the government has independent means, such as corroborating evidence, by which to measure the truthfulness of the witness’ testimony and (2) that the contingency is expressly linked to the witness’ testifying truthfully. Moreover, when a witness is testifying under such a contingent payment arrangement, the government has a duty to inform the court and opposing counsel when the witness’ testimony is inconsistent with the government’s expectation.

Id. at 462-63.

A panel of the Court of Appeals for the Tenth Circuit held that U.S. Attorneys were prohibited from rewarding informants for testimony by 18 U.S.C. § 201(c)(2), which provides that “whoever . . . directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial . . . before any court . . . shall be fined under this title or imprisoned for not more than two years, or both.” The Court, sitting en banc, overruled the panel, holding that the statute does not apply to the United States or an Assistant United States Attorney functioning within the official scope of the office. *Singleton v. Untied States*, 165 F.3d 1297 (10th Cir. 1999) (en banc). Judge Kelly, joined by Chief Judge Chief Seymour and Judge Ebel, dissented, expressing the view that the statute applies to prosecutors and prohibits them from offering “anything of value” to a witness.

Paul Beasley JOHNSON, Appellant,

v.

STATE of Florida, Appellee.

Supreme Court of Florida
44 So.3d 51 (2010).

PERRY, J.

Paul Beasley Johnson, a prisoner under sentence of death, appeals a circuit court order denying his second successive motion for postconviction relief, after an evidentiary hearing. * * * As explained more fully below, the record here is so rife with evidence of previously undisclosed prosecutorial misconduct that we have no choice but to grant relief.

Specifically, we conclude that newly disclosed evidence shows the following. First, after Johnson was arrested and counsel was appointed, the State intentionally induced Johnson to make incriminating statements to a jailhouse informant in violation of Johnson's right to counsel. Because Johnson's statements were impermissibly elicited, the informant's testimony concerning those statements was inadmissible under *United States v. Henry*, 447 U.S. 264 (1980). Second, although the prosecutor at Johnson's first trial knew that Johnson's statements were impermissibly elicited and that the informant's testimony was inadmissible, he knowingly used false testimony and misleading argument to convince the court to admit the testimony. And third, because the informant's testimony was admitted and then later used at Johnson's 1988 trial, and because the State has failed to show that this error did not contribute to the jury's advisory sentences of death, we must vacate the death sentences under *Giglio v. United States*, 405 U.S. 150 (1972), and remand for a new penalty phase proceeding before a new jury.

* * *

This is not a case of overzealous advocacy, but rather a case of deliberately misleading the court.
* * *

I. BACKGROUND

* * * On the night of January 8-9, 1981, Johnson did the following: he kidnapped, robbed, shot and killed William Evans, a taxicab driver, and set his cab on fire; he robbed, shot and killed Ray Beasley, a man who had given him a ride from a late-night restaurant; he struggled with, shot and killed Theron Burnham, a deputy sheriff who had responded to the scene of the Beasley crime; and he fired upon Clifford Darrington and Samuel Allison, two other deputies who had responded to the scene. * * *

[In 1981 a jury convicted Johnson of three counts of first-degree murder, two counts of robbery, kidnapping, arson, and two counts of attempted first-degree murder. The trial court sentenced him to death, among other things, but he was granted a new trial by the Florida Supreme Court on post-conviction review. A retrial began in 1987, but a mistrial was declared because of jury misconduct. The case was retried in Alachua County in April 1988.]

At the 1988 trial, Johnson sought to suppress the testimony and notes of James Smith, a jailhouse informant, on grounds that Smith was operating as a government agent and had impermissibly obtained incriminating information from Johnson in 1981 in violation of his Sixth Amendment right to counsel. The motion was summarily denied, and Smith testified at trial. The jury rejected Johnson's insanity defense and found him guilty of [the crimes]. The judge followed the jury's recommendation and sentenced Johnson to death on each murder count * * *. Johnson appealed, and the Court affirmed.

* * * Johnson then filed [an] * * * amended motion [for post-conviction relief pursuant to Florida R. of Crim. Pro. 3.850], and the court granted an evidentiary hearing. At the hearing, which was held in 1997, the defense presented James Smith as a witness, and he recanted his prior testimony. He testified that he had earlier been operating on instructions from the State and had lied at trial. The postconviction court found that Smith's recantation testimony was

unbelievable, and denied the motion. Johnson appealed, and the Court affirmed. * * * Johnson filed his first successive postconviction motion in 2003, * * *. The postconviction court denied relief, and this Court affirmed.

In the present proceeding, Johnson filed his second successive postconviction motion in April 2007 * * *. The defense asserted that, based on newly discovered notes found in the files of Hardy Pickard, the prosecutor at the first trial, Johnson was entitled to a new trial. The defense claimed that the notes show that Pickard committed *Giglio*⁶ and *Brady*⁷ violations with respect to State witnesses James Smith and Amy Reid. Following the hearing, the postconviction court denied the rule 3.851 motion and Johnson filed the present appeal, asserting that the court erred in denying each of the claims.

