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Amicus requests
no argument time.

COURT OF APPEALS

OF THE STATE OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

JOHN TAYLOR,

Defendant-Appellant.

BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION

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PRELIMINARY STATEMENT

The Criminal Justice Legal Foundation (CJLF), contingent upon this Court's approval, files this brief *amicus curiae* in this appeal. Defendant John Taylor appeals his sentence of death for multiple murders during the robbery of a Wendy's restaurant on May 24, 2000. Taylor does not dispute that he personally killed the manager, Jean Auguste, and that he was a party to the robbery and the murder of Mr. Auguste and four other employees. See Brief for Defendant-Appellant 16.

QUESTION PRESENTED

Should the holding of *People v. LaValle*, 3 N.Y.3d 88, 131 (2004), that the invalidity of the statutory deadlock instruction in CPL § 400.27(10) results in the complete abolition of capital punishment in New York, be reconsidered and overruled?

SUMMARY OF ARGUMENT

The status of *People v. LaValle* as *stare decisis* needs to be examined separately as to each of its holdings, applying the principles of *People v. Hobson*, 39 N.Y.2d 479 (1976). The final holding, throwing out the entire death penalty law because of the invalidity of one sentence, is not entitled to preclusive effect as precedent. This holding is little more than an ipse dixit with no analysis of the treatment of similar issues in other jurisdictions, the effect of the statute's severability clause, or the severability precedent of *Matter of Hynes v. Tomei*, 92 N.Y.2d 613 (1998).

Assuming the sentence in question to be invalid, it is severable. Both the statute itself and *Hynes* indicate that the primary objective of restoring the death penalty has priority over individual items of the sentencing procedure. The invalid sentence is not central to the statute, and excising it does not amount to rewriting the statute.

The statute is valid and enforceable without the stricken sentence. A valid death penalty law need not expressly state the consequences of jury deadlock or how to instruct the jury regarding the consequences. Courts in other jurisdictions have filled in these gaps. *LaValle* claimed to respect the

Legislature's prerogative but actually did the opposite, defying the Legislature's express direction that invalidity of individual provisions of the statute not negate its primary objective of restoring capital punishment.

ARGUMENT

I. *LaValle*'s conclusory, unsupported decision to throw out the entire death penalty is not entitled to preclusive effect as *stare decisis*.

A. The LaValle Decision.

In *People v. LaValle*, 3 N.Y.3d 88 (2004), this Court considered New York's unique deadlock provision for capital cases, Criminal Procedure Law (CPL) § 400.27(10). This section provides for instructions to the jury for determining the sentence in the event of a conviction of murder in the first degree. To place this decision in context, we very briefly review the structure of the New York death penalty law.

To pass muster under the Eighth Amendment jurisprudence of the United States Supreme Court, a death penalty statute must meet two requirements. *See Lowenfield v. Phelps*, 484 U.S. 231, 244-246 (1988). First, it must provide for narrowing the eligible class to some subset of murderers through a finding of at least "one 'aggravating circumstance' (or its equivalent) at either the guilt or the penalty phase." *See Tuilaepa v. California*, 512 U.S. 967, 972 (1994). Second, the statute must provide for a selection decision in which the sentencer considers mitigating evidence and makes an individualized determination. *See id*. at 972-973.

New York Penal Law § 125.27 provides the required narrowing at the guilt phase. The jury must find at least one of the elements listed in § 125.27(1)(a). New York's definition of first-degree murder is therefore similar to California's first-degree murder with special circumstances at issue in *Tuilaepa*, 512 U.S. at 975. In New York, as in California, the second phase of the trial is only for the "selection decision," the "eligibility decision" having been made with the guilt verdict.

The purpose of CPL § 400.27 is stated in the first sentence of subdivision 1: "to determine whether the defendant shall be sentenced to death or to life imprisonment without parole . . . ." This is consistent with the practice in other jurisdictions. *See*, *e.g.*, Cal. Penal Code § 190.3. However, CPL § 400.27(10) is unique in the nation in its deadlock instruction:

> "The court must also instruct the jury that in the event the jury fails to reach unanimous agreement with respect to the sentence, the court will sentence the defendant to a term of imprisonment with a minimum term of between twenty and twenty-five years and a maximum term of life."

