

THE USE OF THE DEATH PENALTY AS A BARGAINING CHIP IN INNOCENCE CASES

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I. PLAYING IN A HIGH STAKES GAME

Winning a case in court, like winning a game of poker, is not always a matter of holding good cards; sometimes, it all comes down to playing a poor hand well. Even then, a skilled poker player needs to have chips to play. At a table full of poker players, it is no shock the player with the most chips in front of them sets the tone of the table and becomes the “Big Stack Bully.”¹ More bargaining chips allow for the player to make more combinations of plays and bluffs. The player

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1. The term “Big Stack Bully” is used by poker players when referring to the player in a poker game with the power to out-bet the players with less bargaining chips. *Big Stack Strategies: Going For The Kill*, CARDSCHAT, <https://www.cardschat.com/poker/strategy/multi-table-tournament/mtt-big-stack/> (last visited Feb. 22, 2023).

with the biggest stack of chips is able to bully the players with smaller stacks into folding—even if their cards are better—to avoid having to go “all-in.” The small stacks are constantly playing on defense waiting for pocket aces that will actually hold up against the “Big Stack Bully.”

In the criminal legal system, the stakes are always high. The “Big Stack Bully” is the prosecution; the player with more resources, advantage, and backed by the might of the state or federal government.² The prosecution has the power to call or fold—to take the case to trial or offer a deal. The small stacks, invariably, are the defendants, those players who come to the table at a tremendous disadvantage, and who are always “all in.” In the most serious cases, the prosecution can raise the stakes to the highest level by leveraging their most advantageous bargaining chip: the death penalty.

While 70% of the world’s countries have abolished the death penalty, also known as capital punishment, much of the United States continues to use it in its criminal legal proceedings.³ According to the Death Penalty Information Center, at least 190 people were exonerated prior to their fated execution date after being wrongly convicted and sentenced to death in the United States.⁴ There is no way to tell how many of the 1,562 people, who have been executed in the United States, were actually innocent. As there are wrongful convictions still happening today, it is no surprise that most countries consider the death penalty a human rights issue.⁵

Among others, a frightening number of those exonerations were the product of official misconduct, perjury or false accusation, or false or fabricated confession, which often occurs simultaneously.⁶ When the prosecution brings a death penalty bargaining chip to the table,

2. Craig R. Chlarson, *The Disparity Among Prosecution and Pub. Def.*, WASATCH DEF. LAWS., <https://wasatchdefenselawyers.com/the-disparity-among-prosecution-and-public-defense/> (last visited Feb. 22, 2023).

3. *Policy Issues: International*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/policy-issues/international> (last visited Feb. 3, 2023) [hereinafter *Policy Issues: International*].

4. *Policy Issues: Innocence*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/policy-issues/innocence> (last visited Feb. 3, 2023).

5. *Policy Issues: International*, *supra* note 4.

6. Robert Dunham, *DPIC Analysis: Causes of Wrongful Convictions*, DEATH PENALTY INFO. CTR. (May 31, 2017), <https://deathpenaltyinfo.org/stories/dpic-analysis-causes-of-wrongful-convictions>.

such a move changes the way a defendant plays their hand. This runs the risk of an innocent person pleading guilty to something they did not do—to fold their hand in the face of impossible stakes, guaranteeing a wrongful conviction.

The California Innocence Project handled Marilyn Mulero and Reggie Cole’s cases where the prosecution used the “Big Stack Bully” tactic.⁷ Marilyn Mulero felt coerced into signing a prepared confession admitting to a murder she did not commit, which ultimately led to the imposition of the death sentence.⁸ Similarly, Reggie Cole, an exonerated who was wrongfully imprisoned, was subsequently accused of a prison murder while acting in self-defense, and confronted with the death penalty.⁹ These defendants were forced to make an unlikely combination of moves to overturn their convictions and avoid a death sentence.¹⁰ Fortunately, both Marilyn Mulero and Reggie Cole’s winning pocket aces held up, and they were rightfully exonerated.¹¹ All too often, however, others in similar situations do not beat the odds.

7. *Freed Clients*, CAL. INNOCENCE PROJECT, <https://californiainnocenceproject.org/freed-clients/> (last visited Feb. 26, 2023). See also *Marilyn Mulero*, CAL. INNOCENCE PROJECT, <https://californiainnocenceproject.org/read-their-stories/marilyn-mulero/> (last visited Feb. 26, 2023) [hereinafter *Marilyn Mulero*] (explaining Marilyn Mulero’s journey to exoneration); *Reggie Cole*, CAL. INNOCENCE PROJECT, <https://californiainnocenceproject.org/read-their-stories/reggie-cole/> (last visited Feb. 26, 2023) [hereinafter *Reggie Cole*] (explaining Reggie Cole’s journey to exoneration).

