Anchors Away: Why the Anchoring Effect Suggests That Judges Should Be Able To Participate in Plea Discussions

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I. Introduction

Researchers have 38 pairs of MBA students at Northwestern University participate in a mock negotiation in which the researchers randomly designate one student in each pair the seller and the other the buyer.1 The researchers tell each student that the negotiation involves the sale of a pharmaceutical plant.2 The students are also told several other facts about the prospective sale: (1) The seller purchased the plant 3 years ago for $15 million, which was below the market price because the previous seller was in bankruptcy; (2) 2 years ago, the plant was appraised at $19 million; (3) in the last 2 years, the real estate market declined 5%, but the plant was unique and possibly immune to the decline; and (4) a similar plant recently sold for $26 million.3 The researchers inform students designated as buyers that they are CFOs of a company in need of a new plant to manufacture highly specialized compounds and that their best alternative is to build a new plant for $25 million which would be closer to the company’s headquarters than the plant up for sale but which would take a year to build.4 The researchers tell seller-students that they are selling the plant because their company is phasing out the product produced by the plant and that their best alternative is to strip the plant and sell the equipment for a projected profit of $17

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2 Id.
3 Id.
4 Id.
million. The only variable is that, in 19 pairs, the seller was told to make the first offer, while in the other 19 pairs, the buyer was told to make the first offer.

The result? In every pair, the students reached an agreement. Sellers made an average first offer of $26.6 million for the plant while the average opening offer by buyers was $16.5 million. When the seller made the initial offer, the average final purchase price was $24.8 million. When the buyer opened the bidding, the average final purchase price was $19.7 million.

These differences in final purchase price can be explained by the “anchoring effect,” an unconscious cognitive bias by which “[p]eople come up with or evaluate numbers by focusing on a reference point (an anchor) and then adjusting up or down from that anchor.” In the Northwestern study, the opening offer was the anchor, and the problem for the students not making that offer was that “people usually do not adjust away from their anchors enough,” so the “initial choice of anchors had an inordinate effect on their final estimates.”

Many legal bargaining theorists now recognize anchoring as a basic truth of civil negotiations, and it seems safe to assume that this same cognitive bias applies to criminal negotiations. For example, Professor Stephanos Bibas has argued that

The same dynamics help to explain the course of plea bargaining. For example, a prosecutor might initially offer a robbery defendant twenty years’ imprisonment by piling on every plausible enhancement. The defendant, of course, rejects this unreasonable offer out of hand, but the initial offer serves as a high anchor. When

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5 Id. at 660-61
6 Id. at 661.
7 Id.
8 Id.
9 Id.
10 Id.
12 Id. at 2516.
the prosecutor comes back with a revised offer of fifteen years, that offer sounds more reasonable. By the time the prosecutor comes down to twelve years, the defendant is ready to jump at the deal. If the prosecutor had started out at twelve years, however, the defendant might have anchored on that number as the highest likely sentence and rejected it as a bad deal.14

More than 90% of all criminal cases in this country are resolved by plea bargains.15 In the vast majority of those cases, the prosecutor makes the initial plea offer,16 and prosecutors often make high initial offers.17 Assuming that the anchoring effect applies to criminal negotiations in the same way that it applies to civil negotiations, this would mean that nearly all criminal cases in this country produce unjust results based upon an unconscious cognitive bias.

One potential solution to this problem would be to have defense attorneys make opening offers in plea negotiations, but even if prosecutors would accept this usurpation of power, it would merely produce unjust results in the other direction. This article thus proposes a solution that the majority of jurisdictions in the United States have rejected: judges should be able to participate in the plea discussions. Federal Rule of Criminal Procedure 11(c)(1) and most state counterparts strictly preclude judges from participating in plea discussions, but a few jurisdictions such as Florida and Connecticut permit judicial participation. In these jurisdictions, plea discussions commence with the prosecutor and defense counsel laying out their cases and asking for particular dispositions and the judge responding with the expected post-plea sentence in the form of a sentence cap, a range, or a fixed sentence.

This article contends that this type of judicial participation would reduce the anchoring effect because the expected post-plea sentence communicated by the judge would replace the

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14 Bibas, supra note 11, at 2517-18.
prosecutor’s opening offer as the anchor and produce fairer final pleas. This article also argues that such judicial participation in plea discussions would ameliorate many of the problems associated with the current plea bargaining system and could avoid many of the pitfalls that have prevented most jurisdictions from allowing judicial participation in plea discussions.

Part II of this article sets forth the problems with the current plea bargaining process, beginning with the “caveat accused” approach courts have taken with regard to plea bargaining and ending with the toothless judicial review of plea agreements. Part III describes the ways in which jurisdictions such as Florida and Connecticut allow judges to participate in the plea bargaining process. Part IV defines the aforementioned anchoring effect and explains both how the cognitive bias is created and how it distorts the way in which defendants evaluate offers during bargaining. Part V details why the anchoring effect likely distorts defendants’ decisionmaking during plea bargaining and concludes that judicial participation during plea discussions would significantly reduce the effect of this cognitive bias. Part VI notes that judicial participation during plea discussions has the capacity to resolve many of the problems identified with the plea bargaining process in Part III. Finally, Part VII argues that most of the problems identified with judicial participation in plea discussions are overstated and can be avoided.

II. Problems With the Plea Bargaining Process

A. Introduction

Defendants desiring to engage in plea bargaining with prosecutors face several potential pitfalls. The Federal Rules of Criminal Procedure and the Federal Rules of Evidence do deem inadmissible statements made by a defendant during plea discussions with an attorney for the
prosecuting authority. That said, courts have created a “caveat accused” approach to these rules, placing the heavy burden of proving that the statements were made during such discussions squarely on defendants. Even when prosecutors clearly inform defendants that they are about to engage in plea discussions, prosecutors often place a condition on the process: For the defendant to get to the plea bargaining table, he often must waive the protections of the above Rules, permitting the prosecutor to use the defendant’s plea-related statements as substantive evidence of his guilt in the event that a bargain is not reached. Moreover, prosecutors often couple such a waiver with a waiver of appellate rights that the defendant must execute for plea discussions to commence.

The defendant is often saddled with a public defender who lacks the training, resources, and time to be able to defend his case effectively or drive a hard bargain during plea discussions. Finally, in cases in which a defendant enters into a plea bargain he does not understand or desire, the toothless judicial review of such a bargain by a theretofore uninvolved judge is unlikely to expose the prosecutor’s coercion or the defendant’s confusion. The following subsections explain each of these stages in more detail.

B. The Courts’ “Caveat Accused” Approach to the Plea-Related Rules

1. The Origins of the Plea-Related Rules

The Federal Rules of Criminal Procedure did not have any explicit provision governing the admissibility of statements made during plea bargaining when Congress enacted the Rules in

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18 See infra note 27 and accompanying text.
19 See infra notes 112-29 and accompanying text.
20 See infra notes 148-73 and accompanying text.
21 See infra notes 174-83 and accompanying text.
22 See infra notes 184-97 and accompanying text.
23 See infra notes 198-210 and accompanying text.
1946. Eventually, in 1975, Congress created identical rules covering such statements with Federal Rule of Criminal Procedure 11(e)(6) and Federal Rule of Evidence 410. These Rules codified common law precedent, which held that withdrawn guilty pleas, pleas of *nolo contendere*, and offers to plead guilty and *nolo contendere* were inadmissible against an accused. As enacted, Rule 11(e)(6) and Rule 410 stated in relevant part:

> [E]vidence of a plea of guilty, later withdrawn, or a plea of *nolo contendere*, or of an offer to plead guilty or *nolo contendere* to the crime charged or any other crime, or of statements made in connection with, and relevant to, any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer.

A previous version of both Rules rendered inadmissible statements made “in connection with” the enumerated pleas and offers to plead. Congress, however, amended both Rules without any explanation so that they covered statements made “in connection with, and relevant to” the enumerated pleas and offers to plead.

2. Courts’ Disputes Over the Breadth of the Plea-Related Rules

After the passage of these Rules, disputes arose among courts concerning what types of conversations constituted “offer[s] to plead guilty” and whether conversations with law enforcement officials, or merely conversations with government attorneys, were covered by the

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25 Id.
26 See Fed. R. Evid. 410 advisory committee's notes to the 1979 amendments (construing cases such as General Electric Co. v. City of San Antonio, 334 F.2d 480 (5th Cir. 1984) and Kercheval v. United States, 274 U.S. 220 (1927)).
29 Id. at 215.
A few opinions on these issues were especially important. In *United States v. Brooks*, a defendant was charged with theft of a check from the mails and unlawful possession of it. At trial, “the Postal Inspector in charge of the case testified that he received a telephone call from [the defendant] in which [he] offered to plead guilty…if he were given a maximum of two years.” After the defendant was convicted, he appealed, claiming that the district court erred in admitting this testimony despite Rules 11(e)(6) and 410. The Sixth Circuit agreed with the defendant in its 1976 opinion, finding that, while the call did not constitute formal plea bargaining, “even an attempt to open plea bargaining (which is what we have in this case) should be covered under the same rule of admissibility.”

The following year, in *United States v. Herman*, a defendant was charged with “robbing a United States Post Office and killing a postal employee.” Two postal inspectors accompanied the defendant to a pre-trial removal hearing, after which he initiated a conversation with them. During this conversation, the defendant made incriminatory statements and “said he would plead guilty to robbery charges if authorities would agree to drop the murder charge.” Defense counsel later moved to suppress these statements under Rules 11(e)(6) and 410, and the district court agreed, finding that the statements were plea-related.

In its ensuing appeal, the government claimed that the defendant’s “statements could not have been plea-related because the postal inspectors had no authority to negotiate a plea.”

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30 See infra notes 31-86 and accompanying text.
31 536 F.2d 1137, 1138 (6th Cir. 1976).
32 Id.
33 Id.
34 Id. at 1139.
35 544 F.2d 791, 792 (5th Cir. 1977).
36 Id. at 793.
37 Id.
38 Id.
39 Id. at 798.
Fifth Circuit disagreed, concluding that “[t]he relevant factor is a defendant's perception of the
government official’s negotiating authority, not the official's actual authority.” The court
focused on the defendant’s subjective perception because accuseds rarely know whether they are
speaking to parties which have the authority to negotiate pleas. The court did acknowledge that
the defendant’s statements would have been admissible if he lacked the subjective belief that the
postal inspectors had the authority to negotiate a plea, but it determined that the district court’s
finding that the defendant had that belief was not clearly erroneous.

In reaching this conclusion, the Fifth Circuit held that “we must examine plea bargains
under the doctrine of caveat prosecutor” because of the propriety of plea bargaining to the
judicial process and the need to protect the accused from deceit. Furthermore, it specifically
rejected the government's contention that an accused’s incriminating statements are admissible
unless the alleged plea discussions were “accompanied by a preamble explicitly demarcating the
beginning of plea discussions.” In a footnote to the opinion, the Fifth Circuit noted the
aforementioned amendment to the Rules but found that there was “no difference” between the
phrases “and relevant to” and “in connection with” because Congress never stated the reason for
adding the former phrase. Instead, according to the court “[t]aken together, they are phrases
of expansion, not restriction.

Judge Gee specially concurred, disagreeing with the majority's conclusion “that, by
adding the phrase ‘and relevant to’ the plea bargain, the Congress expanded rather than restricted

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40 Id.
41 Id.
42 Id. at 798-99.
43 Id. at 796 (emphasis added).
44 Id. at 797.
45 Id. at 796 n.7.
46 Id.
the category of excludible statements.”

He asserted that by amending the Rules, Congress could have intended to limit their scope by, *inter alia*, rendering an accused’s incriminatory statements about one crime admissible if made during plea discussions regarding a separate crime.

Subsequently, the Fifth Circuit issued two opinions which explicitly and implicitly expanded the doctrine of “caveat prosecutor.” In *United States v. Geders*, several defendants were charged in connection with a marijuana trafficking conspiracy. Thereafter, one of the defendants met with a United States Attorney and other government officials who told him “that the government wished to discuss the activities of [two co-defendants] and did not wish to discuss [the defendant’s] present case.” After the officials told him that there would be no discussion regarding his pending case, the defendant made incriminatory statements.

The prosecution presented these statements at trial, resulting in the defendant’s conviction and his appeal, in which he claimed that his statements were inadmissible under Rule 11(e)(6). The Fifth Circuit decided that “[t]he government's contention that plea bargaining had not commenced was to be evaluated according to the standard of ‘caveat prosecutor,’” with the government assuming the risk that [the] accused’s statements would be inadmissible. The court then noted that one of the government officials admitted that he believed that the defendant was motivated at least in part to attend the meeting to help himself in his pending case.

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47 Id. at 799-800 (Gee., J., specially concurring).
48 Id.
50 566 F.2d 1227, 1228 (5th Cir. 1978).
51 Id. at 1229.
52 Id.
53 Id.
54 Id. at 1231(emphasis added).
Accordingly, the Fifth Circuit found enough give-and-take to render the meeting a plea negotiation, triggering Rule 11(e)(6)’s protections.\(^\text{56}\)

Thereafter, the court fleshed out the doctrine of “caveat prosecutor,” finding that the burden did not fall on the accused “to use a preamble to demarcate the beginning of plea bargaining” because such a requirement “was clearly denounced in Herman.”\(^\text{57}\) Rather, the Fifth Circuit concluded that because there was some evidence that the accused’s “statements were sufficiently connected with and relevant to the plea bargaining process,” they were inadmissible when “[m]easured against the standard of caveat prosecutor.”\(^\text{58}\) In other words, according to Geders, it is the government which bears the risk that an accused’s statements are covered by Rule 11(e)(6), even if the accused does not use a preamble in which he states that he wants to make a deal.\(^\text{59}\)

Meanwhile, in \textit{United States v. Robertson}, DEA agents “seized various chemicals and laboratory equipment used in the preparation and manufacture of methamphetamine” and arrested an appellant and a co-defendant.\(^\text{60}\) These two men later made incriminating statements to agents escorting them to their arraignment “in order to gain leniency for their wife and girlfriend,” who were also suspects.\(^\text{61}\) The government eventually gave the wife and girlfriend leniency and used the subject statements to secure convictions for the two men.\(^\text{62}\) The Fifth Circuit initially rejected the appellant’s argument that the district court improperly admitted his

\(^{55}\) Id. at 1232.  
\(^{56}\) Id.  
\(^{57}\) Id.  
\(^{58}\) Id.  
\(^{59}\) Miller, \textit{Caveat Prosecutor, supra} note 28, at 220.  
\(^{60}\) 560 F.2d 647, 648-49 (5th Cir. 1977).  
\(^{61}\) Id. at 649-50.  
\(^{62}\) Id.
statements only on the narrow ground that “if a bargain is consummated and leniency is obtained for a third party, admissions made pursuant to that bargain are not privileged.”  

