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The Dark Plea: One of the Most Coercive Abuses of Power Permitted in the Criminal Justice System

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The Dark Plea: One of the Most Coercive Abuses of Power Permitted in the Criminal Justice System

BY OHIO SUPREME COURT JUSTICE MICHAEL P. DONNELLY

ABSTRACT

Most prosecutions in our criminal justice system are resolved by defendants entering ostensibly knowing and intelligent guilty pleas—often following negotiations with the state—before trial. But during my time as a trial judge, I encountered a different type of guilty plea, procured by the state when an already convicted offender sought to clear his or her name through an application for a new trial based on newly discovered evidence. I believe the "Dark Pleas" secured in these circumstances are one of the greatest abuses of power permitted in the criminal justice process.

This article sets down in writing a speech I give to law students, legal practitioners, and citizens throughout the state of Ohio, seeking to lift the veil on a practice that few realize even exists. I begin by explaining how these guilty pleas arise in the post-conviction phase of the criminal process. Then, using examples I have encountered through my service as trial judge and supreme court justice, I show how these pleas are coercive, an abuse of the state's prosecutorial power, and antithetical to the fundamental principles that undergird the criminal justice system. And it is because of these issues surrounding these pleas that I conclude by calling for their abolition. It is my hope that this article will help trial judges and practitioners identify Dark Pleas and understand their nefarious nature, so that they can stop this abuse of power when they encounter it.

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Most Americans who grow up learning about the ideals of our criminal justice system are familiar with its most fundamental element: the presumption of innocence.[1] The grand bargain this country made when it agreed to cede to the government the power to accuse its citizens of unlawful actions and to punish those found guilty is grounded in the presumption of innocence. The essential guardrail the citizens retained upon relinquishing their power was the requirement that the government must convince a unanimous jury of twelve citizens in a public trial that its accusations were true beyond a reasonable doubt before an accused person could be compelled to forfeit their freedom.[2]

I suspect that most citizens who are taught about such ideals would be offended by the prospect of an agent of our government obtaining a confession through the threat of force or violence. Nor would it take much to persuade the average citizen that evidence the government obtains through blatant coercion is not only an affront to our most basic rights but is untrustworthy to boot.

It may surprise you then to learn that in the great state of Ohio and across the country, prosecutors—who take an oath to seek truth and justice—are coercing admissions of guilt from prisoners who have otherwise maintained their innocence. What is more, trial courts are not only tolerating these actions but, in some cases, encouraging them. The guilty pleas stemming from these coercive tactics are rarely scrutinized by the fourth estate—the press—which is supposed to act as the watchdog in our democracy. I have come up with a name for this practice that I believe befits such an insidious and unconscionable level of coercion: the Dark Plea. And it must be stopped.

The practice of extracting Dark Pleas from prisoners alleging innocence is not a new problem. In 2017, the national Innocence Project launched a national advertising campaign designed to educate the public about the issue.[3] At that time, they described the phenomenon as "The Guilty Plea Problem."[4] On its website, the organization proclaimed:

> While the plea system has a role to play in making the system run efficiently, we have come to rely on pleas to our detriment. The first step in correcting

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[1] Estelle v. Williams, 425 U.S. 501, 502–503 (1976); Bell v. Wolfish, 441 U.S. 520, 533 (1979).

[2] *See* FED. R. CRIM. P. 23(b)(1); *id.* at 31(a); *see also* In re Winship, 397 U.S. 358, 363–64 (1970).

[3] *America's Guilty Plea Problem Under Scrutiny*, INNOCENCE PROJECT (Jan. 23, 2017) https://innocenceproject.org/americas-guilty-plea-problem-scrutiny/.

[4] For insight into the extent of the problem, see GUILTY PLEA PROBLEM, https://guiltypleaproblem.org (last visited Feb. 24, 2024).

> this profound injustice is to demonstrate the all too real harms that have resulted—and raise awareness that there is a problem that must be solved.[5]
>
> -Maddy DeLone, Executive Director of the National Innocence Project.

