Everything You Wanted To Know About Guilty Pleas and More

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“System of Pleas”

90-97 % Of Cases Resolved By Plea

[C]riminal justice today is for the most part a system of pleas, not a system of trials. **Ninety-seven percent of federal convictions** and **ninety-four percent of state convictions** are the result of guilty pleas. As explained in *Frye*, the right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences.

– *Lafler v. Cooper*, 566 U.S. 156, 169-70 (2012) (internal citations omitted)

- As early as 1979, it was reported that “roughly **ninety percent** of the criminal defendants convicted in state and federal courts plead guilty.”

  Albert Alschuler, Plea Bargaining and Its History, 79 COLUM. L. REV. 1, 1 (1979).

- “**Ninety-four percent** of state convictions are the result of guilty pleas.”

  Lafler, 566 U.S. at 170

In Utah, between 2014 and 2019:

- **At least 91% of criminal cases statewide** were resolved by plea, with most of these years **reaching above 93%.**
- By way of sheer number of cases, this amounts to over **83,000** Utah criminal cases each year resolved by plea---

Notably, this 83,000 number is the number in FY 2019, where the defendant pled guilty to the highest severity of charge

And I am not telling you anything you don’t already know . . .

BUT

Many Pleas Are Entered With An "Informational Deficit"

- During the early stages of proceedings when pleas are offered, defense attorneys are generally at an informational deficit compared to prosecutors.

- Defense attorneys might not have many opportunities to meet with their clients before a plea decision is made.

Kelsey S. Henderson, Defense Attorneys and Plea Bargains, in A SYSTEM OF PLEAS: SOCIAL SCIENCE'S CONTRIBUTION TO THE REAL LEGAL SYSTEM 37, 45 (Oxford University Press 2019) (citing study);

- Evidence disclosure rules are not consistently upheld for purposes of plea bargaining
- Including court rulings that hold a prosecutor need not disclose *Brady/Giglio* impeachment evidence **

  E.g., Medel v. State, 2008 UT 32, ¶ 24, 184 P.3d 1226 ("in cases where the defendant pleads guilty . . . his constitutional right to evidence is even more limited") (citing *United States v. Ruiz*, 536 U.S. 622, 633 (2002)).

  ****Look for upcoming changes to Discovery Rules and possible legislation**

Defendants Frequently Face Time Pressures

- Often, “plea offers are provided with an expiration attached.”

  Miko Wilford and Annmarie Khairalla, Innocence and Plea Bargaining, in A SYSTEM OF PLEAS: SOCIAL SCIENCE’S CONTRIBUTION TO THE REAL LEGAL SYSTEM 132, 138 (Oxford University Press 2019).

- The Utah Supreme Court has recognized plea bargains “can be contingent, time limited, or withdrawn as the prosecution reevaluates its case.”

  State v. Greuber, 2007 UT 50, ¶ 13, 165 P.3d 1185.

In Utah, cases have been increasingly set at a faster pace due to victim's rights legislation:

- "Victims and witnesses, particularly children, should have a speedy disposition of the entire criminal justice process."

  Utah Code § 77-37-3(1)(h)

- Victims have "the right to a speedy disposition of the charges free from *unwarranted delay* caused by or at the behest of the defendant."

  Utah Code § 77-38-7(2).

Because of time pressures, studies have shown that the accused may accept a plea “under the influence of a substance or because they did not know better, which suggests that if time had not been a factor,” the accused “could have waited until they sobered up or until their comprehension of the situation had improved.”

Miko Wilford and Annmarie Khairalla, Innocence and Plea Bargaining, in A SYSTEM OF PLEAS: SOCIAL SCIENCE’S CONTRIBUTION TO THE REAL LEGAL SYSTEM 132, 138 (Oxford University Press 2019).

In Utah, Many Pleas Are Entered Absent A Preliminary Hearing

- Because plea offers are often contingent upon waiver of the preliminary hearing, many defendants enter pleas without this critical proceeding.

- Even if a preliminary hearing is held, the standard for bindover is low with all evidence and inferences viewed in the light most favorable to the prosecution.

