

# **Truth or Consequences: Making the Case for Transparency and Reform in the Plea Negotiation Process**

Justice Michael P. Donnelly

## I. INTRODUCTION

Directly adjacent to the Thomas J. Moyer Ohio Judicial Center in Columbus, Ohio, which is the home of the Supreme Court of Ohio, sits a beautiful water fountain. The artist who created it called it “In principle and in practice.” At the base of the fountain visitors can view many of the words we identify as basic tenets of our judicial system, including truth, honesty, and integrity. These tenets are the very values upon which our system for resolving disputes operates. Visitors will not see words such as “backroom deal” or “legal fiction.” Yet those who participate in our state’s criminal justice system know all too well that phrases such as these factor heavily in resolving a significant percentage of cases and, at the same time, threaten the public’s confidence in our legal system.

In 2015, the Supreme Court of Ohio seriously considered requiring all negotiated plea agreements to rest upon a factual basis. This effort was designed to eliminate the practice of resolving cases with “fictional pleas;” in other words, allowing the accused to resolve the case by pleading to a crime that he or she did not commit. The proposed amendment was modest in its intended application. Quite simply, the rule would have required trial courts to do the following: before accepting a plea agreement that resolved the case by having the defendant admit to a charge that did not resemble the original charge, the court would have the parties first state facts on the record that, *if true*, supported the charge to which the defendant was agreeing to plead guilty. Without comment this proposal was voted down by the Supreme Court of Ohio, resulting in this unfortunate headline in the Columbus Dispatch: “State Supreme Court rejects truth-in-sentencing rule.”<sup>1</sup>

Prior to joining the Supreme Court this year, I was privileged to serve for fourteen years as a trial court judge in the Cuyahoga County Court of Common Pleas. There I had the opportunity every day to observe hardworking prosecutors and defense attorneys resolve virtually every type of criminal case imaginable. This experience cemented my firm belief that when all parties are doing their jobs correctly, and a detailed and accurate record is maintained, the law’s inherent procedural checks and balances and substantive protections will produce a just result. And justice comes in many forms: the guilty being held accountable and

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<sup>1</sup> Randy Ludlow, State Supreme Court rejects truth-in-sentencing rule, COLUMBUS DISPATCH (Jan. 15, 2016), <https://www.dispatch.com/article/20160115/NEWS/301159652>.

punished proportionally, consistent with the goals of public safety and rehabilitation; defendants acquitted where the evidence fails to meet the high standard of proof of beyond a reasonable doubt—a standard that protects us all from a government otherwise empowered to strip away our freedoms; and the wrongfully accused, exonerated by either a dismissal, not guilty verdict, or by a court vacating the conviction. In my years of presiding over thousands of felony cases, I’ve seen them all.

## II. THE PREVALENCE OF PLEA BARGAINING

When I look back on all my years as a trial court judge, it is easy to focus first on the many interesting and dramatic jury trials I have experienced. However, if one were to perform a detailed analysis of how much time I spent managing my criminal docket, one would find the overwhelming majority of the time was spent conducting plea hearings and sentencing hearings. The truth is that over 97% of all criminal cases in Ohio in 2018 were resolved not by a trial, but through negotiated plea agreements.<sup>2</sup> Retired U.S. Supreme Court Justice Kennedy once noted, “That is what plea bargaining is. It is not some adjunct to the criminal justice system; it *is* the criminal justice system.”<sup>3</sup> Since 2016, I have accepted many invitations to speak to citizens to explain the intricacies of our criminal justice system, specifically as it relates to negotiated plea agreements—my presentation is entitled *The Mystery of Plea Agreements*. Likewise, I have written this article to shed light on a process, which for the most part remains shrouded from public view.

As a trial judge I received new criminal cases on my docket on a daily basis. At the first pretrial hearing the prosecutor and defense counsel were provided with a firm trial date to resolve the case. Trial date certainty, as every practitioner knows, provides the energy that fuels the entire criminal justice system. On the date set for trial one of three outcomes would take place:

- The case would proceed to trial and the government would be held to the burden of proving the truth of the charges beyond a reasonable doubt;
- The case would be dismissed, either by the prosecutor or the court, if the government was not prepared to go forward and did not have a good reason for the case to be continued; or
- A negotiated plea agreement was reached and was ready to be presented to the court completely resolving the dispute.

In every single case the prosecutor, whose ethical obligation is first and foremost to seek truth and justice, and not necessarily a conviction, must make a judgment call

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<sup>2</sup> THE SUPREME COURT OF OHIO, 2018 OHIO COURTS STATISTICAL SUMMARY 26–29 (2018).