I watched the rollout of this campaign with profound interest because I had observed the near-exclusive reliance on guilty pleas to resolve criminal cases in the Cuyahoga County Justice Center, where I served as a trial court judge. I had my doubts from the beginning about the name selected by the Innocence Project to address this issue, because the organization was conflating two problems that permeate the criminal justice system. The first problem is the coercion used to pressure defendants (whether guilty or not) who are accused of a felony to resolve their case by negotiating a plea rather than by exercising their constitutional right to proceed to trial.[6] The second problem occurs later, when a defendant no longer enjoys the presumption of innocence, but is offered freedom in exchange for pleading guilty to charges that have already been resolved, either through a previous guilty plea or a jury's verdict. This second form of coercion is completely different from the first and so egregious that it needed its own name.

I. A SYSTEM DESIGNED TO RESOLVE DISPUTES

Whenever I accept an invitation to speak to law students and young lawyers who are unfamiliar with the machinations in busy trial courts processing voluminous amounts of criminal disputes,[7] I explain that it helps to imagine the entire system as having two separate starting points. The first is the one that most people think of at the front end of the criminal justice system, when the government initiates an action in the form of an accusation contained within an indictment. The second starting point occurs after the first phase of the criminal process is completed and involves individuals who have been convicted of a crime, either through trial or more likely through a negotiated plea agreement, and are serving their sentence. When these individuals assert that the system has made a mistake and convicted them even though they are actually innocent, the criminal justice process effectively begins again.

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[5] *America's Guilty Plea Problem Under Scrutiny*, *supra* note 3.

[6] U.S. CONST. amend. VI.; Loftus E. Becker, Jr., *Plea Bargaining and the Supreme Court*, 21 LOY. L.A. L. REV. 757, 779–780, 784, 786–787 (1988).

[7] Over the past ten years, the Cuyahoga County Court of Common Pleas has averaged over 12,500 criminal filings per year. BRENDAN J. SHEEHAN, CUYAHOGA COUNTY COMMON PLEAS COURT STATISTICS REPORT DECEMBER 2022, at 4 (2022).

A. The Front End of the Criminal Justice System

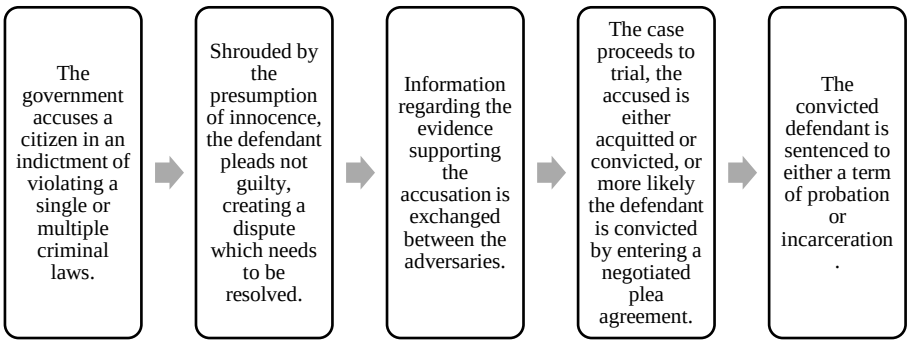

Figure 1: The Front End of the Criminal Justice System

Every front-end dispute in the criminal justice system has a clearly designated starting point that you can identify by simply following the trial court's docket. The dispute is created with the accused entering a not-guilty plea to the government's indictment and then proceeds all the way to a designated endpoint where all disputes are ultimately resolved. The defendant will either be acquitted or convicted at trial or, most likely in the modern criminal justice system, the conviction will result from the defendant entering a negotiated plea agreement.[8]

I have written articles addressing the lack of transparency that permeates the front end of the criminal justice system.[9] Many cases involve off-the-record coercive behavior from the government, factually baseless pleas, and unfulfilled promises regarding sentencing that rarely make it into the case's official record. This article focuses on Ohio's post-conviction system, which is purported to be a safety valve[10] to address serious front-end mistakes, including the worst form of injustice: the incarceration of individuals who are actually innocent.