* * *

II. THE 1981 SUPPRESSION HEARING

In 1980, inmate James Smith worked as an informant and potential witness in several cases for Investigator Ben Wilkerson of the Polk County Sheriff's Office. After Johnson was arrested in January 1981, Smith encountered Johnson in the visitation area of the Polk County jail. At the suppression hearing prior to the first trial, Smith testified as follows concerning this initial encounter:

Q. On that occasion did you have a conversation with Paul Johnson?

A. Yes, I did.

* * *

Q. Did you ask him about what he was charged with?

A. Yes.

6. *Giglio v. United States*, 405 U.S. 150 (1972).

7. *Brady v. Maryland*, 373 U.S. 83 (1963).

Q. At the time that you talked to Mr. Johnson had anybody asked you to speak to Mr. Johnson about his case?

A. No.

After speaking with Johnson, Smith sought to meet with Investigator Wilkerson to discuss the encounter, and he met with him on February 5, 1981, several days after the encounter. At the suppression hearing, Smith testified as follows with respect to that meeting:

Q. Did you discuss with Mr. Wilkerson the possibility of – let me rephrase that. Did you discuss with Mr. – Investigator Wilkerson that you might talk to Mr. Johnson in the future?

A. Yes.

Q. *And what did Investigator Wilkerson say to you about talking to Mr. Johnson in the future?*

A. *Nothing.*

Q. *Did he ever ask you to record or make any notes about any conversations you had with Mr. Johnson?*

A. *No.*

Q. *How about at a later time, did he ever ask you to make any notes?*

A. *No.*

A. *You did begin to take notes; is that correct?*

A. *Yes.*

Q. *Whose idea was that?*

A. *Mine.*

Q. *Did anybody ever suggest that to you?*

A. *No.*

(Emphasis added [by the Court].)

Investigator Wilkerson testified as follows at the suppression hearing with respect to that meeting, on direct examination by defense counsel:

Q. After he told you what he told you about those conversations, did you ever suggest to him that he keep any notes or memos of what was told to him?

A. I believe I did. And he brought up the fact that he would not be able to remember half of the things that he had told him about that day. And I said, “Well, it would be in your best interest to write them down.”

Q. Did you talk about if he heard further things from Mr. Johnson that it would be better off for him to write them down?

A. Specifically on that particular meeting, it was strictly the information he gave me at that time.

Q. Did you ever suggest to him that he – did ever at any time you suggest to him that he keep notes of conversations that he had with Mr. Johnson at future times?

A. I don’t recall.

Q. Is it possible?

A. Having previously suggested that he write down what he reported to him, yes, I would have to say it’s possible.

On cross-examination by prosecutor Pickard, Wilkerson backtracked, clarifying his prior testimony as follows:

Q. Did you ever – after you found out that James Smith had been talking with Paul Johnson or Mr. Johnson had been giving him information, *did you give Smith any instructions on what to do in the future as far*

as going back and talking to Johnson again and getting more information or anything along those lines?

A. No, sir, I did not.

Q. *Did you tell him – give him any instructions at all?*

A. No, sir.

(Emphasis added [by the Court].)

A few days after this meeting with Wilkerson, Smith was transferred from his cell on the third floor of the Polk County jail to a cell directly adjoining Johnson’s cell in a secluded area of the second floor. At the suppression hearing, Smith testified as follows concerning his encounters with Johnson after the transfer:

Q. And you’ve told investigators, haven’t you, that while you were next door to – in the next cell to Mr. Johnson you had some conversations with him about his case; is that right?

A. Correct.

Q. Did you ask him about his charges and how his case was going?

A. Yeah, and he would just come out and tell me.

* * *

Q. Sometimes you’d ask him about his case and sometimes he’d volunteer things; is that right?

A. Yeah.

Q. Did you make any notes of this?

A. Yes.

....

Q. And what type of notes were those?

A. Just, you know, what had been said during the conversations.

Q. *Why did you take those notes?*

A. *I just took them.*

Q. *Excuse me?*

A. *I just took the notes.*

Q. *For what reason?*

A. *Because I was going to give them to the State Attorney.*

Q. *Did you have any motive for giving them to the State attorney, any plans?*

A. *Yeah, because I didn't think it was right what he had done.*

....

Q. Do you recall the first time you gave notes to Ben Wilkerson?

A. Yeah.

....

Q. Did he say anything about these [notes] are good or anything like that?

A. I think he said it would help me remember. I don't remember exactly what was said.

Q. Did he ever say these looked good?

A. I can't remember, it's been a while back.

Q. And Mr. Wilkerson told you that if it helped you to remember better to go ahead and write them down; is that right?

A. I think that was the conversation.

(Emphasis added [by Court].)

Prosecutor Pickard argued as follows in closing argument to the court at the suppression hearing:

Mr. Smith did not even go to the police until after statements had already been made to him. *The police indicated that once they were aware that statements had been made to Mr. Smith they made no request of him, did not tell him to go back and get more information, simply took down his information and sent him back into the jail. Mr. Smith later got other information and reported it to the police. That's his doings. And that's Mr. Johnson's doings if he wants to trust Smith. But the bottom line is, as I said, it was not done at the request of any police officer or police agency. And under those circumstances, there is no governmental involvement in it.*

....

The issue is whether the police had anything to do with what Smith was doing. And they did not according to all the testimony from all the police officers and Mr. Smith, Smith did it on his own.

(Emphasis added [by the Court].)

The trial court denied the motion to suppress, reasoning that although it was a close question as to whether Smith was operating as a government agent, it appeared that the police were passive recipients of information that was being passed to them from Johnson through Smith[.]

