

Plea Bargaining Institute Academic Working Group Newsletter

April 2026

Featured Guest Column

Plea Agreement Appeal Waivers Have Exceptions; Sentencing Guideline Errors Don't Seem to be Among Them

By Jonathan J. Wroblewski

In *Peugh v. United States*, 569 U.S. 530 (2013), the Supreme Court ruled that the Ex Post Facto Clause of the Constitution limited the application of changes in the Federal Sentencing Guidelines which made them more punitive. It came to that conclusion by reasoning that the Guidelines, despite being advisory after the Court's decision in *United States v. Booker*, 543 U.S. 220, 244 (2005), were still sufficiently law-like to trigger Ex Post Facto protections. The doctrine limiting the application of more severe laws to past crimes was applicable, according to the Court in *Peugh*, because "district courts *must* begin their sentencing analysis with the Guidelines in effect at the time of the offense." And it must "use them to calculate the sentencing range correctly." (Emphasis added in both). "Those Guidelines will anchor both the district court's discretion and the appellate review process . . ."

Despite the law requiring a correct calculation of the Guidelines at sentencing, it appears the Court will likely, later this term, allow appeal waivers in plea agreements to be enforced even when a district court miscalculates the Guidelines. This will likely have implications both for the Guidelines and beyond them too. At oral argument last month in *Hunter v. United States*, a case about the enforceability of appeal waivers, defense counsel Lisa Blatt readily conceded that while she believes contract defenses apply to plea agreements, Guideline errors do not trigger any of the defenses, she said, and are thus not reviewable in the face of an appeal waiver.

Munson Hunter pleaded guilty to one count of aiding and abetting wire fraud in the Southern District of Texas. His plea agreement included a waiver of his statutory right to appeal (commonly known as an appeal waiver). As is usual practice in federal court, a probation officer prepared a presentence investigation report for the court. The report identified a history of mental health diagnoses, and it recommended that the district court require, as a special condition of supervised release, that Hunter take all mental health medications prescribed by his treating physician. The probation officer believed that this condition would "assist the probation officer in providing services to the defendant while on supervision." Hunter objected to the condition – "I don't want to have to be forced to medicate" – but the court imposed it anyway.

Hunter appealed, and the question the Supreme Court is now grappling with is whether the only permissible exceptions to a general appeal waiver are for claims of ineffective assistance of counsel or that the sentence exceeds the statutory maximum, as the Fifth Circuit found in its decision below. Hunter is arguing that the supervised release condition imposed by the district court to compel use of mental health medication violated his constitutional right not to take the medication – a deprivation of his liberty – and that such violations must be reviewable on appeal notwithstanding the waiver.

While the government argued that there are no contract exceptions at all to appeal waivers, the reactions by the justices at argument – and the fact that no circuit has ruled in favor of the government’s position – suggests the Court will indeed find some contract-based exceptions. It didn’t take long into the argument, for example, for the justices to ask Assistant to the Solicitor General Zoe Jacoby for her “back-line position” (followed by laughter in the courtroom).

The real issue is how many exceptions the Court will find and where it will draw the line between litigable and unlitigable issues, notwithstanding a waiver. Blatt’s argument for Hunter suggests that legality will not be that line; that certain illegal sentences will be unappealable in the face of an appellate waiver. Blatt argued to the court only that “there is at least some additional safety valve [beyond the two exceptions found by the Fifth Circuit] for appellate review in cases of repugnant and manifestly unjust sentences.” That was her line: repugnant and manifestly unjust. She argued that providing a condition of supervised release that requires taking any “mental-health drugs a doctor might prescribe, no matter any moral or religious objections” would be encompassed by the exception only because it is “an open-ended deprivation of liberty.”

Blatt readily conceded that erroneous sentencing guideline calculations would not be encompassed by the exception that she was advocating. “A lot of defendants are unhappy with their sentences.” But when that unhappiness is about the Guidelines, Blatt said, “courts have universally said tough luck, that part of the appeal waiver is the assumption that the court will make ordinary errors in sentencing guidelines.” As long as the sentence imposed is within the statutory maximum, she said, the waiver is enforceable even if there is a manifest legal error in the Guideline calculation.