8. *Former Ill. Death-Row Prisoner Marilyn Mulero, Framed by Disgraced Chicago Detective, Exonerated After 29 Years*, DEATH PENALTY INFO. CTR. (Aug. 11, 2022), <https://deathpenaltyinfo.org/news/former-illinois-death-row-prisoner-marilyn-mulero-framed-by-disgraced-chicago-detective-exonerated-after-29-years/> [hereinafter *Former Ill. Death-Row Prisoner*].

9. *Reggie Cole*, *supra* note 7.

10. Michael S. Perry & Maurice Possley, *Reggie Cole*, THE NAT’L REGISTRY EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3113> (last updated July 19, 2017); Maurice Possley, *Marilyn Mulero*, THE NAT’L REGISTRY EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=6378> (last updated Aug. 22, 2022).

11. Perry & Possley, *supra* note 10; Possley, *supra* note 11.

II. MARILYN MULERO: THE PLAYER FORCED INTO AN “ALL-IN” SITUATION

On May 12, 1992, two members of the Latin Kings Street Gang were fatally shot in Humboldt Park on Chicago’s northwest side.¹² The next day, Chicago police officers arrested Marilyn Mulero and Jackie Montanez.¹³ The police took them to the station to be interviewed separately.¹⁴ After the police denied legal representation, both women were each subjected to over nine hours of questioning.¹⁵

Throughout her interrogation, Marilyn denied any involvement in the crime.¹⁶ However, it was not long before the detectives brought out their “bargaining chips” and told her she had two options: (1) confess to one of the murders; or (2) be prosecuted for both and die by lethal injection.¹⁷ Police began “bluffing” by telling Marilyn that Jackie already confessed, implicating her in both murders.¹⁸ They told Marilyn she would never see her children again unless she confessed.¹⁹ The prosecution implied the death penalty was merely a placeholder and they would never actually pursue capital punishment in a case where Latinos shot each other.²⁰ Without having many bargaining chips of her own, Marilyn was forced to go “all-in.” She signed a prepared statement by the prosecution, implicating herself in both murders.²¹

Without conducting any basic investigation into Marilyn’s case, her attorney entered a blind plea of guilty on her behalf, which exposed her to the risk of a death sentence.²² Soon after, based on the jury’s recommendation, Marilyn became the first woman to be sentenced to death in Illinois.²³

12. Possley, *supra* note 10.

13. *Id.*

14. *Marilyn Mulero*, *supra* note 8.

15. *Id.*

16. Possley, *supra* note 10.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Marilyn Mulero*, *supra* note 8.

22. Possley, *supra* note 10.

23. *Id.*

Justin Brooks, founder of the California Innocence Project, traveled to Illinois and met with Marilyn in prison, where she adamantly maintained her innocence.²⁴ While Justin could not be sure whether she was truly innocent of these murders, he was stunned at the reality that a defendant could be sentenced to death without a trial.²⁵ As a result, he began litigating the case as a due process issue.²⁶ In May of 1997, the Illinois Supreme Court ordered a new sentencing hearing after vacating Marilyn's death sentence.²⁷ The result of the hearing led to Marilyn being resentenced to life in prison without the possibility of parole.²⁸

Justin continued his investigation into Marilyn's case.²⁹ Over time, he began to expose the weaknesses in the prosecution's cards.³⁰ For example, defense investigators determined it was impossible for the prosecution's main eyewitness to have observed the alleged crime from their vantage point.³¹ Marilyn filed habeas petitions using this information, but state and federal courts denied her claims.³² The United States Supreme Court ultimately denied certiorari.³³ Justin went so far as to argue that the Illinois criminal legal system violated international human rights law by sentencing people to death without trials, however, the courts took no action based on those claims.³⁴

In January, 2017, Jackie came forward to admit she shot both men, affirming Marilyn's innocence.³⁵ Meanwhile, an overwhelming amount of evidence revealing the misconduct by detectives involved in Marilyn's case surfaced.³⁶ On August 9, 2022, the district attorney's office was forced to lay their weak cards down on the table and

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

agreed to vacate Marilyn's conviction.³⁷ Marilyn became the 190th person to be exonerated from death row in the United States.³⁸

The prosecution's hand consisted of a false confession, a bad eyewitness identification, and instances of government misconduct.³⁹ Marilyn's case is a perfect example of the prosecution using capital punishment to gain a better position throughout the entire criminal legal process. In other words, the prosecution used the death penalty in a manner similar to a high stakes bluff. If you ask anyone other than Marilyn's original lawyer, they will agree that being sentenced to death on a plea bargain does not seem like much of a bargain at all, especially if you are innocent.