The court, however, later decided to hold an *en banc* rehearing “to isolate our narrow holding with our focused reasoning....”  

In this rehearing, the Fifth Circuit resolved to focus exclusively on what constituted plea negotiation under Rules 11(e)(6) and 410 and decided that “each case must turn on its own facts.” That said, the court found that these Rules were intended to “encourage[] and protect[] a free flow of dialogue between the accused and the government” and found that its inquiry should first “focus[] on the accused’s perception of the discussion....” According to the court, “the accused’s assertions concerning his state of mind are critical in determining whether a discussion should be characterized as a plea negotiation.”

The Fifth Circuit found, though, that it should not stop the inquiry there because any defendant could allege after the fact that his prior statements were attempts to plea bargain, rendering “every confession...vulnerable to...subsequent challenge.” Based upon this concern, the court created a two-tiered analysis, which would give courts a “basic orientation” toward what constitutes plea negotiation: “The trial court must apply a two-tiered analysis and determine, first, whether the accused exhibited an actual, subjective expectation to negotiate a plea at the time of the discussion, and, second, whether the accused’s expectation was reasonable given the totality of the objective circumstances.”

In a footnote directly succeeding this analysis, the Fifth Circuit found that “[w]hile the government apparently bears the burden of proving that the discussion was not a plea negotiation

63 Id. at 651.
64 United States v. Robertson, 582 F.2d 1356, 1359 (5th Cir. 1978).
65 Id. at 1366.
66 Id.
67 Id.
68 Id.
69 Id.
once the issue has been properly raised, see United States v. Herman, 544 F.2d at 799 n.12, we need not decide the weight of that burden here.” Footnote 12 in Herman dealt with a postal inspector’s testimony that some of the accused’s statements came after the inspector told the accused that he lacked plea negotiation authority. In addressing that testimony, the Fifth Circuit in Herman found that “[t]he government...had the burden of proof, and if the sequence were crucial the trial judge’s suppression of the evidence would indicate that he resolved the conflict in Herman's favor.” The Robertson court, however, concluded that it was “able to reach [its] result because the record [wa]s void of any significant indications of plea negotiations.” Robertson thus ostensibly stands for the proposition that an accused bears the burden of producing “any significant indication[] of plea negotiation,” and once he presents such evidence, the government bears the burden of proof on both tiers of the two-tiered analysis.

Later in its opinion, the Fifth Circuit attempted to explain how the two-tiered analysis applied in two scenarios. In the first factual scenario, when “the accused’s subjective intent is clear and the objective circumstances show that a plea bargain expectation was reasonable, the inquiry may end.” The Fifth Circuit then reaffirmed its Herman holding that the plea-related Rules can apply even without “‘a preamble explicitly demarcating the beginning of plea discussions.’” And the court then went further than it had in Herman and Geders, citing Brooks for that conclusion that “even when…nascent overtures [by an accused] are completely

70 Id. at 1366 n.20.
71 United States v. Herman, 544 F.2d 791, 799 n.12 (5th Cir. 1977).
72 Id.
73 Robertson, 582 F.2d at 1367 n.21.
74 Id.
75 Miller, Caveat Prosecutor, supra note 28, at 223.
76 Robertson, 582 F.2d at 1367.
77 Id.
78 Id. (quoting United States v. Herman, 544 F.2d 791, 797 (5th Cir. 1977).
ignored by the government, such express unilateral offers ought to be held inadmissible, if the context is consistent.”

Meanwhile, in a special concurrence, Judge Morgan agreed with the majority, noting that “the protection of the rules should [not] depend on whether the accused utters a few magic words like, ‘and of course, I'm also going to plead guilty.’”

The majority’s analysis was completely consistent with the “caveat prosecutor” doctrine adopted in Herman and honed in Geders. Indeed, the language from Herman cited by the Robertson court about the Fifth Circuit not requiring a preamble from the accused was the exact language the court in Geders found constituted the substance of “caveat prosecutor.”

The court then discussed a second scenario, “in which the record does not disclose a clear expression of a subjective intent on the part of the accused to pursue plea negotiations....”

According to the Fifth Circuit, in this scenario, “the accused’s after the fact expressions of his intent must be more carefully evaluated,” and “[t]he trial court must focus searchingly on the record to determine whether the accused reasonably had such a subjective intent, examining all of the objective circumstances.”

The Fifth Circuit found that the case before it was more like the second scenario because the defendant’s “expression of a subjective desire to negotiate a plea came after the fact. Indeed, his assertions came after the trial [on appeal].” Consequently, the court “focus[ed] searchingly on the record to determine whether [the defendant] reasonably had such an intent, considering all the objective circumstances.”

In this search, the Fifth Circuit found no indication in the record

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79 Id. (citing United States v. Brooks, 536 F.2d 1137, 1338 n.1, 1139 (6th Cir. 1976)).
80 Id. at 1371 (Morgan, J., specially concurring).
81 See supra note 57 and accompanying text.
82 Robertson, 582 F.2d at 1367.
83 Id.
84 Id. at 1369.
85 Id.
that the defendant was negotiating a plea and thus reaffirmed its prior conclusion that his statements were admissible.\footnote{Id. at 1370-71.}

3. Congress’ 1979 Amendments to the Plea-Related Rules

Based upon disputes among courts over how to apply Rules 11(e)(6) and 410, Congress amended both Rules in 1979\footnote{Fed. R. Crim. P. advisory committee’s note to 1979 amendment.}. The first dispute involved the question of whether the Rules made plea negotiations between law enforcement officials and an accused inadmissible or whether they solely applied when the discussion was between a government attorney and the accused (or his attorney)\footnote{Id.}. The Advisory Committee cited \textit{Brooks} and \textit{Herman} as cases applying the former construction but decided that the latter construction was correct because the Rules’ legislative history indicated that their purpose was to allow candor in plea negotiations between the “\textit{attorney for the government} and the attorney for the defendant or the defendant when acting pro se...”\footnote{Id.}. Because this purpose only related to communications with a government attorney, Congress amended the Rules so that they only covered plea negotiations with government attorneys\footnote{Id.}.

The second dispute dealt with the issue of what types of plea-related statements the Rules covered. Specifically, the Advisory Committee noted that Congress decided to resolve “the dispute between the majority and concurring opinions in \textit{United States v. Herman}...concerning the meanings and effect of the phrases ‘connection to’ and ‘relevant to’ in the present rule.”\footnote{Id.} Congress resolved the dispute by amending the Rules so that they now protect “any statement...”
made in the course of plea discussions….” 92 The Advisory Committee noted that “[t]he language of the amendment identifies[,] with more precision than the present language[,] the necessary relationship between the statements and the plea or discussion.” 93 Specifically, the Committee cited Brooks in concluding that “by relating the statements to ‘plea discussions' rather than an ‘offer to plead,’ the amendment ensures ‘that even an attempt to open plea bargaining [is] covered under the same rule of inadmissibility.” 94

By amending the Rules in this manner, Congress agreed with the Herman majority opinion and disagreed with Judge Gee’s special concurrence. In essence, then, Congress adopted the Herman majority’s “caveat prosecutor” approach, which held that the government bears the risk of an accused’s statements being held inadmissible, even when the accused does not deliver “a preamble explicitly demarcating the beginning of plea discussions.” 95 In fact, Congress actually went a step further, adopting the reasoning of Brooks in holding that the government could not admit an accused’s incriminatory statements made before the start of plea negotiations but while the defendant attempted to open plea bargaining. 96

Former Federal Rule of Criminal Procedure 11(e)(6) is now Federal Rule of Criminal Procedure 11(f), and it merely states that “[t]he admissibility or inadmissibility of a plea, plea discussion, or any related statements is governed by Federal Rule of Evidence 410.” 97 Rule 410 now sets forth that:

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

92 Fed. R. Evid. 410.
93 Fed. R. Crim. P. advisory committee’s note to 1979 amendment.
94 Id.
95 See supra note 44 and accompanying text.
96 See supra note 94 and accompanying text.
(1) a plea of guilty which was later withdrawn;

(2) a plea of nolo contendere;

(3) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas; or

(4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.98

4. Post-Amendment Precedent and Courts’ “Caveat Accused” Approach

   a. Courts’ Conclusions That The Rules Do Not Cover Attempts to Open Plea Bargaining

In the wake of the amendments, however, courts have not honored Congressional intent. First, the vast majority of “[f]ederal and state courts have failed to implement Congress’s intent in adopting the 1979 amendments by admitting attempts to open plea bargaining under the Rules.”99 Some courts have reached this conclusion by ignoring the legislative history behind these amendments. For instance, in United States v. Penta, the First Circuit found that statements made by a defendant in attempt to open plea bargaining were not covered by the

98 Fed. R. Evid. 410.
99 Miller, Caveat Prosecutor, supra note 28, at 234. “Conversely, only a few cases have actually cited to the Advisory Committee's notes to find attempts to open plea bargaining inadmissible.” Id.
Rules based upon its assumption that they were amended to preclude preliminary discussions from the Rules’ protections.\(^{100}\)

Meanwhile, other courts have come to this conclusion based upon the mistaken belief that Congress did away with the entirety of *Herman* and *Brooks* with its 1979 amendments to the Rules. For example, in *State v. Murray*, an appellant cited *Brooks* and *Herman* in support of his claim that his incriminatory statements were inadmissible because they constituted offers to enter into plea discussions.\(^{101}\) The Court of Criminal Appeals of Tennessee disagreed, finding that *Brooks* and *Herman* were “superseded by statute/rule.”\(^{102}\) The court was correct that Congress superseded parts of these opinions through the 1979 amendments: the parts which held that the plea-related Rules protected statements made by accuseds to law enforcement officials.\(^{103}\) But the court was clearly incorrect in finding that Congress superseded the portions of these opinions holding that these Rules protected attempts to open plea bargaining. Instead, as, noted, the Advisory Committee cited *Brooks* in concluding that “by relating the statements to ‘plea discussions’ rather than an ‘offer to plead,’ the amendment ensures ‘that even an attempt to open plea bargaining [is] covered under the same rule of inadmissibility.’”\(^{104}\)

Other courts have not categorically deemed attempts to open plea bargaining admissible but have made clear that a defendant would never be successful in having such an attempt deemed inadmissible. In *United States v. Hare*, Kevin Hare appealed his convictions for wire fraud and money laundering, alleging, *inter alia*, that the district court erred in denying his

\(^{100}\) 898 F.2d 815, 818 (1st Cir. 1990). The court concluded, “We believe the rule was amended because of the realization that not only was there no need to go beyond a finite interpretation, but that once one did, there was no legitimate place to stop.” *Id.*


\(^{102}\) *Id* at *18 n.12.

\(^{103}\) See supra notes 88-90 and accompanying text.

\(^{104}\) *Id.*
motion to suppress statements that he made in an initial meeting with an AUSA.\textsuperscript{105} The Eighth Circuit found that, at the initial meeting,

[t]he AUSA acknowledged that he and Hare had discussed the Sentencing Guidelines somewhat, but said they had done so only in general terms and not for the purpose of negotiating a plea. At Hare's inquiry, the AUSA informed him that the Guidelines would call for definite jail time, absent cooperation due to the amount of money involved. Specifically, the AUSA “told him that a 5K motion would reduce his exposure under the guidelines” but further testified that they “did not discuss the specifics of where the guideline came out.”...The AUSA did not discuss specific charges with Hare and did not offer a plea bargain.\textsuperscript{106}

Thereafter, Hare continued cooperating with the government, and he eventually entered into a plea bargain.\textsuperscript{107} Hare, however, later stopped cooperating under the plea agreement, and the prosecution presented his incriminatory statements from the initial meeting at his trial.\textsuperscript{108} In rejecting Hare’s ensuing appeal, the Eighth Circuit found that “[p]erhaps Hare was hopeful of improving his situation...but the statements cannot be said to have been made in the course of plea discussions within the meaning of the exclusionary rules because no plea bargain was offered or even contemplated at that point.”\textsuperscript{109}

The following year, the Eighth Circuit reached the same result in United States v. Morgan, where it found that an appellant’s incriminatory statements were not made during plea bargaining because

(1) no specific plea offer was made; (2) no deadline to plead was imposed; (3) no offer to drop specific charges was made; (4) no discussion of sentencing guidelines for the purpose of negotiating a plea occurred--only a generalized discussion to give the suspect an accurate appraisal of his situation occurred; and (5) no defense attorney was retained to assist in the formal plea bargaining process.\textsuperscript{110}

\begin{footnotes}
\textsuperscript{105} 49 F.3d 447, 448-449, 451 (8th Cir. 1995).
\textsuperscript{106} Id. at 451.
\textsuperscript{107} Id.
\textsuperscript{108} Id.
\textsuperscript{109} Id.
\textsuperscript{110} 91 F.3d 1193, 1196 (8th Cir. 1996).
\end{footnotes}
By applying these factors, the Eighth Circuit could never find that the plea-related Rules protect an attempt to open plea bargaining. If a defendant is simply trying to open plea negotiations, there would not yet be formal plea bargaining, meaning that there would be no specific plea offer made, no deadline to plead, no offer to drop specific charges, no discussion of sentencing guidelines for the purpose of negotiating a plea, and no defense attorney retained to assist in the formal plea bargaining process (which would not yet have begun). Conversely, if a defendant is attempting to open plea bargaining, a natural response would be for the prosecutor to respond with a generalized discussion of the sentencing guidelines to give the accused an accurate appraisal of his situation. But in both *Hare* and *Morgan*, the Eighth Circuit found such a discussion insufficient to trigger the protections of the plea-related Rules.\(^{111}\)

b. Courts’ “Caveat Accused” Approach

While the vast majority of courts have found that the plea-related Rules do not protect attempts to open plea bargaining, courts have been even more categorical in adopting *Robertson’s* two-tiered analysis.\(^{112}\) Federal and state courts across the country have applied *Robertson’s* two-tiered analysis to the plea-related Rules with only two opinions serving as aberrations;\(^{113}\) moreover, one of those opinions, the unpublished *United States v. Stein*,\(^ {114}\) was issued by a court – the United States District Court for the Eastern District of Pennsylvania – that adopted the *Robertson* approach in two prior opinions.\(^ {115}\)

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\(^{111}\) See supra notes 105-110 and accompanying text.

\(^{112}\) Miller, *Caveat Prosecutor*, supra note 28, at 232-34.

\(^{113}\) *Id*.