<sup>3</sup> *Missouri v. Frye*, 566 U.S. 134, 144, 132 S.Ct. 1399 (2012) (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 *YALE L.J.* 1909, 1912 (1992)).

on how to exercise his or her wide discretion. The prosecutor may decide that the circumstances demand that the defendant be prosecuted to the fullest extent of the law commensurate with a sentence proportional to his or her conduct. Alternatively, the prosecutor might determine there are reasons to exercise restraint in exchange for resolving the case short of proceeding to trial.

In Cuyahoga County, most assistant prosecutors tasked with prosecuting a felony case (commonly referred to as “room prosecutors” because they are assigned to serve on a particular floor containing a number of courtrooms) have virtually no discretion to make the above described judgment calls. Like many major metropolitan prosecutor’s offices, discretion is exercised by supervisors, usually a more seasoned prosecutor chosen to review and supervise the room prosecutors. After a room prosecutor has exercised his or her due diligence in assessing the merits of the case to ensure that a plea bargain is appropriate, the room prosecutor must then convince the supervisor of this position.

The same is true even if the prosecutor has doubts about the theory of guilt put forth by the law enforcement agency that initiated the charges. Convincing a supervising prosecutor to dismiss a charge outright is often a very daunting task. In my experience, the institutional pressure against outright dismissal of felony cases that have been formally indicted by a grand jury is extremely strong. A “weak” case is much more likely first to be “marked” (meaning authorized) by the supervisor, to an enticing misdemeanor plea offer before being dismissed outright.

The defendant, in many cases, may be aware of some facts regarding his or her alleged conduct that might lead to a conviction, and thus, may consider entering into an agreement in order to obtain a benefit in exchange for an admission. The benefit will most likely be in the form of some degree of leniency in sentencing consequences.

A typical plea bargain may involve the prosecutor dismissing a number of counts in exchange for an admission on one or more counts, potentially limiting the accused’s punishment liability. Alternatively, the prosecutor, facing the high burden of proving a serious charge, may offer a defendant a chance to plea to a legally recognized lesser included offense to the charged crime, also effectively limiting the punishment liability. For example, the prosecutor may offer a defendant charged with rape, which is a felony of the first degree, an opportunity to resolve the case by admitting to the crime of gross sexual imposition, which is a lower felony of the third degree. An offense is a lesser included offense if: (1) the original (greater) offense carries a more severe penalty; (2) some element of the greater offense is not required to prove commission of the lesser offense; and (3) the greater offense as statutorily defined cannot be committed without the lesser offense as statutorily defined also having been committed.<sup>4</sup>

Another possibility might involve a prosecutor’s offer to incorporate Ohio’s attempt statute to the indicted charge, *i.e.*, attempted rape, attempted felonious assault, or attempted robbery. This is often utilized even if the victim insists the

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<sup>4</sup> State v. Evans, 122 Ohio St. 3d 381 (2009).

crime was fully completed. Ohio's attempt statute has the mechanical ability to reduce any charge to which it is attached by one full felony degree. This can reduce a charge which carries a legal presumption in favor of a prison sentence to one that carries no such presumption. Such an offer can remove the potential possibility of multiple years from a defendant's prison sentence. This benefit is used so frequently in Cuyahoga County that it has, in my opinion, eclipsed the original intent of the attempt statute, which was to treat uncompleted crimes with a degree of leniency.<sup>5</sup> Instead, "attempt" has become a de facto bargaining chip in the negotiation process and a strong incentive for the accused to enter the agreement.

Perhaps one of the strongest "benefits" in a prosecutor's tool belt involves the existence of crimes that carry a legislative mandate requiring a mandatory prison sentence. For instance, if a defendant is alleged to have brandished a firearm during an aggravated robbery, such a charge will often carry what is known as a three-year gun specification.<sup>6</sup> If convicted by a jury of this specification, the defendant must serve three full years of incarceration before he or she begins to serve day one on the underlying sentence of aggravated robbery, a crime that carries with it a sentence of anywhere from three to eleven years.<sup>7</sup> Whether this mandatory charge remains attached to the initial charge of aggravated robbery is entirely up to the prosecutor's discretion. Even if the act of brandishing a gun was caught on video, the prosecutor has the ability to offer to remove the three-year gun specification, which in effect serves as a powerful inducement for the accused to take the plea deal.<sup>8</sup>

Once the arm's length negotiations between the prosecutor and defense counsel take place and both sides reach a tentative agreement, there is one thing left to do: present the agreement to the trial judge, who under the law has discretion to either accept or reject the proposed plea agreement.<sup>9</sup> That, unfortunately, is where things get murky.