III. REGGIE COLE: THE PLAYER WHO MADE A GOOD PLAY GIVEN THE CIRCUMSTANCES

The case of Reggie Cole is another example of the state using the death penalty as a bargaining chip.⁴⁰ On August 1, 1995, Reggie was sentenced to life in prison without the possibility of parole for a murder he did not commit.⁴¹ While serving his 25-to-life sentence, Reggie stabbed another incarcerated person in self-defense during a prison fight.⁴²

The prosecution decided to go "all-in" by putting the death penalty on the table, given this would be Reggie's second murder conviction.⁴³ The attorney representing Reggie had a mediocre hand and knew he would have to play intelligently to stand a chance against the "Big Stack Bully."⁴⁴

Reggie's attorney knew he would have to make a combination of moves to win this hand and started looking into the integrity of Reggie's original conviction on the off chance that he could gain some bargaining power of his own.⁴⁵ The attorney recognized the prosecu-

37. *Id.*

38. *Former Ill. Death-Row Prisoner, supra* note 8.

39. Possley, *supra* note 10.

40. *Reggie Cole, supra* note 7.

41. Perry & Possley, *supra* note 10.

42. *Reggie Cole, supra* note 7.

43. Perry & Possley, *supra* note 10.

44. *Id.*

45. *Id.*

tion's discretion to charge Reggie with the death penalty under the special circumstances enumerated in section 190.2 of the Penal Code, created some "outs" for his hand to get stronger by the "river."⁴⁶ In California, if a person is facing the death penalty for a prison murder, the defendant is allowed to challenge the original grounds of their incarceration.⁴⁷ This extremely specific section of the California Penal Code was Reggie's "out."

Reggie's attorney, with the help of the California Innocence Project, discovered the prosecution was playing dirty, "with a hidden ace up their sleeve," by withholding evidence.⁴⁸ The prosecution knew their main eyewitness fabricated his testimony in Reggie's original trial.⁴⁹ In April of 2009, the superior court judge vacated Reggie's original conviction based on withheld evidence and ineffective representation.⁵⁰

Unfortunately, Reggie remained in prison for the murder committed in self-defense.⁵¹ Another year passed before his attorneys could successfully argue for Reggie to receive credit for his original time served under the vacated conviction.⁵² The district attorney's office was "tilted"⁵³ from losing the original hand. They then filed new

46. In poker, there are situations when you are putting your bargaining chips in without a completed hand, with the idea that you will be able to make a stronger hand on the later streets, such as the "river," that will ultimately beat your opponent. Those unseen cards that will complete a player's drawing hand are called, "outs," which are used in determining a hand's equity at any time during play. The "river" is the final card dealt to the board before the last round of betting in a hand, which is when the player will want to have the strongest hand. *What is River in Poker?*, UPSWING POKER, <https://upswingpoker.com/poker-terms-glossary/> (last visited Feb. 26, 2023).

47. In a hearing regarding the motion to strike Reggie's prior, his attorney, Christopher Plourd, argued *People v. Horton* calls for this type of hearing and the presiding judge agreed. *People v. Horton*, 11 Cal. 4th 1068 (1995).

48. *Reggie Cole*, *supra* note 7.

49. Perry & Possley, *supra* note 10.

50. *Id.*

51. *Id.*

52. *Id.*

53. "Tilted" is a poker slang term that is often used to describe a player who is angry or in a frustrated emotional state. The word "tilted" is commonly associated as the result of simply taking a bad beat or losing a big poker hand. Barbara Connors, *Understanding Tilt*, POKEROLOGY, <https://www.pokerology.com/lessons/understanding-tilt/> (last visited Feb. 26, 2023).

charges against Reggie for allegedly concealing a razor blade in his prison mattress.⁵⁴ Fortunately, Reggie was acquitted on that charge and finally released on May 15, 2010.⁵⁵

The importance of Reggie's case cannot be understated. Reggie's case exposed prosecutorial misconduct; the prosecution misplayed its hand by attempting to use the death penalty as a bargaining chip. The prosecution's strategy forced Reggie to go "all in" and play his hand for any possible "outs" due to the severity of the consequences. Luckily, in this "all-in" situation, Reggie made the stronger hand that proved his innocence, and won his freedom after years of wrongful incarceration.⁵⁶