- Utah constitutional amendments and recent litigation surrounding the purpose of a preliminary hearing, have made the preliminary hearing, from the perspective of a criminal defendant, little more than an exercise in futility.

Many Defendants Are In Custody Pretrial

It comes as no surprise:

- That "[i]n an effort to be released, criminal defendants detained pretrial feel more inclined to accept plea bargains than criminal defendants who have been released pretrial."

  Alexander Shalom, Bail Reform As A Mass Incarceration Reduction Technique, 66 RUTGERS L. REV. 921, 921 (2014)

- "Defendants detained pretrial are more likely to enter guilty pleas regardless of actual guilt because of the coercive effects of long detentions" and "[i]n fact, detained defendants plead guilty twice as much as released defendants in order to secure their release."

  Lydette S. Assefa, Assessing Dangerousness Amidst Racial Stereotypes: An Analysis of the Role of Racial Bias in Bond Decisions and Ideas for Reform, 108 J. CRIM. L. & CRIMINOLOGY 653, 668 (2018).

Related to the informational deficit problems,

Those defendants in custody pretrial are “[e]ffectively cut off from communication with persons outside the detention facility, the incarcerated defendant is unable to arrange meetings with witnesses who could testify in his defense, to assist in the investigation of his case, or to provide his attorney with the facts to support a counter-narrative of the events leading to the criminal charge(s) against him.”

Clara Kalhous, John Meringolo, Bail Pending Trial: Changing Interpretations of the Bail Reform Act and the Importance of Bail from Defense Attorneys' Perspectives, 32 PACE L. REV. 800, 801(2012).

Many Pleas Are Therefore Entered Without a Defendant's Understanding of the Evidence, the Law, or the Process

The Entry of the Plea Itself Poses Additional Problems

- Plea forms may be discussed minutes before entry

  (particularly incarcerated defendants).
- Plea forms "are frequently written at an eighth-grade level or higher" though on average, "defendants read at or below the sixth-grade level."
- Language barriers
- Prevalence of higher order vocabulary and legalese

Wilford and Khairalla, supra at 140 (citing studies).

Defendants Not Fully Advised of Rights Waived

The Statement in Support of Guilty Plea form advises:

> **Appeal.** I know that under the Utah Constitution, if I were convicted by a jury or judge, I would have the right to appeal my conviction and sentence. If I could not afford the costs of an appeal, the State would pay those costs for me. I understand I am giving up my right to appeal my conviction if I plead guilty (or no contest). I understand if I wish to appeal my sentence, I must file a notice of appeal within 30 days after my sentence is entered.

Do you advise your client and clarify what this means?

The Statement in Support of Guilty Plea form advises-

I understand that if I want to withdraw my guilty (or no contest) plea(s), I must file a written motion to withdraw my plea(s) before sentence is announced. I understand that for a plea held in abeyance, a motion to withdraw from the plea agreement must be made within 30 days of pleading guilty or no contest. I will only be allowed to withdraw my plea if I show that it was not knowingly and voluntarily made. I understand that any challenge to my plea(s) made after sentencing must be pursued under the Post-Conviction Remedies Act in Title 78B, Chapter 9, and Rule 65C of the Utah Rules of Civil Procedure.

Do you advise your client and clarify what this means?

Do you know what this means?

Do you tell clients:

- What PCRA is?
- What it entails?
- Time limits for filing?
- Fact that there is no right to counsel in seeking relief?

Do you know what to tell them?

If <u>you don't</u>– And <u>court doesn't</u>–

Defendants are never told:

By entering a plea, **they are waiving their right to the assistance of counsel for any further challenge to their conviction, and some challenges to their sentences, if a motion to withdraw is not filed prior to being sentenced**.

Did you know this?

No Motion to Withdraw is Timely Filed in Most Circumstances

- Trial counsel does not advise (or does not know at that point) of grounds to support withdrawal.
- At times, a defendant files letters seeking to withdraw the plea, which are stricken by trial counsel.
- Every incentive for trial counsel to advise the defendant to remain passive and not attempt to withdraw the plea.

- In the **VAST majority** of cases, no motion to withdraw a plea is filed.
- In Utah – **in less than 1% of cases** – was a motion to withdraw a plea made before sentencing.