### III. AN OPAQUE PROCESS

Once a tentative agreement has been reached in a criminal dispute, the adversarial parties will present the agreement to the judge for approval. When I started my legal career as an assistant prosecutor, and into my first term as a trial

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<sup>5</sup> According to Cuyahoga County Common Pleas Court records, between January 1, 2017 and February 3, 2020, a total of 1,129 cases were indicted with at least one count of attempt under OHIO REV. CODE ANN. § 2923.02, compared to 5,719 cases during this same period where attempt was ultimately incorporated into the final resolution.

<sup>6</sup> OHIO REV. CODE ANN. §§ 2929.14(B)(1)(ii), 2941.145 (West 2020).

<sup>7</sup> OHIO REV. CODE ANN. §§ 2911.01(c), 2929.14(A)(1)(b) (West 2020).

<sup>8</sup> One other additional benefit may involve the prosecutor agreeing to take a particular position in the sentencing hearing, which is favorable to the defendant. In some cases, the court may be amenable to accepting the parties' agreed upon sentence.

<sup>9</sup> OHIO R. CRIM. P. 11(F), (G).

court judge, this process would usually involve an informal, off the record discussion between the lawyers and the judge back in the judge's chambers.

As a young assistant prosecutor, during these backroom discussions, I was eager to convey to the judge that both sides had fully participated in the discovery process and, as a result, were fully in command of the underlying facts of the case. Further, I would advocate that the proposed agreement reflected, to a satisfactory degree, the truth about what actually took place on the date in question. I would conclude by stating that having now arrived at what was believed to be a fair disposition, the parties were ready to proceed to the next step of the process with the court deciding what the appropriate sentence should be according to law.

The defense attorney often used this off the record opportunity to highlight mitigating factors about the case and his or her client. Most importantly from the defense perspective, the discussion was viewed as a chance (to the extent a particular judge would allow it) to explore the judge's mindset regarding what sentence the client would receive if the plea was deemed acceptable by the court.

A systematic flaw, and the most troubling aspect of this critical point in the process, relates to the trial court's discretion to either accept or reject the parties' plea agreement. Judges look to the law for guidance in their decision-making authority that will hopefully lead to fair and uniform decisions. The law instructs the judge in many ways. For instance, in every jury trial, after the prosecutor concludes his or her case, the defense attorney, as a matter of course, will move for an acquittal. At that point, the law instructs a trial court judge to examine the record, in "a light most favorable to the prosecution."<sup>10</sup> This is done to determine whether sufficient evidence has been presented as to each and every element of the charge that, if believed by the trier of fact, could sustain a conviction on that charge.

Unfortunately, however, the law comes up woefully short in providing guidance to the trial court judge when determining whether to accept or reject a plea agreement. It is well settled that our trial court judges enjoy wide and unfettered discretion in deciding whether to accept or reject a plea agreement.<sup>11</sup> Indeed, a defendant has no absolute right to have a guilty plea accepted at all.

In the absence of any clear constitutional or statutory law direction, a fundamental systemic flaw is exposed: the disparate judicial philosophies that exist and operate among the hundreds of state court judges regarding the judge's role in the plea negotiation process. Essentially, each individual judge has his or her own approach in exercising their discretionary power to accept a plea and impose a sentence upon a criminal defendant.

As the neutral arbiter in the adversarial process, I always viewed my role as a check on the entire process. My philosophy was to listen to the positions of both sides to ensure that the defendant was prepared to enter the proposed plea agreement knowingly, intelligently, and voluntarily and that the proposed plea agreement was negotiated with zealous representation from both sides so as to form the basis of an

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<sup>10</sup> See OHIO R. CRIM. P. 29(A); and *State v. Ramirez*, 2020-Ohio-602 (Ohio).

<sup>11</sup> OHIO R. CRIM. P. 11(G).

arm's length transaction. I would carefully consider both sides' positions, weighing their arguments with the known facts, in order to ascertain a disposition that was within the parameters advocated by the parties.

In my courtroom, I always made clear that I was amenable to plea agreements that included agreed sentences negotiated by the parties. After all, they knew more about the facts and procedural hurdles in the underlying case than I did. If the parties were unable to reach an agreed sentence, I would conduct a sentencing hearing. Although I had many opportunities in my fourteen years as a trial judge to use my discretion to sentence a defendant above what the prosecuting attorney advocated, I never did.