If the Court follows Blatt’s reasoning – and all indications at oral argument suggests it will – the Court will endorse, implicitly if not explicitly, the enforcement of appeal waivers in the face of some illegal sentences, so long as they are not “manifestly unjust.” If it does, there will be a tremendous Court-endorsed incentive for all prosecutors in federal court – and prosecutors in state courts, too, where appeal waivers have not been prohibited – to include waivers in all plea agreements. It is possible, but I believe unlikely, that prosecutors will write more limited waivers than those they are using now to allow appeals of illegal sentences even when not

“repugnant or manifestly unjust.” The driving interest of prosecutors has always been – and will most likely remain – finality and avoiding appellate litigation.

In federal court, the result will also mean fewer appeals of guideline decisions, despite the Guidelines’ ever-growing complexity and ambiguity. It will lead to other illegal – but perhaps not so egregious – sentencing errors. And it will require more awkward conversations between defense counsel and their clients about how, if they agree to an offered plea bargain, that they may be sentenced illegally and have no recourse.

Recently-Published Article Summaries

[How defense attorney race, sex, and quality shape the guilty plea process](#)

A growing body of work suggests that criminal defense attorneys are extremely influential to their clients in guilty plea decisions, particularly in evaluating plea offers from prosecutors. As a next step, research is now starting to explore how client perceptions and characteristics of attorneys themselves impact just how influential they are to defendants during this process. Using experimental mock plea vignettes with AI-generated photos of defense attorneys (black, white, male, and female), this study first found that, contrary to expectations, respondents rated Black attorneys higher than White attorneys and female attorneys higher than male attorneys on several dimensions, such as trustworthiness, intelligence, and work ethic. Similarly, clients of Black attorneys, particularly Black female attorneys, reported higher willingness to accept plea offers. This study demonstrates that clients are likely making quick judgments about their attorneys, at least partly based on physical appearance, and that those perceptions affect how much credence they give their attorney’s counsel. Respondents were more likely to accept a plea offer if the positive evaluation of that offer came from someone they thought was smart, hard-working, and trustworthy. Due to the unexpected nature of some of the findings, future research should focus on further understanding how clients perceive their attorneys and whether they are more or less likely to heed the advice of attorneys based on those views.

[Interrogation tactics may have downstream consequences on innocent and guilty defendants’ plea decisions](#)

In many U.S. jurisdictions, interrogators are permitted to lie to suspects about the existence of incriminating evidence and to downplay the seriousness of an accusation. These tactics are known to elicit both true and false confessions. Yet, they may also affect other decisions by distorting the way suspects think about their case (i.e., their likelihood of acquittal, the severity of punishment). In this study, innocent and guilty participants were accused of cheating on an experimental task and interrogated using no tactics, tactics that exaggerated the incriminating evidence and possible punishment, or tactics that downplayed the accusation and possible

punishment. They were then offered a deal to admit guilt for a lenient outcome or contest the accusation for a potentially harsher one. Results showed that the interrogation tactics affected innocent and guilty participants' decisions. When the interrogator exaggerated the incriminating evidence and possible punishment, guilty (but not innocent) participants were more likely to take the deal. When the interrogator downplayed the accusation and possible punishment, innocent (but not guilty) participants were less likely to take the deal. These results reveal that interrogation tactics can affect cases beyond the interrogation room. They suggest that careful attention should be paid to the information and pressure communicated during interrogations to ensure defendants have a clear and accurate understanding of their case before making consequential decisions.

Extending the fuzzy-trace theory informed model of guilty plea decision making: Accounting for factual guilt and innocence

This paper develops and tests a new conceptual model of plea decision making that draws on modern psychological theory (Fuzzy Trace Theory) to capture how perceived probability of conviction, sentence differentials, and factual guilt are likely to influence defendant decision making. The model recognizes that decision makers tend to rely on meaningful representations of information in memory (e.g., long / short, some chance / no chance) to resolve decisions, when possible, rather than more fine-grained distinctions. An important aim of this work was to test model predictions about how sentence discounts influence factually guilty and factually innocent defendants differently. Model predictions were tested, and supported, in an experimental paradigm. Specifically, while the plea rates of participants asked to assume guilt generally increased with increasing plea discounts, those asked to assume innocence showed reluctance to plead guilty until a clear "break point." These results have important implications for policy, because they suggest that offering moderate (but not large) discounts, might encourage a significant number of guilty pleas from guilty defendants, while retaining low guilty plea rates among the factually innocent.