- Or, perhaps, **at the time the plea is entered, time is waived for sentencing and the defendant is sentenced that same day**. **So, a motion to withdraw a plea cannot be filed . . .**
- Between 2014 and 2019, Utah court data shows that **plea and sentencing occurred on the same day, on average, 41% of the time**.

So why do you care if a motion to withdraw a plea is not filed?

Even if a Defendant Does file a Timely Motion to Withdraw the Plea, Since 2003, The Grounds justifying Withdrawal are Limited

- Motions to withdraw pleas were once “liberally granted” because of the enormity of the rights defendants were waiving in comparison to a lack of prejudice to the State.

BUT

- The Plea Withdrawal Statute was amended in 2003/ three major ways that you need to understand

In 2003:

#1 The legislature narrowed the grounds for filing a motion to withdraw a plea from the broadly interpreted (and liberally granted) “good cause” showing to the more limited (and harder to establish) showing that the plea was not “knowingly or voluntarily made.”

In 2003:

#2 The amendments also modified the 30-day time limit, as interpreted by the Utah Supreme Court's *Ostler* decision (which said plea had to be withdrawn within 30 days after sentencing) - which had the effect of making the plea withdrawal window run parallel to the notice of appeal

The time frame for filing was changed to a "before sentence is announced" deadline.

In 2003:

#3 The requirement was implemented to pursue any challenges through the PCRA and the applicable rules of civil procedure for those who wished to challenge their plea, but who had not filed a motion to withdraw prior to sentencing.

No big deal, right?

Defendants still have an "appeal" remedy- they just have to go through a different vehicle.

Under the PCRA:

- the appointment of pro-bono counsel is discretionary; (frankly- not enough attorneys or resources)
- the consideration of appointment does not occur until the petition has been researched, drafted, and (hopefully timely) filed; and
- if pro-bono counsel is appointed, they need not be effective.

This Is All To Say That:

- Once a defendant utters the word “guilty”, must show that the plea itself was not knowingly and voluntarily entered.
- This showing must still be made prior to sentencing, despite the Court’s previous acknowledgement that this would be “absurd”
- And if all challenges, are not made prior to sentencing, defendant is barred from appellate review and the aid of counsel in PCRA –

  Even Prosecutorial Misconduct and IAC claims

This Is ALSO All To Say That:

- Entering a plea is a big deal
- It is not to be taken lightly

In our "system of pleas" – It is the point where Injustice all-to-often occurs

This Is ALSO All To Say That:

If an injustice occurs at this point in the process—

The Cold Reality Is:

It is likely because YOU -- as the defense attorney -- didn't do your job

Shift in Mindset ≠ Not Shift in Duties

Your Duties Before Advising A Defendant to Enter A Plea

Please Remember

In today's criminal justice system . . . the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant . . . [C]riminal defendants require effective counsel during plea negotiations. Anything less ... might deny a defendant effective representation by counsel at the only stage when legal aid and advice would help him.

– *Missouri v. Frye*, 566 U.S. 134, 144 (2012)

Duty to Investigate

ABA Standard 4-4.1
Duty to Investigate and Engage Investigators

(a) Defense counsel **has a duty to investigate in all cases**, and to determine whether there is a sufficient factual basis for criminal charges.

(b) **The duty to investigate is not terminated** by factors such as **the apparent force of the prosecution's evidence**, a client's alleged **admissions to others of facts suggesting guilt**, a client's **expressed desire to plead guilty or that there should be no investigation**, or **statements to defense counsel supporting guilt**.

(c) **Defense counsel's investigative efforts should commence promptly** and should explore appropriate avenues that reasonably might lead to information **relevant to the merits of the matter, consequences of the criminal proceedings, and potential dispositions and penalties**.

Although investigation will vary depending on the circumstances, **it should always be shaped by what is in the client's best interests, after consultation with the client.** Defense counsel's investigation of the merits of the criminal charges should include efforts to **secure relevant information in the possession of the prosecution, law enforcement authorities, and others, as well as independent investigation.** Counsel's investigation should also include evaluation of the prosecution's evidence (including possible re-testing or re-evaluation of physical, forensic, and expert evidence) and consideration of inconsistencies, potential avenues of impeachment of prosecution witnesses, and other possible suspects and alternative theories that the evidence may raise.

