CONSTITUTIONAL LAW—POSSIBILITY OF DISPARATE MINIMUM SENTENCE UPON PLEA OF NON VULT AND PLEA OF NOT GUILTY TO CHARGE OF MURDER NOT UNCONSTITUTIONAL—*Corbitt v. New Jersey*, 99 S. Ct. 492 (1978).

McArthur Corbitt was indicted in 1972 for arson and felony murder,[1] upon an allegation that he set a fire in his landlord's Newark, New Jersey tenement.[2] The death of one of the building's occupants occurred as a result of the May 13 arson.[3] Corbitt pleaded not guilty to the offense, and after an unsuccessful attempt to suppress Corbitt's alleged confession as coerced,[4] the case went to trial.[5] A jury found

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[1] The indictment was for two counts of arson, arising from two separate fires which occurred on May 11, 1972 and May 13, 1972. State v. Corbitt, No. A-3457-72 (App. Div., Sept. 23, 1975). Brief for Appellant at A-1, Corbitt v. New Jersey, 99 S. Ct. 492 (1978) [hereinafter cited as Appellant's Brief].

The New Jersey arson statute provides in pertinent part that "[a]ny person who willfully or maliciously burns . . . a dwelling house . . . is guilty of arson and shall be punished as for a high misdemeanor." N.J. STAT. ANN. § 2A:89–1 (West 1969).

The statute under which the felony murder count proceeded states that

> [i]f any person, in committing or attempting to commit arson . . . kills another, or if the death of anyone ensues from the committing or attempting to commit any such crime or act . . . then such person so killing is guilty of murder.

N.J. STAT. ANN. § 2A:113–1 (West 1969) (repealed eff. Sept. 1, 1979).

[2] Corbitt had resided in the building for three years, and had previously been involved in several disputes with the landlord over rent increases, some of which had resulted in the initiation of eviction proceedings. *See* Trial Transcript at 3.165–66, 5.102, State v. Corbitt, Indictment No. 4554-71 (Law Div., Apr. 2–10, May 16, 1973) [hereinafter cited as Trial Transcript].

[3] The decedent, Earl Redding, was visiting the premises at the time of the fire. State v. Corbitt, 74 N.J. 379, 382, 378 A.2d 235, 236 (1977), *aff'd*, 99 S. Ct. 492 (1978). At trial it was established by defense counsel that Redding was nearly unconscious due to extreme intoxication, and that he also suffered from emphysema. Trial Transcript, *supra* note 2, at 5.38, 5.45, 5.65, 5.69–.70.

[4] Corbitt had voluntarily reported on several occasions to the office of the Newark Arson Squad to give a statement to investigating officers connected with the case. Trial Transcript at 2.45–.48, 2.50–.51. It was not until after the investigators had an opportunity to question Corbitt's cousin, *id.* at 1.25, that they met with Corbitt on May 31, 1972, *id.* at 1.16. Based on certain inconsistencies between Corbitt's statement at that time and that given by his cousin, Corbitt was then placed under arrest. *Id.* at 1.24–.25.

Corbitt alleged that shortly after being arrested, the officers struck him with a book and pointed a pistol at his head, thereby forcing him to sign a second statement—a confession to having set the fatal fire. *Id.* at 2.60, 5.141–.144. Corbitt maintained that he had not been given Miranda warnings prior to signing the statement, *id.* at 2.60, that he did not read the statement before signing it, *id.* at 2.75, and that he was not allowed to call an attorney, *id.* at 2.72. Although a Miranda warning appeared in the text of the second statement, Corbitt testified that the warning was not contained in the statement when he signed it. *Id.* at 2.75.

[5] The assistant prosecutor had offered Corbitt a plea which remained open for the length of the trial. Letter from Leonard H. Berkley, Esq., former Assistant Prosecutor for Essex County, to Seton Hall Law Review (May 2, 1979) (on file, Seton Hall Law Review editorial office). *See also* N.J.R. 3:9–3 (permitting discussion of plea between prosecutor and defense counsel, with disclosure to the court for its acceptance). Although Mr. Berkley did not recall the terms of the

the defendant guilty of both offenses.[6] Corbitt was subsequently sentenced to life imprisonment in accord with the state statutory provisions.[7]

Corbitt appealed his conviction to the Superior Court of New Jersey, Appellate Division.[8] The major issue[9] raised by Corbitt's attorney on appeal was that "[s]ince the defendant could have pleaded

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offered plea, the assistant deputy public defender representing Corbitt has stated that the offer was for an indeterminate term at the Yardville Correctional Facility, not to exceed five years. Letter from John F. McMahon, Esq., former Assistant Deputy Public Defender for New Jersey, to Seton Hall Law Review (July 12, 1979) (on file, Seton Hall Law Review editorial office) [hereinafter cited as McMahon Letter]. Since Corbitt had no prior record, Appellant's Brief, *supra* note 1, at 15 n.2, it was probable that Corbitt would not have been incarcerated for the entire five years.

[6] Trial Transcript, *supra* note 2, at 6.286. The jury acquitted Corbitt on the arson count arising out of the May 11th fire, but found him guilty of having set the May 13th fire. *Id.* at 6.285–.286. They also found him guilty of murder. *Id.* at 6.287–.288.

[7] For a discussion of the relevant statutory provisions, see note 1 *supra*.

When a death results from the commission of an act of arson, the perpetrator is guilty of murder in the first degree. N.J. STAT. ANN. § 2A:113–2 (West 1969) (repealed eff. Sept. 1, 1979). Although first degree murder is punishable by death, N.J. STAT. ANN. § 2A:113–4 (West 1969) (repealed eff. Sept. 1, 1979), the sentence imposed on conviction is life imprisonment since the death penalty was declared unconstitutional by the New Jersey supreme court. *See* State v. Funicello, 60 N.J. 60, 286 A.2d 55, *cert. denied*, 408 U.S. 942 (1972).

Relying on the foregoing statutes, the trial judge rejected defense counsel's argument that the court had the discretion to sentence Corbitt under the statutory provision regulating non vult pleas. Trial Transcript, *supra* note 2, at 2–5; *see* N.J. STAT. ANN. § 2A:113–3 (West 1969) (repealed eff. Sept. 1, 1979). *See also* N.J.R. 3:9–2 (defendant may only plead not guilty or non vult to capital offense). The sentence to be imposed upon a plea of non vult, if accepted by the court, is "either imprisonment for life or the same as that imposed upon a conviction of murder in the second degree." N.J. STAT. ANN. § 2A:113–3 (West 1969) (repealed eff. Sept. 1, 1979); *see id.* at § 2A:113–4 (West 1969) (repealed eff. Sept. 1, 1979) (thirty year maximum imprisonment for second degree murder conviction). The court concluded, however, that it was bound to follow the statute's mandate in light of the trial and verdict, regardless of any personal convictions to the contrary as to the appropriateness of sentence. Trial Transcript, *supra* note 2, at 5–6. The judge therefore imposed a life sentence. *Id.*

The court also rejected defense counsel's argument that there should be no separate sentence imposed for the arson count, since either on a felony murder or first degree murder by arson theory, the arson offense was incorporated into the murder conviction. *Id.* at 2.

[8] State v. Corbitt, 74 N.J. at 382, 378 A.2d at 236.

