MORE THAN A POUND OF FLESH: THE TROUBLING TREND OF UNCONSCIONABLE WAIVER CLAUSES IN PLEA AGREEMENTS

CARRIE LEONETTI*

* Ahonuku/Associate Professor, School of Law, University of Auckland / Waipapa Taumata Rau. She wishes to acknowledge Māori as the traditional custodians of Aetearoa New Zealand. *Whāia te mātauranga kia mārama* ("Seek knowledge for understanding.").

I. INTRODUCTION

> How sweetly he would hear confession! How pleasant was his absolution! He was an easy man in giving shrift, when sure of getting a substantial gift . . . . For if you gave, then he could vouch for it that you were conscience-stricken and contrite; For many are so hardened in their hearts they cannot weep, though burning with remorse.[1]

Plea bargaining in the United States has increasingly begun to resemble a science–fiction game show, the kind of brutal spectacle where desperate contestants engage in riskier and riskier bargaining to escape death, torture, or imprisonment, á la *Running Man* or *Hunger Games*. The practice is no longer limited to an exchange of certainty (by way of guilty plea and a fixed sentence) for efficiency (avoiding the resource expenditure of an adversarial criminal trial). Instead, defendants are being asked to give up much more than just a shot at a not-guilty verdict through waivers of rights that entail forfeiture of other valuable considerations less clearly linked to any legitimate state interest: a functional paying of the king's ransom in exchange for future freedoms.

The basic statistic on plea bargaining is well known: upwards of ninety-five percent of defendants in the United States forego their constitutional right to a trial and plead guilty in exchange for a charge or plea leniency from the prosecution.[2] Much has already been written about the "innocence problem" in plea bargaining: the pressure that huge trial penalties and/or guilty-plea discounts place on defendants to plead guilty even to a crime

[1] Geoffrey Chaucer, The Canterbury Tales 6–7 (Oxford Univ. Press, 1986).

[2] *See* Missouri v. Frye, 566 U.S. 134, 143 (2012) ("Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas."); Allison D. Redlich, *The Validity of Pleading Guilty*, 2 ADVANCES IN PSYCH. & L. 1, 1 (2016); Bennett Capers, *The Prosecutor's Turn,* 57 WM & MARY L. REV. 1277, 1278 (2016); Jacqueline E. Ross, *The Entrenched Position of Plea Bargaining in United States Legal Practice,* 54 AM. J. COMP. L. 717, 717 (2006); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract,* 101 YALE L.J. 1909, 1912 (1992).

that they did not commit.[3] This Article focuses on a specific variant of that problem: the pressure not only to plead guilty and give up the right to proof beyond a reasonable doubt at trial, but also to accept an increasingly bizarre and unreasonable list of conditions attached to that guilty plea beyond the plea itself.

Some waivers and/or forfeitures of rights are essentially inherent in any negotiated guilty plea, including the waiver of the right to have a trial at which the prosecution would have to prove guilt beyond a reasonable doubt (as well as the bundle of rights that come with trial, like compelling the attendance of defense witnesses, presenting evidence, cross-examining prosecution witnesses, and remaining silent without penalty) and the forfeiture of most issues that could be raised on appeal or post-conviction by virtue of the "preservation" doctrine, which generally requires defendants to have fully and finally litigated an issue on the merits before a trial court in order to ask

[3] *See* NATIONAL REGISTRY OF EXONERATIONS, *Innocents Who Plead Guilty*, http://www.law.umich.edu/special/exoneration/Documents/NRE.Guilty.Plea.Article1.pdf [https://perma.cc/SDZ4-K5T5] (last visited Apr. 3, 2019); *see also* Daniel Givelber, *Kalven and Zeisel in the Twenty-First Century, in* WHEN LAW FAILS: MAKING SENSE OF MISCARRIAGES OF JUSTICE 153 (Charles J. Ogletree Jr. & Austin Sarat, eds., 2009) ("Eschewing a plea in favor of a trial in which one puts forward no witnesses or only the defendant does not appear to be a rational response to the resource constraints under which criminal defense operates."); *see generally* WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 7 (2011); Josh Bowers, *Punishing the Innocent,* 156 PENN. L. REV. 1117, 1132 ("[P]lea bargaining may be the best way for an *innocent* defendant to minimize wrongful punishment."); Eunyung Theresa Oh, *Innocence After "Guilt": Postconviction DNA Relief for Innocents Who Pled Guilty,* 55 SYRACUSE L. REV. 161 (2004). *But see* FED. R. CRIM. P. 11(b)(3) (requiring federal courts to determine that there is a sufficient factual basis for a guilty plea before accepting it); *cf.* Rachel Barkow, *Separation of Powers and the Criminal Law,* 58 STAN. L. REV. 989, 1034 (2006) ("[Defendants] who do take their case to trial and lose receive longer sentences than even Congress or the prosecutor might think appropriate, because the longer sentences exist on the books largely for bargaining purposes. This often results in individuals who accept a plea bargain receiving shorter sentences than other individuals who are less morally culpable but take a chance and go to trial.") (citation omitted).