(d) Defense counsel should determine **whether the client's interests** would be served by **engaging fact investigators, forensic, accounting or other experts, or other professional witnesses such as sentencing specialists or social workers**, and if so, consider, in consultation with the client, whether to engage them. **Counsel should regularly re-evaluate the need for such services throughout the representation**.

(e) **If the client lacks sufficient resources to pay for necessary investigation**, counsel should seek resources from the court, the government, or donors. **Application to the court should be made ex parte** if appropriate to protect the client's confidentiality. Publicly funded defense offices should advocate for resources sufficient to fund such investigative expert services on a regular basis. **If adequate investigative funding is not provided, counsel may advise the court that the lack of resources for investigation may render legal representation ineffective**.

The Takeaway:

Defense counsel should **conduct a prompt investigation** of the circumstances of the case and **explore all avenues leading to facts relevant to the merits of the case and the penalty** in the event of conviction. The investigation should include **efforts to secure information in the possession of the prosecution and law enforcement authorities**. **The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty**.

ABA Standard 4-6.1
Duty to Seek Plea Disposition Short of Trial

(a) Defense counsel should be open, at every stage of a criminal matter and after consultation with the client, to discussions with the prosecutor concerning disposition of charges by guilty plea or other negotiated disposition. **Counsel should be knowledgeable about possible dispositions** that are alternatives to trial or imprisonment, including diversion from the criminal process.

(b) In every criminal matter, defense counsel should consider the individual circumstances of the case and of the client, **and should not recommend to a client acceptance of a disposition offer unless and until appropriate investigation and study of the matter has been completed. Such study should include discussion with the client and an analysis of relevant law, the prosecution's evidence, and potential dispositions and relevant collateral consequences**. Defense counsel **should advise against a guilty plea at the first appearance**, unless, after discussion with the client, a speedy disposition **is clearly in the client's best interest**.

ABA Standard 4-6.2
Negotiated Disposition Discussions

(a) **As early as practicable**, and preferably before engaging in disposition discussions with the prosecutor, **defense counsel should discuss with and advise the client about possible disposition options**.

(b) Once discussions with the prosecutor begin, **defense counsel should keep the accused advised of relevant developments**. Defense counsel should **promptly communicate and explain to the client any disposition proposals** made by the prosecutor, **while explaining that presenting the prosecution's offer does not indicate counsel's unwillingness to go to trial.**

(c) Defense counsel **should ensure that the client understands any proposed disposition agreement, including its direct and possible collateral consequences**.

(d) Defense counsel should not recommend to a defendant acceptance of a disposition without appropriate investigation. Before accepting or advising a disposition, defense counsel should request that the prosecution disclose any information that tends to negate guilt, mitigates the offense or is likely to reduce punishment.

(e) Defense counsel may make a recommendation to the client regarding disposition proposals, but should not unduly pressure the client to make any particular decision.

(f) Defense counsel should not knowingly make false statements of fact or law in the course of disposition discussions.

. . .

ABA Standard 4-6.3
Plea Agreements and Other Negotiated Dispositions

(a) Defense counsel **should ensure that any written** disposition agreement **accurately and completely** reflects the precise terms of the agreement, including the prosecution's promises and the client's obligations and whether any dismissal of charges will be with or without prejudice to later reinstatement.

(b) During any court hearing regarding a negotiated disposition, **defense counsel should ensure that all relevant details of the negotiated agreement are placed on the record**, and that the record fully reflects any factors necessary to protect the client's best interests. Although the presumption is that the record will be public, in some cases the record (or a portion) may be sealed for good cause or as required by applicable rule or statute.

(c) Defense counsel should **fully prepare the client for any hearing before a court related to entering or accepting a negotiated disposition**, **and for any pre-disposition or post-disposition interview** conducted by the prosecution or by court agents such as presentence investigators or probation officers. **Counsel should ordinarily be present at any such interview to protect the client's interests there**.