[9] The defendant also maintained that the trial court erred in its refusal to allow inquiry into and presentation to the jury of all the circumstances available to the judge in determining voluntariness of the confession when he assessed its veracity. Corbitt further alleged that the trial court erred in failing to merge the arson and felony murder convictions and sentences. Appellant's Brief, *supra* note 1, at A-2 – A-3.

The appellate division initially ruled that any error in delimiting testimony as to the giving of the Miranda warnings was harmless. It further held that the arson and murder counts should have been merged, and therefore vacated the sentence imposed on the arson count. Appellant's Brief, *supra* note 1, at A-5. The appellate court relied on State v. Hubbard, 123 N.J. Super. 345, 303 A.2d 87 (App. Div. 1973), in finding the merger. The *Hubbard* court had held that an armed robbery was such an integral part of the felony murder that the lesser offense merged with the greater. *Id.* at 352, 303 A.2d at 90.

non-vult . . . and thus received less than a life sentence, his mandatory life sentence [for conviction after a plea of not guilty] . . . should be set aside."[10] This argument was summarily rejected by the appellate court in an unreported opinion.[11]

The ruling of the appellate division was appealed to the New Jersey supreme court, which granted certification.[12] Corbitt attacked his life sentence under the murder statute on due process grounds, arguing that if he had pleaded non vult, he could have received a prison term of less than life imprisonment.[13] He maintained that the effect of the disparate penalties imposed under the statute was to violate his fifth amendment right against self-incrimination by encouraging him to plead non vult rather than not guilty to an offense to avoid a mandatory life sentence if convicted.[14] Corbitt additionally argued that by pleading non vult, he would forego his sixth amendment right to a jury trial.[15] Finally, Corbitt stated that the creation of two otherwise identical classes of persons for sentencing purposes, based solely upon their pleas, violated the equal protection clause of the fourteenth amendment.[16]

The New Jersey supreme court rejected both the due process and equal protection arguments.[17] The court found no constitutional infirmity in the disparate minimum penalties,[18] but rather analogized the statutory provisions to the concept of plea bargaining.[19] A sufficient rational basis was also found to exist for the statute's classification scheme.[20]

Corbitt appealed the state supreme court ruling to the United States Supreme Court, which noted probable jurisdiction.[21] In *Corbitt v. New Jersey*,[22] Mr. Justice White, writing for the majority, affirmed the defendant's conviction.[23] Relying in large part on the

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[10] Appellant's Brief, *supra* note 1, at A-3. This point had been argued by defense counsel at trial but had ultimately been rejected. *See* note 7 *supra*. The appellate court found this argument to be "clearly without merit and warrant[ing] no discussion." Appellant's Brief, *supra* note 1, at A-5.

[11] Appellant's Brief, *supra* note 1, at A-1 – A-5.

[12] State v. Corbitt, 69 N.J. 447, 354 A.2d 644 (1976).

[13] 74 N.J. at 393–94, 378 A.2d at 242.

[14] *Id.* at 387, 378 A.2d at 238–39.

[15] *Id.* at 387, 378 A.2d at 239.

[16] *Id.* at 400, 378 A.2d at 245–46.

[17] *Id.* at 400–03, 378 A.2d at 245–47.

[18] *Id.* at 393–97, 378 A.2d at 242–44.

[19] *Id.* at 394–97, 378 A.2d at 242–44.

[20] *Id.* at 402–03, 378 A.2d at 246–47.

[21] Corbitt v. New Jersey, 434 U.S. 1060 (1978).

[22] 99 S. Ct. 492 (1978).

[23] *Id.* at 501.

rationale utilized by the New Jersey supreme court,[24] Justice White held that the New Jersey statutory scheme of differential sentencing did not unconstitutionally burden the defendant's fifth, sixth, and fourteenth amendment rights, nor did it constitute a deprivation of equal protection.[25]

The supreme court's decision in *Corbitt* was not the first time a New Jersey murder statute had been subject to a constitutional attack. Previous state statutes provided that all persons found guilty of first degree murder would be sentenced to death.[26] The harshness of this mandatory death sentence was mitigated by an 1893 amendment to the statute which provided that a defendant could plead non vult to a charge of murder.[27] Under the non vult plea provision, the defendant would, in effect, be pleading guilty to the general indictment, but not to any specific degree of murder.[28] In 1916, the murder statute was further amended to provide for a recommendation of life imprisonment on a conviction of first degree murder.[29]

The statutory non vult provision[30] differs from the statutory penalty[31] since it provides that one who pleads non vult may be sentenced to life imprisonment or to the same sentence as mandated for second degree murder.[32] The New Jersey courts have construed this

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[24] *Id.* at 496–97, 499.

[25] *Id.* at 497–501.

[26] An 1874 New Jersey law stated that any "murder . . . which shall be committed in perpetrating, or attempting to perpetrate, any arson . . . shall be deemed murder of the first degree." N.J. REV. STAT. § IV, ch. 68 (1874). The statute further provided that "[e]very person convicted of murder of the first degree . . . shall suffer death." *Id.* at § IV, ch. 69 (1874). No provision was made for consideration of any mitigating or extenuating circumstances. Thus, if one was found guilty of first degree murder, death was the mandatory penalty.

[27] 1896 N.J. LAWS, ch. 271. The amendment to the 1874 murder statute provided that:

> in no case shall the plea of guilty be received upon any indictment of murder . . . *provided, however*, that nothing herein contained shall prevent the accused of pleading non vult or nolo contendre to such indictment; the sentence to be imposed, if such plea be accepted, shall be the same as that imposed upon a conviction of murder of the second degree.

Id. (emphasis in original).

The penalty provision for one convicted of murder in the second degree was "imprisonment at hard labor for any term, not less than five years nor more than twenty years." N.J. REV. STAT. § IV, ch. 69 (1874).

[28] State v. Walker, 33 N.J. 580, 588–89, 166 A.2d 567, 571–72 (1960).

[29] 1916 N.J. LAWS, ch. 270.

The non vult sentencing provision was correspondingly revised in 1917 to provide for a sentence of "either imprisonment at hard labor for life or the same as that imposed upon a conviction of murder in the second degree." 1917 N.J. LAWS, ch. 238.

[30] N.J. STAT. ANN. § 2A:113–3 (West 1969) (repealed eff. Sept. 1, 1979). For the text of this statute, see note 7 *supra*.

[31] N.J. STAT. ANN. § 2A:113–4 (West 1969) (repealed eff. Sept. 1, 1979); *see* note 7 *supra*.

[32] *Id.*

provision to mean that upon a non vult plea, it is within the trial court's discretion to impose either alternative[33] as warranted by the facts of the case.[34] A hearing on the issue of guilt after the entry of such a plea (assuming the plea is voluntarily offered) was not contemplated by the statute; therefore, the issue of guilt was never presented before the court.[35]

The statutory provision was subject to a major constitutional challenge in 1964 in *State v. Sullivan*.[36] A co-defendant, Taylor, who had been charged with murder, initially entered a plea of not guilty.[37] He later requested and was given leave to withdraw his former plea and enter a non vult plea.[38] Taylor was then sentenced to life imprisonment under the non vult provision.[39] He subsequently recanted his confession and sought a new trial, but his request was denied.[40] Taylor's appeal from the denial of his motion for a new trial to the New Jersey supreme court attacked the constitutionality of the statute, arguing that since an accused who pleaded non vult could be sentenced to the thirty year maximum sentence for second degree murder or life imprisonment but not death, the statute impermissibly deterred a defendant's right to go to trial.[41]

The supreme court, in a careful analysis of the operation of the non vult plea,[42] rejected the defendant's constitutional attack.[43] Justice Francis, writing for the majority, pointed out that, although the death penalty could be avoided by a non vult plea, life imprisonment was one of the sentencing options available at the trial court's discretion.[44] The justice also noted that even if such a plea was ac-

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[33] 33 N.J. at 589, 166 A.2d at 572. Walker had originally pleaded not guilty but later changed his plea to non vult. He was subsequently permitted to withdraw that plea and have the not guilty plea reinstated. *Id.* at 587, 166 A.2d at 570.