Some of my former colleagues on the trial bench, however, take a different view regarding the power to sentence a defendant. Some judges view it as solely and inherently within the authority of the judge. As a result, these judges tell the parties that although they are free to advance sentencing recommendations, the judge will not be bound by any position advocated by the parties. These judges will tell the parties that they retain unfettered discretion within statutory limits and will often impose a sentence that is more severe than that which was advocated by the prosecutor.

Some judges in our system have developed personal plea policies and, for instance, will tell prosecutors and defense lawyers that they will refuse a proposed plea agreement that reduces a felony charge to a misdemeanor. Also, at times, some judges have refused to accept a prosecutor's good faith attempt to dismiss the case. Further complicating and frustrating practitioners, who must navigate among these individual philosophies, is the speculative uncertainty over how far each judge is willing to go to communicate to the parties what they are inclined to do regarding the sentence. If the judge makes a sentencing commitment in chambers, it is an unspoken rule in some courtrooms that such a commitment is not to be communicated publicly, especially at the plea hearing. Therefore, defense counsel must often privately instruct his or her client to unequivocally answer "no" when asked at the hearing if any promises have been made to induce the plea.

Occasionally in the courtrooms where this occurs, a defendant will forget this important instruction from the attorney and state at the plea hearing something to the effect like: "Yes, my attorney told me I would receive a minimum sentence." There are scores of transcripts where something like this has occurred. The embarrassed defense attorney will then usually say something like, "Judge, may I please speak to my client off the record?" And then miraculously the client will resume back on the record, "No your honor, no promises have been made to me."

At the other end of the spectrum are trial court judges who refuse to make any commitment regarding the sentence, leaving defendants not with a negotiated benefit but merely the *hope* of a benefit at the sentencing hearing. There are multitudes of cases from such courtrooms where defendants were induced into a plea agreement where the prosecutor offered to change a charge that carried mandatory prison time to one that did not. In many of these cases the prosecutor will remain silent at the plea hearing regarding the sentence they intend to advocate for at the

sentencing hearing. Consequently, defendants have appeared at their sentencing hearings hoping for probation, or a minimum sentence, but who instead received severe, sometimes decades-long sentences. They leave the courtroom shell-shocked, wondering just what benefit they received in exchange for their plea. I refer to this phenomenon as “sentencing by ambush.”

#### IV. THE SPOTLIGHT OF TRANSPARENCY

There came a time during my first term as a trial court judge when I began to question the way I was conducting these important informal plea negotiation discussions back in my chambers. I started to feel uncomfortable discussing aspects of a proposed plea agreement outside the presence of the two most important stakeholders in the process: the accused, whose life would often be profoundly affected by the agreement, and of no less importance, the victim, who was seeking justice and accountability. Eventually, after much thought, I experienced the major epiphany of my legal career: **No stakeholder in the plea negotiation process, including the judge, should ever say anything in chambers and off the record that he or she would not repeat verbatim in open court while on the record.**

Subsequently, I told my bailiff that I was going to change how I interacted with the attorneys. I explained to the attorneys appearing before me that I would continue to be as accessible as ever to discuss any aspect of a proposed plea agreement. However, those discussions would no longer take place in my chambers. From that day forward, these discussions would take place in open court and on the record. I cannot overstate the revelatory awakening that occurred the first time I began to conduct the process in this manner.

When parties are placed on the record, it naturally forces the adversaries to focus on the strengths and weaknesses of the case. No one wants to be caught lying or embellishing the facts on the record. No one wants to appear coercive or threatening. Instead, by conducting these discussions in open court and on the record, the parties focus on their positions and the known facts of the case, and everyone in the process, including the judge, is held accountable for what they say.

It worked like this: at the court hearings, the prosecutor would typically start by outlining the framework of the proposed plea agreement and the proposed benefit being extended to the accused in exchange for an admission of guilt. Victims, who have the right to be present and are encouraged to attend the hearing, are then given the opportunity to correct any factual inaccuracies and provide the court with impact testimony regarding the crime. Defense counsel would then acknowledge their understanding of what was outlined and, just like we used to discuss in chambers, would often raise the issue of sentencing. At this point, I would typically turn to the prosecutor and ask what position they intended to take at the sentencing hearing and whether the facts of the case, the defendant’s background, and our sentencing laws supported such a position. Many times, the prosecution would voice no objection to probation or would indicate that they were taking no position regarding the sentence and instead, would leave sentencing to the sound discretion of the court.