. . .

(e) **Defense counsel should investigate and be knowledgeable about sentencing procedures, law, and alternatives, collateral consequences and likely outcomes, and the practices of the sentencing judge**, and advise the client on these topics **before permitting the client to enter a negotiated disposition**. Counsel should also consider and explain to the client how specific terms of an agreement **are likely to be implemented**.

(f) **If defense counsel believes that prosecutorial conduct or conditions (such as unreasonably speedy deadlines or refusal to provide discovery) have unfairly influenced the client's disposition decision**, defense counsel should bring the circumstances to the attention of the court on the record, unless after consultation with the client, it is agreed that the risk of losing the negotiated disposition outweighs other considerations.

ABA Standard 4-5.1
Duty to Objectively Advise of Plea Offers and Trial Considerations

. . .

(b) Defense counsel should keep the client reasonably and regularly informed about the status of the case. **Before significant decision-points**, and at other times if requested, defense counsel should advise the client with candor concerning all aspects of the case, including an assessment of possible strategies and likely as well as possible outcomes**. Such advisement should take place after counsel is as fully informed as is reasonably possible in the time available about the relevant facts and law. Counsel should act diligently and, unless time does not permit, advise the client of what more needs to be done or considered before final decisions are made**.

(c) Defense counsel should **promptly communicate to the client every plea offer** and **all significant developments, motions, and court actions or rulings**, and provide advice as outlined in this Standard.

. . .

(e) Defense counsel should **provide the client with advice sufficiently in advance of decisions** to allow the client to consider available options, and avoid unnecessarily rushing the accused into decisions.

(f) Defense counsel should not intentionally **understate or overstate the risks, hazards, or prospects of the case** or exert undue influence on the client's decisions regarding a plea.

ABA Standard 4-5.4
Consideration of Collateral Consequences

(a) Defense counsel **should identify, and advise the client of, collateral consequences that may arise from charge, plea or conviction**. Counsel **should investigate consequences under applicable federal, state, and local laws, and seek assistance from others with greater knowledge** in specialized areas in order to be adequately informed as to the existence and details of relevant collateral consequences. Such **advice should be provided sufficiently in advance** that it may be fairly considered in a decision to pursue trial, plea, or other dispositions.

(b) **When defense counsel knows that a consequence is particularly important to the client**, counsel should advise the client as to whether there are procedures for avoiding, mitigating or later removing the consequence, and if so, how to best pursue or prepare for them.

(c) **Defense counsel should include consideration of potential collateral consequences in negotiations** with the prosecutor regarding possible dispositions, and in communications with the judge or court personnel regarding the appropriate sentence or conditions, if any, to be imposed.

Case/Client Specific

- **Enhanceable Offenses** (DUI, drugs, theft, DV, others)
- **Potential future prosecution** based upon conviction (federal crimes, restricted person crimes)
- **Ability to possess a weapon** (felony, DV cases, other restricted persons)
- **Driver's License consequences** (DUIs, Drug convictions, fleeing, leaving the scene of a crime; automobile accidents with injuries; traffic ticket points, etc.)
- **Federal Student Loans; Social Services consequences; housing** (drug convictions, felonies, outstanding warrants)

- **Registration requirements and consequences** (Sex offender registration; kidnapping registration, white collar crimes)
- **Other databases** (DCFS findings)
- **Professional licensing consequences**
- **Military; Clearance Issue**
- **Employment consequences**

Only Tip of the Iceberg

ABA Standard 4-5.5
Special Attention to Immigration Status and Consequences

(a) Defense counsel should determine a client's citizenship and immigration status, assuring the client that such information is important for effective legal representation and that it should be protected by the attorney-client privilege. Counsel should avoid any actions that might alert the government to information that could adversely affect the client.

(b) If defense counsel determines that a client may not be a United States citizen, counsel should investigate and identify particular immigration consequences that might follow possible criminal dispositions. **Consultation or association with an immigration law expert or knowledgeable advocate is advisable in these circumstances**. Public and appointed defenders should develop, or seek funding for, such immigration expertise within their offices.