an appeals court to review the trial court's decision later.[4] Historically, negotiated guilty pleas have also included certain concessions beyond waiving the right to a jury trial and admitting that the prosecution could prove guilt beyond a reasonable doubt, including waiving the right to appeal anything other than the voluntariness or legality of the guilty plea itself.[5]

Prosecutors, however, have begun to make increasingly onerous demands that defendants waive more than simply their trial or some of their appellate rights in exchange for charging or sentencing leniency, and many of these demands seem to be unrelated to the subject of the plea negotiations between the parties. These demands include waiving their rights to: a preliminary hearing;[6] disclosure of *Brady* and *Giglio* material; challenge a conviction or sentence on the grounds of prosecutorial misconduct or newly discovered evidence that might prove their innocence; challenge the constitutionality of their sentences; seek any appellate, postconviction, or *habeas-corpus* relief, including the retroactive application of new constitutional rules of criminal procedure, even if the sentencing court

[4] *See, e.g.,* Bradshaw v. Richey, 546 U.S. 74, 79 (2005) (finding that the United States Court of Appeals for the Sixth Circuit had improperly granted Richey *habeas* relief from his conviction and death sentence for aggravated felony murder because, in finding that Richey's trial counsel had been unconstitutionally ineffective, the Court of Appeals had considered evidence not presented to the state *habeas* courts); Estelle v. Williams, 425 U.S. 501, 512 (1976) (holding that Texas compelling Williams to stand trial before a jury while dressed in a jail jumpsuit would have violated his due-process rights if Williams had objected, but that his failure to do so negated any compulsion by the State). *But see* FED. R. CRIM. P. 11(a) (permitting a defendant to enter a conditional guilty plea, expressly preserving one or more pretrial issues for appellate review); Lefkowitz v. Newsome, 420 U.S. 283, 288-93 (holding that, because Newsome's guilty plea was entered into with the clear understanding and expectation that it would not foreclose judicial review of the merits of an alleged constitutional violation, federal *habeas corpus* was still open to him).

[5] *See* Emily Yoffe, *Innocence is Irrelevant,* ATLANTIC (Sept. 2017), https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171/ [https://perma.cc/BJ3C-JXB5]; E-mail from Lisa Hay, Federal Defender, District of Oregon, (Mar. 11, 2021) (on file with author) [hereinafter Hay E-mail].

[6] *See* E-mail from Edward Kroll, Kroll & Johnson P.C., (Apr. 3, 2019) (on file with author) (describing the standard practice of the Washington County, Oregon District Attorney's Office of making plea offers prior to preliminary hearing on the condition that such offers will remain valid only if the Defendant waives the right to the hearing).

miscalculates the sentence;[7] seek DNA testing that may prove factual innocence; seek asylum or relief from deportation in subsequent removal proceedings;[8] or challenge the admissibility of the facts alleged by the prosecution in any subsequent procedure, even if inadmissible under the rules of evidence or procedure.[9] For example, the standard clause in plea agreements drafted by United States Attorney's Offices governing appeals and postconviction challenges dictates:

> **Waiver of Appeal / Post-Conviction Relief**:
>
> Defendant knowingly and voluntarily waives the right to appeal from any aspect of the conviction and sentence . . . . Defendant's waiver includes, but is not limited to, any challenges to the constitutionality of the statute to which defendant is pleading guilty and any argument that the fact to which defendant admits are not within the scope of the statute.

[7] Defendants are generally entitled to the benefit of appellate-court rulings that occur before or during their trial or while their convictions are on direct appeal. *See* Griffith v. Kentucky, 479 U.S. 314, 328 (1987) (holding that new rules are to be applied retroactively on direct review). They are only entitled to the benefit of appellate-court rulings after their direct appeals are completed if the new rule of criminal procedure is deemed to be integral to the accuracy of their convictions – *i.e.,* unless their trial was conducted or their guilty plea acquired through a criminal procedure that a court of appeals has now determined may have resulted in a wrongful conviction.

[8] See Donna Lee Elm et al., Immigration Defense Waivers in Federal Criminal Plea Agreements, 69 MERCER L. REV. 679, 877 (2018); Brooke Williams & Shawn Musgrave, Federal Prosecutors Are Using Plea Bargains as a Secret Weapon for Deportations, INTERCEPT (Nov. 15, 2017), https://theintercept.com/2017/11/15/deportations-plea-bargains-immigration/. These waivers of the right to an immigration hearing, called "stipulated judicial removal orders," are statutorily authorized. See 8 U.S.C. § 1228(c)(5) ("The United States Attorney, with the concurrence of the Commissioner, may, pursuant to Federal Rule of Criminal Procedure 11, enter into a plea agreement which calls for the alien, who is deportable under this chapter, to waive the right to notice and a hearing under this section, and stipulate to the entry of a judicial order of removal from the United States as a condition of the plea agreement or as a condition of probation or supervised release, or both."). The United States Department of Justice has specifically blessed "using the JRO as a bargaining chip to negotiate a plea with a defendant who is less interested in fighting removal than in litigating the prison sentence." U.S. DEP'T OF JUST. EXEC. OFF. FOR U.S. ATTORNEYS, NO. 65 U.S. ATT'Y BULL. 111–12 (2017)..

[9] *See* Hay E-mail, *supra* note 5.