* * *

This Court on direct appeal agreed that it was a close question as to whether Smith was operating as a government agent, but the Court concluded that the evidence supported the trial court's suppression ruling:

Here, the trial court held that the detectives did not direct Smith, either directly or

*surreptitiously, to talk with Johnson or to take notes on their conversations. * * * We agree with the trial court that this case presents a close question on whether Smith had become an agent of the state, but we find the ruling that he had not to be supported by the evidence.*

(emphasis added [by the Court]).

Subsequently, at the 2007 evidentiary hearing, prosecutor Pickard was confronted with his own handwritten notes from the State files that were disclosed to the defense in 1997 and that are now the subject of Johnson’s present postconviction motion. One of the notes, which was dated February 19, 1981, states: “Wilcox – Talk to me + Glen about agent theory.” And another note on the same page is configured as follows:

Ben [Wilkerson] – Smith had already talked to Johnson –

Told Smith to make notes

Told [Smith] to keep ears open

When Pickard was confronted with these notes on direct examination by defense counsel, the following transpired:

Q. Who was Wilcox?

A. Don Wilcox was – I think he was in charge of our intake unit in the State Attorney’s Office at that time. He was working in intake. He was an assistant state attorney in our office is who he was.

Q. And so the indication that – well, again, the note says, “talked to me and Glen about agent theory.” Who’s Glen, do you know?

A. Glen Brock. James Smith’s attorney.

Q. Okay. Do you know why you would have written down you went into this conversation about agent theory?

A. Sure. We were concerned that Mr. Smith not be considered an agent of the State. I was aware that the law was we could not send Mr. Smith in there to take statements from Mr. Johnson because it would have violated his attorney – he had an attorney. And I wanted to make sure that everybody was on the same page that Mr. Smith was not planted, so to speak, in Mr. Johnson’s cell for the purpose of obtaining statements.

Q. Okay. And do you recall whether there was an issue as to whether or not he was told to take notes or anything like that?

A. *I’m sure he was told to listen, to take notes if he had an opportunity to take notes as to anything that Mr. Johnson said. He may have been even told to turn over the notes.*

....

Q. Well – well, given on what you just said, let me just call your attention to the lines next to – to the name Ben [Wilkerson]. Because *there is a line that says “Told Smith to make notes,” and a line that says, “Told Smith to keep his ears open.” Is that your understanding of what Mr. Smith would have been told?*

A. *Yes.*

Q. *To take notes and to keep his ears open?*

A. *Correct.*

Q. And your understanding is that doesn’t turn him into an agent?

A. *Correct.*

(Emphasis added [by the Court].)

This testimony by Pickard at the 2007 evidentiary hearing is contrary to all the above emphasized passages in the testimony of Smith and Wilkerson and in the closing argument of Pickard at the 1981 suppression hearing. In those

emphasized passages, the declarants indicate that Smith, after his initial meeting with Investigator Wilkerson, was acting on his own in gathering information from Johnson and recording it in notes and then disclosing it to the State, whereas in prosecutor Pickard's testimony at the evidentiary hearing, Pickard indicates that Smith was *told* to go back and gather information * * *.

III. GOVERNMENT AGENT

The United State Supreme Court addressed the issue of jailhouse informants in *United States v. Henry*, 447 U.S. 264 (1980). The facts there were as follows:

On November 21, 1972, shortly after Henry was incarcerated, Government agents working on the Janaf robbery contacted one Nichols, an inmate at the Norfolk city jail, who for some time prior to this meeting had been engaged to provide confidential information to the Federal Bureau of Investigation as a paid informant. Nichols was then serving a sentence on local forgery charges. * * *

Nichols informed the agent that he was housed in the same cellblock with several federal prisoners awaiting trial, including Henry. The agent told him to be alert to any statements made by the federal prisoners, but not to initiate any conversation with or question Henry regarding the bank robbery. In early December, after Nichols had been released from jail, the agent again contacted Nichols, who reported that he and Henry had engaged in conversation and that Henry had told him about the robbery of the Janaf bank. Nichols was paid for furnishing the information.

....

Nichols testified at trial that he had "an opportunity to have some conversations with Mr. Henry while he was in the jail," and that Henry told him that on several occasions he had gone to the Janaf Branch to see which employees opened the vault. Nichols also

testified that Henry described to him the details of the robbery and stated that the only evidence connecting him to the robbery was the rental receipt. The jury was not informed that Nichols was a paid Government informant.

Henry, 447 U.S. at 266-67 (footnotes omitted).

Henry was convicted in federal district court, but the circuit court reversed and remanded for an evidentiary hearing into whether Nichols was acting as a government agent. At the hearing, a federal agent submitted an affidavit [stating he told Nichols "to be alert to any statements" but "that he was not to question Henry" about any charges against him.] *Henry*, 447 U.S. at 268 (quoting agent's affidavit).

The federal agent's affidavit also stated that the agent "never requested anyone affiliated with the Norfolk city jail to place Nichols in the same cell with Henry." The district court again denied relief, and the circuit court again reversed, concluding that the government had violated Henry's Sixth Amendment right to counsel. The government sought review.