(c) **After determining the client's immigration status and potential adverse consequences from the criminal proceedings**, including removal, exclusion, bars to relief from removal, immigration detention, denial of citizenship, and adverse consequences to the client's immediate family, **counsel should advise the client of all such potential consequences and determine with the client the best course of action for the client's interests and how to pursue it.**

(d) If a client is convicted of a removable offense, defense counsel **should advise the client of the serious consequences if the client illegally returns to the United States.**

The Takeaway:

Although the duties of a criminal defense attorney include seeking plea disposition as well as properly advising a client as to plea offers and trial considerations, trial counsel cannot fulfill these duties without having first properly investigated the facts and the law.

Entering A Knowing and Voluntary Plea

A guilty plea is valid under the Due Process Clause of the U.S. Constitution only if it is made voluntarily knowingly, and intelligently, with sufficient awareness of the relevant circumstances and likely consequences.

State v. Alexander, 2012 UT 27, ¶16; *Bluemel v. State*, 2007 UT 90, ¶17,

For plea to be voluntary and knowing, defendant must have knowledge of:

- Nature of the charges
- Constitutional rights being waived
- Likely consequences of entering the guilty plea

The Nature of the Charges

- Complete understanding of the charge
- Understanding of the law in relation to the facts
- Understanding of the “critical” or “essential” elements of the crime

Constitutional Rights Being Waived

- Self-Explanatory
- Not being done with regard to PCRA

Likely Consequences of Entering Plea

- Direct Consequences of Plea/ According to Plea Type

  "A direct consequence is one that will have a definite, immediate and largely automatic effect on the range of the defendant's punishment such as lack of eligibility for parole." *State v. Harvey*, 2015 UT App 92, ¶7, 348 P.3d 1199.

- Nature and value of promises made by the prosecutor through the plea bargain process

  State v. Magness, 2017 UT App 130, ¶18; *State v. Copeland*, 765 P.2d 1266, 1274 (Utah 1988).

Whose duty to ensure a knowing and voluntary plea?

Both defense counsel and the court

Withdrawal of Pleas

- Bound by Plea Withdrawal Statute
- Limited Grounds
- Any Untimely Challenge cannot be raised on appeal

Make an Informed Decision ---

Allow Your Client to Make An Informed Decision

Some Potential Grounds

- IAC

  failure to investigate case and law; offered incorrect advice or remained silent on “issues of great importance”

- State not fulfill promises; breach plea agreement*

  A prosecutor may not undermine promised sentencing recommendations at the sentencing hearing. Prosecutor owes a defendant a duty to pay more than lip service to a plea agreement.

- Defendant not have complete understanding of charge, law in relation to the facts, or the critical or essential elements of the crime(s)
- Failures of the court to advise, find a factual basis, find plea entered knowingly and voluntarily

The Reality–

Truth Be Told

Once a plea is entered . . .

It is nearly impossible to undo . . .

An Example -- The Big Picture

- An incompetent person enters a plea
- No motion to withdraw the plea is filed prior to sentencing
- Person is sentenced to prison

Does this incompetent person have any ability to raise anything in the district court?

Does this incompetent person have any ability to raise anything on direct appeal?

No Problem---

This (still incompetent) Defendant can just raise his incompetence in a PCRA petition–

Right?

Because of minefield of “procedural bars”--

Can’t just say– I was incompetent, and my constitutional rights were violated even though you prosecuted an incompetent person

The Current Fight: "The Unconstitutionality of Utah's System of Pleas"

There is litigation in the Courts—

Eventually the Utah Supreme Court will have to reckon with the reality that

- Although it is well-recognized that plea negotiation and the entry of pleas is the most critical stage of the criminal justice system, this phase in proceedings has been rendered unreviewable for the vast majority of Utah criminal defendants.
- For all practical purposes, most error that occurs during this critical period has been effectively shielded not only from essential review by the courts, but from the constitutionally guaranteed aid of counsel to raise those issues.

Closing Thoughts

- Do your job
- Understand the Big Picture
- Know – once the word guilty is uttered, the book is closed
- Protect your client as much as you can

Sery Pleas/ Binding Pleas/ Preserve Issues and Conditions Relied Upon