\(^{114}\) 2005 WL 1377851, No. CR. 04-269-9 (E.D. Pa., June 8, 2005).

\(^{115}\) United States v. Jasin, 215 F.Supp.2d 552, 583-84 (applying *Robertson’s* analysis); United States v. Washington, 614 F.Supp. 144, 149-51 (“[a]pplying the *Robertson* criteria ...” but also suggesting that a “non-fact specific standard is more easily administered than the *Robertson* test”).
While almost every court has adopted *Robertson’s* two-tiered approach, almost every court has ignored the footnote following this approach, in which the Fifth Circuit found that the government bears the burden of proving that an accused’s discussion with a prosecutor was not a plea discussion protected by the plea-related Rules.\(^\text{116}\) The one aberration from this general insouciance was the Eastern District of Pennsylvania’s opinion in *United States v. Washington*, an opinion called into question by the court’s later opinion in *Stein*.\(^\text{117}\) Meanwhile, only two courts have explicitly addressed the doctrine of “caveat prosecutor,”\(^\text{118}\) with the Court of Appeals of Washington adopting it in *State v. Nowinski*\(^\text{119}\) and the Supreme Court of Rhode Island rejecting it in *State v. Traficante*.\(^\text{120}\) Furthermore, only two additional courts have cited to the portion of *Robertson* setting forth the substance of caveat prosecutor: that it is the government which bears the risk that an accused’s statements are covered by the plea-related Rules, even if the accused does not use a preamble in which he states that he wants to make a deal.\(^\text{121}\) After the 1979 amendments were promulgated, but before they became effective, the Supreme Court of Illinois used this reasoning to exclude a defendant’s plea-related statements,\(^\text{122}\) and a dissenting judge used this reasoning to criticize the majority’s strict reading of *Robertson* in the Supreme Court of New Mexico’s opinion in *State v. Anderson*.\(^\text{123}\)

While most courts have not expressly said that defendants bear the burden of proving both elements of *Robertson’s* two-tiered analysis, most courts have implied as much in their

\(^{116}\) Miller, *Caveat Prosecutor, supra* note 28, at 239-40.
\(^{117}\) Washington, 614 F.Supp. at 151.
\(^{118}\) Miller, *Caveat Prosecutor, supra* note 28, at 240-41.
\(^{119}\) 102 P.3d 840, 846 (Wash. App. 2004) (citing United States v. Geders, 566 F.2d 1227, 1230 (5th Cir. 1978) (“The government’s contention that plea bargaining has not commenced is to be evaluated according to the standard of ‘caveat prosecutor’”).
\(^{120}\) 636 A.2d 692, 696 (R.I. 1994).
\(^{121}\) See *supra* note 44 and accompanying text
\(^{122}\) People v. Friedman, 403 N.E.2d 229, 235 (Ill. 1980).
\(^{123}\) 866 P.2d 327, 336 (N.M. 1993) (Montgomery, J., dissenting).
holdings.\textsuperscript{124} In the aforementioned opinion in \textit{State v. Traficante}, the Supreme Court of Rhode Island found that a meeting was not a “plea negotiation” because “the words ‘plea bargain’ or ‘negotiate a plea’ were never mentioned.”\textsuperscript{125} And, in \textit{United States v. Lau}, the United States District Court for the District of Maine reached the same conclusion when “the words ‘plea,’ ‘charge,’ and ‘indictment’ were not used” by the accused's attorney during a meeting.\textsuperscript{126} Such opinions cannot be reconciled with \textit{Robertson}’s holding that an accused does not have to deliver “a preamble explicitly demarcating the beginning of plea discussions”\textsuperscript{127} and imply that courts are incorrectly requiring “magic words” from the accused.\textsuperscript{128}

Thus, if a defendant is charged with a crime and attempts to open plea bargaining with the prosecutor, that prosecutor will almost certainly be able to introduce any incriminatory statements made by the defendant during his attempt should the case proceed to trial. And, if a defendant makes such statements while thinking that he is already engaged in plea discussions with a prosecutor, there is still a strong possibility that the prosecutor can admit those statements unless there is a preamble explicitly demarcating the beginning of plea discussions. The above opinions make clear that courts have created a “caveat accused” approach to the plea-related Rules, under which the defendant assumes the risk that his statements are admissible because they were not made during plea discussions unless he can affirmatively prove under \textit{Robertson}’s two-tiered analysis (1) that he subjectively expected that he was negotiating a plea; and (2) and that his expectation was reasonable given the totality of the objective circumstances.\textsuperscript{129}

\textsuperscript{124} Miller, \textit{Caveat Prosecutor}, supra note 28, at 241-43.
\textsuperscript{125} 636 A.2d 692, 697 (R.I. 1994).
\textsuperscript{126} 711 F.Supp. 40, 42 (D. Me. 1989).
\textsuperscript{127} United States v. Robertson, 582 F.2d 1356, 1367 (5th Cir. 1978) (citing United States v. Herman, 544 F.2d 791, 797 (5th Cir. 1977)).
\textsuperscript{128} See supra note 80 and accompanying text.
\textsuperscript{129} Miller, \textit{Caveat Accused}, supra note 28, at 241-43.
C. Forced Waiver of the Plea-Related Rules and Appellate Review

1. *Mezzanatto* and the Forced Waiver of the Plea-Related Rules

   a. *Mezzanatto* and Impeachment Waivers

   Let’s assume, though, that a defendant catches a break with regard to the above. His attorney or he clearly communicates a desire to the prosecutor to commence plea bargaining, and the request does not fall on deaf ears. Or, let’s say that the prosecutor independently informs the defendant that they are about to commence plea discussions. At this point, the prosecutor is likely to give the defendant two forms that he must sign to reach the plea bargaining table. The first of these forms is a proffer, or “Queen for a Day,” agreement.”

   This form communicates to the defendant that he is in some way waiving the protections of the plea-related Rules, possibly permitting the prosecutor to use the defendant’s statements made during plea discussions in the event that a bargain is not reached.

   The Supreme Court gave its imprimatur to this practice in its 1995 opinion in *United States v. Mezzanatto*. In *Mezzanatto*, the State charged Gary Mezzanatto with possession of methamphetamine, and the prosecutor later informed Mezzanatto and his attorney that as a condition to proceeding with a plea meeting, Mezzanatto “would have to agree that any statements he made during the meeting could be used to impeach any contradictory testimony he might give at trial if the case proceeded that far.” Mezzanatto signed a waiver to this effect, *i.e.*, an impeachment waiver, and, after the prosecutor caught him in a series of lies, he cut the meeting short. At Mezzanatto’s trial, Mezzanatto began providing testimony that contradicted

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130 See, e.g., United States v. Parra, 302 F.Supp.2d 226, 230 n.1 (S.D.N.Y. 2004) (“Proffer agreements are also sometimes called *Mezzanatto* agreements after the Supreme Court case or ‘Queen for a Day’ agreements.”).
132 Id. at 198.
133 Id. at 198-99.
some of his statements during the plea meeting, and, over defense counsel’s objection, the prosecutor impeached Mezzanatto through his prior inconsistent statements.\textsuperscript{134}

After Mezzanatto was convicted, he appealed, claiming, \textit{inter alia}, that prosecutors cannot force defendants to waive the protections of the plea-related Rules in order to commence plea discussions.\textsuperscript{135} The Ninth Circuit agreed, noting the importance to both the accuser and accused of plea bargains: “They allow criminal cases to be resolved in a quick and cost-effective manner while maintaining the just administration necessary to the criminal justice system.”\textsuperscript{136}

The government thereafter appealed to the United States Supreme Court, and the Court reversed, finding that criminal defendants may indeed waive the protections of the plea-related Rules.\textsuperscript{137} In an opinion joined by three other Justices, Justice Thomas acknowledged that the plea-related Rules evince a Congressional intent to promote voluntary settlements but found that the waiver procured by the government would not discourage plea bargaining.\textsuperscript{138} The Court held that, “as a logical matter, it simply makes no sense to conclude that mutual settlement will be encouraged by precluding negotiation over an issue that may be particularly important to one of the parties to the transaction.”\textsuperscript{139} Instead, the Court decided that “[a] sounder way to encourage settlement is to permit the interested parties to enter into knowing and voluntary negotiations without any arbitrary limits on their bargaining chips.”\textsuperscript{140}

In a concurring opinion joined by two other Justices, Justice Ginsburg pointed out that the Court merely held “that a waiver allowing the Government to impeach with statements made

\begin{footnotes}
\footnotetext{134}{\textit{Id.} at 199.}
\footnotetext{135}{United States v. Mezzanatto, 998 F.2d 1452, 1453 (9th Cir. 1993).}
\footnotetext{136}{\textit{Id.} at 1454.}
\footnotetext{137}{United States v. Mezzanatto, 513 U.S. 196 (1995).}
\footnotetext{138}{\textit{Id.} at 206.}
\footnotetext{139}{\textit{Id.}}
\footnotetext{140}{\textit{Id.}}
\end{footnotes}
during plea negotiations is compatible with Congress’ intent to promote plea bargaining.”¹⁴¹ She warned, though, that “[i]t may be…that a waiver to use such statements in the case in chief would more severely undermine a defendant's incentive to negotiate, and thereby inhibit plea bargaining.”¹⁴² Because the waiver in *Mezzanatto* was not this type of waiver, however, she left this issue for another day.¹⁴³

In an opinion joined by another Justice, Justice Souter dissented, reframing Justice Ginsburg’s concern in a different way. According to Justice Souter, “although the erosion of the Rules has begun with this trickle, the majority's reasoning will provide no principled limit to it.”¹⁴⁴ This is because “[t]he Rules draw no distinction between use of a statement for impeachment and use in the Government's case in chief.”¹⁴⁵ Therefore, “[i]f objection can be waived for impeachment use, it can be waived for use as affirmative evidence, and if the Government can effectively demand waiver in the former instance, there is no reason to believe it will not do so just as successfully in the latter.”¹⁴⁶ Justice Souter then warned that “[w]hen it does, there is nothing this Court will legitimately be able to do about it.”¹⁴⁷

b. *Mezzanatto’s* Aftermath: Case-in-Chief Waivers and Rebuttal Waivers

Justice Souter’s words ended up being prophetic. After *Mezzanatto*, three circuits have addressed the issue of whether a prosecutor, as a precondition for plea bargaining, can force an accused to sign a waiver permitting the prosecutor to use his statements during plea discussions

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¹⁴¹ *Id.* at 211 (Ginsburg, J, dissenting).
¹⁴² *Id.*
¹⁴³ *Id.*
¹⁴⁴ *Id.* at 217 (Souter, J., dissenting).
¹⁴⁵ *Id.*
¹⁴⁶ *Id.*
¹⁴⁷ *Id.*
as part of the State’s case-in-chief, regardless of whether the accused testifies at trial. Those circuits – the D.C. Circuit and the Fifth and Eighth Circuits – have each endorsed these so-called case-in-chief-waivers.

For example, in the Fifth Circuit case, *United States v. Sylvester*, the government arrested Donald Sylvester based upon his alleged killing of a witness for the prosecution in a federal case involving a drug conspiracy. AUSA Martin Landrieu then presented Sylvester with some evidence against him and closed his presentation with another important piece of information: The Attorney General could seek capital punishment because Sylvester was accused of murdering a federal witness. Landrieu then informed Sylvester that he would ask permission from the Attorney General to seek life imprisonment, but only in the event that Sylvester confessed to the crime and waived any objection to the admission of his incriminatory statements, even during the prosecution’s case-in-chief, if plea discussions failed.

As requested, Sylvester signed the case-in-chief waiver and confessed, and Landrieu made his recommendation as promised. Sylvester thereafter had second thoughts, decided to go forward with trial, and requested new counsel. Before his trial, Sylvester moved to suppress his confession, but the district court enforced his waiver and allowed for the prosecution to use his confession as part of its case-in-chief to procure Sylvester’s conviction.

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149 See *id*. (noting that each of these circuits have held such “provisions to be enforceable”).
150 *583 F.3d 285, 287 (5th Cir. 2009)*.
151 *Id.*
152 *Id.*
153 *Id.*
154 *Id.*
155 *Id.* at 288.
Sylvester subsequently appealed, and the Fifth Circuit affirmed, finding “no convincing reason for not extending Mezzanatto’s rationale to this case.”

The First, Fourth, and Tenth Circuits have not yet addressed the question of whether case-in-chief waivers are enforceable, but district courts in each of these circuits have upheld such waivers. It is unclear, however, whether other district courts in those circuits will reach the same conclusion and whether any of these circuits will uphold those conclusions on appeal.

Meanwhile, the Second, Third, Sixth, Seventh, Ninth, and Eleventh Circuits also have not yet resolved this issue, but these circuits have all approved of rebuttal waivers in either published or unpublished opinions. Whereas the impeachment waiver approved by the Court in Mezzanatto permitted a prosecutor to impeach a defendant with his statements made during plea discussions if he provided inconsistent testimony at trial, a rebuttal waiver permits the prosecution to use a “defendant’s plea statements if the defendant presents any evidence at trial that contradicts his plea statements.”

Exactly “[w]hat constitutes contradictory evidence varies by circuit and the language of a particular plea agreement.”

For instance, in United States v. Rebbe, the government suspected Roger Rebbe, an accountant, of preparing false tax returns. His attorney and he thereafter met with federal agents, who informed them that they would not engage in plea bargaining unless they both

156 Id. at 289.
159 United States v. Sylvester, 583 F.3d 285, 291 (5th Cir. 2009).
160 Id. at 291 n.23.
161 United States v. Rebbe, 314 F.3d 402, 404 (9th Cir. 2002).
signed a waiver. That waiver provided that if a plea agreement were not reached, “the government may use...statements made by you or your client at the meeting and all evidence obtained directly or indirectly from those statements for the purposes of cross-examination should your client testify, or to rebut any evidence, argument or representations offered by or on behalf of your client in connection with the trial....” Rebbe and his attorney signed the waiver, Rebbe thereafter made incriminatory statements, i.e., “proffer statements,” during plea discussions, and the discussions did not result in a plea agreement. The government then informed Rebbe of its intent to introduce his incriminatory statements at trial under the terms of the waiver. Rebbe moved to exclude these statements, but the district court denied his motion, concluding that his statements would be “admissible to rebut any evidence or arguments he made at trial that were inconsistent with his proffer statements.”

