# Legislative Testimony

**Oregon Criminal Defense Lawyers Association**

18 May 2019

Chair Paul Holvey
Members of the House Committee on Rules

**Re: Testimony in Support of HB 3419**

Thank you for providing me with the opportunity to provide testimony in support of HB 3419.

I am an Associate Professor at the University of Auckland School of Law in New Zealand, where I teach classes in criminal law and evidence with a focus on miscarriages of justice. Prior to joining the faculty at Auckland, I was a full-time professor at the University of Oregon School of Law for ten years, where I worked in both the Eugene and Portland campuses, teaching courses in criminal procedure, criminal law, and evidence. Prior to joining the Academy, I was an Assistant Federal Public Defender in the Eastern District of California for four years and an Assistant Public Defender in the Office of the Maryland Public Defender for two years. In 2011, I was awarded a J.W. Fulbright Foreign Scholar Fellowship to visit the University of Sarajevo and study criminal-procedure code reform in Bosnia and Herzegovina. I am the Editor in Chief of the *New Criminal Law Review,* the Reporter for the Uniform Law Commission's Criminal Justice Reform Monitoring Committee, and I have been a member of the OCDLA Legislative Committee since 2015. I have published approximately thirty law-review articles and book chapters on various issues relating to criminal law and procedure. Two of the primary streams in my scholarly research have focused on prosecutorial discretion and wrongful convictions, respectively. I am also a native Oregonian, born and raised in the Portland area, and I remain registered to vote in Southeast Portland. I am a constituent of Sen. Kathleen Taylor and Rep. Karen Power.

Many decisions in the area of criminal procedure involve a balancing of two core but oft-competing values: accuracy and finality. The harder that a procedure makes it for a criminal defendant to challenge an aspect of a conviction or sentence, the more finality that such conviction or sentence has. Because of this, barriers to review also make it more likely that mistakes will occur and less likely that they will be detected and corrected.

The consensus of the scholarly literature relating to plea bargaining in the United States[1] is that it is at best a risky but necessary evil and at worst categorically undesirable and

[1] The United States is the only country where any form of guilty plea comprises the majority of dispositions of criminal cases. Approximately ninety-five percent of cases in American criminal courts are resolved by way of negotiated guilty plea. *See* Innocents Who Plead Guilty, available at: http://www.law.umich.edu/special/exoneration/Documents/NRE.Guilty.Plea.Article1.pdf (last visited 3 April 2019). Most countries on earth expressly prohibit, through their constitutional law or criminal codes, any form of charge bargaining (allowing a Defendant to plead guilty to a lesser offense than the one charged in exchange for waiving the right to proof of guilt at trial). The handful of countries outside of the United States that have experimented with

dangerous. When plea bargaining is defended, it is typically characterized as advancing one or more of the following values: certainty, efficiency, and/or finality. Plea bargaining advances certainty, at least for the parties to a criminal proceeding (the State and the Defendant), by allowing them to negotiate the charges and likely sentence that the Defendant will be given and avoid the inherent unpredictability of a jury trial. It advances efficiency by eliminating the burden that jury trials place on an already overburdened system. In fact, few courts, practitioners, or commentators believe that the American criminal-justice system could process anywhere near all charged offenses in a timely and fair manner in the absence of negotiated guilty pleas. It advances finality because a guilty plea will result in the forfeiture of most legal challenges to a charge or conviction, primarily because the defendant is waiving the right to trial and, therefore, by extension, forfeiting the right to appeal any errors that might occur during the trial.