The United States Supreme Court framed the Sixth Amendment right to counsel issue as follows:

This Court first applied the Sixth Amendment to postindictment communications between the accused and agents of the Government in *Massiah v. United States*, [377 U.S. 201 (1964)]. There, after the accused had been charged, he made incriminating statements to his codefendant, who was acting as an agent of the Government. In reversing the conviction, the Court held that the accused was denied "the basic protections of [the Sixth Amendment] when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him." The *Massiah* holding rests squarely on interference with his right to counsel.

The question here is whether under the facts of this case a Government agent “deliberately elicited” incriminating statements from Henry within the meaning of *Massiah*. Three factors are important. First, Nichols was acting under instructions as a paid informant for the Government; second, Nichols was ostensibly no more than a fellow inmate of Henry; and third, Henry was in custody and under indictment at the time he was engaged in conversation by Nichols.

Henry, 447 U.S. at 270 (citation omitted). The Court then affirmed based on the following reasoning:

By intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel, the Government violated Henry’s Sixth Amendment right to counsel. This is not a case where, in Justice Cardozo’s words, “the constable ... blundered,”; rather, it is one where the “constable” planned an impermissible interference with the right to the assistance of counsel.

Henry, 447 U.S. at 274-75 (footnote omitted) (emphasis added [by the court]).

In the present case, based on the evidence now before the Court as a result of the 2007 evidentiary hearing, we conclude that the State intentionally created a situation likely to induce Johnson to make incriminating statements without the assistance of counsel.¹¹ First, James Smith was an experienced informant who had been working with Investigator Wilkerson for at least a month on pending cases prior to encountering Johnson in the visitation area of the jail. Second, * * * Smith was told to go back and “keep his ears open” and “take notes” and then presumably disclose the notes to the State. Third, a few days after Smith’s initial meeting with Wilkerson, Smith was transferred from his cell on the third floor of the

11. Throughout this pretrial period, Johnson was represented by counsel.

Polk County jail to a semi-isolation cell directly adjoining Johnson’s semi-isolation cell in a secluded area on the second floor, where the two could talk freely and privately.

And finally, Smith was not operating as a passive listener with respect to Johnson, but rather was actively engaging Johnson in conversation and questioning him concerning his case and then reporting back to Investigator Wilkerson on a regular basis – and prosecutor Pickard was aware of this at the time of the suppression hearing.

* * *

Smith testified at the suppression hearing that while he was housed next to Johnson, he met with Investigator Wilkerson at least three or four times and turned in his notes. Wilkerson also testified that he met with Smith at least three or four times during this period and that Smith turned in his notes. And prosecutor Pickard’s notes indicate that he too met with Smith on at least two occasions – February 16 and 19, 1981 – during this period and that they discussed Johnson’s case in detail. As it turned out, shortly after Smith testified at Johnson’s trial, Smith’s seven-year prison sentence was vacated and he was set free. Based on the foregoing, we conclude that Smith, after his initial meeting with Investigator Wilkerson, was acting as a government agent, and his testimony and notes concerning Johnson’s statements should have been suppressed.

IV. KNOWING USE OF FALSE TESTIMONY

The United States Supreme Court in *Giglio v. United States*, 405 U.S. 150, 153-54 (1972), held that a prosecutor cannot knowingly use false testimony against a defendant. To establish a *Giglio* violation, a defendant must show the following: (1) the prosecutor presented false testimony; (2) the prosecutor knew the testimony was false; and (3) the false evidence was material. Once the first two prongs are established, the State bears the burden of showing that the false evidence was immaterial by showing that its use was harmless beyond a reasonable doubt. To do

this, the State must show that “there is no reasonable possibility that the error contributed to the conviction.” A court’s decision with respect to a *Giglio* claim is a mixed question of law and fact, and a reviewing court will defer to the lower court’s factual findings if they are supported by competent, substantial evidence, but will review the court’s application of law to facts de novo.

* * *

On this record, we conclude that prosecutor Pickard committed a *Giglio* violation with respect to Smith at the 1981 suppression hearing. First, the prosecutor presented false testimony and misleading argument to the court. As noted above, all the earlier referenced passages in the testimony of Smith and Wilkerson and in Pickard’s closing argument at the 1981 suppression hearing are contrary to Pickard’s notes and his testimony at the 2007 evidentiary hearing. * * *

Second, according to Pickard’s notes and testimony, he knew at the time of the suppression hearing that the testimony of Smith and Wilkerson was false and his own closing argument was misleading.

* * *

Significantly, there was no equivocation in Pickard’s response [at the 2007 evidentiary hearing] with respect to Smith’s listening and taking notes: “*I’m sure* he was told to listen, to take notes.” (Emphasis added.) Given this response and given the plain language of Pickard’s notes * * * we conclude that Pickard knew in 1981 that during Smith’s initial meeting with Investigator Wilkerson, Smith was told to go back and “keep his ears open” and “take notes” and then presumably disclose the notes to the State. * * *

* * *

* * * Had Smith and Wilkerson testified truthfully and had Pickard argued truthfully in closing argument at the 1981 suppression hearing,

the trial court would have been bound under *Henry* to suppress Smith’s testimony and notes. * * *

V. MATERIALITY

A. *Smith’s Testimony at the 1988 Trial*

During the State’s case-in-chief in the guilt phase of the 1988 trial, Smith testified as to what Johnson told him in February and March 1981 concerning each of the murders. First, Smith testified as follows concerning Johnson’s statements with respect to the murder of William Evans, the taxicab driver:

* * *

Q. What do you remember him telling you about that?

A. That he had killed a cab driver and burnt the car, because his fingerprints was in it.

Q. Do you remember if he said anything else about that particular incident?

A. That he had talked to the lady dispatcher on the radio, but – I asked him was he worried about her identifying his voice, and he said no, because your voice is different when you’re drunk than when you’re sober.