After the government rested its case at trial, Rebbe requested an advisory opinion “as to whether the admissibility of [his] proffer statements had been triggered.” The district court, however, refused to rule on the issue, prompting Rebbe to hedge his bets by presenting four defense witnesses but not testifying on his own behalf. The gamble did not pay off; instead, at the close of Rebbe’s case, the government successfully moved to admit Rebbe’s statements as substantive evidence of Rebbe’s guilt. On Rebbe’s ensuing appeal, in United States v. Rebbe, the Ninth Circuit affirmed, holding that Rebbe presented a defense inconsistent with his proffer

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162 Id.
163 Id.
164 Id.
165 Id. at 405.
166 Id.
167 Id.
168 Id.
169 Id.
statements by having his attorney elicit certain testimony from defense witnesses during direct examination and prosecution witnesses during cross-examination.\textsuperscript{170}

In \textit{Barrow v. United States}, the Second Circuit was presented with a slightly different waiver.\textsuperscript{171} In \textit{Barrow}, the accused signed a waiver allowing the prosecution to use his proffer statements “to rebut any evidence offered or elicited, or factual assertions made, by or on behalf of [him] at any stage of a criminal prosecution.”\textsuperscript{172} And, according to the Second Circuit, this waiver could be triggered not only by contradictory interrogation by defense counsel but also by “[f]actual assertions made by a defendant’s counsel in an opening argument….”\textsuperscript{173}

In other words, defendants waive their plea-related rights to different degrees based both on the circuit where their case is heard and the language used in a particular rebuttal waiver. In circuits in which courts merely have approved of rebuttal waivers in unpublished opinions, it is unclear how courts in those circuits will treat such waivers in future cases. In circuits in which courts have approved of one type of rebuttal waiver, it is far from certain how courts in those circuits will treat waivers with different language. And, in circuits in which courts have approved of rebuttal waivers and have not yet addressed the constitutionality of case-in-chief waivers, neither the defendant nor his counsel would know how courts in that circuit would treat the latter.

2. Forced Waiver of the Right to Appellate Review

The second form that the prosecutor might force the defendant to sign to commence plea discussions is an appeal waiver. Appeal waivers are “clauses in plea agreements by which

\textsuperscript{170} \textit{Id.}
\textsuperscript{171} 400 F.3d 109 (2\textsuperscript{nd} Cir. 2005).
\textsuperscript{172} \textit{Id.} at 116.
\textsuperscript{173} \textit{Id.}
defendants waive their rights to appellate and postconviction review of sentencing errors...."174

Courts have been as receptive to appeal waivers as they have been to rebuttal waivers as “every federal circuit court has held [appeal] waivers theoretically valid.”175 These waivers are also pretty popular with prosecutors. In the first empirical study of appeal waivers, Nancy J. King and Michael E. O’Neill reviewed 971 randomly selected 2003 cases that were coded as including a written plea agreement or other agreement and found that 65.2% of them contained some type of appeal waiver clause.176

These waivers take various forms. In United States v. Blick, the Fourth Circuit reviewed a waiver which stated: “[T]he defendant knowingly waives the right to appeal the conviction and any sentence within the maximum provided in the statute of conviction (or the manner in which that sentence was determined)...on any ground whatsoever, in exchange for the concessions made by the United States in this plea agreement.”177 In the Eighth Circuit case, United States v. Azure, the defendant appealed from a waiver under which she “waive[d] any right to appeal any and all motions, defenses, probable cause determinations, and objections which she has asserted or could assert to this prosecution, and to the Court's entry of judgment against her and imposition of sentence, including sentence appeals under 18 U.S.C. § 3742.”178 And, in the Tenth Circuit case, United States v. Novosel, the defendant signed a waiver waiving his right to appeal “any matter in connection with [the] prosecution, conviction, and sentence....”179

176 King & O’Neill, supra note 174, at 225, 231.
177 408 F.3d 162, 174 (4th Cir. 2005).
178 536 F.3d 922, 926 (8th Cir. 2008).
179 481 F.3d 1288, 1295 (10th Cir. 2007).
These differences are not merely semantic; instead, even “slight differences in a simple appeal waiver can lead to widely different and unexpected results.”\footnote{Michael Zachary, Interpretation of Problematic Federal Criminal Appeal Waivers, 28 VT. L. REV. 149, 171 (2003).} Furthermore, courts in different jurisdictions can read the same language in appeal waivers as producing different results. For example, courts have reached different results on the issue of whether defendants can waive a claim of ineffective assistance of counsel during plea bargaining as part of an appeal waiver.\footnote{See, e.g., United States v. Castillo-Sanchez, 2006 WL 1628076, No. CR S-04-0194 FCD KJM P. at *2 (E.D. Cal., June 7, 2006) (noting the split).} Moreover, courts have split over whether judges must engage defendants in explicit discussions regarding their waiver of appellate rights at their plea hearings.\footnote{United States v. Michelsen, 141 F.3d 867, 871-72 (8th Cir. 1998) (noting the split).} One way that a defendant can attempt to “reduce the risk posed by an appeal waiver is to limit the scope of the waiver itself, so that appeal remains available under certain circumstances.”\footnote{King & O’Neil, supra note 174, at 242.} Of course, this presumes that the defendant or defense counsel realizes that the terms of such a waiver can be negotiated and has the savvy to procure meaningful concessions. As the next subsection reveals, this is not something that can be safely assumed.

D. Public Defender Crisis

Assuming that a defendant signs these two forms or is able to convince the prosecutor to proceed in the absence of either or both of these waivers, the sides commence plea discussions. In the vast majority of these cases, the prosecutor makes the initial plea offer,\footnote{Dion, supra note 16, 161.} and prosecutors often make high initial offers.\footnote{Taslitz, supra note 17, at 21.} Indeed, a professor recently reported that “in a roomful of public defenders from across the country, not one reported having ever considered the possibility

\footnote{\textsuperscript{180}}
of presenting the opening offer in plea negotiations—even though it is well-understood by
students of dispute resolution that the opening offer tends to exert considerable influence over all
subsequent negotiation.”

Some defendants will be represented by private attorneys of their own choosing in such
negotiations, but about “80 percent of criminal defendants are represented by public
defenders.” Moreover, “‘approximately ninety percent of capital defendants are indigent’ and
thus receive the services of each state’s public defender system.” Surveys reveal “constraints
endemic to most public defendant services: staggering caseloads, tremendous time pressure,
limited resources, and inadequate training.”

Research indicates that these problems manifest themselves in the plea bargaining
process. Debra S. Emmelman conducted the most significant study of how public defenders
conduct themselves during the plea bargaining process by observing 15 public defenders in
action from 1984 to 1988 and interviewing them toward the end of the study. She found that
“[r]ather than taking a more aggressive, proactive stance toward research and
investigation,…defenders assume a more passive, reactive posture.” The result is “that they
may be less likely to find viable defenses than attorneys who represent wealthy clients with

186 Michael M. O’Hear & Andrea Kupfer Schneider, Dispute Resolution in Criminal Law, 91 MARQ. L. REV. 1, 1
n.1 (2007).
188 Adam Lamparello, Establishing Guidelines for Attorney Representation of Criminal Defendants at the
Sleeping Lawyers Lie: Raising the Standard for Effective Assistance of Counsel, 38 AM. CRIM. L. REV. 147, 149
(2001)).
189 Charles J. Ogletree, Jr., Beyond Justifications: Seeking Motivations to Sustain Public Defenders, 106 HARV.
Repute 63-64, 77-91 (1987) (surveying the attitudes of public defenders about their work, and their disillusionment
due to adverse working conditions)).
190 Debra S. Emmelman, Gauging the Strength of Evidence Prior to Plea Bargaining: The Interpretive Procedures
191 Id. at 952.
greater access to resources”\textsuperscript{192} and “presumably, more likely to accept a prosecutor’s plea offer.”\textsuperscript{193}

Recently, these inadequacies have come to a head. In 2007, indigent defendants in three Michigan counties sued the state, claiming “that the public defender systems in their counties are so bad that poor people are pleading guilty because, for all practical purposes, they are given no other choice.”\textsuperscript{194} Specifically, they alleged that “cash-strapped public defenders [we]re violating the constitutional rights of defendants by allegedly too eagerly encouraging plea bargains, as opposed to vigorously fighting the charges.”\textsuperscript{195}

These criticisms have also come from public defenders themselves. The following year, “in November 2008, public defenders’ offices from seven states either refused to take on new cases or sued to limit them, citing overwhelming workloads that prevented defendants from receiving adequate attention, time, and representation.”\textsuperscript{196} According to these offices, the majority of a public defender’s workload has turned into the processing of guilty pleas,” leading them to claim “that the hurried pace of their representation was less justice and more ‘McJustice,’ as their representation essentially formed plea bargain ‘assembly line[s].’”\textsuperscript{197}

E. Toothless Judicial Review of Plea Bargains

If the defendant reaches a plea agreement with the prosecutor, “the only ‘process’ to which she is entitled is a plea hearing, at which a judge ascertains that the plea is knowing,

\begin{itemize}
\item \textsuperscript{192} \textit{Id.}
\item \textsuperscript{193} Brandon J. Lester, Note, System Failure: The Case for Supplanting Negotiation with Mediation in Plea Bargaining, 20 OHIO ST. J. ON DISP. RESOL. 563, 586 n.96 (2005).
\item \textsuperscript{195} \textit{Id.}
\item \textsuperscript{196} Laura I. Appelman, The Plea Jury, 85 IND. L.J. 731, 769 (2010).
\item \textsuperscript{197} \textit{Id.}
\end{itemize}
intelligent, and voluntary.” In cases governed by the Federal Rules of Criminal Procedure, the judge first becomes involved with the plea bargaining process at the plea hearing. This is because Federal Rule of Criminal Procedure 11(c)(1) provides that “[a]n attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions.” The majority of “state rules mirror the federal rule in this respect, but a growing minority of states allow and even encourage judges to participate in plea negotiations.”

Because judges are not involved with plea negotiations until the plea hearing, “this post-hoc review is difficult to perform.” In large part, this is because “[t]he parties have already agreed on the terms of a plea bargain and have little interest in revealing anything to the judge that might disturb the agreement.” While some “judges may ask a defendant to ‘allocute,’ that is, to concede guilt, there is no judicial ‘trial’ or even a cursory review of evidence.” Professor Gerald Lynch has described this process as “a five-minute interview of the person, under Rule 11, getting a kind of half-hearted, scripted confession as part of the guilty plea process.” As noted, if the defendant signed an appeal waiver, the judge may engage the defendant in an explicit discussion regarding the waiver, but many courts have found that such a discussion is not required.

202 Id.
203 Id.
204 Panel Discussion, The Expanding Prosecutorial Role from Trial Counsel to Investigator and Administrator, 26 FORDHAM URB. L.J. 679, 684 (1999).
205 See supra note 182 and accompanying text.
If the judge accepts the plea agreement, he includes the agreed disposition in the judgment. Alternatively, the judge can reject the plea, in which case he informs the parties of the rejection and advises the defendant that he can withdraw his guilty plea or maintain his guilty plea but that “the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated.”

If the judge rejects the plea or the defendant and prosecutor do not reach a plea agreement, the case proceeds to trial. If the defendant signed a case-in-chief waiver, the prosecution can present any incriminatory statements made by the defendant during plea discussions as part of its case-in-chief as substantive evidence of his guilt, even if the defendant chooses not to present any witnesses or evidence. If the defendant signed a rebuttal waiver and wants to prevent his incriminatory statements from being introduced, he must walk a tightrope, presenting some evidence to bolster his case but not enough evidence to trigger the waiver. And, if the defendant signed an impeachment waiver and wants to testify in his own defense, he must balance the risk of opening himself up to impeachment based upon any inconsistent statements that he made during plea discussions against the risk of invoking his privilege against self-incrimination.

III. Judicial Involvement in Plea Bargaining

A. Introduction

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208 See supra notes 148-57 and accompanying text.
209 See supra note 158-73 and accompanying text.
210 See supra notes 130-47 and accompanying text.
As noted, while Federal Rule of Criminal Procedure 11(c)(1) and many state counterparts prohibit judges from participating in plea discussions, a growing minority of states allow or encourage judges to participate in such discussions.\(^{211}\) For her article *Judicial Participation in Plea Negotiations: A Comparative View*, Professor Jenia Iontcheva Turner researched the plea bargaining process and interviewed prosecutors, defense attorneys, and judges in two such jurisdictions – Florida and Connecticut.\(^{212}\)

1. Florida’s Model of Judicial Involvement

Florida Rule of Criminal Procedure 3.171(d) provides that

After an agreement on a plea has been reached, the trial judge may have made known to him or her the agreement and reasons therefor prior to the acceptance of the plea. Thereafter, the judge shall advise the parties whether other factors (unknown at the time) may make his or her concurrence impossible.\(^{213}\)

While this Rule only allows judicial participation after a plea has been reached, and while Florida case law also envisions limited judicial involvement in plea discussions, “[t]he practice of plea bargaining in Florida diverges in various ways from the parameters established in case law.”\(^{214}\) Judges typically become involved with plea discussions “during the pre-trial conferences,” and “[b]ecause pre-trial conferences are routine, it is hard to tell who ‘initiates’ plea discussions with the court—such discussions appear to be a matter of course.”\(^{215}\) Because these discussions occur during pretrial conference, there is usually a public record of such discussions although off the record discussions occur from time to time.\(^{216}\)

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\(^{211}\) See supra note 200 and accompanying text.

\(^{212}\) Turner, *supra* note 201, at 200.

\(^{213}\) Florida Rule of Criminal Procedure 3.171(d).

\(^{214}\) Turner, *supra* note 201, at 240.

\(^{215}\) *Id.* at 241.

\(^{216}\) *Id.* at 241-42.
In either case, “the negotiations proceed in a similar fashion” as “[t]he prosecution typically lays out its case first, reciting some of the material facts and asking for a particular disposition.”\textsuperscript{217} The prosecution’s case usually includes “the nature of the crime, the background of the defendant, and the defendant’s score under Florida’s sentencing system….”\textsuperscript{218} Defense counsel then “responds with his or her own interpretation of the facts, with information on mitigating facts and with a request for a more lenient disposition.”\textsuperscript{219}

Thereafter, “the court does not actively mediate between the two sides, but simply offers a disposition of the case after hearing both the prosecution and the defense.”\textsuperscript{220} Specifically, “[t]he judge communicates the expected post-plea sentence in the form of a sentence cap, a range, or a fixed sentence.”\textsuperscript{221} As a general rule, Florida judges “refrain from giving information about the possible post-trial sentence, because such statements may be perceived as coercing the defendant into waiving his right to trial.”\textsuperscript{222} Rather, “a typical comment by the judge to the defense might take the following form: ‘I have not seen the witnesses and the other information that might come at trial, but just from the information I have here, I think that you would get X [years]. But if we go to trial, you might get a different sentence if a lot of the evidence is new.’”\textsuperscript{223}

2. Connecticut’s Model of Judicial Involvement

In \textit{State v. Revelo}, the Supreme Court of Connecticut reaffirmed that it “expressly has approved judicial involvement in plea discussions when it is clear to all concerned parties that, in

\textsuperscript{217} \textit{Id.} at 242.
\textsuperscript{218} \textit{Id.}
\textsuperscript{219} \textit{Id.}
\textsuperscript{220} \textit{Id.}
\textsuperscript{221} \textit{Id.}
\textsuperscript{222} \textit{Id.} at 243.
\textsuperscript{223} \textit{Id.}
the event a plea agreement is not reached, the judge involved in the plea negotiations will play no role in the ensuing trial, including the imposition of sentence upon conviction.”