These benefits, however, exist in counterbalance to the risks that the coercive nature of negotiating guilty pleas engenders, the most serious risk being that of inaccuracy. The primary driver of negotiated guilty pleas and/or sentencing agreements is the risk calculation of the respective lawyers in light of the expected alternative outcome at trial. Because of this, plea bargaining rewards defendants in cases in which the admissible evidence against is weak with leniency and, relatively speaking, penalizes defendants who are facing the strongest prosecution cases at trial. While this may seem intuitive or even desirable, the realities of the day-to-day workings of the criminal-justice system, especially when one considers the complexity of rules of evidence and criminal procedure and the investigatory resource constraints on police and defender agencies, is that the strength of the State's expected case at trial is a fairly poor proxy for the actual likelihood of a defendant's factual guilt (and *vice versa*). In sum, people do not plead guilty because they are guilty; they plead guilty because their trial prospects are grim, regardless of actual guilt or innocence. *See* Thea Johnson, *Plea Bargaining's Guilt Problem,* SLATE, June 7, 2018, available at: https://slate.com/news-and-politics/2018/06/why-guilty-defendants-sometimes-plead-to-crimes-they-never-committed.html (last visited 8 June 2018) ("[T]he ratio between the trial penalty and the plea bargain penalty is so out of whack that many totally innocent people plead guilty out of fear of a massive sentence after trial."); Emily Yoffe, *Innocence is Irrelevant,* THE ATLANTIC, Sept. 2017, available at: https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171/ (last visited 8 June 2018); *see generally* WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE (2011).

Perhaps the best evidence for the accuracy cost of plea bargaining comes from the National Registry of Exonerations ("the Registry"). The Registry is a catalogue of every American who was convicted of a crime of which they have subsequently been exonerated. *See* National Registry of Exonerations, available at: http://www.law.umich.edu/special/exoneration/Pages/about.aspx (last visited 3 April 2019). As of the date of the writing of this testimony, 2,414 exonerees have been entered into the Registry. These are individuals who have been exonerated by official processes based on newly discovered evidence of their actual, factual innocence. *See* Registry Glossary, available at:

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sentence bargaining and/or statutory leniency in exchange for guilty pleas require a serious evidentiary showing and judicial finding of the sufficiency of the evidence for conviction prior to entry of the guilty plea.



**For questions or comments contact:**
Mary A. Sofia, OSB # 111401
Legislative Director
Oregon Criminal Defense Lawyers Association
503.516.1376 * msofia@ocdla.org

http://www.law.umich.edu/special/exoneration/Pages/glossary.aspx (last visited 3 April 2019). In other words, these are people whom either courts or prosecutors' offices (and usually both) have agreed were convicted of crimes that we now know conclusively that they did not commit. A stunning ***fifteen percent*** of those exonerees ***pleaded guilty*** to the crimes for which they were wrongfully convicted (in other words, crimes that we now know that they ***did not*** commit). *See* Innocents Who Plead Guilty, available at: http://www.law.umich.edu/special/exoneration/Documents/NRE.Guilty.Plea.Article1.pdf (last visited 3 April 2019).

These accuracy concerns are amplified by the role that prosecutorial discretion plays in the American criminal-justice system. In other countries, charging decisions are made by bureaucratic magistrates employed in the judicial branch. Most other countries also have mandatory-prosecution principles (which require prosecutors to charge all defendants who commit similar acts with the same crimes and prevent them from either inflating or reducing those charges for strategic reasons) ensure neutrality and equality across cases. In the United States (including Oregon), by contrast, charging decisions are made by partial, adversarial prosecutors employed by elected officials, who have nearly unfettered discretion to bring charges, as long as there is probable cause to sustain them. Probable cause is a standard that, despite the plain meaning of the word "probable," does not necessarily demand even mathematical probability of guilt. These prosecutors also have nearly unfettered discretion to amend charges once brought and dismiss charges with no meaningful judicial oversight. The one pressure point at which courts could, at least theoretically, play a role in reigning in prosecutorial discretion and abuses of power would be by placing constitutional limits on the practice of negotiation itself (*e.g.,* by finding that a guilty plea that is given solely because of the high costs of maintaining innocence is not voluntary in any factual or legal sense), but, so far, they have largely failed to do so, finding almost categorically that the mere presence of a defense attorney during plea negotiations is sufficient to render any subsequent guilty plea knowing, intelligent, and voluntary (the state of mind that the constitution requires before relinquishing personal rights). *See Bordenkircher v. Hayes,* 434 U.S. 357, 363 (1978) (recognizing that punishing the exercise of constitutional rights violated due process, but finding that the threat of more serious punishment during he "give and take" of plea negotiations did not constitute such punishment); *Brady v. United States,* 397 U.S. 742, 751 (1970) ("We decline to hold . . that a guilty plea is compelled and invalid under the Fifth Amendment whenever motivated by the defendant's desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged.").