Second, Smith testified as follows concerning Johnson’s statements with respect to the murder of Ray Beasley, the driver who gave Johnson a ride from the late-night restaurant:

* * *

Q. What, if anything, did he tell you about that?

A. He said he got a ride with Mr. Beasley, told him he had to urinate, asked him would he pull over. When he pulled over, he went out and told him, after he urinated, that he had lost his billfold and would he mind helping him find it, and when he come back there, he shot him.

Q. Did Mr. Johnson tell you if he got any money from Mr. Beasley after he shot him?

A. I think it was around a \$100. * * *

Q. Now, did Mr. Johnson make any statements to you describing the position Mr. Beasley was in at the time that he shot him?

A. I believe it was down on his knees.

And third, Smith testified as follows concerning Johnson's statements with respect to the murder of Theron Burnham, the police officer:

* * *

Q. What do you remember him telling you about that?

A. That it was a struggle. The deputy pulled up and there was a struggle between him and the deputy, and the deputy was shot twice.

* * *

Further, Smith testified in 1988 as follows concerning Johnson's plan to evade punishment for the killings by tricking everyone and acting as though he were crazy at the time of the crimes:

Q. *Mr. Smith, do you recall if Mr. Johnson, during the time you were talking to him in February of 1981, made a specific statement to you ... about what kind of defense he might have and what might happen to him? Do you remember if he made such a statement, first of all?*

* * *

Q. What do you recall him telling you in that respect?

A. *He said he could play like he was crazy [when he was doing all this], and they would send him to the crazy house for a few years and that would be it.*

(Emphasis added.)

B. Impact on the 1988 Trial

* * * With respect to the guilt phase, the State has met its burden of showing that Smith's testimony – including both his description of the details of the crimes and his “play like he was crazy” statement – was harmless beyond a reasonable doubt. First, the defense conceded that Johnson had committed the killings but claimed that he was insane at the time because of his drug use. Because Johnson conceded that he had committed the killings, the State's use of Smith's testimony concerning the details of the crimes was immaterial as to Johnson's guilt. And * * * the State's use of Smith's “play like he was crazy” statement was also immaterial as to Johnson's guilt. * * * [T]he circumstances of the killings display a degree of awareness on the part of Johnson that belies his claim of not knowing what he was doing or not knowing that what he was doing was wrong. The insanity standard thus posed a virtually insurmountable hurdle for the defense, regardless of Smith's “play like he was crazy” statement.

With respect to the penalty phase, on the other hand, we conclude that the State has *not* met its burden of showing that Smith's testimony was harmless beyond a reasonable doubt. The penalty phase jury was the same jury that had sat through the guilt phase proceeding and had heard Smith's testimony concerning Johnson's role in committing the crimes and his plan to “play like he was crazy.” The jury had also heard the prosecutor's final closing argument in the guilt phase wherein he emphasized Smith's “play like he was crazy” statement, *twice*:

* * *

MR. ATKINSON: * * *

He could play like he was crazy, and they would send him to the crazy house for a few years, and that would be it. February 1981, the words of Paul Johnson.

* * *

Well, Mr. Smith does, from time to time become a snitch[.] * * * It would be kind of hard for a jailhouse snitch to do much to help himself if every time he went to the police when he needed help, and provided them with information about crimes or criminals, he got it wrong, he made mistakes, the information wasn't any good.

* * *

* * * Mr. Smith remembers it still: *He could play like he was crazy, and they would send him to the crazy house for few years, and that would be it.*

(Emphasis added.) Further, the penalty phase jury was specifically instructed that it should base its advisory sentence not just on the evidence that was presented in the penalty phase but also on the evidence that was presented in the guilt phase[.] * * *

After closing arguments, the judge instructed the jury with respect to the following mental health mitigating circumstances, both statutory and nonstatutory:

* * *

One, the crimes for which the defendant is to be sentenced were committed while he was under the influence of extreme mental or emotional disturbance.

Two, the capacity of the defendant to appreciate the criminality of his conduct was substantially impaired.

Three, the capacity of the defendant to conform his conduct to the requirements of law was substantially impaired.

Four, at the time that the crimes were committed, the defendant was under the influence of drugs.

Five, at the time of the crimes, the defendant suffered a disorder of drug dependency which contributed to his committing the crimes.

* * * The jury then deliberated and returned death recommendations for each of the murders, but the recommendations were nonunanimous on each count[.] * * *

Although Smith's testimony appears to be damaging to the defense in general, it appears to be far more consequential with respect to the death sentences than the convictions. * * * First, the proposed mental health mitigating circumstances posed a lower hurdle for the defense to overcome[.] * * * This was an entirely different scenario from the guilt phase, where the defense had to show that Johnson was insane.