The *LaValle* Court concluded, after a long discussion, see 3 N.Y.3d at 116-128, that the statutory deadlock instruction was coercive and invalid. In a much more superficial analysis, *LaValle* went on to hold that giving the jury no instruction at all on the consequences of deadlock is also unconstitutional, *see id.* at 128-130, despite the fact that giving no instruction "is the norm in the country," *id.* at 144 (R.S. Smith, J., dissenting), and despite a United States Supreme Court precedent on point. *See Jones v. United States*, 527 U.S. 373, 381-384 (1999).

With its depth of analysis declining exponentially, and inversely to what was required, the *LaValle* Court then delivered its most dubious holding *in a single paragraph*. In a stunning act of jurisprudential jujitsu, the majority leveraged this comparatively minor instructional problem into the complete abolition of capital punishment in New York, at least until the Legislature acts again. *See* 3 N.Y.3d at 131.

B. Stare Decisis and Its Limits.

Defendant relies on *People v. Hobson*, 39 N.Y.2d 479 (1976) for the proposition that *LaValle* "demands precedential respect." *See* Brief for Defendant-Appellant 36. *Hobson* does indeed discuss the relevant principles, but as *Hobson* itself says, "[*s*]*tare decisis*, if it is to be more than a shibboleth, requires more subtle analysis." 39 N.Y.2d at 487.

Hobson was a case in which this Court overruled three of its own cases, then fairly recent. *See* 39 N.Y.2d at 485-486. One reason the three cases could be overruled was their inconsistency with an earlier, better reasoned line of cases. "The odd cases rode roughshod over *stare decisis* and now would be accorded *stare decisis* as their legitimate right, whether or not they express sound, good, or acceptable doctrine." *Id*. at 487. As we explain in Part II, *infra*, *LaValle* ran roughshod over the severability holding of *Matter of Hynes v. Tomei*, 92 N.Y.2d 613 (1998). *Hobson* further notes,

> "The nub of the matter is that stare decisis does not spring full-grown from a 'precedent' but from precedents which reflect principle and doctrine rationally evolved. Of course, it would be foolhardy not to recognize that there is potential for jurisprudential scandal in a court which decides one way one day and another way the

> next; but it is just as scandalous to treat every errant footprint barely hardened overnight as an inescapable mold for future travel." 39 N.Y.2d at 488.

Hobson emphasizes that *stare decisis* is most important in matters of contracts and property where people have relied on precedents in structuring their transactions. *See id*. at 489. "The absence of such factors, on the other hand, makes easier the reassessment of aberrational departures from precedents and accepted principles." *Id*.; *accord Payne v. Tennessee*, 501 U.S. 808, 828 (1991). Criminal procedure decisions favoring the defendant have the least reliance problems of any category of precedent. Those defendants who successfully relied on such precedents have, with few exceptions, already been acquitted or received their lesser sentences. To the extent anyone relied on *LaValle* in his decision to *commit* murder, any such reliance is patently illegitimate and presents no barrier. Cf. *Dobbert v. Florida*, 432 U.S. 282, 297-298 (1977) (no Ex Post Facto violation in fixing procedurally invalid death penalty law after the crime).

Statutory interpretation precedents are generally given greater force on the theory that "the Legislature's competency to correct the 'misinterpretation' is readily at hand." *Hobson*, 39 N.Y.2d at 489. This argument has some weight here, but less so on a highly contentious issue where the Legislature is deadlocked. Enacting legislation requires much more than a simple majority. It requires either concurrence of both houses of the Legislature and the Governor or a supermajority of both houses. N.Y. Const., art. IV, § 7. Once the majority has cleared these hurdles to enact a law, the constitutional

plan is that the law should remain a law until its opponents clear the same hurdles to repeal it. By forcing the proponents to clear the same hurdles again to maintain in force a law they have already enacted, *LaValle* seriously distorts the legislative process.