Some waiver and/or forfeitures[2] of rights are essentially inherent in any negotiated guilty plea, including the waiver of the right to have a trial at which the State would have to prove guilt beyond a reasonable doubt (as well as the bundle of rights that come with trial, like compelling the attendance of defense witnesses, presenting evidence, cross-examining prosecution witnesses, and remaining silent without penalty) and the forfeiture of most issues that could be raised on appeal or postconviction by virtue of the "preservation" doctrine, which generally

[2] A "waiver" of rights is consciously made; a "forfeiture" of rights typically occurs implicitly, by action or omission.



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Legislative Director
Oregon Criminal Defense Lawyers Association
503.516.1376 * msofia@ocdla.org

requires defendants to have fully and finally litigated an issue on the merits before a trial court in order to ask an appeals court to review the trial court's decision later. Increasingly, however, prosecutors have begun to insist that defendants waive more than simply their trial rights in exchange for charging or sentencing leniency. These demands include waiving the rights to: a preliminary hearing (the mechanism by which the trial court ensures that there is at least probable cause to sustain the charges); disclosure of favorable evidence that is known to the prosecution (so-called *Brady* rights, after the seminal United States Supreme Court case *Brady v. Maryland*); an opportunity for early release, alternative incarceration, or transitional leave upon a showing of rehabilitation or in order to implement a successful reentry plan; an opportunity for non-custodial probation sanctions; access to Grand Jury recordings; confront witnesses and object to the admission of otherwise inadmissible hearsay evidence at subsequent hearings (*e.g.,* probation-revocation hearings); challenge a conviction or sentence on the grounds of newly discovered evidence that might prove the Defendant's innocence, prosecutorial misconduct, or unconstitutionally severe sentences; seek post-conviction or *habeas corpus* relief,[3] including the retroactive application of new constitutional rules of criminal procedure;[4] and/or seek DNA testing that may prove factual innocence. These demands also include agreeing that a particular criminal law or procedure is constitutional (or unconstitutional), even when there is a good argument that is not, or that the defendant has the ability to pay attorney fees (and, therefore, is ineligible for appointment of counsel and state payment of litigation costs), even if s/he does not.

Individually, some of these demands may arise from finality concerns and a desire not to reopen otherwise final convictions. Others may arise from efficiency concerns with the administrative burdens of unnecessarily producing certain types of evidence. Collectively, however, they place far too much weight on the finality side of scale and not enough on the accuracy side. Within the criminal-procedure doctrines that govern the individual rights that defendants are being asked to waive or stipulate away in these plea negotiations, there are already stringent finality constraints. For example, in order to win a *Brady* claim, a defendant must prove not only that the State withheld exculpatory evidence, but that such evidence, if disclosed, likely would have resulted in a different verdict. Statutes governing newly discovered evidence, DNA testing, postconviction relief, and *habeas* review contain stringent statutes of limitation, procedural-default and exhaustion rules, and standards of review that foreclose even many meritorious claims. For example, in order to raise – not win, just have a federal court ***listen to*** the merits of – a claim that a State court violated fundamental constitutional rights in convicting or sentencing a Defendant, that Defendant must investigate and plead that claim within one year of a final conviction, prove that the claim was previously raised before the

[3] "Postconviction relief" generally refers to the review by Oregon courts of claims of error at trial or sentencing that could not be raised on "direct" appeal because they required the introduction of additional evidence not available from the trial record. "*Habeas-corpus"* review generally refers to the review of State convictions and sentences in federal courts to determine if the State trial court violated the defendant's fundamental federal constitutional rights (*e.g.,* the federal constitutional rights to silence, counsel, or due process).