Second, the burden of proof for mitigating circumstances is [lower than] for insanity, for jurors must only be "reasonably convinced" that a mitigating circumstance exists in order to consider it established * * *. Third, * * * Johnson conceivably could have proceeded with the killings in a deliberate manner and yet [the mitigating factors would apply.] In fact, all the mental health experts that testified in the penalty phase attested to this. And finally, the proposed mental health mitigation was extensive, consistent and un rebutted. * * *

Dr. Gary Ainsworth, a psychiatrist, testified that at the time of the crimes Johnson was severely intoxicated on amphetamines, that he was under extreme mental or emotional disturbance, that his capacity to appreciate the criminality of his conduct was somewhat impaired, and that his capacity to conform his conduct to the requirements of law was substantially impaired. Dr. Thomas McClane, a psychiatrist, testified that at the time of the crimes Johnson was substantially intoxicated on amphetamines, that he suffered from amphetamine-induced delirium, that he was under extreme mental and emotional disturbance, that his capacity to appreciate the criminality of his conduct was substantially impaired, and that his capacity to conform his

conduct to the requirements of law was substantially impaired. And Dr. Walter Afield, a psychiatrist, testified that at the time of the crimes Johnson was very heavily intoxicated on amphetamines, that he exhibited symptoms of amphetamine-induced delirium, that he was under the influence of extreme mental or emotional disturbance, that his ability to appreciate the criminality of his conduct was substantially impaired, and that his ability to conform his conduct to the requirements of law was substantially impaired.

* * * Smith's testimony was material in the penalty phase in two respects. First, Smith's statements concerning the details of the killings may have reinforced in jurors' minds the deliberate nature of the killings and thereby caused jurors to discount the proposed mental health mitigation. * * * And second, Smith's "play like he was crazy" statement may have contributed to a conclusion, in the eyes of jurors, that the proposed mental health mitigation was inapplicable to Johnson, for this statement makes it appear as though Johnson had decided beforehand to trick his own mental health experts and feign mental health issues in order to evade punishment for the killings. * * *

[T]he jury at Johnson's 1981 trial recommended death by the slimmest of margins – a seven-to-five vote. The jury at Johnson's 1988 trial also recommended death by a nonunanimous vote on each count: eight to four, nine to three, and nine to three. Had Smith's testimony been suppressed in 1981, the outcome of either trial might have been different. * * *

VI. CONCLUSION

* * *

* * * Lawlessness by a defendant never justifies lawless conduct at trial. * * * The State must cling to the higher standard even in its dealings with those who do not. Accordingly, we must grant relief.

PARIENTE, LEWIS, and LABARGA, JJ., concur.

QUINCE, C.J., and CANADY, J., recused.

POLSTON, J., dissenting.

* * *

In this case, even assuming that the testimony at issue was false and that the prosecutor knew it was false, a reversible *Giglio* violation did not occur because the testimony was immaterial. When viewed in context, there is no reasonable possibility that Smith's testimony affected Johnson's death sentences.

First, Smith's testimony was brief and extensively impeached, making it unlikely that the jury and the sentencing judge relied on it. * * * Smith conceded on cross-examination that he had a lengthy criminal history and that he had worked as an informant in multiple cases in order to receive favorable treatment. He then admitted * * * that, after providing information in Johnson's case, his prison sentences were vacated and he was set free. Smith also admitted that he knew the facts and circumstances of Johnson's crimes because he had read the police reports and other discovery materials to Johnson. Furthermore, Smith disclosed that his regular drug use had negatively affected his ability to recall matters when testifying in this case.

Second, Smith's testimony about the cold-blooded nature of Johnson's crimes was cumulative[.] * * *

Third, * * * while Smith's testimony included the "play like he was crazy" statement, it also included other more numerous and descriptive statements that supported Johnson's proposed drug abuse mitigators. * * *

* * *

For further reading

Alexandra Natapoff, *SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE* (NYU Press 2009); www.snitching.org.

James G. RICKETTS, Director, Arizona Department of Corrections, et al., Petitioners
v.
John H. ADAMSON.

Supreme Court of the United States
483 U.S. 1, 107 S.Ct. 2680 (1987).

White, J., delivered the opinion of the Court, in which Rehnquist, C.J., and Powell, O'Connor, and Scalia, JJ., joined. Brennan, J., filed a dissenting opinion, in which Marshall, Blackmun, and Stevens, JJ., joined.

Justice WHITE delivered the opinion of the Court.

The question for decision is whether the Double Jeopardy Clause bars the prosecution of respondent for first-degree murder following his breach of a plea agreement under which he had pleaded guilty to a lesser offense, had been sentenced, and had begun serving a term of imprisonment. * * *

In 1976, Donald Bolles, a reporter for the Arizona Republic, was fatally injured when a dynamite bomb exploded underneath his car. Respondent was arrested and charged with first-degree murder in connection with Bolles' death. Shortly after his trial had commenced, while jury selection was underway, respondent and the state prosecutor reached an agreement whereby respondent agreed to plead guilty to a charge of second-degree murder and to testify against two other individuals – Max Dunlap and James Robison – who were allegedly involved in Bolles' murder. Specifically, respondent agreed to “testify fully and completely in any Court, State or Federal, when requested by proper authorities against any and all parties involved in the murder

of Don Bolles. . . .” The agreement provided that “[s]hould the defendant refuse to testify or should he at any time testify untruthfully ... then this entire agreement is null and void and the original charge will be automatically reinstated.”¹ The parties agreed that respondent would receive a prison sentence of 48-49 years, with a total incarceration time of 20 years and 2 months. In January 1977, the state trial court accepted the plea agreement and the proposed sentence, but withheld imposition of the sentence. Thereafter, respondent testified as obligated under the agreement, and both Dunlap and Robison were convicted of the first-degree murder of Bolles [and sentenced to death]. While their convictions and sentences were on appeal, the trial court, upon motion of the State, sentenced respondent. In February 1980, the Arizona Supreme Court reversed the convictions of Dunlap and Robison and remanded their cases for retrial. This event sparked the dispute now before us.