IV. CHANGING THE GAME

At the core of both of these cases is the startling fact that two innocent people risked being executed. Central to both cases is the combination of luck and chance. However, these cases are not unique. It is not uncommon for the prosecution to use the threat of execution as a strategy to better position the State in the "game" of the criminal legal system. Implementing this strategy gives the prosecution an unfair advantage. Indeed, it bleeds into many cases, even those cases reasonable people would not consider "death worthy."⁵⁷

In 2021, the Pew Research Center conducted a study to better understand America's view of the death penalty.⁵⁸ The study concluded that 60% of adults in the United States favor the death penalty for

54. Perry & Possley, *supra* note 10.

55. *Id.*

56. *Reggie Cole*, *supra* note 7.

57. *THE CASE AGAINST THE DEATH PENALTY*, AM. CIV. LIBERTIES UNION, <https://www.aclu.org/other/case-against-death-penalty> (last visited Feb. 26, 2023). The Court has made clear that the death penalty is constitutional when it is applicable to those denominated "the worst of the worst," therefore, implying there are some cases that are "death worthy." See also Jules Epstein, *Examining Modern Approaches to Prosecutorial Discretion: Death-worthiness and Prosecutorial Discretion in Capital Case Charging*, 19 TEMP. POL. & CIV. RIGHTS L. REV. 389 (2010).

58. *Most Americans Favor the Death Penalty Despite Concerns About Its Administration*, PEW RSCH. CTR. (June 2, 2021), <https://www.pewresearch.org/politics/2021/06/02/most-americans-favor-the-death-penalty-despite-concerns-about-its-administration/>.

people convicted of murder, 27% of adults strongly favor it.⁵⁹ Proponents of the death penalty often argue the simple threat of the death penalty deters criminals from killing or committing other heinous acts.⁶⁰

In theory, prosecutors should only be threatening the death penalty in the worst possible cases. However, in practice and as applied to individual cases, the threat of the death penalty is up to the subjective determination of the prosecutor and does not aim to punish “the worst of the worst.”⁶¹ For example, in California, Penal Code section 190.2, lists twenty-two of the special circumstances that could trigger a death sentence in a murder case.⁶² Some of the circumstances include murders that are carried out for financial gain; in efforts to avoid or prevent lawful arrest; for purposes of preventing testimony; by means of lying in wait; or in the commission of one of twelve enumerated felonies.⁶³ The special circumstances are broad enough to encompass creative reasonable arguments for almost any murder to fall within the scope of capital sentencing.⁶⁴ Therefore, the copious number of special circumstances creates more opportunities for prosecutors to use this bargaining power. The very possibility of the death penalty allows prosecutors to play their advantageous bargaining chip. This strategy results in the overcharging and bullying of defendants to negotiate a lesser sentence, which does not result in death.

The way the prosecutors used the death penalty in Marilyn and Reggie’s case, and many like them, used the death penalty goes against the two premises Judge Carney highlighted in *Jones v. Chappell*: (1) that the government does not seek death arbitrarily, but instead must only do so when it furthers the interests of society; and (2) that the death penalty must be applied consistently and reliably to similarly situated cases and defendants, so that the system—and society—

59. *Id.*

60. *THE CASE AGAINST THE DEATH PENALTY*, *supra* note 57.

61. Jules Epstein, *supra* note 57.

62. Cal. Pen. Code § 190.2 (West 2019).

63. *Id.* (the twelve enumerated felonies include: Robbery, Kidnapping, Rape, Sodomy, lewd or lascivious acts upon a child under the age of 14 years, Oral copulation, Burglary in the first or second degree, Arson, Train wrecking, Mayhem, Rape, or Carjacking).

64. *Id.*

can be sure that death is the appropriate punishment in any specific case.⁶⁵

The very act of negotiating down from a more severe punishment to a lesser punishment in exchange for waiving rights is coercive on its face. That issue is further compounded when the possibility of death is on the table. Indeed, Defendants may not ordinarily consider pleading to a sentence of life without parole. However, when faced with the possibility of the death penalty, defendants are more inclined to accept pleas that would otherwise be rejected.⁶⁶ The difference is matter of life and death. There are concerns that the threat of the death penalty will coerce defendants who are not “death-worthy.”⁶⁷ This issue includes those who may be innocent, but plead guilty in an effort to spare their life.⁶⁸ Consequently, the death penalty is not used as intended to further the “interest of society,”—detering or punishing the serious or heinous acts—but rather is used by prosecutors as bargaining power to guarantee convictions.