[34] *Id.* at 589, 166 A.2d at 572.

[35] State v. Williams, 39 N.J. 471, 479, 189 A.2d 193, 197 (1963). Williams had originally entered a non vult plea but the court had allowed it to be withdrawn and a plea of not guilty entered on the ground that it had not been voluntary and understanding. *Id.* at 475, 189 A.2d at 195.

[36] 43 N.J. 209, 203 A.2d 177 (1964).

[37] *Id.* at 216–17, 203 A.2d at 181.

[38] *Id.* at 216–18, 203 A.2d at 181.

[39] *Id.* at 218, 203 A.2d at 181.

[40] *Id.*

[41] *Id.* at 241, 203 A.2d at 194.

[42] *Id.* at 241–42, 203 A.2d at 194.

[43] *Id.* at 247, 203 A.2d at 197.

[44] *Id.* at 246–47, 203 A.2d at 197. The court approvingly discussed the legislature's attempts to ameliorate the rigors of a mandatory death penalty by the addition of the non vult plea provision. *Id.* at 244–45, 203 A.2d at 196. The majority stated, however, that the acceptance of

cepted, there was no guarantee of a sentence of less than life imprisonment.[45] The court placed particular emphasis on the fact that Taylor had made a choice to go to trial.[46] It seemed to imply that his arguments lacked validity due to this choice not to plead non vult and to risk conviction for a chance of acquittal.[47]

In 1968, the United States Supreme Court addressed the issue of differential sentencing provisions contained in a federal statute in *United States v. Jackson*.[48] Jackson was indicted for his alleged participation in a kidnapping scheme.[49] The Federal Kidnapping Act provided for the death penalty upon conviction by jury, but contained no similar provision if one pleaded guilty or waived a jury trial for a trial to the bench.[50] Based on Jackson's argument that the statute impermissibly coerced the waiver of his fifth amendment right not to plead guilty and his sixth amendment right to demand a jury trial,[51] the district court dismissed his indictment.[52]

The Government took a direct appeal of the district court's decision to the United States Supreme Court.[53] Justice Stewart, writing for the majority, rejected the Government's contention that a trial judge could adequately protect a defendant from offering a coerced plea.[54] The Court found the statute to be constitutionally infirm by "needlessly encourag[ing]" guilty pleas and jury waivers due to the differential sentencing provisions.[55] The majority, however, reasoned that the death penalty provision was severable from the statute, and thereby allowed the defendant's indictment to stand.[56]

Within several months of the *Jackson* decision, a major constitutional attack on the New Jersey murder statute occurred in *State v. Forcella*.[57] There the defendant brought a post-conviction attack

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a non vult plea was within the trial court's discretion and not a matter of right. *Id.* at 246, 203 A.2d at 197.

[45] *Id.* at 246, 203 A.2d at 197.

[46] *Id.* at 247, 203 A.2d at 197.

[47] *Id.*

[48] 390 U.S. 570 (1968).

[49] *Id.* at 571 & n.1.

[50] 18 U.S.C. § 1201(a) (1976).

[51] 390 U.S. at 581.

[52] *Id.* at 571.

[53] *Id.* at 571–72.

[54] *Id.* at 583.

[55] *Id.* (emphasis omitted).

[56] *Id.* at 590–91. The Court noted that the statute could be saved by simply excising the death penalty provision in light of the act's legislative history, since this would not frustrate the purpose of its drafters. *Id.* at 584–91.

[57] 52 N.J. 263, 245 A.2d 181 (1968).

upon the imposition of the death penalty after his conviction for first degree murder.[58] Forcella argued that the statute[59] was unconstitutional in light of the recent *Jackson* decision.[60]

In denying the relief sought by Forcella, the New Jersey supreme court noted that the federal act in *Jackson* was invalid since it provided for a lesser maximum penalty if the defendant pleaded guilty or waived a jury trial, whereas under the New Jersey statute a jury trial could not be waived and a plea of guilty could not be entered.[61] Rather than " 'needlessly' "[62] encouraging non vult pleas, the court found that the statute operated to the defendants' benefit as a class, since it humanely provided an alternative to trial and the possible imposition of a death sentence.[63]

The New Jersey supreme court faced the issue of differential sentencing again in *State v. Funicello.*[64] In 1971, the United States Supreme Court, in *Funicello v. New Jersey,*[65] vacated the death penalty imposed on Funicello at his state court trial.[66] The New Jersey supreme court, on remand, in a dramatic shift from its position in *Forcella,* held that the New Jersey murder statute[67] was constitution-

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[58] *Id.* at 268, 245 A.2d at 184. Forcella had previously brought a direct appeal from the trial court's imposition of the death penalty, which had been affirmed by the New Jersey supreme court. *Id.*

[59] N.J. STAT. ANN. § 2A:113–4 (West 1969) (repealed eff. Sept. 1, 1979).

[60] 52 N.J. at 268, 245 A.2d at 183–84.

[61] *Id.* at 268–72, 245 A.2d at 184–85. The court concluded that *Jackson* was not applicable to sentences imposed under the New Jersey murder statute. *Id.* at 280–81, 245 A.2d at 190; *see* N.J. STAT. ANN § 2A:113–4 (West 1969) (repealed eff. Sept. 1, 1979). The majority also noted that it perceived no sixth amendment "right to trial" problem, but if the statute was subject to attack, it could only be on the basis of a fifth amendment "self-incrimination" challenge. 52 N.J. at 272, 245 A.2d at 185.

[62] 52 N.J. at 280, 245 A.2d at 190.

[63] *See id.* The court stated that the absence of the non vult provisions from the murder statute would have the " 'cruel' " effect of "requir[ing] *all* defendants to undergo a trial and to do so at the risk of life." *Id.* (emphasis in original).

By way of dicta the court went on to note that if *Jackson* was subsequently found to apply, the non vult plea's infringement of the right to contest one's guilt would be the constitutional infirmity, since it was clearly the intent of the legislature to have the capital punishment provision remain. *Id.* at 283, 245 A.2d at 192. The dissenting opinion of Justices Jacobs and Hall, however, argued that the rationale underlying *Jackson* would require retention of the non vult plea, but the death penalty provision would have to be stricken. *Id.* at 299, 301–02, 245 A.2d 200–01. (Jacobs & Hall, JJ., dissenting).

[64] 60 N.J. 60, 286 A.2d 55 (1972) (*per curiam*).

[65] 403 U.S. 948 (1971).

[66] *Id.* In a summary disposition, the Supreme Court ordered the state court "[j]udgment . . . insofar as [it] impose[s] the death sentence, reversed and [the] case . . . remanded for further proceedings." *Id.* Both a motion for clarification and a petition for rehearing were subsequently denied. 404 U.S. 876 (1971).