Finally, there is the passage of *Hobson* that defendant relies on but quotes selectively:

> "Throughout, however, a precedent is less binding if it is little more than an ipse dixit, a conclusory assertion of result, perhaps supported by no more than generalized platitudes. On the contrary, a precedent is entitled to initial respect, however wrong it may seem to the present viewer, if it is the result of a reasoned and painstaking analysis." 39 N.Y.2d at 490.

Defendant maintains that *LaValle* is "the result of a reasoned and painstaking analysis." That assertion needs to be taken point by point.

For the holding that the fifth sentence of CPL § 400.27(10) is unconstitutional as written, *LaValle* arguably fits that description. The opinion reviews legislative history, federal and sister state precedents on death penalty instructions, and New York precedents on coerced verdicts. Despite our disagreement with *LaValle* on this point, *amicus* CJLF does not ask this Court to overrule it.

On the validity of a "no instruction" option, characterizing *LaValle* as "reasoned and painstaking" is more difficult. The opinion gives short shrift to Supreme Court precedent, *see* 3 N.Y.3d at 129, and it cites statutes and supervisory-power decisions of other states for the conclusion that a practice is *constitutionally* required, a *non sequitur*. *See id*. at 130; *id*. at 144 (R.S.

Smith, J., dissenting); cf. *Cupp v. Naughten*, 414 U.S. 141, 146 (1973) (even "universally condemned" instruction is not necessarily unconstitutional); *Estelle v. McGuire*, 502 U.S. 62, 72 (1991).

On the third holding, that the entire death penalty law must fall, *LaValle* is a perfect exemplar of *Hobson*'s description of precedent with minimal binding force. Nothing but generalities are offered to support this staggering conclusion. There is *no* discussion of the authority of courts to supply jury instructions omitted by the statute. There is *no* discussion of how other states have addressed similar problems. There is *no* discussion of the severability clause of the statute, its implications on this question, or the precedent of *Matter of Hynes*, *supra*.

Whether the invalidity of the *entire* death penalty law follows from the invalidity of *one sentence* of that law is a question of monumental importance. Such a stunning conclusion could be legitimately reached only after the most thorough analysis and consideration. To toss it off in one paragraph with a few tangentially relevant citations is a disservice to the people of New York, an affront to the democratic process, and a stain on this Court's reputation. Under the principles of *People v. Hobson*, the conclusory ipse dixit of *People v. LaValle* should be reconsidered *de novo* and given the attention the point deserves.

II. The invalid sentence of CPL § 400.27(10) is severable.

For a court to declare a statute unconstitutional is a drastic action. Such a declaration impinges upon the People's right of self-government, a

constitutional right every bit as precious as the rights expressly guaranteed in the Bill of Rights. Courts have this authority only because of the necessity to enforce the higher law of the Constitution, also a product of people's sovereignty, over the lower law of the statute to the extent they conflict in a case before the court. *See Marbury v. Madison*, 5 U. S. 137, 177-178 (1803). The authority is limited by the necessity. Courts should not carry the invalidation of statutes any further than is necessary to avoid the conflict with the higher law. To go any further is to violate the Constitution in the guise of defending it. This mandate is at the root of severability analysis. As Judge Cardozo wrote, "Our right to destroy is bounded by the limits of necessity. Our duty is to save unless in saving we pervert." *People ex rel. Alpha Portland Cement Co. v. Knapp*, 230 N.Y. 48, 62-63 (1920); *accord Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987).

The principle that judicial review of a statute would extend no further than the necessity that justified it appears to have been so obvious in *Marbury* that nonseverability—striking down the entire Judiciary Act of 1789—was not even considered. See Shumsky, Severability, Inseverability, and the Rule of Law, 41 Harv. J. on Legis. 227, 232 (2004). Not for another quarter century did the high court feel the need to say this expressly.

> "If any part of the act be unconstitutional, the provisions of that part may be disregarded while full effect will be given to such as are not repugnant to the Constitution . . . ." *Bank of Hamilton v. Lessee of Dudley*, 27 U.S. 492, 526 (1829); see also Nagle, Severability, 72 N.C. L. Rev. 203, 212 (1993).