The issue of innocence within the death penalty debate gained significant attention in 2014 after the National Academy of Sciences (NAS) reported at least 4.1% of defendants on death row are innocent.⁶⁹ The report also suggests the number of innocent people is likely more than double the number of those actually exonerated and freed from death row.⁷⁰ With prosecutors wielding such high bargaining power, it is arguably inevitable that innocent people will continue to be convicted and sentenced to death for crimes they did not commit.

Shockingly, even after NAS released the report, the Pew Research Center found that only 78% of people in the United States believe some risk of wrongful convictions exists.⁷¹ Additionally, only 21% of adults think adequate safeguards are currently in place to prevent

65. Jones v. Chappell, 31 F. Supp. 3d 1050 (C.D. Cal. 2014), *rev'd sub nom.* Jones v. Davis, 806 F.3d 538 (9th Cir. 2015).

66. Susan Ehrhard, *Plea Bargaining and the Death Penalty: An Exploratory Study*, 29 THE JUST. SYS. J. 313, 314 (2008).

67. *Id.*

68. *Id.*

69. *National Academy of Sciences Reports Four Percent of Death Row Inmates are Innocent*, CAL. INNOCENCE PROJECT (Apr. 28, 2014), <https://innocenceproject.org/national-academy-of-sciences-reports-four-percent-of-death-row-inmates-are-innocent/>.

70. *Id.*

71. PEW RSCH. CTR., *supra* note 58.

wrongful convictions.⁷² Thirty-percent of death penalty supporters believe adequate safeguards exist to spare innocent people from execution.⁷³

Given that the error rate of the death penalty is greater than zero, there are no effective safeguards that exist. State legislatures must implement more safeguards to prevent prosecutor strategy from resulting in the murder of innocent people.

States should consider eliminating—or at the very least clarifying—many of the special circumstances enumerated within the respective death penalty sentencing schemes. As currently enumerated, these over encompassing sentencing schemes allow prosecutors to play “more aces” than a deck typically has by choosing which murder case they want to impose the death penalty on. The death penalty is intended to punish the “worst of the worst” criminals.⁷⁴ But, “as California Governor Gavin Newsome stated in his executive order, the punishment too often falls on the young, especially youth of color, disabled, mentally ill, and on those raised in abusive environments and extreme poverty.”⁷⁵ It is difficult to conceptualize that the sentencing scheme accurately narrows down these marginalized groups as the “worst of the worst.”

A prosecutor should be forced to “play with their cards face up.” This means the intention of utilizing the death penalty should be abundantly clear from the beginning: when the defendant is charged with a capital crime. Specifically, prosecutors should be able to indicate, and support with solid evidence, the extreme circumstances that would elevate a first-degree murder to a capital murder. Their decision to pursue the death penalty should be reviewed with strict scrutiny by an independent agency. This objective review would help assist in regulating the prosecutors who intentionally overcharge in hopes of coercing defendants to give up their constitutional rights to a fair trial or into deals they normally would not have made, but for death being on the table. Independent review would add an additional protection to ensure no racial and socioeconomic disparities in the prosecutor’s decision exist.

72. *Id.*

73. *Id.*

74. Ehrhard, *supra* note 66.

75. *Id.*

Finally, prosecutors should only be allowed to play in “the game” if they are able to abide by the table rules. A death sentence should only be imposed when a prosecutor can unequivocally prove, beyond a reasonable doubt, that the defendant committed a capital offense. While this is the legal standard prosecutors are held to, criminal defense attorneys would argue it is not uncommon for the prosecution to have shadows of doubt in their cases but still be able to manipulate the emotions of the jurors to secure convictions, consequently, against innocent people. At the very least and under no circumstances should there ever be death sentences imposed without a trial or on a plea deal.

V. ELIMINATE THE “BARGAINING CHIP”

Many defense advocates would agree getting convicted of a crime when the prosecution has all the “bargaining chips” is much easier than going against “all odds” to overturn a conviction and prove innocence once a conviction is final. Marilyn and Reggie’s cases demonstrate the imbalance of bargaining power in the criminal legal system, favoring the prosecution. The consequences of this imbalance are deadly and irreversible. Given the harrowing stories about the wrongful convictions and misuse of the death penalty, at some point, the poker floor manager needs to eliminate the bargaining chip from the international game all together, so that the others in the game can have a shot at winning.