[67] N.J. STAT. ANN. § 2A:113–4 (West 1969) (repealed eff. Sept. 1, 1979).

ally deficient and could be saved only by excising the death penalty.[68] The court concluded that the effect of its holding would be to make life imprisonment the mandatory sentence to be imposed on a verdict of first degree murder.[69]

In *Corbitt*, the United States Supreme Court was presented with a three level challenge to the constitutionality of the New Jersey statute.[70] Corbitt alleged an infringement of his sixth amendment right to jury trial,[71] his fifth amendment right against self-incrimination,[72] and his fourteenth amendment right to equal protection.[73] Corbitt premised the major part of his argument upon the Supreme Court's holding in *Jackson*.[74]

The *Corbitt* Court found itself in agreement with the New Jersey supreme court's position that there were "substantial differences" between the challenged statute and the one invalidated in *Jackson*.[75] Justice White stated the majority's contention that "the pressures to forego trial and to plead to the charge" were markedly different in the two cases.[76] Unlike the federal statute in *Jackson*, the New Jersey statute did not involve the imposition of the death penalty

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[68] 60 N.J. at 67, 286 A.2d at 59.

The court again looked to what it perceived to be the legislative intent, and concluded that the legislature would desire the remainder of the statute to stand even though the death penalty could not be sustained. *Id.*

[69] *Id.* at 68, 286 A.2d at 59. The Chief Justice, in a concurring opinion, expressed displeasure with the lack of clarity in the United States Supreme Court opinion, although he agreed with the majority that the Court's memorandum opinion did invalidate New Jersey's death penalty provision. *Id.* at 69–84, 286 A.2d at 59–68 (Weintraub, C.J., concurring).

Justice Francis, in a dissenting opinion, took the position that any constitutional deficiency in the statute arose from the attempted amelioration by adding the non vult plea provision. *Id.* at 97–99, 286 A.2d at 75–76. The justice believed that this provision was the element which must be excised to conform with the constitutional mandate. *Id.* (Francis, J., dissenting).

[70] N.J. STAT. ANN. § 2A:113–4 (West 1969) (repealed eff. Sept. 1, 1979).

[71] 99 S. Ct. at 496. The sixth amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. CONST. amend. VI. In Duncan v. Louisiana, 391 U.S. 145 (1968), the sixth amendment was held applicable to the states through the fourteenth amendment. The Court there held that a jury trial was "fundamental to the American scheme of justice." *Id.* at 149.

[72] 99 S. Ct. at 496. Under the provisions of the fifth amendment, "[n]o person shall . . . be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. The fifth amendment right against self-incrimination was held applicable to the states through the fourteenth amendment in Malloy v. Hogan, 378 U.S. 1 (1963).

[73] 99 S. Ct. at 496. The fourteenth amendment provides in pertinent part that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

[74] 99 S. Ct. at 496.

[75] *Id.*

[76] *Id.*

upon conviction.[77] Additionally, the challenged statute, as opposed to the *Jackson* statute, did not *guarantee* a sentence lesser than the maximum—a trial judge retained the discretion to sentence a defendant to life imprisonment upon acceptance of a plea of non vult.[78]

Turning to Corbitt's constitutional claims, the Court held that the non vult statute's "less than life" imprisonment provision did not burden the defendant's fifth, sixth or fourteenth amendment rights.[79] Justice White stated that the post-*Jackson* decisions "have clearly established that not every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid."[80] In fact, the majority maintained "that a State may encourage a guilty plea by offering substantial benefits in return for the plea."[81] A state, therefore, could obtain a plea from a

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[77] *Id.* While the New Jersey supreme court had argued that *Jackson* was not an authority when the maximum penalty imposable upon conviction after trial was less than death, State v. Corbitt, 74 N.J. at 389, 378 A.2d at 240, the United States Supreme Court did not explicitly adopt this conclusion. 99 S. Ct. at 496. Justice White did note, however, that the fact that the maximum penalty was life imprisonment was a material one, *i.e.*, since it was not as " 'unique in its severity and irrevocability' " as was the penalty of death. *Id.*; *see* Gregg v. Georgia, 428 U.S. 153, 187 (1976) (declaring state statute's death penalty provision unconstitutional).

[78] 99 S. Ct. at 496. *See* note 7 *supra* and accompanying text. Another distinction between the state and federal statutes not noted in the Supreme Court's opinion is that the New Jersey statute does not allow the waiver of a jury and trial to the court. Corbitt contended that despite the absence of this provision, the New Jersey scheme compelled a waiver to avoid the certainty of life imprisonment upon a conviction of first degree murder by the jury. 99 S. Ct. at 497.

[79] 99 S. Ct. at 497.

[80] *Id.* The plea of guilty (and, for sentencing purposes, a non vult plea may be considered the equivalent of a plea of guilty) has long been considered a waiver of three basic constitutional rights—self-incrimination, jury trial, and confrontation. Note, *The Guilty Plea As A Waiver Of Rights And As An Admission Of Guilt*, 44 TEMP. L.Q. 540, 540 (1971) [hereinafter cited as *Guilty Plea*]. Although waiver was originally considered liberally by the court along a freedom of contract theory, *see* Tigar, *Foreword: Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 HARV. L. REV. 1, 9 (1970), the Court in *Jackson* reflected the modern attitude towards waivers. It invalidated the Federal Kidnapping Act for "needlessly *encourag[ing]*" a waiver, 390 U.S. at 583 (emphasis in original), stating that "[a] procedure need not be inherently coercive in order that it be held to impose an impermissible burden upon the assertion of a constitutional right." *Id.*

[81] 99 S. Ct. at 497. The Court noted that its decision in Brady v. United States, 397 U.S. 742 (1970), set the standard for assessing the validity of such inducements. Brady brought an attack on his conviction in light of *Jackson* since he had pleaded guilty under the statute invalidated in *Jackson*. *Id.* at 744. In rejecting the defendant's argument, the *Brady* Court stated that a plea made in fear of a possible death sentence was neither per se involuntary nor invalid. *Id.* at 747. Furthermore, it expressly declined to hold

> 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.

Id. at 751.

defendant in exchange for " 'the possibility or certainty' " of a lesser sentence than the government could rightfully seek to impose upon a conviction.[82]

Although the Court rejected Corbitt's claims under a *Jackson* rationale, it found "no difference of constitutional significance" between the defendant's case[83] and *Bordenkircher v. Hayes*.[84] Justice White noted that in both cases the defendants had foregone any possible leniency by proceeding to trial where a conviction would lead to a mandatory sentence.[85] Since the possibility of leniency in exchange for the defendant's plea did not render the mandatory penalty upon conviction invalid in *Bordenkircher*, the Court reasoned that the possibility of leniency would not, similarly, render the state statute invalid where the judge retained sentencing discretion as to a non vult plea.[86]

In examining the record, the Court stated that it could perceive no "vindictiveness" by the state in response to Corbitt's exercise of the right to go to trial and no indication of the imposition of a penalty for the exercise of such right.[87] The majority also rejected the argument that the statute's influence effectively "coerce[d] inaccurate guilty pleas" so as to render it constitutionally suspect.[88] Instead, the court believed that as long as plea bargaining was considered a valid part of the criminal justice system, it was permissible to treat those who pleaded non vult more leniently than those who went to trial.[89]

It appears that the Court was repudiating any liberal reading of *Jackson*. This conclusion is supported by the holdings of two companion cases to *Brady*. *See* McMann v. Richardson, 397 U.S. 759 (1970) (competently counseled defendant who pleaded guilty and waived argument that confession was coerced may not argue involuntariness of plea), Parker v. North Carolina, 397 U.S. 790 (1970) (even if statute under which plea was entered imposed unconstitutional maximum penalty, otherwise valid plea is not made involuntary by defendant's desire to limit maximum penalty).