Invalidating the entire statute is the exception rather than the rule, and such a step requires weighty justification. Severability is generally a question of whether severance is consistent with the legislative purpose.

> "The question is in every case whether the legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part exscinded, or rejected altogether. The answer must be reached pragmatically, by the exercise of good sense and sound judgment, by considering how the statutory rule will function if the knife is laid to the branch instead of at the roots." *Alpha Portland Cement*, 230 N.Y. at 60.

Severance has been found inappropriate in cases where the invalid portion lies at the core of the enactment and permeates every part of it. *Matter of New York State Superfund Coalition v. New York State Dept. of Envtl. Conservation*, 75 N.Y.2d 88 (1989) is an example of this kind of nonseverability. The case involved a regulation rather than a statute, but the Court applied the same analysis. *See id.* at 94. The regulation's definition of a "significant threat" was invalid. Although the regulation had a severability clause,

> "the 'significant threat' standard is the core of this part and is interwoven inextricably through the entire regulatory scheme . . . . Thus, judicial excision of that provision to let the rest survive is inappropriate." *Id*.

Along similar lines, courts sometimes state that they cannot "rewrite" a statute. *People v. Smith*, 63 N.Y.2d 41, 79 (1984) involved the last remnant of the New York mandatory death penalty statute that had been struck down for the most part in *People v. Davis*, 43 N.Y.2d 17 (1977) following *Roberts*

(Harry) v. Louisiana, 431 U.S. 633 (1977). The mandatory sentencing aspect of that law was central to its character, and the *Smith* Court felt that changing it to a discretionary system would be rewriting rather than severing. More recently, the United States Supreme Court has engaged in precisely such a salvaging operation for the Federal Sentencing Guidelines. *See United States v. Booker*, 543 U.S. 220, 246-247 (2005). The difference, if any, between *Booker* and *Smith* need not be resolved in this case, however. No such change in the fundamental character of the sentencing system is at issue in this case.

Matter of Hynes v. Tomei, 92 N.Y.2d 613, 627 (1998) applied the principles of *Alpha Portland Cement* and *Superfund* to the New York Death Penalty Law and found that a procedural defect regarding guilty pleas did not require striking the entire death penalty statute.

> "[I]t is clear from the face of the statute before us that the very purpose of the Legislature and Governor in enacting the statute was to provide for capital punishment in New York. The statute's severability clause indicates that the lawmakers would not have wanted the entire statute to fail if the particular provisions regarding pleas were declared unconstitutional . . . ." *Id.* at 628.

Curiously, the *LaValle* opinion does not even mention, much less distinguish, this apparently dispositive statement of the legislative purpose in a unanimous opinion only a few years earlier. *See* 3 N.Y.3d at 142 (R.S. Smith, J., dissenting) ("The majority opinion, however, does not mention the issue of severability.")

The apparent reason for *LaValle*'s lack of discussion of severability is its statement that the court lacks the power to fill the void. *See id*. at 131. We turn to that question next.

III. The New York death penalty statute is constitutional without the invalid sentence.

Two premises are established by precedent between the reasoned portion of *People v. LaValle*, 3 N.Y.3d 88 (2004) and *Matter of Hynes v. Tomei*, 92 N.Y.2d 613 (1998). The first premise is that the fifth sentence of CPL § 400.27(10) is invalid. The second premise is that the Legislature's dominant purpose in enacting the 1995 death penalty law was to reinstate the death penalty in New York, and therefore the severability clause should generally operate as written to excise invalid provisions and save the whole. Given these two premises, how is it possible to reach the conclusion that the entire structure falls? There appear to be only two possibilities. Either (1) the invalid sentence is so essential to the law that the law would have been unconstitutional had that sentence been omitted; or (2) despite the sentence's invalidity and severability, it leaves some lingering trace that poisons the remaining statute. Neither possibility withstands examination.