[4] Defendants are generally entitled to the benefit of appellate-court rulings that occur before or during their trial or while their convictions are on direct appeal. They are generally not entitled to the benefit of appellate-court rulings after their direct appeals are completed, unless the new rule of criminal procedure announced after their conviction becomes final is deemed to be integral to the accuracy of their convictions – *i.e.,* unless their trial was conducted or their guilty plea acquired through a criminal procedure that a court of appeals has now determined may have resulted in a wrongful conviction.



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Oregon State courts (not one State court, but ***every*** State court that had jurisdiction to hear the claim), and that the last State court to hear the claim ruled against the Defendant not only incorrectly but so incorrectly that no rational court could have agreed with ruling. *See* 28 U.S.C § 2254 (1996); *see. e.g., Yarborough v. Alvarado,* 541 U.S. 652, 664 (2004) (holding that a state appellate court's determination that a postconviction claim lacked merit precluded federal *habeas* relief if "fairminded jurists could disagree" on the correctness of the decision); *Williams v. Taylor,* 529 U.S. 362 (2000); *Schlup v. Delo,* 513 U.S. 298 (1995) (holding that, in order to excuse a procedural default that would ordinarily bar federal *habeas* review of an alleged constitutional error in a state criminal conviction and death sentence, a petitioner had to show that s/he was probably actually innocent); *Herrera v. Collins,* 506 U.S. 390 (1993) (recognizing the theoretical possibility of federal *habeas* relief in a capital case involving actual innocence if there were no other avenue for relief, but holding that Herrera had failed to meet that "extraordinarily high" burden"); *Coleman v. Thompson,* 501 U.S. 722 (1991); *McCleskey v. Zant,* 499 U.S. 467 (1991); *Teague v. Lane,* 489 U.S. 288 (1989) (restricting retrospective application of new rules of constitutional criminal procedure); *Murray v. Carrier;* 477 U.S. 478 (1986); Wainwright v. Sykes, 433 U.S. 72 (1977); *see also District Atty's Office for the 3d Judicial Dist. v. Osborne,* 557 U.S. 52, 68 (explaining that a defendant who had been convicted after a fair trial had "only a limited interest in post-conviction relief" and concluding, therefore, that Alaska's statutory limitations on postconviction access to DNA testing were constitutional even when they interfered with a defendant's ability to prove actual innocence). In fact, most scholars of criminal procedure consider these doctrines already to be weighted too heavily in favor of finality at the expense of accuracy and fairness. *See, e.g.,* Stephanie Roberts Hartung, *Habeas Corpus for the Innocent,* 19 U. PA. J. LAW & SOC. CHANGE 1 (2016); Joseph L. Hoffmann, *Is Innocence Sufficient? An Essay on the US Supreme Court's Continuing Problems with Federal Habeas Corpus and the Death Penalty,* 68 INDIANA L.J. 817 (1993); Donald P. Lay, *The Writ of Habeas Corpus A Complex Procedure for a Simple Process,* 77 MINN. L. REV. 1015 (1993); Michael Naughton, *The Importance of Innocence for the Criminal Justice System,* in THE CRIMINAL CASES REVIEW COMMISSION: HOPE FOR THE INNOCENT? 17–41 (Michael Naughton, ed., 2010); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice,* 107 YALE L.J. 1, 65 (1997) (describing how the Supreme Court "cut off habeas relief through restrictive procedural default and retroactivity decisions" in an effort to foreclose challenges to the death penalty); Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: the Pathologies of the Antiterrorism and Effective Death Penalty Act,* 47 DUKE L.J. 1 (1997); *Kenneth Williams, The Antiterrorism and Effective Death Penalty Act: What's Wrong With It and How to Fix It,* 33 CONN. L. REV. 919, 923 (2001). Requiring defendants to waive their rights to these challenges, which are already so restricted, will enhance efficiency and finality only in cases in which incredibly strong claims to relief exist, because judicial review of any other type of claims has already been foreclosed by courts and legislatures.