[82] 99 S. Ct. at 497–98.

[83] *Id.* at 498. *See* notes 84–88 *infra* and accompanying text for a discussion of *Bordenkircher*.

[84] 434 U.S. 357 (1978).

[85] 99 S. Ct. at 498–99.

[86] *Id.* at 499.

[87] *Id.*

[88] *Id.* at 500.

[89] *Id.* The Supreme Court expressly upheld the validity, necessity, and propriety of plea bargaining and gave it enhanced legitimacy in Santobello v. New York, 404 U.S. 257 (1971). There, Chief Justice Burger, speaking for the Court, stated that "' plea bargaining' is an essential component of the administration of justice. Properly administered, it is to be encouraged." *Id.* at 260. *See also* Blackledge v. Allison, 431 U.S. 63 (1977) (guilty pleas and plea bargains are necessary and important components of criminal justice system with benefits to all parties);

Passing upon Corbitt's final constitutional attack on the statute, Justice White found no equal protection deficiency in the New Jersey statutory scheme.[90] The Court noted that all defendants were given the same choice—they could proceed to trial and face a mandatory life sentence upon conviction, possible acquittal, or conviction of a reduced degree of homicide, *or* they could plead non vult and possibly receive the maximum of life imprisonment.[91] The Court concluded its analysis by suggesting that the equal protection clause does not protect those who make "a bad assessment of the risks or a bad choice from the consequences of their decision."[92]

Mr. Justice Stewart concurred only in the Court's judgment.[93] He agreed that *Jackson* was not controlling since a defendant who went to trial or one who pleaded non vult were both subject to the same maximum penalty of life imprisonment.[94] He would not join the majority opinion, however, due to the majority's reliance on *Bordenkircher*.[95] Justice Stewart argued forcefully that there is a vast difference between a statutory scheme adopted by the legislature as in *Corbitt*, and the informally negotiated plea bargain in *Bordenkircher*.[96]

Ludwig v. Massachusetts, 427 U.S. 618 (1976) (harsher sentence imposed on *de novo* trial to jury when penalty range is same for original trial to court and *de novo* trial does not infringe right to jury trial); Chaffin v. Stynchcombe, 412 U.S. 17 (1973) (possibility of higher sentence upon retrial does not impermissibly chill right to challenge original conviction by way of appeal or collateral attack); Parker v. North Carolina, 397 U.S. 790 (1970) (valid guilty plea not made involuntary by defendant's desire to escape maximum penalty imposed after trial).

For a thorough historical survey of the plea bargaining process from Anglo-Saxon England through its present operation, see Comment, *The Plea Bargain in Historical Perspective*, 23 BUFFALO L. REV. 499 (1974) [hereinafter cited as *Plea Bargain*].

[90] 99 S. Ct. at 500–01.

[91] *Id.* at 501.

[92] *Id.* In Boykin v. Alabama, 395 U.S. 238 (1969), the Supreme Court held that there must be an intelligent and understanding decision to plead guilty for a plea to be deemed voluntary. Furthermore, it was held that a knowing and intelligent plea, involving the waiver of several constitutional rights, could not be presumed from a silent record. *Id.* at 242–43.

[93] 99 S. Ct. at 501–02.

[94] *Id.* at 501. *See* notes 77–78 *supra* and accompanying text for the posited distinctions between the *Jackson* statute and the New Jersey provision.

[95] 99 S. Ct. at 501.

[96] *Id.* at 501–02. (Stewart, J., concurring). Justice Stewart pointed out that he saw

> a vast difference between the settlement of litigation through negotiation between counsel for the parties, and a state statute such as is involved in the present case. While a prosecuting attorney, acting as an advocate, necessarily must be able to settle an adversary criminal lawsuit through plea bargaining with his adversary a state legislature has a quite different function to perform.

Id. at 501–02.

Mr. Justice Stevens, joined by Mr. Justice Brennan and Mr. Justice Marshall, dissented.[97] The Justices objected to what they considered a penalty, imposed on Corbitt, for entering a " 'false' not guilty plea."[98] It was their position that a statute which penalized the assertion of the right to trial by imposing a more severe mandatory penalty upon those found guilty by a jury than upon those pleading non vult was not constitutionally permissible.[99] They concluded that it had the effect of punishing the defendant for the time, energy, and expense incurred by the state in proving the " 'fals[ity]' " of his not guilty plea.[100] Rather, they believed that "[a] defendant has a constitutional right to require the state to support its accusation with evidence."[101]

The dissent found the *Jackson* opinion to be controlling[102] and they believed that the majority's holding had divorced *Jackson* "from the rationale on which it rested."[103] Justice Stevens rejected any implication that *Jackson* was not authority for cases in which the penalty to be imposed was less than death.[104] The Justice found the New Jersey statute to be, in effect, more onerous than the one invalidated by *Jackson*.[105] Although both statutes involved the waiver of a defendant's right to a jury trial to avoid a more severe penalty, the New Jersey statute also involved the waiver of the defendant's "right to put the government to its proof, to confront one's accusers, and to present a defense."[106] In addition, one who exercised his

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[97] *Id.* at 502 (Stevens, J., dissenting).

[98] *Id.*

[99] *Id.* at 502–03. The dissent believed that it was improper to exact punishment based on the type of plea offered by a defendant since a plea was neither testimony nor evidence. *Id.* at 502 & n.1; *see* Wood v. United States, 128 F.2d 265, 273 (D.C. Cir. 1942) (not guilty plea and entrapment defense not inconsistent). *See also* Sorrells v. United States, 287 U.S. 435, 452 (1932); State v. Valentina, 71 N.J.L. 552, 556, 60 A. 177, 179 (Ct. Err. & App. 1905) (not guilty plea and confession of guilt held not inconsistent).

[100] 99 S. Ct. at 502–03 (Stevens, J., dissenting).

[101] *Id.* at 502.

[102] *Id.* The dissent noted that *Jackson* had held, *inter alia*, that " '[i]f the provision had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional.' " *Id.* at n.4; *see Jackson*, 390 U.S. at 581. The dissenting Justices believed that Corbitt's case was within the Court's mandate in *Jackson*. 99 S. Ct. at 502.

[103] 99 S. Ct. at 503.

[104] *Id.* at n.5. The dissent cited the Court's opinion in Brady v. United States, 397 U.S. 742 (1970) as recognizing no difference between a defendant who pleads guilty to avoid the death penalty and one who pleads guilty to avoid any " 'maximum sentence authorized by law.' " 99 S. Ct. at 503 n.5; *see* 397 U.S. at 752.

[105] 99 S. Ct. at 503 n.6 (Stevens, J., dissenting).