If the fifth sentence had been omitted from the 1995 statute, then the New York law would have neither an explicit statutory direction regarding the consequences of deadlock nor an explicit statutory direction on how to instruct the jury on that issue. The latter omission is not unusual. Cases and statutes are collected in the *LaValle* dissent, 3 N.Y.3d at 144, nn. 4-6. Only a few modern capital punishment statutes omit the actual consequences of

deadlock, but in those jurisdictions it does not appear that *any* court has held that this omission renders the statute unconstitutional.

Probably the most thoughtful analysis in such a jurisdiction is that of the Supreme Court of Connecticut. With no special rule for capital cases, the Court in *State v. Daniels*, 207 Conn. 374, 388, 542 A.2d 306, 314 (1988) turned to the general rule "that a valid jury verdict in a criminal case must be unanimous." That is, the verdict must be unanimous one way or the other. The similarity of a capital penalty hearing to a guilt trial points to the same rule. Cf. *Bullington v. Missouri*, 451 U.S. 430, 438 (1981). Applying the same rule to the penalty phase encourages thorough deliberation and a more reliable verdict.[1] *See* 207 Conn. at 389, 542 A.2d at 315. This conclusion was reinforced by the language of the statute that a life sentence would be imposed only upon a specific finding by the jury, a finding that could only be made unanimously. *See id*. at 393, 542 A.2d at 317. Falling back again on general principles of criminal law, the proper course in the event of deadlock is to declare a mistrial as to the penalty phase and retry it, unless the case is so clear as to warrant a directed verdict for the defendant. *See id*. at 394-397, 542 A.2d at 317-318.

But for the invalid sentence of CPL § 400.27(10), the New York law would be susceptible to the same construction for the same reasons. The fourth sentence of that section says that for the jury to decide on either of the

1. On this point, *Daniels* is a refreshing recognition of an often overlooked point. Reliability works both ways. It is important that convicted felons not be sentenced to punishments they do not deserve, but it is also important that they not escape their deserved punishment.

two available sentences, it must be unanimous. *See also* CPL § 400.27(11)(d) & (e). A deadlock is not a decision. See *Sattazahn v. Pennsylvania*, 537 U.S. 101, 109 (2003). Absent a special rule for capital cases, the general rule permits a partial verdict where the jury agrees and retrial on the parts where it does not. See CPL §§ 310.60-310.70.

The federal death penalty statute also makes no express provision for jury deadlock. In 18 U.S.C. § 3593(e), the statute requires the jury to be unanimous in whatever sentence it recommends. The Fifth Circuit interpreted this language much like the Connecticut Supreme Court, calling for a retrial in the event of deadlock. *See United States v. Jones*, 132 F.3d 232, 242-243 (1998). The Supreme Court ruled to the contrary on this point while affirming on other grounds, finding that the court should impose a noncapital sentence in this circumstance. *See Jones v. United States*, 527 U.S. 373, 381 (1999).

Without the stricken sentence, the New York law could plausibly be construed to require a sentence of life without parole upon deadlock. The purpose of the proceeding is to choose between death and life without parole. *See* CPL § 400.27(1). If the proceeding cannot end in a death sentence and if, for any reason, a retrial is not authorized, then the lesser of the two alternatives is implicitly the prescribed result. What is most important for the present case, however, is that, with the sole exception of *LaValle*, every court faced with this problem has found an answer in either the death penalty statute or the general criminal statutes. Death penalty statutes need not have an express deadlock provision to be constitutional. New York's law is

constitutional whichever option may be taken regarding the consequences of deadlock.