As with plea bargaining in Florida, “judges in Connecticut become involved in negotiation during pre-trial conferences.” In Connecticut, however, “these conferences usually occur in the judge’s chambers and are not officially recorded, though both parties and the judge take notes of the conversations.” When the sides first “meet with the judge, the prosecutor presents a brief summary of the case, and the defense attorney is entitled to respond.”

In Connecticut, “[Judges] listen to the description and the pitch from each side and they suggest to either side that they are being unreasonable and tell them things they should consider.” Judges are “especially active when they think a case is not worth a lot of time in court….” After each side presents its position, “the judge usually states the expected sentence after a plea,” usually in the form of “a sentence range, a cap, or a fixed sentence….”

Sometimes, judges in Connecticut “also offer an estimate of the post-trial sentence….”

If the sides do not reach a plea agreement after plea discussions, Connecticut case law provides that “a judge who was not involved in the plea negotiations and is unaware of the plea terms offered at pre-trial should conduct the trial and post-trial sentencing phase.” Moreover, “motions to suppress go to a trial judge different from the judge who handle[d] the negotiations.”

224 775 A.2d 260, 268 (Conn. 2001).
225 Turner, supra note 201, at 249.
226 Id.
227 Id.
228 Id.
229 Id.
230 Id. at 249 & 249 n.305.
231 Id. at 249.
232 Id. at 248.
233 Id.
IV. Explaining the Anchoring Effect

The “anchoring effect” is a cognitive bias by which “[p]eople come up with or evaluate numbers by focusing on a reference point (an anchor) and then adjusting up or down from that anchor.”234 The anchoring effect is a cognitive bias because it poses three primary problems.235 First, “the selection of an anchor is often biased.”236 Specifically, in the negotiation context, “assessments of fairness are self-serving….”237

Researchers conducted a study with 19 pairs of students from the Heinz School at Carnegie Mellon University, 60 pairs of law students from the University of Texas, and 15 pairs of students from the Wharton School at the University of Pennsylvania.238 The researchers gave the pairs 27 pages of testimony which they abstracted from an actual Texas case.239 The case involved a motorcyclist suing an automobile driver for $100,000 after a car crash.240 The researchers told the pairs that they “had given the same materials they saw to a judge in Texas, who decided how much, if anything, to award to the plaintiff.”241 They also told each subject to make “two judgments: (i) what they thought was a fair settlement from the vantage point of a neutral third party; (ii) their best guess of the amount that the judge would award.”242

The subjects received a bonus of $1 if their prediction was within $5,000 of the judge’s actual award of $30,560.243 Also,

234 Bibas, supra note 11, at 2515.
235 Id. at 2516.
236 Id.
237 Id.
239 Id. at 1338.
240 Id.
241 Id.
242 Id.
243 Id. at 1338-39.
The subjects were each paid a fixed fee for participating in the experiment. They were instructed to try to negotiate an “out of court” settlement in the form of a monetary payment from the defendant to the plaintiff. Before the negotiation, the defendant was given $10 from which to make this payment. Every $10,000 from the case was equivalent to $1 for the subjects. For example, a $40,000 settlement meant the defendant gave $4 to the plaintiff and kept $6.\textsuperscript{244}

The main variable was that the researchers told subjects in Group A whether they were the plaintiff or defendant before giving them their case materials and told subjects in Group B their roles after the subjects submitted their thoughts on a fair settlement and guessed the judge’s award.\textsuperscript{245} The Group A plaintiffs and defendants, who were pre-assigned their roles, differed in their thoughts regarding a fair settlement by an average of $19,756 and their guesses regarding the amount that the judge would award differed from the judge’s actual award by an average of $18,555, both of which were statistically different from zero.\textsuperscript{246} In Group B, the average differences were $6,275 and $6,936, neither of which was statistically different from zero.\textsuperscript{247} In other words, “[t]here was a strong tendency toward self-serving judgments of fairness and predictions of the judge’s award when subjects knew their roles.”\textsuperscript{248}

Moreover, the Group A pairs only settled 72% of the time and after an average of 3.75 negotiation periods while the subjects in Group B settled 94% of the time after an average of 2.51 periods, both statistically significant differences.\textsuperscript{249} Alternatively put, “there were four times as many disagreements when bargainers knew their roles initially than when they did not know their roles.”\textsuperscript{250} This result is consistent with a second problem with the anchoring effect, which is that “people usually do not adjust away from their anchors enough,” meaning that “their

\textsuperscript{244} Id. at 1339.
\textsuperscript{245} Id.
\textsuperscript{246} Id. at 1340.
\textsuperscript{247} Id.
\textsuperscript{248} Id. at 1341.
\textsuperscript{249} Id. at 1339-40.
\textsuperscript{250} Id. at 1339.
initial choice of anchors has an inordinate effect on their final estimates." The reason for this underadjustment is that “the anchor brings to mind features of the target that resemble the anchor, thus leading people to overemphasize similarities and underestimate differences.” The researchers in the pharmaceutical plant negotiation study from the introduction found a similar underadjustment, with the average purchase price for the plant being $24.8 million when the seller made the higher initial offer and $19.7 million when the buyer opened the bidding with a lower offer.

Russell Korobkin and Chris Guthrie also found underadjustment in a study in which they told subjects that they purchased a BMW that occasionally stalled at stop lights and was extremely difficult to start in the morning. The researchers informed each subject that BMW claimed that the car was not defective, that the subject’s mechanic disagreed, and that BMW refused to refund the subject’s money. They further told subjects that their lawyer informed them that there could only be two outcomes if they went to trial: (1) the jury could find in their favor and award them a complete refund; or (2) the jury could find against them, and they would recover nothing. Finally the researchers told each subject that they received and rejected an offer from BMW and later received a second offer of a $12,000 refund if the subject kept the car and dropped the lawsuit. The variable was that researchers told subjects in Group A that BMW’s initial offer was $2,000 and subjects in Group B that the first offer was $10,000.

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251 Bibas, supra note 11, at 2516.
252 Id.
253 See supra notes 9-10 and accompanying text.
255 Id.
256 Id.
257 Id. at 12
258 Id. at 12-13
The researchers then asked the subjects to rate the second offer from 1 to 5, with “‘definitely accept’ scored as a ‘5’ and ‘definitely reject’ scored as a ‘1.’” Group A subjects, who received the lower initial offer, “responded with an average score of 3.54, clearly favoring the final offer, while Group B subjects responded with an average score of 2.97, narrowly disfavoring acceptance of the final offer,” a statistically significant difference. Furthermore, 63% of Group A subjects indicated that they would “definitely accept” or “probably accept” the $12,000 offer while only 34% of Group B subjects indicated the same, again a statistically significant result.

Later, Guthrie and Dan Orr conducted a “‘meta-analysis’ of studies that have tested the impact of an opening figure in a negotiation experiment.” Across these studies, they found “a correlation of 0.497 between the initial anchor and the outcome of the negotiation,” an unusually “large” correlation “by the standards commonly applied in the social and behavioral sciences…. A correlation of 0.497 ‘means that every one dollar increase in an opening offer is associated with an approximate fifty-cent increase in the final sale price.’ Put another way, ‘nearly 25 percent of the difference in outcomes among negotiations can be accounted for as a function of an opening offer or other initial anchor.’

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259 Id. at 13.
260 Id.
261 Id.
262 Dan Orr & Chris Guthrie, Anchoring, Information, Expertise, and Negotiation: New Insights From Meta-Analysis, 21 OHIO ST. J. ON DISP. RESOL. 597, 598 (2006). “Meta-analysis…is a statistical method that allows scholars to analyze all available studies to measure the impact of one variable—in this case, opening offers, demands or other starting figures—on another variable—in this case, negotiation outcomes.” Id.
263 Id. at 621.
264 Id.
265 Id.
The third main problem with the anchoring effect is that “even arbitrary, random, or irrelevant numbers can serve as anchors and distort calculations.” In one famous study, researchers had subjects spin a “wheel of fortune” that was rigged to stop on the number 10 or 65. After subjects spun the wheel, the researchers asked the subjects whether the number that they spun was higher or lower than the percentage of African countries in the United Nations. The researchers then asked the subjects to estimate the percentage of countries in the United Nations that are African: Those who spun 10 on average guessed 25% while those who spun 65 guessed 45% on average. Even when the researchers offered to pay the subjects for accuracy, it “did not reduce the anchoring effect.”

Researchers have found similar results in studies with mock jurors and plaintiffs’ damages requests. Somewhat unsurprisingly, when a plaintiff’s attorney requested $100,000 in damages in a fake case, mock jurors awarded slightly more than $90,000 in damages, but other mock jurors awarded nearly $300,000 when the attorney requested $500,000 in the very same case. Other studies have found, however, that “[e]ven silly and outrageous requests can influence juror decision making.” In one study, mock jurors “awarded the plaintiff substantially more in damages when the plaintiff’s lawyer requested an outlandish $1 billion than when the plaintiff’s lawyer requested a more plausible amount.”

Researchers also have found similar results in studies with actual judges. In one study, researchers posed the following facts to federal magistrate judges:

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266 Bibas, supra note 11, at 2516.
268 Id.
269 Id.
270 Id.
272 Id.
273 Id.
Suppose that you are presiding over a personal injury lawsuit that is in federal court based on diversity jurisdiction. The defendant is a major company in the package delivery business. The plaintiff was badly injured after being struck by one of the defendant’s trucks when its brakes failed at a traffic light. Subsequent investigations revealed that the braking system on the truck was faulty, and that the truck had not been properly maintained by the defendant. The plaintiff was hospitalized for several months, and has been in a wheelchair ever since, unable to use his legs. He had been earning a good living as a free-lance electrician and had built up a steady base of loyal customers. The plaintiff has requested damages for lost wages, hospitalization, and pain and suffering, but has not specified an amount. Both parties have waived their rights to a jury trial.\textsuperscript{274}

The researchers randomly assigned 66 judges to a “No Anchor” condition and asked them how much they would award the plaintiff.\textsuperscript{275} They also randomly assigned 50 judges to “the Anchor condition that ‘[t]he defendant had moved for dismissal of the case, arguing that it does not meet the jurisdictional minimum for a diversity case of $75,000.’\textsuperscript{276} The researchers asked these judges to rule on the motion and asked them what they would award the plaintiff if they denied the motion.\textsuperscript{277} Because it was clear that the plaintiff “incurred damages greater than $75,000, the motion was meritless,” but the researchers still believed that the motion would serve as a low anchor in the Anchor condition.\textsuperscript{278} And their hypothesis was borne out as the judges in the No Anchor condition awarded the plaintiff an average of $1,249,000 while judges in the Anchor condition awarded an average of $882,000, a statistically significant result.\textsuperscript{279}

Researchers in Germany found similar results in a study of German judges and prosecutors, “who receive identical training and alternate between both positions in the first
years of professional practice." In the first iteration of the study, the researchers gave subjects case materials which they reviewed regarding a rape. Thereafter, the researchers told about half of the subjects that a journalist called them during a recess and asked whether they thought that the sentence would be higher or lower than 1 year. They told the other subjects that they also received a call, with the journalist asking whether they thought that the sentence would be higher or lower than 3 years. The researchers told all subjects that they refused to answer the question and asked them whether they would tell a colleague that the sentence suggested by the journalist was too low, too high, or just right. The researchers then had the subjects sentence the defendant, with judges asked about a 1 year incarceration sentencing the defendant to an average of 25.43 months incarceration and subjects asked about a 3 year incarceration sentencing an average of 33.38 months, a statistically significant result.

In the second iteration of the study, the researchers gave different subjects case materials regarding a shoplifting, with the only variable being that they told some subjects that the prosecutor demanded a sentence of 3 months probation and other subjects that the prosecutor demanded 9 months probation. The researchers then asked the subjects whether the prosecutor’s demand was too high, too low, or just right and had the subjects sentence the defendant. Subjects exposed to the 3 month demand sentenced the defendant to an average of

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281 Id.
282 Id.
283 Id.
284 Id.
285 Id.
286 Id. at 192.
287 Id.
4.00 months probation while judges exposed to the 9 month demand sentenced an average of 6.05 months probation, also a statistically significant result.\textsuperscript{288}

Finally, in the third iteration, the researchers kept the facts the same as in the second iteration, except that the prosecutor’s demand came from a roll of dice.\textsuperscript{289} Researchers gave about half of the subjects dice that would always come up with the numbers 1 and 2 and the other subjects dice that would always come up with the numbers 3 and 6.\textsuperscript{290} After the subjects rolled the dice, the researchers told them that the combined number that they rolled – 3 or 9 – was the number of months that the prosecutor demanded as a sentence.\textsuperscript{291} The researchers again asked the subjects whether this demand was too high, too low, or just right and had the subjects sentence the defendant.\textsuperscript{292} Subjects who rolled a 3 gave an average sentence of 5.28 months while subjects who rolled a 9 gave an average sentence of 7.81 months, a statistically significant difference.\textsuperscript{293} Based upon these results, the researchers concluded that even “irrelevant anchor values that were obviously determined at random may influence sentencing decisions of legal professionals.”\textsuperscript{294}

Thus, it is clear that the anchoring effect plays a large role in legal environments, and many legal bargaining theorists now recognize anchoring as a basic truth of civil negotiations.\textsuperscript{295} But does the effect play such a role in criminal negotiations?