[106] *Id.* The statute involved in *Jackson* provided for trial to the court which could not, upon conviction, impose the same maximum penalty as that which could be imposed upon conviction

constitutional rights by proceeding to trial could be subject to mandatory life imprisonment, whereas one who pleaded non vult would be subject to a discretionary sentence whose maximum term was life—the former involving the "substantial risk of greater punishment" which *Jackson* had sought to preclude.[107]

Finally, the dissent noted that there was a vast difference between the statutory scheme under consideration and the usual plea bargaining process.[108] They found that, unlike the statute, one who refused a plea bargain was not subject to additional penalties for his "constitutionally protected recalcitrance."[109] The dissenting Justices concluded by reasoning that since a not guilty plea was constitutionally protected by the fifth amendment, it could not be "simultaneously a punishable offense."[110]

If there is a difference of constitutional significance between *Corbitt* and *Jackson*, it is apparently only in the fact that *Corbitt* made an attack on the statute at the trial level[111] while *Jackson* brought a facial attack on the statute by way of motion to dismiss the indictment.[112] This issue, however, was not addressed, with the majority relying on analogies to the plea bargaining process.[113] The major problem in premising the decision in *Corbitt* on such an analogy is due to the disparate operation and purposes of a statutory plea provision and plea bargaining.[114]

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by a jury. *Jackson*, 390 U.S. at 570–71. Under the New Jersey statute, confrontation, self-incrimination, and a jury trial had to be waived to avoid the certainty of the maximum penalty. State v. Corbitt, 74 N.J. at 420, 378 A.2d at 256 (Pashman, J., dissenting).

[107] 99 S. Ct. at 503 (Stevens, J., dissenting). In its practical effect, the defendant, by choosing to go to trial, had not increased the maximum penalty but had made its imposition mandatory upon a finding of guilt. *See* Lindsey v. Washington, 301 U.S. 397, 400 (1937) (statute's effect was "to make mandatory what was before only the maximum sentence.").

[108] 99 S. Ct. at 504. A plea bargain, as opposed to a mandatory sentence, would permit consideration of individual factors relevant to the particular case. A properly conducted plea negotiation, therefore, could be of benefit to both parties. *Id.*

[109] *Id.* The dissenters suggested that the statute, by imposing a "more severe range of statutory penalties" upon those who did not plead non vult penalized the " 'false' " not guilty plea as well as the substantive offense. *Id.*

[110] *Id.* at 505.

[111] *See* note 7 *supra*.

[112] 99 S. Ct. at 501 n.* (Stewart, J., concurring). Of the three opinions written in *Corbitt*, only Justice Stewart's concurrence addressed this issue, and at that, only in a short footnote. *Id.*

[113] *See* note 89 *supra* and accompanying text.

[114] It has been suggested that the plea bargain developed in response to the "Draconian penalties" present in many statutory schemes. *Plea Bargain*, *supra* note 89, at 526. Unlike a statutorily mandated sentence, a plea bargain is not a statutory procedure but is practiced on a case-by-case basis. *Guilty Plea*, *supra* note 80, at 543. Even where an official provision is made for plea discussions, no party to the agreement is bound by it until the agreement is accepted by the court. *See, e.g.*, N.J.R. 3:9–3. Among the various forms available, the agreement may involve the prosecutor's recommendation of leniency, an allowance of a plea to a lesser included

The primary function of the plea bargaining process is to allow consideration of factors relevant to the particular case and the particular sentence, both in the charge and the sentence imposed.[115] By contrast, the statute attacked in *Corbitt* made no provision for consideration of individual factors.[116] A defendant either had to plead not guilty or non vult (with the concurrent waiver of constitutional rights).[117] If the defendant chose the former and was convicted, the life sentence imposed was mandatory.[118] Additionally, whereas a plea bargain may often provide a degree of certainty as to the penalty to be imposed as a result of the bargained for concession, defendants offering a non vult plea can receive, at the judge's discretion, a term ranging from life imprisonment to probation.[119] Thus, any attempt to analogize the plea bargain to the state statute is inappropriate.[120]

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offense, or a plea to one of several charges and dismissal of the remaining ones. *See* Comment, *Constitutional Law—Plea Bargaining—New Jersey Statute Allowing a Defendant to Avoid the Death Penalty by Pleading Non Vult or Nolo Contendere Held Valid*, 44 N.Y.U. L. REV. 612, 617–18 (1969). As a general rule, a promise made to induce a plea which is not kept will invalidate the plea. *Id.* at 618. *See also* Santobello v. New York, 404 U.S. 257 (1971) (reversing conviction for prosecutor's failure to refrain from making sentence recommendation after promising to so refrain in return for plea).

While the apparent purpose of the bargain is to encourage a guilty plea, State v. Corbitt, 74 N.J. at 396, 378 A.2d at 243–44 (1977), the client is not protected from the erroneous assumption of his counsel as to either the state of the law or that of the facts. McMann v. Richardson, 397 U.S. 759, 770 (1970). The process is deemed to be to the potential benefit of both parties, Brady v. United States, 397 U.S. 742, 752 (1970), since the defendant limits the possible penalty range and the state conserves "scarce judicial and prosecutorial resources." *Id.*

[115] 99 S. Ct. at 504 (Stevens, J., dissenting). This is the most crucial distinction between the plea bargain process and the statutory scheme under consideration. The plea bargain gives the defendant a choice which, if rejected, does not result in a more significant penalty being imposed.

[116] *See id.*

[117] N.J. STAT ANN. § 2A:113–3 (West 1969) (repealed eff. Sept. 1, 1979).

[118] *Id.* § 2A:113–4 (West 1969) (repealed eff. Sept. 1, 1979). In light of the mandatory penalty imposed after conviction by the New Jersey statute, one could conclude that this is the antithesis of a plea bargain. For a discussion of the imposition of stricter equal protection standards (under either a rational basis or a strict scrutiny analysis) to reduce sentencing disparity, see Note, *Equal Protection Applied To Sentencing*, 58 IOWA L. REV. 596, 610–17 (1973).

[119] N.J. STAT. ANN. § 2A:113–4 (West 1969) (repealed eff. Sept. 1, 1979). Since there is a duty to adhere to the concession offered for the plea, Santobello v. New York, 404 U.S. 257 (1971), and provision in New Jersey for judicial concurrence in the proposed disposition prior to its entry, N.J.R. 3:9–3 (c), one entering into a plea bargain is far more certain of the consequences of the plea than a non vult defendant whose fate is entirely within the discretion of the sentencing judge.

[120] *But see* Comment, *The Use of Death Penalty Provisions To Encourage Guilty Pleas And Jury Waivers: An Application of United States v. Jackson*, Vol. 1969 WASH. U.L.Q. 231, 237–38 (1969) (statutory plea bargain, the author's term for a scheme similar to that discussed here, acceptable so long as plea bargaining itself recognized).

The presumption[121] that there were fewer pressures imposed upon Corbitt by the New Jersey statute[122] than those imposed on Jackson by the federal statute[123] also presents certain analytic problems. The majority relied on the absence of the death penalty provision[124] and the fact that the same maximum penalty could be imposed on a non vult plea as on a conviction after trial.[125] Yet, it appears that Corbitt had foregone a possible prison term of eighteen months by refusing to plead non vult, rather choosing to go to trial as was his constitutional right, with the result being the imposition of a mandatory term of life imprisonment.[126]

The *Corbitt* Court implied that the New Jersey statute would not be invalid under *Jackson* since the mandated term of life imprisonment for a conviction of murder was the maximum alternative available at the discretion of the sentencing judge upon acceptance of a non vult plea.[127] Similarly, the majority opinion of the New Jersey supreme court conceded that there would be problems with the statute only if a substantially lesser sentence was imposed upon a defendant pleading non vult.[128] In actuality, the rationale used by both courts to uphold the constitutionality of the state statute is not supportable.

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[121] 99 S. Ct. at 496.

[122] N.J. STAT. ANN. § 2A:113–1 to –9 (West 1969) (repealed eff. Sept. 1, 1979).