I would then address defense counsel and have the very same discussion. Afterward, I would consider the overall principles and purposes of felony sentencing embodied in our criminal statutory code,<sup>12</sup> and offer my reasons on the record as to why I believed the facts supported the sentence I was considering. In more serious cases, if I needed additional time to consider all of the relevant facts and law, I would defer my decision and continue the matter for another day. I would then refer the defendant to the probation department for a presentence investigation. I would inform the parties that if all facts were verified as represented by the parties, I was prepared to issue that sentence. Thus, at the future sentencing hearing, *I too*, was held accountable for what I represented on the record.

This became my standard practice in conducting plea negotiations for well over a decade. Frequently, during such on-the-record hearings, I would have the parties state the factual basis of the charges to which the defendant was admitting. I let the attorneys know in advance about my “blanket” policy governing all plea agreements, insisting that they maintain a factual basis. This policy could be found on my informational page on the court’s website. This is important because there are some state appellate court decisions that suggest it is plain error for a trial court to maintain a blanket policy governing plea agreements.<sup>13</sup> A close examination of these cases reveal they usually involve a trial court judge with an individual arbitrary policy, for instance, a failure to plead by a certain date will result in a forfeiture of the ability to plead or a court refusal to accept a no-contest plea.<sup>14</sup> My blanket policy, which I believe promoted transparency and accountability for all parties, was never challenged during my tenure as a trial court judge.

#### V. FLAWS WITHIN THE SYSTEM

The vast majority of cases that enter the system will not proceed to trial, and if the essential facts are no longer in dispute, a trial becomes unnecessary. A plea negotiation—if everyone is performing their function as designed—will result in a fair and just resolution. Cases where defendants have been overcharged can be adjusted appropriately once an effective defense lawyer is given the opportunity to bring this fact to light to reasonable prosecutors.

However, when one or more of the parties (judge, prosecutor, or defense attorney) does not perform their roles as designed, there is a real danger of grave injustice. One particular type of injustice involves the acceptance of factually baseless plea agreements. These occur where a court permits a defendant to resolve the case by pleading to a crime that the defendant did not commit. There are some occasions where if the parties are unable to reach an agreement, the parties will enter what some have described as “creative” negotiations to create what lawyers refer to

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<sup>12</sup> OHIO REV. CODE ANN. §§ 2911.11, 2911.12 (West 2020).

<sup>13</sup> See, e.g., *State v. Beasley*, 152 Ohio St.3d 470, 474 (2018).

<sup>14</sup> *Id.*



as “legal fictions,” more commonly understood by the layperson as “lies.” I believe such legal fictions, a.k.a. lies, operate as a fraud on the unsuspecting public.

Pleas like these are sometimes difficult to spot because of the general public’s lack of understanding regarding the factual elements that support the crimes that are being offered to the defendant as “legal fictions.” Occasionally, however, they can be blatant; for example, in a particular Cuyahoga County case a defendant was charged with multiple counts of downloading child pornography and one count of possession of criminal tools, presumably concerning the computer used to commit these alleged criminal acts. What were the potential truths about these allegations that could exist? One truth might be that the defendant committed these offenses and was guilty of the alleged criminal conduct. Another truth might be that the crimes were committed by someone else. But what we know was not true is that the defendant did not commit the crime of felonious assault, even though that is what he was allowed to plead to in order to resolve this case.

How did this plea happen? What were the reasons behind the plea agreement, which drove the parties to resolve the case in this manner, reaching a conclusion that no jury would have been able to reach in its deliberations? There are several possibilities. Perhaps the police had conducted an illegal search, thus violating defendant’s constitutional rights, and defense counsel intended to raise this issue. Possibly, the prosecutor recognized that the case would be lost if the trial judge excluded the evidence. Or perhaps the defendant suffered from some cognitive disability that caused all parties, including the prosecutor, to feel enough sympathy to authorize such a plea. The fact is we will never know why this defendant who was allowed to plead to a “legal fiction” was treated differently and much more leniently than others who have been charged with the same serious crimes. The true reasons have been lost in the ether, shrouded by off-the-record conversations that often take place in the backroom.

The parties in this case probably felt that the “creative” resolution amounted to some form of “rough justice,” where everyone was allowed to walk away with something. The defense counsel most certainly rationalized that he or she achieved a just result for this client, successfully shielding the client from the potential consequences of the original charges, including years in prison and a lifetime obligation to register as a sexually oriented offender. But what about the scores of other defendants who were not so fortunate, serving decades in prison and suffering collateral consequences? How should they feel about such a resolution? Tough luck? Too bad for them? They should have hired the right lawyers? And what about future employers performing a background check on this individual? They will never know whether or not they are actually hiring a sex offender.