V. \textbf{The Anchoring Effect in the Plea Bargaining Process and How Judicial Involvement Can Decrease It}

\textsuperscript{288} \textit{Id.}
\textsuperscript{289} \textit{Id.} at 193.
\textsuperscript{290} \textit{Id.}
\textsuperscript{291} \textit{Id.}
\textsuperscript{292} \textit{Id.}
\textsuperscript{293} \textit{Id.}
\textsuperscript{294} \textit{Id.}
\textsuperscript{295} Condlin, supra note 213, at 247.
A. The Likelihood That the Anchoring Effect Has a Significant Effect on the Plea Bargaining Process

While there have been many studies about the anchoring effect in civil negotiations, there have been no studies of the anchoring effect in criminal negotiations. This is unsurprising. It does not take much for a research subject to place himself in the shoes of an aggrieved BMW buyer or a potential pharmaceutical plant purchaser or seller. But having a subject put himself in the shoes of a criminal defendant facing a murder rap and the death penalty or life imprisonment seems like much more like a flight of fancy. Subjects should be able to accurately predict how they would deal with a settlement offer of $12,000 for an allegedly defective BMW to a much greater extent than they could predict how they would deal with an offer to plead guilty to voluntary manslaughter and 10 years’ incarceration. Moreover, it is difficult to replicate the actual plea bargaining conditions in a study such as the defendant’s likely pre-trial incarceration, minimal resources, and inadequate representation. Furthermore, while the researchers gave the subjects in the BMW study conflicting evidence regarding whether the BMW was defective, researchers in a plea bargaining study presumably would need to tell subjects whether or not they committed the subject crime.

That said, plea bargaining scholars have speculated that the anchoring effect plays a large role in the plea bargaining context. As noted, according to Professor Stephanos Bibas,

The same dynamics help to explain the course of plea bargaining. For example, a prosecutor might initially offer a robbery defendant twenty years' imprisonment by piling on every plausible enhancement. The defendant, of course, rejects this unreasonable offer out of hand, but the initial offer serves as a high anchor. When the prosecutor comes back with a revised offer of fifteen years, that offer sounds more reasonable. By the time the prosecutor comes down to twelve years, the defendant is ready to jump at the deal. If the prosecutor had started out at twelve years, however, the defendant might have anchored on that number as the highest likely sentence and rejected it as a bad deal.296

296 Bibas, supra note 11, at 2517-18.
Such a conclusion makes sense given the three main problems associated with the anchoring effect. As noted, the first problem is that “the selection of an anchor is often biased”\textsuperscript{297} with “assessments of fairness [being] self-serving….\textsuperscript{298}” For instance, in the $100,000 car accident study, pairs of subjects who were not pre-assigned their roles as plaintiffs and defendants differed in their thoughts regarding a fair settlement by an average of $6,275 while pairs of subjects pre-assigned their roles differed by an average of $19,756.\textsuperscript{299}

In the plea bargaining context, the prosecutor is like the subject who was pre-assigned his role: He knows that he is the attorney for the prosecuting authority when he reviews the defendant’s case file and makes the initial offer during plea discussions. Several cognitive biases beyond the anchoring effect suggest that the prosecutor will view the evidence in the light least favorable to the defendant and make a high initial offer. It is well established that there is a “confirmation bias,” which leads individuals to seek out and prefer information that tends to confirm whatever hypothesis they are testing….\textsuperscript{300} Therefore, “a prosecutor reviewing a file to determine a suspect’s guilt would be inclined to look only for evidence that supports a theory of guilt.”\textsuperscript{301} Another well recognized cognitive bias is “selective information processing, the inclination to search out and recall information that tends to confirm one’s existing beliefs, and to devalue disconfirming evidence.”\textsuperscript{302} Thus, once the prosecutor forms an opinion that the defendant is guilty, the prosecutor will “weigh evidence that supports her existing belief more heavily than contradictory evidence. Because of selective information processing, the prosecutor

\textsuperscript{297} See supra note 236 and accompanying text.  
\textsuperscript{298} See supra note 237 and accompanying text.  
\textsuperscript{299} See supra note 247 and accompanying text.  
\textsuperscript{301} Id. at 517.  
\textsuperscript{302} Id.
will accept at face value any additional evidence supporting the initial theory of guilt, while ignoring or undervaluing potentially exculpatory evidence.”

People also suffer from “reactive devaluation—the tendency to give insufficient weight to information supplied by someone they dislike….” Thus, assuming that a prosecutor dislikes a defendant and/or the acts that he has allegedly committed, reactive devaluation means that he is likely to disregard exculpatory evidence provided by the defendant. A final cognitive bias is “belief perseverance,” which suggests a prosecutor believing a defendant to be guilty will cling to that belief despite evidence to the contrary. All of these cognitive biases could contribute to prosecutors overcharging defendants and making high initial plea offers.

Moreover, “empirical evidence indicates that the most important goal of a prosecutor is to avoid trial” based upon heavy caseloads. And, it is well established that “prosecutors deliberately overcharge to obtain a desirable plea agreement.” Indeed, “[w]here there are no limits on the size of plea discounts, as is typically the case, prosecutors can be expected to, and do routinely, overcharge simply because overcharging gives prosecutors bargaining leverage.” Prosecutors engage in both vertical and horizontal overcharging. Prosecutors horizontally overcharge by padding charges with nonoverlapping counts of a similar offense type, or with multiple counts of the same offense type, where the underlying criminal conduct sought to be punished is adequately penalized by a single count. Vertical overcharging is simpler, with

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303 Id. at 518.
305 Burke, supra note 300, at 518.
306 See id. at 516-519.
310 Id.
311 Id.
the prosecutor merely charging “a higher offense than the evidence reasonably supports.”\textsuperscript{312} Prosecutors then present a potential plea deal as a way for defendants to minimize losses and often make high initial plea offers.\textsuperscript{313} The prosecutor’s hope is that the defendant will anchor on the offer, resulting in a plea bargain that might have been rejected in the absence of overcharging and an inflated initial plea offer.\textsuperscript{314}

This leads to the second problem with the anchoring effect, which is that “people usually do not adjust away from their anchors enough,” meaning that “their initial choice of anchors has an inordinate effect on their final estimates.”\textsuperscript{315} As noted, the prosecutor rather than defense counsel almost always makes the initial offer during plea discussions, and prosecutors often overcharge and make high initial offers.\textsuperscript{316} Thus, if criminal defendants are like the subjects in the aforementioned studies, the plea bargains most defendants accept are inordinately influenced by prosecutors’ self-serving and biased charges and initial offers.

There is reason to believe that the average criminal defendant underadjusts more than the average person. As noted, public defenders represent about 80\% of criminal defendants, and research reveals that public defenders are “less likely to find viable defenses than attorneys who represent wealthy clients with greater access to resources,”\textsuperscript{317} and “presumably, more likely to accept a prosecutor’s plea offer.”\textsuperscript{318} These problems have been exacerbated in recent years, with indigent defendants in Michigan recently claiming that “cash-strapped public defenders [we]re violating the constitutional rights of defendants by allegedly too eagerly encouraging plea

\textsuperscript{312} Id.
\textsuperscript{313} Taslitz, supra note 17, at 21.
\textsuperscript{314} Id.
\textsuperscript{315} See supra note 251 and accompanying text.
\textsuperscript{316} See supra note 184-85 and accompanying text.
\textsuperscript{317} See supra note 192 and accompanying text.
\textsuperscript{318} See supra note 193 and accompanying text.
bargains, as opposed to vigorously fighting the charges.”  These circumstances suggest that a criminal defendant is more likely to underadjust than the average person and even the average litigant, who is likely to have better resources and representation.

Moreover, there is the phenomenon known as the “trial penalty,” the penalty judges impose at sentencing “on those defendants with the temerity to go to trial….  There is significant support for the existence of such a penalty as “several studies that attempt like-to-like comparisons do find quite substantial differences in the sentences imposed after jury trials relative to those imposed after guilty pleas.” For instance, “in one study of sentences imposed for different offense types in five states, researchers found ‘consistent support’ for the hypothesis that jury trial cases are associated with harsher average sentences than guilty plea cases, including a finding of a 350% plea-trial differential in sentence length in heroin distribution cases in one state.” And, in another study, “researchers found that sentences following jury trials were 44.5 months longer than those following guilty pleas, after controlling for offense type, criminal justice status at time of arrest, prior record, attorney type, geographic location, pretrial status, age, race, and gender.” Indeed, one of the main reasons that the vast majority of jurisdictions preclude judges from participating in plea discussions (and the reason that Connecticut precludes plea-participating judges from presiding over defendants’ trials if plea negotiations fail) is the fear that these judges would penalize non-pleading defendants. It is easy to see why defendants would underadjust rather than vigorously negotiate based upon the fear that they will suffer the consequences of the trial penalty if a deal is not reached.

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319 See supra note 195 and accompanying text.
321 Id. at 419 n.33.
322 Id.
323 Id.
As noted, the third main problem with the anchoring effect is that “even arbitrary, random, or irrelevant numbers can serve as anchors and distort calculations.” Most people are risk averse, and while guilty defendants are likely to be less risk averse than innocent defendants, it is easy to see how a guilty but overcharged defendant could “plausibly distrust adjudication’s capacity to vindicate false charges” and would thus “sensibly accede to inaccurate pleas to avoid the risk of graver consequences.” As noted, in one study, subjects awarded the plaintiff a higher amount of damages when the plaintiff made an outlandish claim for $1 billion in damages than when the plaintiff asked for a more reasonable damages award. Similarly, it is easy to see how a defendant who attacked a victim with no intent to cause lethal damage could eventually accept a plea bargain under which he pleads guilty to second degree murder if the prosecutor charges him with murder in the first degree and offers him an initial deal under which he would plead guilty to first degree murder in exchange for a recommendation to the judge that the death penalty not be imposed.

B. How Judicial Participation in Plea Discussions Could Reduce The Anchoring Effect

As noted, studies have found that when researchers present subjects with a hypothetical case and only provide them with the plaintiff’s request for damages, they anchor on that request, with damages awards increasing as the plaintiff’s request increases. Conversely, when researchers present subjects with damages requests by both the plaintiff and the defendant, the

324 Bibas, supra note 11, at 2516.
327 See supra note 273 and accompanying text.
328 See supra notes 271-73 and accompanying text.
anchoring effect is reduced or eliminated. In one study, researchers read 360 undergraduate students a case summary which was adapted from an actual case in which the defendant shipping company was responsible for a fall by the plaintiff, a 33-year-old male longshoreman. The summary described the plaintiff’s injuries, including injured tendons and cartilage in one knee and a herniated disc. The plaintiff also had several attacks of temporary paralysis that developed complications following his second arthroscopic surgery, causing him to be bedridden and to need a wheelchair for 6 months. The plaintiff’s injuries caused severe depression for which he received psychiatric treatment. His doctors testified that his chronic back pain and occasional pain and swelling in his knee probably would worsen as he aged. The summary stated that although the plaintiff found desk work at similar pay, he was unable to continue working outdoors and missed the physical labor.

The researchers told the subjects that a prior jury had already found the defendant responsible for the plaintiff’s injuries and awarded him damages for medical expenses and lost earnings; the subjects merely needed to award damages for pain and suffering. The subjects had to decide the minimum and maximum award that they thought would be reasonable and the amount of damages that they would award. The variable was the amount of damages for pain and suffering requested by the plaintiff and the defendant.

Subjects told that the plaintiff requested $750,000 in damages and that the defendant made no request listed an average minimum and maximum reasonable award of $351,250 and $1,058,626 and an average award of $609,866. Subjects told that the defendant countered the plaintiff’s $750,000 request with a request that it be ordered to pay only $25,000 in damages.

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330 Id.
331 Id.
332 Id. at 95.
listed an average minimum and maximum of $187,250 and $625,653, with an average award of $433,594.333

Subjects who were told that the plaintiff made a request for $1.5 million in damages with no corresponding defense request listed $490,484 and $1,267,903 as the average minimum and maximum awards and $867,419 as their average award.334 Subjects who were told that the defendant countered this request with a $25,000 damages request averaged a $371,033 minimum, $1,101,684 maximum, and $662,179 average award.335

Subjects informed that the plaintiff asked for $5 million in damages and that the defendant made no damages request listed average minimums and maximums of $787,452 and $3,313,000 and $1,929,129 as an average award.336 Meanwhile, subjects informed that the plaintiff’s request was accompanied by a defense request of $25,000 listed an average minimum and maximum of $552,679 and $2,322,321 and an average award of $1,264,286.337

Unsurprisingly, the average minimum and maximum awards that subjects thought were reasonable increased as the plaintiff’s request for damages increased.338 When, however, “the defense provided a rebuttal amount…both the maximum and the minimum reasonable awards were significantly lower than when a rebuttal amount was not specified.”339 Also unsurprisingly, “awards increased as the plaintiff’s request increased.”340 But, once again, the “[a]wards were significantly lower when a rebuttal amount was specified…than when it was not.”341

333 Id.
334 Id.
335 Id.
336 Id.
337 Id.
338 Id.
339 Id.
340 Id.
341 Id.
Researchers in another study found similar results. In this study, researchers selected 122 jurors waiting to be called for *voir dire* at a local courthouse to participate in a study. The researchers gave the subjects a summary of evidence presented in an age discrimination lawsuit. Subjects were placed in four different groups. Subjects in one condition were neither exposed to any suggested awards during closing arguments nor any expert witness testimony. Subjects in a second condition heard that the plaintiff’s attorney requested $719,354 in damages for lost wages and benefits while defense counsel countered that the defendant be ordered to pay $321,000. In a third condition, subjects learned the same information as the subjects in the second condition but also heard testimony from the plaintiff’s expert economist explaining how he arrived at the $719,354 figure. Finally, subjects in a fourth condition were exposed to the same information as subjects in the third condition but also heard testimony from the defendant’s expert explaining the basis for his $321,000 figure.

The researchers had the subjects in each group complete predeliberation questionnaires and then deliberate for up to 45 minutes or until they reached a verdict. Subjects in group 1 awarded the plaintiff an average of $520,000 in lost wages and benefits while group 2 subjects awarded an average of $566,000. Subjects in group 3, who heard expert testimony from the plaintiff’s expert but not the defendant’s expert, awarded the plaintiff an average of $719,000 in damages, *i.e.*, nearly “the exact amount advocated by the plaintiff’s expert.” Conversely,

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343 *Id.* at 113.
344 *Id.* at 112.
345 *Id.*
346 *Id.*
347 *Id.*
348 *Id.* at 114.
349 *Id.*
350 *Id.* at 118.
subjects in group 4, who heard expert testimony from both sides, awarded the plaintiff an average of $529,000 in damages, the "midway between the extremes suggested by the opposing experts." 351

Earlier, it was noted that Professor Bibas provided a hypothetical example of the anchoring effect in plea bargaining where the prosecutor makes a high initial offer of 20 years’ incarceration to a robbery defendant by piling on every plausible enhancement. The defendant rejects this opening offer but anchors on 20 years, and, while he rejects the prosecutor’s next offer of 15 years’ imprisonment, he later accepts the prosecutor’s final offer of 12 years’ incarceration. Based upon the aforementioned studies such as the BMW study, 352 this would appear to be a plausible result.