[123] 18 U.S.C. § 1201(a) (1976).

[124] 99 S. Ct. at 496. The basic premise of the *Corbitt* Court was that since this case did not involve the death penalty, there was less pressure upon the defendant to plead non vult because the maximum sentence imposable upon conviction was life imprisonment. *Id.* This analysis overlooks the fact that it is not the penalty range available under the statute which is at issue, but the imposition of a penalty for the exercise of a constitutional right. As the Court itself had previously noted, a " 'penalty' is not restricted to fine or imprisonment. It means . . . the imposition of any sanction which makes the assertion of the Fifth Amendment privilege 'costly.' " Spevack v. Klein, 385 U.S. 511, 515 (1967).

[125] 99 S. Ct. at 496; *see* N.J. STAT. ANN. § 2A:113–4 (West 1969) (repealed eff. Sept. 1, 1979).

[126] *See* McMahon Letter, *supra* note 5. In light of these facts, which apparently were not available to the Court, a strong facial argument can be made that the mandatory versus the discretionary sentencing alternatives provide sufficient "needless encourage[ment]" of a guilty plea to overturn the New Jersey statute. *See Jackson*, 390 U.S. at 583. However, both the New Jersey supreme court, State v. Corbitt, 74 N.J. 379, 378 A.2d 235 (1977), and the United States Supreme Court, 99 S. Ct. 492 (1978) declined to so hold.

[127] 99 S. Ct. at 496.

[128] State v. Corbitt, 74 N.J. 379, 378 A.2d 235 (1977). The court reasoned that

> [i]f the invariable or almost invariable practice were to accord the pleading defendant a substantially lesser sentence than that mandated on a conviction, the argument of pressure to avoid a trial by pleading guilty . . . would have logical merit even though the statute facially allowed imposition, on the taking of the plea, of the same penalty required in case of conviction after trial.

Id. at 389, 378 A.2d at 240.

A recent survey of New Jersey homicide sentences conducted under the auspices of the Administrative Office of the Courts is directly relevant to the issues raised by *Corbitt*.[129] In the one-year[130] span covered by the survey, seven criminal defendants identically situated to Corbitt pleaded non vult.[131] The median term for those sentenced to the state prison was 18 years.[132] The median term for those sentenced to an indeterminate term at the Yardville Correctional Facility was 13.5 years.[133] As to those defendants found guilty by a jury after trial, the penalty of life imprisonment was imposed in accordance with the statute's mandate.[134] It is clear that this disparate treatment of individuals otherwise identically situated, based solely upon their "voluntary"[135] waiver of constitutional rights, is a

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[129] STATE OF NEW JERSEY ADMINISTRATIVE OFFICE OF THE COURTS SENTENCING GUIDELINES PROJECT, Supplemental Report of the Sentencing Guidelines Project to the Administrative Director of the Courts 1979 [hereinafter cited as Sentencing Guidelines].

[130] Sentencing Guidelines, *supra* note 129, at 6.

[131] *Id.* at 11, 12, 16. By identically situated is meant those with no record of prior convictions, who were charged with the commission of a homicide during the commission/attempted commission of a high misdemeanor, where the victim was not less than 18 years of age and no violence upon multiple persons was involved. *Id.* at 11. In New Jersey arson is considered a high misdemeanor. N.J. STAT. ANN. § 2A:89–1 (West 1969) (repealed eff. Sept. 1, 1979); *see* note 1 *supra*.

The combination of these factors resulted in the development of matrices, Sentencing Guidelines, *supra* note 129, at 15–17, relative to the scores received under each of the following three factors: criminal history, nature of the homicide, and exacerbating factors. *Id.* at 11.

Homicide during the commission/attempted commission of a high misdemeanor is murder of the first degree. *See* notes 1 & 7 *supra* and accompanying text. Those who had no prior record, had committed a homicide during the commission/attempted commission of a high misdemeanor, in the absence of any exacerbating factors comprised the class into which Corbitt would have fit if he had been within the study's temporal span and had pled non vult.

[132] Sentencing Guidelines, *supra* note 129, at 16.

[133] *Id.* During the same temporal span any defendant charged with "felony murder" and found guilty after a plea of not guilty (these defendants were not deemed within the scope of the survey since, as the report noted, "the life sentence is mandatory," *id.* at 10) received a significantly greater sentence.

[134] N.J. STAT. ANN. § 2A:113–4 (West 1969) (repealed eff. Sept. 1, 1979). By setting a mandatory penalty, the legislature precluded the ability to consider any mitigating factors. Therefore, despite the fact that Corbitt had no prior record, Appellant's Brief, *supra* note 1, at 15 n.2, Corbitt was sentenced to life imprisonment. Trial Transcript, *supra* note 2, at 6. The judge specifically noted that he had no alternative to the imposition of such sentence. *Id.* at 5.

[135] A serious question arises as to whether such a non vult plea can be deemed a voluntary waiver. The voluntariness standard is that a plea be both "intelligent and voluntary." Boykin v. Alabama, 395 U.S. 238, 242 (1969). The Court subsequently expanded the notion of "intelligent," defining it to mean "with sufficient awareness of the . . . likely consequences." Brady v. United States, 397 U.S. 742, 748 (1970). As noted in the dissent of Mr. Justice Pashman in Corbitt's state court appeal, a defendant who pleads non vult may receive a sentence varying from life imprisonment to probation. State v. Corbitt, 74 N.J. at 416, 378 A.2d at 253 (Pashman, J., dissenting). Due to this vast range of sentencing discretion made available to a

penalty imposed upon those rights repugnant to the fourteenth amendment[136] and invalid under *Jackson*.

There also remains the problem of the forced waiver of one's constitutional rights. In light of the actual sentences imposed,[137] it is apparent that the severity of a sentence imposed under the New Jersey scheme depends upon whether a defendant chooses to exercise his constitutional right to put the state's proof of his or her guilt to the test of trial.[138] Although the *Jackson* Court sought to prohibit the needless encouragement of the waiver of constitutional rights,[139] Justice Stevens argued that the sole effect of the state statute was to penalize the defendant's assertion of those rights.[140] The Justice also noted that to the degree that the statutory scheme has "conserv[ed] scarce prosecutorial resources,"[141] it has done so at the expense of penalizing those who resist the inducement to waive.[142] There would seem to be no less onerous a penalizing effect where there is a great disparity in the possible minimum penalty to be imposed, conditioned on the exercise of constitutional rights, than in the disparate maximums considered in *Jackson*. The effect of the statute, by for-

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judge, it would appear that a defendant could not be aware of the likely consequences of his plea.

[136] For a discussion of the equal protection arguments raised by Corbitt, see notes 71–73 *supra* and accompanying text.

[137] *See* note 7 *supra* and accompanying text.

[138] Concededly, a defendant who goes to trial could be acquitted (an alternative not available to those pleading non vult), or could be found guilty of a lesser offense and given the correspondingly lower sentence, with the benefit of any sentencing discretion involved (analogous to that available to non vult defendants). The constitutional implications of these circumstances are beyond the scope of this Note, which is solely concerned with those defendants who were convicted and received a more onerous penalty than those who pleaded non vult for having exercised their constitutional right to proceed to trial. This discussion has focused on the concept of a " 'false' not guilty plea," and the penalty imposed under the current scheme for entering a not guilty plea which is proved "false" by a subsequent conviction. 99 S. Ct. at 502–03 (Stevens, J., joined by Brennan & Marshall, JJ., dissenting).