To examine this issue, I go back to the epiphany that I experienced during my first term in office: **No one should ever say anything in the back room that they would not say out in the open and on the record.**

Years ago, as part of an ethics presentation, I had an opportunity to speak to a room full of trial court judges and present a hypothetical fact pattern that provided an example of how such a conversation might unfold in the backroom chambers of

a judge. The question posed to this audience was simple: “would you or would you not accept the following plea?”

Next Monday you have a serious rape trial set to go forward. The victim, who is now 15 years old, claims that the defendant, her uncle, raped her on two occasions four years earlier when he was out of work and living temporarily with her mother, the defendant’s sister. The victim claims that she kept the details of the incidents to herself, but after receiving the encouragement of a teacher, she decided to come forward with the charges.

You meet with the prosecutor and defense attorney who both enter your chambers stating, “Judge, you’ll be happy to hear we have reached a resolution.” Upon inquiry, the prosecutor states she will motion the Court to amend count 1 of the indictment from one count of rape to a charge of aggravated assault—a felony of the fourth degree. All remaining counts would be dismissed in exchange for the plea. She adds that the victim has been severely traumatized by what occurred and the thought of testifying in court in the presence of the defendant has her almost paralyzed with fear. “The State will be advocating for prison time but we understand sentencing is totally up to your wise discretion.”

You turn your attention to the defense attorney who says, “Judge, my guy swears up and down this stuff never happened but he’s not going to roll the dice on a mandatory life sentence. He understands all the potential penalties he faces, and I will be prepared to argue in mitigation at the sentencing hearing.

Each member of the audience of judges was equipped with an electronic responder. Interestingly, a little over half of the judges in the audience voted that they would not accept the proposed plea because the crime of aggravated assault was not a sex crime and had no resemblance to the crime of rape. Rather, it was a lower level physical assault crime that included an element of provocation by the alleged victim. The remainder of judges in the room voted that they would accept the plea agreement. A vigorous debate immediately took place among the audience members in an attempt to defend their opposing positions.

In 2015, when the Ohio Supreme Court Commission on the Rules of Practice and Procedure considered whether to join the federal system and a handful of states that had outlawed factually-baseless pleas,<sup>15</sup> the effort received support from the editorial boards of *The Cleveland Plain Dealer*, *The Columbus Dispatch*, nationally recognized academics in the field of legal ethics (including Professor Bruce Green

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<sup>15</sup> OHIO CRIM. SENT’G COMM’N, ANN. REPORT 20 (2015).

from Fordham University and Professor Jack Sahl from the Akron School of Law), the Cleveland Rape Crisis Center, and the Ohio Alliance to End Sexual Violence.<sup>16</sup>

The Ohio Prosecuting Attorney's Association did not submit any formal objection to the measure. However, Tim Young, the Ohio State Public Defender, articulated a thoughtful measured response that contained many valid reasons why the majority of the defense bar is wary of moving in this direction.<sup>17</sup> He pointed out that practitioners in our flawed system operate under numerous draconian laws.<sup>18</sup> (Some examples are the current sexual registration laws and mandatory prison specifications that strip trial court discretion and inhibit their ability to mitigate severe and unjust results when the facts of the case warrant it.)

I completely agree with Mr. Young on this point. Where we differ is in what the response should be. The answer, in my opinion, is not to continue a duplicitous practice that commits a fraud upon the citizens we serve. Instead, the answer is to reform the laws he has identified and create diversionary programs for situations where the collateral consequences in a case justify treating the defendant differently than those in situations where such consequences do not exist.

Many trial court judges in this state could testify that the current sexual registration laws have required them to register individuals that they do not believe pose a threat to the public. In my opinion, these laws currently operate in a way that actually places the public in a greater state of peril. This is because there are bona fide sexual predators who live in our communities, and if we are going to have registration programs, those predators should definitely be listed on them. But given the manner in which the current laws operate, the information surrounding these individuals becomes diluted within a sea of mandatory registrants who pose no threat to the public—at least not the type of threat that these laws purport to protect against. If these laws are not reformed to provide trial court judges with discretion to register only those who deserve registration, practitioners will continue in their attempts to circumvent the system in order for defendants to receive what they perceive as a just result. The public will continue, however, to be left with a false sense of security.