Conversely, if this case were heard in a jurisdiction such as Florida or Connecticut in which the judge can be involved in plea discussions, there could easily be a different result. During a plea negotiation in such a jurisdiction, the prosecutor would first present his case and make his initial request for 20 years’ imprisonment. Defense counsel would then present his case and request, which he presumably would have formulated before the hearing and which thus would not be anchored to the prosecutor’s opening request. Assuming that the enhancements piled on by the prosecutor lack evidentiary and/or factual support, defense counsel’s request is likely to be significantly lower; he might request 5 years’ incarceration.

The judge would then communicate the expected post-plea sentence. As noted above, studies have shown that judges are subject to the same anchoring effect as students and other research subjects. 353 Therefore, the previous two studies indicate that the judge would likely

351 Id. at 116.
352 See supra note 254-61 and accompanying text.
353 See supra notes 274-94 and accompanying text.
communicate an expected sentence somewhere in between the requests by the prosecutor and defense counsel.

First, the judge could communicate the expected sentence in the form of a fixed sentence by indicating that he thinks an appropriate sentence under a plea bargain would be 10 years’ incarceration. Professor Geoffrey P. Miller recently proposed that a judge in a civil case be allowed to issue a preliminary judgment:

a tentative assessment of the merits of a case or any part of a case, based on the same sorts of information that the courts already consider on motions for summary judgment. The difference between a preliminary judgment and a summary judgment is that the court, in a preliminary judgment, would not be limited to deciding issues with which no reasonable jury could disagree.

According to Professor Miller, the anchoring effect hinders civil negotiations because the parties “make extreme demands in hopes of anchoring discussions at a favorable figure.” If judges, however, were able to make preliminary judgments, “[a]nchoring effects would presumably be reduced because the preliminary judgment itself would provide the anchor.” Moreover, Miller argued that “[b]ecause preliminary judgments [would be] made by a judge after a provisional review of the evidence,…they offer litigants the satisfaction of a formal adjudication and thus potentially enhance their willingness to accept the outcome as legitimate and binding.” Furthermore, preliminary judgments would be publicly announced and thus “provide valuable information to third parties to guide future conduct.” Finally, Miller claimed that while reactive devaluation likely causes many civil parties to ignore their opponents’ arguments, it “is unlikely to cause a party to discount information received from the

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354 See supra notes 221 & 230 and accompanying text.
356 Id. at 179.
357 Id.
358 Id. at 168.
359 Id.
judge in a preliminary judgment ruling, because the judge is not the party’s adversary, but rather a neutral figure with no stake in the controversy other than an interest in achieving a prompt and fair resolution of the dispute.” ³⁶⁰

The anchoring effect suggests that these same results would apply if a judge communicates a fixed sentence that he thinks is appropriate after both sides present their cases at a preliminary hearing. In this case, the anchor would be the judge’s fixed sentence suggestion of 10 years’ incarceration, not the prosecutor’s opening offer of 20 years’ imprisonment. By having a neutral judge communicate a fixed sentence, the prosecutor and defendant would more easily agree upon a plea bargain. Indeed, Connecticut interviewees in Professor Turner’s study broadly agreed “that the active involvement of an impartial third party in the plea negotiations makes its own contribution to the fairness of the process” and believed the judicial participation made the parties “more likely to agree on a disposition early in the process and…less likely to appeal afterward.”³⁶¹ And while plea conferences with judges are not officially recorded in Connecticut, they are recorded in Florida and can provide valuable information to future prosecutors and defendants about what judges think are appropriate plea bargain sentences under given sets of facts. Finally, coming from a neutral judge, a fixed sentence recommendation should help the prosecutor overcome some of the aforementioned cognitive biases like reactive devaluation.³⁶² Such a recommendation should also have the same effect on defendants; as interviewees noted in Professor Turner’s study, “the judge’s involvement may be valuable to

³⁶⁰ Id. at 179.
³⁶¹ Turner, supra note 201, at 254-55.
³⁶² See supra note 300-06 and accompanying text.
defendants, who would refuse a reasonable bargain simply because they mistrust the prosecutor, yet would accept the same offer if it came from the judge.” 363

Second, the judge could communicate the expected sentence in the form of a sentence range by indicating that he would approve a plea deal under which the defendant would be sentenced to between 8 and 12 years’ incarceration or a sentencing cap by indicating that the maximum sentence that he would accept under a plea bargain would be 12 years’ incarceration. Studies indicate that such actions by a judge would mitigate the anchoring effect.

For example, in one study, researchers gave 40 male Vanderbilt University students a set of written instructions which

explained to the subject that he and the other subject were to take the role of two automobile dealers. One of the dealers, Colonial Motors, had a customer for a “Mongoose” sedan, but did not have the car on his lot. The other dealer, Tower Automobile Company, had just such a car. The task for the subjects as dealers was to arrange a contract whereby Tower sold Colonial the sedan, so that Colonial could then sell it to the customer. Colonial’s task was to submit bids to Tower for the price he was willing to pay for the car. Tower could accept a bid or make a counterbid. Tower’s profit was the difference between the cost of the car to him ($2500) and what Colonial would pay him for the automobile. Colonial’s profit was the difference between what the customer would pay for the car and what he had to pay Tower. 364

In reality, the researchers designated each subject a Tower automobile dealer, and there was no other subject. 365 Researchers gave each subject a first bid from a fictional Colonial automobile dealer, the subject then submitted a counterbid, the fictional dealer submitted a second bid, the subject counterbid, and so forth, until an agreement was reached. 366 The counterbids were determined according to a bid schedule constructed on the basis of Colonial

363 Turner, supra note 201, at 254.
364 Robert M. Liebert et al., The Effects of Information and Magnitude of Initial Offer on Interpersonal Negotiation, 4 J. Experimental Soc. Psychol. 431, 434-35.
365 Id. at 435.
366 Id.
selling the car for $3500, with Colonial profiting on the difference between $3500 and the amount it paid Tower for the car.\textsuperscript{367} In each condition, “after Colonial’s initial bid…, each successive bid reduced Colonial’s profit by approximately 10%.”\textsuperscript{368}

There were two variables: the amount of Colonial’s opening bid, and the amount of information given to the subjects.\textsuperscript{369} In the unfavorable-incompletely informed condition, researchers gave subjects an initial bid of $2615 and merely told them that the cost of the car was $2500.\textsuperscript{370} Subjects in the unfavorable-completely informed condition were treated the same except that researcher also told them that Colonial’s customer would pay $3500 for the car.\textsuperscript{371} In the favorable-incompletely informed condition, researchers gave subjects a first bid of $3050 and only told them the $2500 cost of the car.\textsuperscript{372} Researchers treated subjects in the favorable-completely informed condition the same except that they also told them that the Colonial customer would pay $3500.\textsuperscript{373}

The researchers hypothesized “that uninformed bargainers would accept a contract of lower value to themselves when faced with an unfavorable first bid from the opponent than when his first bid was favorable, while the contract value of informed bargainers would not be affected by the first bid of the opponent.”\textsuperscript{374} The results proved this hypothesis to be accurate.\textsuperscript{375} In the unfavorable-incompletely informed condition, subjects reached an average contract price under which they profited by $525.70 while subjects in the favorable-incompletely informed condition

\textsuperscript{367} Id.
\textsuperscript{368} Id.
\textsuperscript{369} Id.
\textsuperscript{370} Id.
\textsuperscript{371} Id.
\textsuperscript{372} Id.
\textsuperscript{373} Id.
\textsuperscript{374} Id. at 436.
\textsuperscript{375} Id.
profited by an average of $765.50. 376 Meanwhile, subjects in the unfavorable-completely informed condition achieved an average profit of $628 while subjects in the favorable-completely informed condition procured $646.50 as an average profit. 377

In other words, “uninformed bargainers appeared to use the opponent’s first bid to set an aspiration level” and “the value of the contract they accepted was found to be less favorable to themselves when the opponent’s first bid was unfavorable to them than when it was favorable.” 378 Conversely, “[i]nformed bargainers did not rely on the opponent’s first bid in this fashion since…the opponent's first bid did not influence the value of the contract finally accepted.” 379

In jurisdictions in which judges are not involved in plea negotiations, most defendants are like the subjects in the unfavorable-incompletely informed condition: The prosecutor offers the typical defendant a high initial plea offer, and the defendant has no knowledge of how much of a sentencing discount the prosecutor would offer. 380 Therefore, defendants in these jurisdictions likely accept unfavorable plea bargains based upon the anchoring effect.

In jurisdictions like Florida and Connecticut in which judges are involved in plea discussions, most defendants are like the subjects in the unfavorable-completely informed condition. The prosecutor still makes a high initial plea “offer,” with the “offer” being a high sentencing demand to the judge. 381 Defense counsel then makes a lower sentencing demand to the judge who can respond to the sentencing demand with a sentence cap or range, which

376 Id.
377 Id.
378 Id. at 438.
379 Id.
380 See supra note 184 and accompanying text.
381 See supra notes 217 & 228 and accompanying text.
presumably will be somewhere in between the two demands. In such cases, the fact that the prosecutor made a high, rather than a low, initial offer should not influence the nature of the plea bargain reached by the parties. Instead, like the informed bargainers in the previous study, defendants should be able to make decisions based upon their knowledge of the maximum (and sometimes minimum) sentence that the judge would accept, making the nature of the prosecutor’s initial offer irrelevant.

VI. Judicial Participation Ameliorates Other Plea Bargaining Problems

A. Eliminating “Caveat Accused”

As noted, the plea-related Rules deem inadmissible a defendant’s statements if they were “made in the course of plea discussions with an attorney for the prosecuting authority….” And, as noted, in a series of cases, culminating with United States v. Robertson, the Fifth Circuit adopted a “caveat prosecutor” approach to the plea-related Rules, under which the prosecutor assumed the risk that a defendant’s statements were inadmissible because they were made during plea discussions. While Congress seemed to adopt this “caveat prosecutor” approach in amending the plea-related Rules in 1979, courts since 1980 nearly universally have adopted a “caveat accused” approach under which the defendant assumes the risk that his statements are admissible because they were not made during plea discussions and attempts to open plea bargaining are not protected.

One response to this situation would be to change the way that courts approach plea bargaining so that the burden is placed back on the prosecution as Congress apparently

382 See supra note 351 and accompanying text.
384 See supra notes 35-86 and accompanying text.
385 See supra notes 99-129 and accompanying text.
Critics, of course, could respond that reintroducing a “caveat prosecutor” approach would hamper criminal prosecutions and too easily allow defendants to insulate their statements from the eyes and ears of jurors.

Conversely, courts can more easily protect both defendants and prosecutors in the plea bargaining process if judges are allowed to participate in the early stages of plea bargaining. Consider again the Connecticut and Florida experiences. As noted, in Connecticut, judges become involved in plea discussions during pre-trial conferences, with both sides presenting summaries of the case when they first meet the judge. Meanwhile, in Florida, judges also typically become involved with plea bargaining during the pre-trial conferences, with plea discussions occurring as “a matter of course.”

In jurisdictions such as Connecticut and Florida, defendants and defense counsel worried about whether a particular conversation with the prosecutor will constitute a “plea discussion” covered by the plea-related Rules have a partial solution: They can simply wait for the pre-trial hearings where such discussions take place as a matter of course before the judge. At these conferences, the defendant can speak with impunity, knowing that his statements are being made during “plea discussions.”

Of course, critics could claim that prosecutors prefer the status quo, under which they can engage in plea-related conversations with defendants and then introduce incriminatory statements made by defendants during these discussions because they do not qualify as “plea discussions” under most courts’ “caveat accused” approach. Professor Turner’s study, however, reveals that such an outcome is unlikely. In Connecticut, “[a]lthough the defense and the

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386 See supra notes 87-98 and accompanying text.
387 See supra note 225 and accompanying text.
388 See supra note 215 and accompanying text.
prosecution...can meet independently to conduct plea negotiations, they often choose to proceed through judicially moderated plea bargaining.”\textsuperscript{389} Indeed, “[i]n some districts, virtually all plea negotiations are conducted in the judge’s chambers.”\textsuperscript{390}

\section*{B. The Ability of Judges to Explain Waivers to Defendants}

As noted, there are two types of waivers that prosecutors often force defendants to sign to get to the plea bargaining table: “Queen for a Day” agreements and appeals waivers.\textsuperscript{391} And, as noted, even slight differences in language in both of these types of waivers can lead to widely different and unexpected results.\textsuperscript{392} Moreover, even if two agreements have identical language, they might produce very different results in different jurisdictions. Some courts have only approved of rebuttal waivers while other courts have approved of case-in-chief waivers.\textsuperscript{393} Some courts have approved of rebuttal waivers only in unpublished opinions.\textsuperscript{394} Courts have also split over several aspects of appeals waivers, such as whether defendants can waive claims for ineffective assistance of counsel.\textsuperscript{395}

In other words, when a defendant signs either or both of these waivers, he often does not know exactly what he is waiving. Furthermore, even if the defendant or defense counsel knows that terms in these waivers can be negotiated, they would not necessarily know whether the judge would treat any prosecutorial concessions as meaningful. These concerns are not limited to the defense. If a prosecutor only wants to proceed with plea discussions if the defendant signs a case-in-chief waiver, getting the defendant to sign such a waiver is only the first step in most

\textsuperscript{389} Turner, supra note 201, at 248.
\textsuperscript{390} Id.
\textsuperscript{391} See supra notes 130 and accompanying text.
\textsuperscript{392} See supra notes 180 and accompanying text.
\textsuperscript{393} See supra notes 149-73 and accompanying text.
\textsuperscript{394} See id.
\textsuperscript{395} See id.
jurisdictions. Unless the case is being heard in the D.C., Fifth, or Eighth Circuits, the prosecutor must also convince the judge that the waiver is constitutionally defensible. And, the prosecutor desiring to foreclose most avenues of appeal by having the defendant sign an appeal waiver must take the large risk that he is leaving the possibility of an appeal open unless the judge hearing the case has previously ruled favorably on a waiver with the same language.