Works in Progress

As part of the PBI AWG's efforts to foster collaboration and interaction among researchers, we welcome members to submit works in progress to solicit feedback. Our first member's work in progress was submitted by Chris Slobogin. Send comments to c.slobogin@vanderbilt.edu.

The Paradoxical Promise of Plea Bargaining

As practiced today, plea bargaining has well-known substantive and procedural flaws. From a substantive standpoint, plea bargaining allows prosecutors to leverage massive numbers of guilty pleas that do not

accurately reflect defendants' guilt and are linked to criminal dispositions that, while reduced from the likely trial penalty, still manage to be quite punitive and anti-therapeutic. From a procedural standpoint, plea bargaining has contributed to unreliable and delegitimizing results by denying defendants the ability to test the state's case through a criminal trial and by coercing people to admit to crimes they did not commit. Properly conceptualized, however, the flexibility of plea bargaining could be a mechanism for transforming the criminal system into a regime that promotes rather than diminishes fair results, public safety and procedural justice. Taking a social ecological perspective, this article critiques traditional legal doctrines that rely on mens rea-based liability, adversary procedures, and desert-based dispositions. It then uses a social ecological analysis to provide a reconceptualization of blaming, adjudication and sentencing practices regime we call "preventive justice" that can help realize the paradoxical promise of plea bargaining as an antidote to mass incarceration and procedural injustice.

News & Announcements

PBI files its first amicus brief to the U.S. Supreme Court

On December 15, 2025, the PBI filed its [first amicus brief](#) to the Supreme Court in *Hunter v. United States*. The defendant acceded to a blanket waiver of his right to appeal as part of a plea agreement. He is now challenging his sentence as unconstitutional. The [PBI's brief](#) provides a broad overview of social science research on the innocence problem and issues concerning the knowingness and intelligence of guilty plea decisions (citing papers published by many members of this Academic Working Group). Ultimately, the brief illustrates why guilty pleas are **not** inherently reliable indications of guilt—undermining an assumption which many American courts have long relied on. See our guest column for a discussion of the Hunter case.

Report commissioned to address court backlog published in UK

In England and Wales, Sir Brian Leveson recently published his two-part independent review of the criminal courts ([Part I](#); [Part II](#)). The review was commissioned by the UK government to examine how to address the serious backlog in the criminal courts of England and Wales. Some proposals from the review, including removing some cases from the remit of the jury, are currently being considered by Parliament in the Courts and Tribunals Bill. The review also considered guilty plea sentencing discounts. In England and Wales, defendants who plead guilty at the earliest opportunity typically receive a 33% sentence discount. The review recommends changing this reduction to 40%. The aim of this change is to provide stronger encouragement for defendants who are inclined to plead guilty to do so early in the trial process.

These updates have focused on the countries in which we reside. If you are aware of plea-related stories transpiring in other countries you would like included in this newsletter please [share them with us](#).

Seeking Volunteers

The Plea Bargaining Institute, and in particular the Academic Working Group, aims to distill existing empirical research into accessible, “ready-to-use” text that practitioners can draw on for legal briefs and expert reports. We are seeking volunteers to draft language relating to validity of waiver/plea. We plan to form two committees: one focused on language relevant to the *knowing/intelligent* prong, and one focused on *voluntariness*.

Committee composition may vary, but members should have relevant expertise in related research or practice. Ideally, each committee should include at least one legally trained member to ensure the relevance of content and the appropriateness of language for court filings. There are no pre-determined timelines. The committees are free to organize themselves and their time as they choose.

To volunteer or receive more information about this or any other of our initiatives please complete the PBI AWG [Qualtrics survey](#).

To date, our updates have focused on the countries in which the co-chairs reside. If you are aware of plea-related stories transpiring in other countries you would like included in this newsletter please [share](#) them with us.

[Learn More & Volunteer](#)

Grant Opportunities

[Charles Koch Foundation: Criminal Justice Grants](#)

[MacArthur Foundation: Safety + Justice Challenge](#)

[Russell Sage Foundation \(in collaboration with Arnold Ventures\): Causal Research on the Criminal Justice System](#)

[Arnold Ventures: Causal Research on Community Safety & the Criminal Justice System](#)

[William T. Grant Foundation: Institutional Challenge Grant](#)

We would love to include **your content** in these newsletters to foster collaboration in the working group and ensure we share a wide range of information of interest to members. We are also open to feedback on how to make the working group most useful for all of you and encourage you to reach out with any suggestions.

[**Submit Content & Feedback**](#)