Here's an example to highlight the issue. I once had a case in which a 19-year-old male was charged with having a consensual, though unlawful, sexual relationship with a 15-year-old female. Because the defendant and victim were slightly over four years apart in age, a conviction would leave me with no choice but to register the defendant for a 25-year period as a sexually-oriented offender. Defense counsel indicated before trial that the defendant would not plead to any

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<sup>16</sup> See Rachel Dissell, Should Ohio ban judges from banning plea deals that are 'lies'? (poll), *THE PLAIN DEALER* (May 30, 2015), [https://www.cleveland.com/court-justice/2015/05/should\\_ohio\\_change\\_what\\_plea\\_d.html](https://www.cleveland.com/court-justice/2015/05/should_ohio_change_what_plea_d.html); and Randy Ludlow, Plea deals must reflect crime committed, judges demand, *THE COLUMBUS DISPATCH* (Sept. 18, 2015), <http://www.dispatch.com/content/stories/local/2015/09/18/judges-pleas-must-reflect-crime.html>.

<sup>17</sup> Tim Young, Ohio Public Defender, Public Comments to Proposed Amendment to Ohio Rule of Criminal Procedure 11 (2015).

<sup>18</sup> *Id.*

offense that would result in a sexual registration requirement and the parties were at an impasse. We began the jury selection portion of the trial.

Before we returned to the courtroom after the lunch break, the attorneys appeared at my chambers door and asked if they could come back and discuss a potential resolution they had reached and would like me to consider. I told them I would be glad to, but I discuss everything out in open court on the record. So, we all walked out into the courtroom.

The defendant, looking very young and very scared, sat at the trial table. The courtroom was filled with spectators, including the defendant's parents and family members, the victim's family members, and various members of the general public. This was actually the first time I captured a proposed "legal fiction" plea agreement on the record. If it had been discussed in the backroom as the lawyers desired it would have prevented the public from learning the case specifics and just how "creative" certain legal fictions can get. The following is a formal transcript excerpt reflecting the actual exchange between myself and the parties with the identities of all involved removed.

**TUESDAY AFTERNOON SESSION, AUGUST 2016:**

THE COURT: We're back on the trial. This is the state of Ohio versus John Doe. The parties want to address the Court. Is there a proposed plea or something?

THE DEFENSE ATTORNEY: I believe the prosecutor has a recommendation she'd like to make to the Court, and we would like to be heard if we could.

THE PROSECUTOR: That is correct, your Honor. During the break, we did have time to review the case and talk with our witnesses.

At this time, we are prepared to make an amendment to Count I different from that that was placed on the record.

We would be prepared to amend Count I by deleting the furthermore—forgive me. Amending the furthermore language to indicate that the offender is less than four years older than the person with whom the offender engaged in sexual conduct. That will then make this a Misdemeanor 1.

Further within this, there is no allegations it was non-consensual sex. It is agreed upon by all the parties this was, in fact, consensual sex, and, therefore, it would be non-registerable offense.

So it is unlawful sexual conduct with a minor with the discrepancy being less than four years with the agreement it's consensual, so no registration.

THE COURT: In fact, they are more than four years?

THE PROSECUTOR: That is correct.

THE COURT: So you would be stipulating to a fallacy?

THE PROSECUTOR: That is correct, your Honor.

I explained to the parties that the proposed plea agreement violated the court's policy of requiring a factual basis for guilty pleas, and that I was inclined to reject their proposal. I then had a lengthy exchange with the prosecutor, who clearly saw valid reasons why the case merited a plea with no registration requirement. It seemed, given the circumstances of this case, that the requirement was unduly harsh and unnecessary for public safety. The case also involved a victim who still had feelings for the young defendant and was reluctant to testify against him in the first place.

What was the state's end game, I inquired? The state understandably wanted the defendant to have no further contact with the victim, at least until she had reached an age where the law would permit it. I inquired whether the state's diversion program would accept the defendant and place those requirements upon him. The prosecutor indicated that unfortunately office policy banned all sex offenses from its diversion program. The prosecutor then suggested the offense of contributing to the delinquency of a minor. Are there facts, I inquired, that if true, would support the charge? The prosecutor outlined the numerous occasions where the defendant had encouraged and assisted the victim to sneak out of her home after curfew. I told parties that if the defendant was willing to waive all procedural defects (because that was not what he was charged with in the first place) I would accept that proposal to resolve the case.

The guilty plea would have been factually based, the state would have reached its goal of having some supervision placed upon the defendant, the defendant would have avoided harsh unnecessary collateral consequences, and if any member of the public wanted to take issue with the resolution, a transcript existed holding me accountable for accepting the resolution in the first place. Ultimately, the prosecutor decided to dismiss this case without prejudice.