The State sought respondent's cooperation and testimony in preparation for the retrial of Dunlap and Robison. On April 3, 1980, however, respondent's counsel informed the prosecutor that respondent believed his obligation to provide testimony under the agreement had terminated when he was sentenced. Respondent would again testify against Dunlap and Robison only if certain conditions were met, including, among others, that the State release him from custody following the retrial. The State then informed respondent's attorney on April 9, 1980, that it deemed respondent to be in breach of the plea agreement. On April 18, 1980, the State called respondent to testify in pretrial proceedings. In response to questions, and upon advice of counsel, respondent invoked his Fifth Amendment privilege against

1. The agreement further provided that, in the event respondent refused to testify, he “will be subject to the charge of Open Murder, and if found guilty of First Degree Murder, to the penalty of death or life imprisonment requiring mandatory twenty-five years actual incarceration, and the State shall be free to file any charges, not yet filed as of the date of this agreement.”

self-incrimination. * * *

On May 8, 1980, the State filed a new information charging respondent with first-degree murder. Respondent's motion to quash the information on double jeopardy grounds was denied. * * * [T]he Arizona Supreme Court * * * held with "no hesitation" that "the plea agreement contemplates availability of [respondent's] testimony whether at trial or retrial after reversal," and that respondent "violated the terms of the plea agreement." The court also rejected respondent's double jeopardy claim[.] * * *

After these rulings, respondent offered to testify at the retrials, but the State declined his offer. * * *

Respondent was then convicted of first-degree murder and sentenced to death. * * *

We may assume that jeopardy attached at least when respondent was sentenced in December 1978, on his plea of guilty to second-degree murder. * * * [T]he Double Jeopardy Clause, absent special circumstances, would have precluded prosecution of respondent for the greater charge on which he now stands convicted. The State submits, however, that respondent's breach of the plea arrangement to which the parties had agreed removed the double jeopardy bar to prosecution of respondent on the first-degree murder charge. We agree with the State.

Under the terms of the plea agreement, both parties bargained for and received substantial benefits.⁵ * * * The agreement specifies in two separate paragraphs the consequences that would

5. We have observed that plea agreements are neither constitutionally compelled nor prohibited; they "are consistent with the requirements of voluntariness and intelligence-because each side may obtain advantages when a guilty plea is exchanged for sentencing concessions, the agreement is no less voluntary than any other bargained-for exchange." *Mabry v. Johnson*, 467 U.S. 504, 508 (1984).

flow from respondent's breach of his promises. Paragraph 5 provides that if respondent refused to testify, "this entire agreement is null and void and the original charge will be *automatically* reinstated." Similarly, Paragraph 15 the agreement states that "[i]n the event this agreement becomes null and void, then the parties shall be returned to the positions they were in before this agreement." Respondent unquestionably understood the meaning of these provisions. At the plea hearing, the trial judge read the plea agreement to respondent, line by line, and pointedly asked respondent whether he understood the provisions in [it] * * *. Respondent replied "Yes, sir," to each question. * * *

* * *

* * * The State did not force the breach; respondent chose, perhaps for strategic reasons or as a gamble, to advance an interpretation of the agreement that proved erroneous. * * *

Finally, it is of no moment that following the Arizona Supreme Court's decision respondent offered to comply with the terms of the agreement. At this point, respondent's second-degree murder conviction had already been ordered vacated and the original charge reinstated. * * *

* * *

Justice BRENNAN, with whom Justice MARSHALL, Justice BLACKMUN, and Justice STEVENS join, dissenting.

The critical question in this case is whether Adamson ever breached his plea agreement. * * * By simply assuming that such a breach occurred, the Court ignores the only important issue in this case.

* * *

I
* * *

A

Without disturbing the conclusions of the Arizona Supreme Court as to the proper construction of the plea agreement,¹ one may make two observations central to the resolution of this case. First, the agreement does not contain an explicit waiver of all double jeopardy protection.² Instead, the Arizona Supreme Court found in the language of ¶¶ 5 and 15 of the agreement only an *implicit* waiver of double jeopardy protection which was *conditional* on an act by Adamson that breached the agreement, such as refusing to testify as it required. * * *

Second, Adamson's interpretation of the agreement – that he was not required to testify at the retrials of Max Dunlap and James Robison – was reasonable. Nothing in the plea agreement explicitly stated that Adamson was required to provide testimony should retrials prove necessary. Moreover, the agreement specifically referred in two separate paragraphs to events that would occur only after the conclusion of all testimony that Adamson would be required to give. [One

paragraph] stated that Adamson “will be *sentenced* at the conclusion of his testimony in all of the cases referred to in this agreement * * *.” At the time that the State demanded that Adamson testify in the retrials, he had been sentenced. [Another paragraph] stated that “[t]he defendant is to remain in the custody of the Pima County Sheriff from the date of the entry of his plea until the conclusion of his testimony in all of the cases in which the defendant agrees to testify as a result of this agreement.” At the time the State demanded that Adamson testify in the retrials, Adamson had been transferred from the custody of the Pima County Sheriff. Adamson therefore could reasonably conclude that he had provided all the testimony required by the agreement, and that * * * the testimony demanded by the State went beyond his duties under the agreement.³ * * *

* * * The next step in the analysis is to determine whether Adamson ever breached his agreement.