Many of these demands during plea bargaining bear no rational relationship to a legitimate State interest – in fact, seem to be undesirable from a societal point of view (*e.g.,* denying DNA testing that could prove that the wrong person is in prison) – but rather seem to exist simply because prosecutors have the power to demand them and to punish defendants who refuse them. The imbalance of power that exists between the State and an individual defendant, particularly a defendant among the approximately ninety-five percent of defendants unable to



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Legislative Director
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503.516.1376 * msofia@ocdla.org

retain counsel of their choice, when the State has unfettered charging discretion, not to mention mandatory-minimum sentencing statutes and inflexible sentencing guidelines at its disposal, means that most defendants have no choice but to agree to any condition if its reward is a reduction in sentencing exposure. The risks of refusal are simply too great.

The American Bar Association Criminal Justice Standards for the Defense Function ("Defense Standards"), which establish best practices for defense counsel, provide that defense attorneys should not agree to clauses in plea agreements that require blanket waiver of the defendant's postconviction claims relating to ineffective assistance of counsel, prosecutorial misconduct, or destruction of evidence. *See* ABA Crim. Justice Stds., Defense Function (4th ed.), Std. 4-6.4 (a). They also provide that defense counsel should not agree to clauses in plea agreements that require waiver of the defendant's appeal rights (including sentencing appeals), *Brady* rights, or postconviction-relief rights unless the prosecution has provided "specific, individualized reasons for the inclusion of such waivers;" the benefits gained in the plea agreement "outweigh" the value of the rights being waived; and the agreement includes an exception to the waiver(s) "for a subsequent showing of manifest injustice based on newly discovered evidence, or actual innocence." *Id.* at Std. 4-6.4 (b) & (c). The reality of criminal defense, however, is that a defense attorney with no viable trial strategy has neither the ethical nor strategic luxury of advising a client to refuse the offer of a plea agreement that contains these kinds of waivers if the alternative is a longer term of incarceration than that being promised in the plea bargain. For this reason, the Defense Standards conclude that defense attorneys should only consider challenging such waivers if they can do so "without harming the client's interests." *Id.* at Std. 4-6.4 (d).

In an era in which not only scholars and advocates but also the general public are showing new concern for the mass-incarceration epidemic, *see, e.g.,* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010); JAMES FORMAN, JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA (2017), and the plague of wrongful convictions of the innocent, *see, e.g.,* BRANDON L. GARRETT, CONVICTING THE INNOCENT (2011); BARRY SCHECK, *ET AL.,* ACTUAL INNOCENCE (2000); Richard Leo, *Has the Innocence Movement Become an Exoneration Movement?* in WRONGFUL CONVICTIONS AND THE DNA REVOLUTION: TWENTY-FIVE YEARS OF FREEING THE INNOCENT (Daniel S. Medwed, ed., 2017), at 57; National Public Radio, Serial (podcast), available at: https://serialpodcast.org/season-one (last visited 21 March 2019); Netflix, Making a Murderer, available at: https://www.netflix.com/title/80000770) (last visited 21 March 2019), it seems particularly perverse that prosecutors are forcing concessions upon defendants that serve no other purpose than guaranteeing unassailable terms of imprisonment. Enacting HB 3419 would be a significant step in reigning in the abuses that can occur during the negotiation of guilty pleas and that can expose innocent people to the Hobson's choice of maintaining their innocence during a long prison term or waiving all of their rights and accepting, without challenge, a shorter one for crimes that they did not commit.

Thank you for reading my testimony, and thank you to the bill Sponsors, Representative Williamson and Senators Prozanski and Winters, for bringing this important and necessary conversation to the fore. I have included my e-mail contact information at the bottom of this



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testimony, and I am happy to answer any additional questions that any members might have about this important proposal.

Sincerely,

CARRIE LEONETTI
Associate Professor of Law
OCDLA Member
carrie.leonetti@auckland.ac.nz



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Legislative Director
Oregon Criminal Defense Lawyers Association
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