When a judge is involved in plea discussions, these concerns disappear. If the defendant wants to know what he is waiving and/or the prosecutor wants to know what he is having the defendant waive, either party merely needs to ask the judge. The judge can then inform both sides whether he will enforce the subject waiver and what effect it will have on trial and/or subsequent appeals. Currently, in most jurisdictions, there is no way for the parties to get information from the judge regarding a “Queen for a Day” agreement because judges cannot become involved with the plea bargaining process until the plea hearing, at which point the defendant would have already signed the waiver and spilled the beans.\(^\text{396}\) As noted, if the defendant signed an appeal waiver, the judge may engage the defendant in an explicit discussion regarding the waiver at the plea hearing, but many courts have found that such a discussion is not required.\(^\text{397}\)

C. Diminishing the Effects of the Public Defender Crisis

Debra S. Emmelman’s landmark study revealed that public defenders, who represent the vast majority of criminal defendants, “may be less likely to find viable defenses than attorneys who represent wealthy clients with greater access to resources”\(^\text{398}\) and “presumably, more likely

\(^{396}\) See supra notes 199-200 and accompanying text.
\(^{397}\) See supra note 205 and accompanying text.
\(^{398}\) Id.
to accept a prosecutor’s plea offer.” Early judicial participation in the plea bargaining process can be an important brake on the “McJustice” delivered by the plea bargain assembly lines.

In Professor Turner’s study of Connecticut’s plea bargaining system, “there [wa]s broad agreement that the active involvement of an impartial third party in plea negotiations ma[de] its own contribution to the fairness of the process.” Specifically, interviewees indicated that, “[a]s an impartial mediator, the judge can…better ensure that the plea adequately reflects the facts of the case, even where lawyers fail in their representation.” As an example, “the judge can refuse to accept a bargain where she sees that the defendant is misinformed or induced to enter into a bargain by an incompetent defense attorney or an attorney who is too quick to urge her clients to plead (for instance, where the attorney is paid per case or is otherwise overburdened with work).” One public defender interviewee responded “that even prosecutor judges try to help inexperienced attorneys make sure that their client will not be harmed.” The judge might also “encourage the defense attorney to explore alternatives to incarceration.”

It is understandable that prosecutors also concurred that early judicial involvement in plea bargaining made the process fairer because the benefits of such participation do not solely inure to the defense. Instead, “the judge can temper the bargaining positions of both overzealous prosecutors and overconfident defendants.” With a judge present, “a prosecutor is less likely to attempt to bully the defense during negotiations, but also less likely to give in too easily to an

400 Id.
401 Turner, supra note 201, at 254.
402 Id. at 255.
403 Id.
404 Id. at 255 n.348.
405 Id. at 254.
406 Id.
unreasonable defense offer so as to dispose of the case more quickly.\textsuperscript{407} Moreover, “[t]he judge can also refuse to acquiesce to a bargain distorted by a prosecutor’s lack of competence….”\textsuperscript{408}

D. Putting the Teeth Back in Plea Review

As noted, if the defendant reaches a plea agreement with the prosecutor, “the only ‘process’ to which she is entitled is a plea hearing, at which a judge ascertains that the plea is knowing, intelligent, and voluntary.”\textsuperscript{409} And, as noted, because judges are not involved with plea negotiations until the plea hearing, “this post-hoc review is difficult to perform.”\textsuperscript{410} At this stage, neither the judge nor the parties has much interest in disturbing the agreement, and the judge, with no prior exposure to the plea bargaining process, typically just engages in “a five-minute interview of the person, under Rule 11, getting a kind of half-hearted, scripted confession as part of the guilty plea process.”\textsuperscript{411}

In jurisdictions which allow judicial participation in plea discussions, the situation is markedly different. As noted, judges can explain the plea bargaining process to defendants, reducing the chance that a plea bargain is unknowing or unintelligent. Moreover, when a judge participates in plea discussions, it gives him the ability to determine whether the plea was voluntary or coerced, and, perhaps more importantly, allows the defendant to perceive the final plea deal as fair.\textsuperscript{412} As a judge in Florida noted in Professor Turner’s study,

[Involvement by judges in the plea negotiations can possibly help with determining whether the plea is voluntary, knowing, or whether there is a factual basis….The colloquy is probably sufficient for that, but it helps somewhat to be

\begin{itemize}
\item \textsuperscript{407} Id.
\item \textsuperscript{408} Id. at 255.
\item \textsuperscript{409} See supra note 198 and accompanying text.
\item \textsuperscript{410} See supra note 201 and accompanying text.
\item \textsuperscript{411} See supra note 204 and accompanying text.
\item \textsuperscript{412} Turner, supra note 201, at 245.
\end{itemize}
involved in advance because the defendant sees the court as somewhat less hostile than the prosecutor. So the defendant is more likely to believe it is a fair deal.\textsuperscript{413}

In turn, this means that defendants in such jurisdictions are “less likely to appeal subsequently.”\textsuperscript{414}

VII. The Objections To Judicial Involvement in Plea Discussions are Overstated and Can be Avoided

A. The Three Principal Interests Served by the Ban on Judicial Participation

Courts generally have viewed Rule 11(c)(1)’s proscription on judicial involvement in plea discussions as advancing three principal interests.\textsuperscript{415} First, courts claim that the proscription “guards against ‘the high and unacceptable risk of coercing a defendant’ to enter into an involuntary guilty plea.”\textsuperscript{416} According to courts, the fear is that if a judge were involved in plea discussions, the defendant would believe that the judge desired a plea bargain and thus accept one rather than risk being punished by the judge for taking his chances at trial.\textsuperscript{417}

A second, related interest allegedly served by prohibiting judges from participating in plea discussions is the interest in preserving judicial neutrality.\textsuperscript{418} In other words, courts believe that a defendant would be correct in accepting a plea bargain because a judge involved in plea discussions “may feel personally involved, and thus, resent the defendant’s rejection of his advice.”\textsuperscript{419} Courts also have claimed that judicial involvement during plea discussions may make it difficult for judges objectively to assess the voluntariness of pleas.\textsuperscript{420}

\textsuperscript{413} Id.
\textsuperscript{414} Id. at 243.
\textsuperscript{415} United States v. Bradley, 455 F.3d 453, 460 (4th Cir. 2006).
\textsuperscript{416} Id. (quoting United States v. Casallas, 59 F.3d 1173, 1178 (11th Cir. 1995)).
\textsuperscript{417} Id.
\textsuperscript{418} Id.
\textsuperscript{419} Id.
\textsuperscript{420} Id.
The third interest that the ban on judicial participation during plea discussions allegedly furthers is the prevention of “the impression of the court being anything less than a neutral arbiter during the course of negotiations.”\(^{421}\) Courts fear that if judges were involved in plea discussions, a defendant would view a “judge as an adversary…rather than as the embodiment of the guarantee of a fair trial and just sentence.”\(^{422}\) According to courts, “the ‘interests of justice are best served if the judge remains aloof from all discussions preliminary to the determination of guilt or innocence so that his impartiality and objectivity shall not be open to any question.”\(^{423}\)

\[\text{B. Why These Concerns Are Overstated}\]

The analysis in the previous parts of this article, however, establishes that these concerns are overstated and can be avoided in a jurisdiction that allows for judicial participation in plea discussions. It may very well be true that if a judge were involved in plea discussions, a defendant would feel coerced into accepting a plea bargain rather than face the wrath of a vengeful judge at trial. This fear, however, already exists even in the absence of judicial participation. As noted, it is well established that there is the phenomenon known as the “trial penalty,” the penalty judges impose at sentencing “on those defendants with the temerity to go to trial.…”\(^{424}\) Perhaps more importantly, regardless of whether the trial penalty actually exists, the majority of defendants believe that there is a trial penalty, which “drives the perceived need to plead guilty.”\(^{425}\)

\(^{421}\) Id.
\(^{422}\) Id. at 460-61 (quoting United States v. Bruce, 976 F.2d 552, 557 (9th Cir. 1992).
\(^{423}\) Id.
\(^{424}\) See O’Hear, supra note 320, at 419.
\(^{425}\) Id.
Therefore, the fear that judicial participation in plea discussions would lead to defendants being coerced into plea bargains and/or judges punishing noncompliant defendants is overstated. Instead, these fears already exist in jurisdictions that do not allow judicial participation in plea discussions, meaning that judicial participation would, at worst, only incrementally cause more harm. Moreover, this fear is based upon the presumption that judges assume that obstinate defendants prevent the achievement of plea bargains. If judges were involved in plea discussions, however, they would have firsthand knowledge of whether it was the defendant seeking an unreasonable sentencing discount or the prosecutor offering an unreasonable sentencing discount that preventing the sides from making a deal.

Moreover, if jurisdictions were to allow judicial participation in plea discussions, they could ensure that such participation would not result in a trial penalty any steeper than the penalty that exists in jurisdictions which prohibit such participation. As noted, in Connecticut, if the sides do not reach a plea agreement after plea discussions, “a judge who was not involved in the plea negotiations and is unaware of the plea terms offered at pre-trial…conduct[s] the trial and post-trial sentencing phase.”\textsuperscript{426} Moreover, “motions to suppress go to a trial judge different from the judge who handle[d] the negotiations.”\textsuperscript{427} This procedure is intended to ensure that the judge involved in the plea negotiations will play no role in the ensuing trial, including the imposition of sentence upon conviction.\textsuperscript{428}

Jurisdictions could prevent any increased trial penalty by adopting Connecticut’s procedure. Of course, if jurisdictions adopted this procedure, they would lose the aforementioned benefit gained by having a judge gain firsthand knowledge of plea discussions.

\textsuperscript{426} See supra note 232 and accompanying text.
\textsuperscript{427} See supra note 233 and accompanying text.
\textsuperscript{428} See supra note 224 and accompanying text.
and then later rule on whether the defendant’s plea was knowing, voluntary, and intelligent.\textsuperscript{429} Of course, courts precluding judicial participation in plea discussions have done so in part based upon the fear that judicial involvement during plea discussions may make it difficult for judges objectively to assess the voluntariness of pleas.\textsuperscript{430} If these jurisdictions are correct, this fear should not manifest itself if the judge assessing the voluntariness of a defendant’s plea is not the same judge who participated in plea discussions.

The fear that judicial participation in plea discussions would prevent the impression that judges are neutral arbiters and cause defendants to view judges as adversaries rather than the embodiment of the guarantee to a fair trial also appears ill-founded. Instead, there was broad agreement among interviewees in Professor Turner’s study “that the active involvement of an impartial third party in the plea negotiations makes its own contribution to the fairness of the process.”\textsuperscript{431} Rather than claiming that judges involved in plea discussions coerce defendants into pleading guilty, interviewees indicated that, “[a]s an impartial mediator, the judge can…better ensure that the plea adequately reflects the facts of the case, even where lawyers fail in their representation.”\textsuperscript{432} Indeed, “the judge can refuse to accept a bargain where she sees that the defendant is misinformed or induced to enter into a bargain by an incompetent defense attorney or an attorney who is too quick to urge her clients to plead….”\textsuperscript{433}

C. Addressing Other Possible Interests Served by the Ban on Judicial Participation

\textsuperscript{429} See supra notes 409-14 and accompanying text.  
\textsuperscript{430} See supra note 420 and accompanying text.  
\textsuperscript{431} See supra note 361 and accompanying text.  
\textsuperscript{432} See supra note 402 and accompanying text.  
\textsuperscript{433} See supra note 403 and accompanying text.
It seems as if there could be two other major defenses of the proscription on judicial participation in plea discussions. The first major defense would be that judicial participation would decrease the number of plea bargains reached and increase the number of criminal cases reaching trial, which would run counter to the Congressional intent of promoting plea bargains.\textsuperscript{434} Currently, more than 90\% of all criminal cases in this country are resolved by plea bargains.\textsuperscript{435} While numbers regarding the percentage of criminal cases in Connecticut resolved by plea bargain are unavailable, “[n]inety-six percent of cases [in Florida] are plea bargained.”\textsuperscript{436} Therefore, it seems unlikely that judicial participation in plea discussions would decrease the percentage of cases resolved by plea discussion. Indeed, interviewees in Professor Turner’s study believed the judicial participation made the parties “more likely to agree on a disposition early in the process and…less likely to appeal afterward.”\textsuperscript{437}

These responses reveal that the second major defense of the proscription on judicial participation in plea discussions may lack support. This defense would be that judicial participation would strain judicial resources. It is of course true that judicial involvement in plea discussions would increase the strain on judicial resources at the front end of criminal trials. Professor Turner’s study reveals, however, that such involvement has the capacity to greatly decrease the strain on judicial resources at the back end of criminal trials based upon defendants being less likely to appeal their guilty pleas and/or the sentences imposed.

\section*{VIII. Conclusion}

In \textit{United States v. Herman}, the Fifth Circuit concluded that

\begin{itemize}
\item \textsuperscript{434} See Fed. R. Evid. 410 advisory committee’s note.
\item \textsuperscript{435} See supra note 15 and accompanying text.
\item \textsuperscript{436} Turner, supra note 201, at 244.
\item \textsuperscript{437} Id. at 254-55.
\end{itemize}
The legal battlefield has thus shifted from the propriety of plea bargaining to how best to implement and oversee the process. Plea bargaining is a tool of conciliation. It must not be a chisel of deceit or a hammered purchase and sale. The end result must come as an open covenant, openly arrived at without judicial oversight. A legal plea bargain is made in the sunshine before the penal bars darken. Accordingly, we must examine plea bargains under the doctrine of caveat prosecutor.438

As noted, while Congress seemed to embrace Herman and the “caveat prosecutor” approach in amending the plea-related Rules in 1979, courts nearly categorically have adopted a “caveat accused” approach to plea bargaining. Indeed, “caveat accused” now applies to all aspects of the plea bargaining process, with defendants often being forced to waive their rights to reach the plea bargaining table, having experience and resource strapped public defenders represent them, and only being afforded toothless judicial review of the validity of their guilty pleas. Because prosecutors frequently overcharge criminal defendants and make high initial plea offers, the anchoring effect strongly suggests that the vast majority of defendants also accede to unfair plea bargains based upon a cognitive bias.

Federal Rule of Criminal Procedure 11(c)(1) prohibits judges from participating in plea discussions, and most states have followed suit; however, “a growing minority of states allow and even encourage judges to participate in plea negotiations.”439 More states would be wise to follow the lead of these early adopters because a judge’s participation in plea discussions has the capacity to eliminate or at least reduce the anchoring effect. After hearing the sentencing demands of both sides, the judge can communicate the expected post-plea sentence, which would replace the prosecutor’s opening offer as the anchor and produce fairer final pleas. Judicial participation also has the ability to cure many of the other ills that infect the plea bargaining process. Best of all, these benefits inure to both the defense and the prosecution, with

438 544 F.2d 791, 796 (5th Cir. 1977).
439 See supra note 200 and accompanying text.
prosecutors and defense attorneys broadly agreeing in Professor Turner’s study “that the active involvement of an impartial third party in the plea negotiations makes its own contribution to the fairness of the process.”

440 See supra note 361 and accompanying text.