[139] 390 U.S. at 583. For a critical analysis of the deterrent effect of recent Supreme Court "waiver" decisions, *see, e.g.*, Note, *The Guilty Plea As A Waiver Of "Present But Unknowable" Constitutional Rights: The Aftermath Of The* Brady *Trilogy*, 74 COLUM. L. REV. 1435 (1974); *Guilty Plea*, *supra* note 80.

[140] 99 S. Ct. at 503 (Stevens, J., joined by Brennan & Marshall, JJ., dissenting).

[141] *Id.*

[142] *Id.* It is arguable that the foremost thought on the mind of a criminal defendant is to minimize his or her potential exposure to the sanctioning process. A statute which (de facto) provides for near certain avoidance of the otherwise mandatory maximum penalty could be a powerful inducement to waive an entire battery of constitutional rights irrespective of the accused's guilt or innocence, despite the presumption of innocence which the state has the burden to overcome. *See generally* Note, *Revised Federal Rule 11: Tighter Guidelines For Pleas In Criminal Cases*, 44 FORDHAM L. REV. 1010 (1976) (federal court rules amended to avoid abuse of plea bargaining process).

malizing such a disparity, makes the inducement to waive one's rights by pleading non vult so much the greater.[143] Since the statute appears to have no other purpose but needless encouragement to forego one's right to contest his or her guilt, it would fail to meet even a minimal rationality test and, therefore, should fall as unconstitutional.[144]

As previously shown, the operative effect of the New Jersey murder statute is to deter the exercise, by the accused, of several constitutional rights.[145] Even if a facial interpretation would allow the statute to stand, its practical effect is clearly discriminatory.[146] It is particularly ironic, in an era in which judicial philosophy is moving towards the individualization of sentencing tailored to the particular defendant, that the statute under consideration imposes a mandatory sentence.[147] While the subject of this note is limited to Corbitt's case, its implications apply with equal force to others similarly situated.

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[143] In fact, the state statute could easily be construed as more coercive than that involved in *Jackson*. Under the *Jackson* statute, one could waive a jury trial, avoid the maximum penalty, and still contest guilt in a trial to the bench. The New Jersey statute presents only two alternatives—a contest of guilt and exposure to a mandatory maximum penalty, or waiver of the right to contest guilt for a near certain guaranteed avoidance of the maximum, *see* Sentencing Guidelines, *supra* note 129, with the opportunity for the court to consider individual mitigating factors.

[144] Several theories have been advanced in support of the statute. The humanitarian rationale, which seeks to ameliorate unduly harsh sentences, State v. Corbitt, 74 N.J. at 402, 378 A.2d at 246, is inapplicable since it equally pertains to those who exercise their constitutional rights. The conservation of scarce prosecutorial resources rationale, *id.* at 402, 378 A.2d at 247, arguably indicates that economy is more relevant than constitutional rights (especially since this is not a plea bargain, from which this rationale had initially developed). The final rationale, early exposure to the rehabilitative process, *id.*, involves the risk of "rehabilitating" those who were guilty of no crime, but who, when confronted with substantial circumstantial evidence, were induced to plead non vult.

[145] *See* notes 105–10 *supra* and accompanying text. A defendant's fifth amendment protection against self-incrimination, sixth amendment right to confrontation and a jury trial, and fourteenth amendment guarantee of equal protection are all infringed by this statutory scheme. *Id.*

[146] *See* notes 129–33 *supra* and accompanying text for the results and implications of the New Jersey Sentencing Survey.

[147] This issue is especially problematic in this case. The plea bargain offer implied, by its terms, a concession that a life sentence was not appropriate in this case. McMahon Letter, *supra* note 5. This view is bolstered by the comments of the trial judge when he imposed sentence on Corbitt. The judge stated: "I am powerless, even if I felt differently about it . . . I have no discretion in this sentence." Trial Transcript, *supra* note 2, at 5–6. Since the statute did not provide for sentencing discretion to consider mitigating factors once the defendant was convicted, McArthur Corbitt, a 22 year old black man with a high school education and no prior record, was sentenced to be imprisoned for life. Appellant's Brief, *supra* note 1, at 15 n.2; Trial Transcript, *supra* note 2, at 6.

On September 1, 1979, a new criminal code takes effect in New Jersey.[148] The new code evidences a markedly different approach to sentencing for those convicted of first degree murder,[149] vesting considerable discretion in the sentencing judge.[150] Most importantly, the new code provides for re-sentencing of those convicted before the code took effect.[151]

McArthur Corbitt, and those similarly situated, should be given the benefit of the liberal philosophy evidenced by this re-sentencing provision. Material previously presented, which was apparently not at the disposal of the Supreme Court,[152] evidences a showing of "good cause"[153] required by the code for a new sentence.

A judge, in the exercise of his discretion, as provided by the code,[154] could then re-sentence Corbitt to a term of less than life which would reflect the special circumstances surrounding Corbitt's

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[148] *See* New Jersey Code of Criminal Justice, N.J. STAT. ANN. § 2C:98–4 (West eff. Sept. 1, 1979) (Code to take effect thirteen months after enactment). The new code was adopted by the legislature on August 16, 1978. 1978 N.J. Sess. Law Serv. ch. 95.

[149] While the new code retains provisions for felony murder prosecutions, New Jersey Code of Criminal Justice section 2C:11–3a.(3), no mandatory penalty provision is included.

[150] New Jersey Code of Criminal Justice, N.J. STAT. ANN. § 2C:11–3b. (West eff. Sept. 1, 1979). The new code provides that:

> Murder is a crime of the first degree but a person convicted of murder may be sentenced by the court to (1) a term of 30 years of which the person must serve 15 years before being eligible for parole or (2) as in a crime of the first degree except that the maximum term for such a crime of the first degree shall be 30 years.

Id.

While section 2C:43–7 provides for the imposition of a life sentence, it is no longer mandatorily imposed only on those who are convicted after opting for a trial, but is a matter of discretion for the court. The problems addressed in this Note evidence the need for statutory reform which has culminated in the adoption of the new criminal code.

[151] New Jersey Code of Criminal Justice, N.J. STAT. ANN. § 2C:1–1 d. (2) (West eff. Sept. 1, 1979). The applicable provision of the code states that:

> Any person who is under sentence of imprisonment on the effective date of the code for an offense committed prior to the effective date . . . who has been sentenced to a maximum term of imprisonment for an offense committed prior to the effective date which exceeds the maximum established by the code for such an offense . . . may move to have his sentence reviewed by the sentencing court and the court may impose a new sentence, for good cause shown as though that person had been convicted under the code.

Id.

[152] *See* notes 5 and 129–33 *supra* and accompanying text.

[153] New Jersey Code of Criminal Justice, N.J. STAT. ANN. § 2C:1– d. (2) (West eff. Sept. 1, 1979).

[154] *Id.* at § 2C:11–3 b. (2).

case. The possibility of a term which may make Corbitt immediately eligible for parole should not be ruled out.[155]

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[155] The New Jersey legislature has specifically refused to amend the new code (by rejecting SENATE, No. 3062, introduced on January 22, 1979) to mandate a life sentence, without eligibility for parole, for a murder which resulted from an arson. Newark Star Ledger, April 27, 1979, at 17, col. 1. The re-sentencing of McArthur Corbitt may serve as recognition by the courts of this new legislative wisdom.