This experience led me to work with the court's technology department to learn how often this "stipulation to a fallacy" was occurring in cases involving unlawful sex with a minor. I also wondered if it occurred only when the age discrepancy between the defendant was close to the four-year separation that the law prohibited.<sup>19</sup> The data I uncovered revealed approximately twenty-five cases over a three-year period, and as expected the vast majority of the cases involved age differences that were barely over four years. A few glaring discrepancies did exist, however, including one case where the defendant was 28 years older than the underage victim.

## VI. RIPE FOR REFORM

I am hopeful that the reflections contained within this article will motivate stakeholders in our system to discuss what I believe are necessary reforms. Attorneys, judges, legislators, and advocacy groups should have an opportunity to sit down and take their "hats off" so to speak and ask two simple questions: "what

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<sup>19</sup> OHIO REV. CODE ANN. § 2907.04(B)(2) (West 2020).

is actually occurring in the system?” and “how can we improve things in such a way that will increase public confidence in our courts?”

I recently had the honor of testifying before the American Bar Association Task Force on Plea Bargaining in Washington D.C. This impressive group, comprised of lawyers, judges, legal academics, and policy advocates, is examining these very issues on a national scale in both the federal and state systems. My vision is an Ohio task force similar to the many successful task forces Chief Justice Maureen O'Connor has created over her tenure to complement the ABA's work and implement the inevitable reforms this group will put forth when their work is complete. Issues I would like the task force to examine include:

- What resources would it take to create a centralized database to track every criminal sentence issued in our state with information available to advocates and judges to allow for meaningful comparison and analyses promoting both consistency and proportionality throughout the state of Ohio?
- What role should the judge play in the plea negotiation process? Are there certain rules that can be created to promote more uniformity and fairness? Why do some judges accept agreed sentences and some do not? Is it acceptable for a judge to suggest to a prosecutor how to exercise their discretion? Is it ever acceptable for a judge to prevent a prosecutor from dismissing a case?
- What are the existing laws (for example, sexual registration laws and mandatory sentencing laws) that advocates and judges perceive as “tying their hands” in such a fashion that they are unable to negotiate fair resolutions in certain criminal cases and tempt them to circumvent these laws with fictional pleas? How can these laws be changed to provide the trial courts with much needed discretion?
- In a fair justice system, should a defendant who enters a negotiated plea agreement know, at least within reason, what benefit they are receiving in exchange for the admission they are providing? And should the defendant know at the plea hearing what position the prosecutor will be advocating for at the sentencing hearing so as to avoid sentencing by ambush?
- Are there certain plea agreements in our system that are so coercive that they should be outlawed as unethical? For instance, when a plea is negotiated *before* a post-conviction relief hearing is held, at which the incarcerated defendant intends to demonstrate actual innocence. On some occasions, the prosecutor will offer a defendant the opportunity to plead to the charges to which he or she has already achieved a conviction. In exchange for defendant's plea, the

prosecutor will negotiate a release from prison.<sup>20</sup> In these circumstances, the defendant has no leverage or bargaining power. In my opinion, this plea is so coercive it is the legal equivalent to holding a gun to a defendant's head to force the plea's acceptance.

- Can our rules that outline the ethical obligations of prosecutors be strengthened? Can we offer guidance through rule changes to ensure that prosecutors at all times maintain a "good faith" belief in the guilt of the accused with direction to fully dismiss charges or vacate convictions if available information suggests they cannot maintain such a belief?
- Should the legislature create an "accountability benefit," *i.e.*, a mechanism similar to Ohio's attempt statute, that would provide the defendant with the benefit of a reduced sentence but more accurately and honestly inform the public as to how it was utilized to resolve the case?

Ohio's citizens deserve the assurance that the outcomes of every dispute in our criminal justice system are based in fact, based in truth. Further, all citizens should rightly expect that everyone who enters the system either as the accuser or the accused will be treated fairly and according to the rule of law. We, the current members of the legal profession, have an obligation to work together for the next generation of lawyers and judges and deliver a system better than the one we found both in principle and in practice.

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<sup>20</sup> I call this type of plea a "dark plea." David Akadjian, Dark Pleas and the Justice Gap: 7 Questions for Michael Donnelly, Candidate for Ohio's Supreme Court, DAILY KOS (Sep. 30, 2018, 6:30 PM), <https://www.dailykos.com/stories/2018/9/30/1799071/-Dark-pleas-and-the-justice-gap-7-questions-for-Michael-Donnelly-candidate-for-Ohio-s-Supreme-Court>.