B

* * *

The State argues and the Arizona Supreme Court seems to imply that a breach occurred when Adamson sent his letter of April 3, 1980, to the prosecutor in response to the State's demand for his testimony at the retrials of Dunlap and Robison. * * *

* * * [O]ne *might* argue that, in the language of commercial contract law, the letter constituted a

1. Although in text my argument proceeds on the assumption that deference to the Arizona Supreme Court's construction is appropriate, I note here my view that its construction is premised on an interpretive method that is obviously biased and unfair. In rejecting Adamson's interpretation of the agreement, the Arizona Supreme Court relied not on the plain language of the agreement, which offers the State only modest support, but rather on a colloquy that occurred at the time Adamson's plea was taken. Yet at the same time that the court went outside “the four corners of the document” in order to uphold the State's view, it denied Adamson's request to introduce other evidence that he maintained would demonstrate that at the time of sentencing the State shared Adamson's understanding of the agreement. In these circumstances, the Court of Appeals would have been justified in remanding for the evidentiary hearing denied Adamson in state court, and thereafter independently construing the agreement.

2. Nowhere in the agreement do the words “double jeopardy” appear. Significantly, ¶ 17 of the agreement, which lists the “rights” which Adamson “underst[ood] that he [gave] up . . . by pleading guilty,” does not mention the right not to be placed twice in jeopardy.

3. Prior to sentencing, Adamson had provided extensive testimony for the State. He testified that he had “made 14 court appearances ... on five separate cases consisting of approximately 31 days of testimony.... Of the 81 or so jurors who have heard my testimony all have returned guilty verdicts in each case resulting in seven convictions. I have been cross-examined under oath for approximately 190 hours . . . by 22 different attorneys. . . . I have cooperated in approximately 205 interrogative sessions. . . . Fifty-five of these have been formal face-to-face in-depth question and answer sessions, approximately.”

breach by anticipatory repudiation. Such a breach occurs when one party unequivocally informs the other that it no longer intends to honor their contract. * * *

* * * In his letter of April 3, however, Adamson did not announce such an intention. To the contrary, Adamson *invoked* the integrity of that agreement as a defense to what he perceived to be an unwarranted demand by the prosecutor that he testify at the retrials of Dunlap and Robison. And in insisting that he had no obligation to perform as the State demanded, Adamson advanced an objectively reasonable interpretation of his contract.

* * *

* * * The determination of Adamson's rights and responsibilities under the plea agreement is controlled by the principles of fundamental fairness imposed by the Due Process Clause. To grant to one party – here, the State – the unilateral and exclusive right to define the meaning of a plea agreement is patently unfair. Moreover, * * * [g]uilty pleas are enforceable only if taken voluntarily and intelligently. It would be flatly inconsistent with these requirements to uphold as intelligently made a plea agreement which provided that, in the future, the agreement would mean whatever the State interpreted it to mean. * * *

* * * If the defendant offers an interpretation of a plea agreement at odds with that of the State, * * * a ready solution exists – either party may seek to have the agreement construed by the court in which the plea was entered. * * *

C

* * * [I]mmediately following the decision of the Arizona Supreme Court adopting the State's construction of the plea agreement, Adamson sent a letter to the State stating that he was ready and

willing to testify.¹² At this point, there was no obstacle to proceeding with the retrials of Dunlap and Robison; each case had been dismissed without prejudice to refile, and only about one month's delay had resulted from the dispute over the scope of the plea agreement. Thus, what the State sought from Adamson – testimony in the Dunlap and Robison trials – was available to it.

The State decided instead to abandon the prosecution of Dunlap and Robison, and to capitalize on what it regarded as Adamson's breach by seeking the death penalty against him. No doubt it seemed easier to proceed against Adamson at that point, since the State had the benefit of his exhaustive testimony about his role in the murder of Don Bolles. But even in the world of commercial contracts it has long been settled that the party injured by a breach must nevertheless take all reasonable steps to minimize the consequent damage. . . .

* * *

Here it is macabre understatement to observe that the State needlessly exacerbated the liability of its contractual partner. The State suffered a 1-month delay in beginning the retrial of Dunlap and Robison, and incurred litigation costs. For these "losses," the State chose to make Adamson pay, not with a longer sentence, but with his life. A comparable result in commercial law, if one could be imagined, would not be enforced. The fundamental unfairness in the State's course of conduct here is even less acceptable under the Constitution.

* * *

12. Conversely, if Adamson had refused to testify at this point – after an authoritative construction of the agreement had been rendered – then he could be deemed to have breached his agreement.