Once the issue of the consequences of deadlock is decided, the absence of a statutory instruction on that issue is clearly not a constitutional defect. Courts throughout the country have decided how to instruct juries on this point without statutory direction. *See*, *e.g.*, *Jones*, 527 U.S. at 383; *Calhoun v. State*, 297 Md. 563, 593-595, 468 A.2d 45, 58-60 (1983). In footnote 22, *LaValle* cites three capital cases for the proposition that courts cannot fill in the gaps. All are inapposite. *People v. Smith*, 63 N.Y.2d 41 (1984) and *State v. Cline*, 121 R.I. 299, 397 A.2d 1309 (1979) are both mandatory statutes enacted in the interval between the Supreme Court's strong implication that mandatory sentencing was required in *Furman v. Georgia*, 408 U.S. 238 (1972) and its subsequent holding that such sentencing is forbidden in *Woodson v. North Carolina*, 428 U.S. 280 (1976). *United States v. Harper*, 729 F.2d 1216 (9th Cir. 1984) involved an even older statute with unfettered, unguided discretion of the type struck down in *Furman*. These cases involve a lack of substantive criteria for the eligibility and selection decisions, *see supra* at 3, which courts have uniformly held to be beyond their authority to prescribe. These cases are not authority for the astonishing proposition that a court lacks authority to craft a jury instruction when the criteria for the jury's decision are found in the statute. Crafting jury instructions is a basic judicial function. *See*, *e.g.*, CPL § 300.10. There can be little doubt that if the 1995 death penalty law had been enacted without this one problematic sentence, it would have been constitutional.

The only remaining theory for striking down the entire death penalty is that the invalid sentence, even though stricken, somehow leaves a poisonous residue that prevents the statute from operating the way it would have operated in that sentence's absence. Such a theory, in reality, is a finding of nonseverability. Between the express severability clause and the *Hynes* precedent, the proponent of such a finding has a heavy burden.

LaValle claimed that it wished to avoid "usurp[ing] legislative prerogative." *See* 3 N.Y.3d at 131. This is a passive-aggressive kind of deference that tramples on the legislative prerogative while professing to respect it. As the statute expressly states and *Hynes* unambiguously held, the Legislature has made its wishes known regarding the consequence of a partial invalidity of the statute. The *primary* prerogative exercised by the Legislature was its decision to reinstate capital punishment in New York. The Legislature's exercise of its authority regarding the consequences of deadlock and instruction of the jury was purely secondary. One need look no further than *LaValle* itself to see this. The proponents' primary concern was not the policy choice on deadlock but avoiding constitutional problems and enacting a valid statute. *See id*. at 120-121. As it turns out, they made the wrong choice. However, exploiting that error on a secondary point to negate the Legislature's decision on the primary point is not respect for the legislative prerogative but rather an act of gross disrespect for it.

Finally, the *LaValle* majority appears to be uncomfortable with using severability in a way that could result in some defendants receiving greater sentences than they would have received if the statute had been upheld as

written. This concern would be substantial if severance resulted in a defendant being convicted of conduct not prohibited by the original statute or receiving a punishment greater than prescribed by the original statute for his crime. However, the deadlock issue does not involve a determination of punishment deemed appropriate by the Legislature upon a finding by the jury. Instead, it is a windfall that the Legislature mistakenly believed it needed to bestow upon the inability of the jury to agree. *See Sattazahn*, 537 U.S. at 109-110.

Once again, we turn to Judge Cardozo for the proper judicial response to legislation enacted in murky constitutional waters, where the Legislature cannot foresee what twists and turns jurisprudence will take in the following years.

> "When all the world can see what sensible legislators in such a contingency would wish that we should do, we are not to close our eyes as judges to what we must perceive as men. This need is all the greater in fields where the law is in a stage of transition and readjustment [citation]. With the line so blurred and vague between the lawful and the unlawful, the most honestly conceived and carefully developed system of assessment may involve some element of value beyond the reach of the taxing power." *Alpha Portland Cement*, *supra*, 230 N.Y. at 63.

Capital punishment law is every bit as complex and unpredictable in modern times as interstate taxation law was then. Justice Scalia has aptly referred to it as "the fog of confusion that is our annually improvised Eighth Amendment 'death is different' jurisprudence." *Morgan v. Illinois*, 504 U.S. 719, 751 (1992) (dissenting opinion). To throw out the entire law and force

the Legislature to reenact it simply to maintain a policy it has once decided is a distortion of the legislative process and an impairment of the people's right of democratic self-government. The primary policy of the capital punishment law should be carried out, and procedural issues should be dealt with as necessary. *People v. LaValle* should be overruled.

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

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