The back end of the system is where convicted individuals who claim actual innocence must attempt to litigate their claims. The lack of transparency for these individuals makes the flawed front end of the system look like a beacon of transparency and efficiency by comparison. Their journey can be described as a mirror image of the front end, but it lacks the same guardrails designed to protect the accused. These individuals are not presumed innocent or even credible, they do not have the right to an attorney, the right to a speedy trial, and the right to have the truth of the

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[8] Mark Motivans, *Federal Justice Statistics, 2022*, U.S. DEP'T OF JUST. 11 (Jan. 2024), https://bjs.ojp.gov/document/fjs22.pdf.

[9] Justice Michael P. Donnelly, *Sentencing by Ambush: An Insider's Perspective on Plea Bargaining Reform*, 54 AKRON L. REV. 223, 234–35 (2021); Justice Michael P. Donnelly, *Truth or Consequences: Making the Case for Transparency and Reform in the Plea Negotiation Process*, 17 OHIO ST. J. CRIM. L. 423, 429–30 (2020).

[10] State v. Davis, 131 Ohio St.3d 1, 2011-Ohio-5028, 959 N.E.2d 516, ¶ 37.

accusations against them proven in open court.[11] Ohio's post-conviction system is a virtual morass, where claims lie unattended, often for years.

We should begin this discussion by putting the problem of wrongful convictions in perspective. According to the National Registry of Exonerations, the first DNA exoneration occurred in 1989.[12] In the 213 years before that exoneration, there had been a total of 418 exonerations in the United States.[13] In the last thirty-four years, 3,442 prisoners have been exonerated.[14] The registry calculates the total amount of time the United States has kept innocent people imprisoned at an almost unfathomable 31,070 years.[15]

Despite these alarming statistics, there is little public will to address this problem. Prosecutors continue to defend the integrity of convictions even when new evidence is discovered that, if true, would completely undermine the theory of guilt that was put forth in the original case.

B. The Back End of the Criminal Justice System

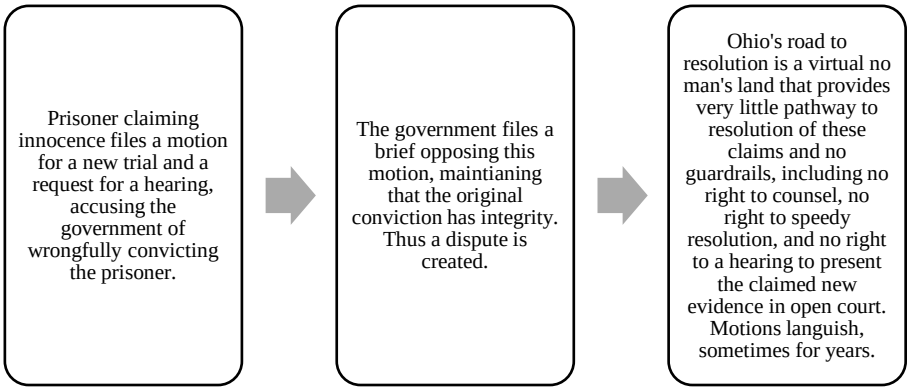

Figure 2: The Back End of the Criminal Justice System

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[11] *See* Timothy Young, *Postconviction Petition Pro Se Packet*, OFF. OHIO PUB. DEF. 15 (2022), https://opd.ohio.gov/static/Law%20Library/Representing%20Yourself/Postconviction_Packet_2-2022.pdf; *see also* Memorandum in Support of Jurisdiction at 5–6, State v. Watkins, 2020 WL 995014 (Ohio Ct. App. 2020) (No. 2020-0940); Herrera v. Collins, 506 U.S. 390, 398–400 (1993).

[12] NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/about.aspx (last visited Feb. 15, 2024).

[13] *Exonerations Before 1989*, NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/ExonerationsBefore1989.aspx?View={43e04d15-8918-459f-bb8f-dddc168edf0d}&SortField=Exonerated&S%E2%80%A6 (last visited Mar. 15, 2024).

[14] *Exonerations by State*, NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx (last visited Feb. 4, 2024).

[15] *Id.*

Unlike the front end of the criminal justice system, the disputes that are initiated on the back end of the system do not give an individual the right to counsel.[16] If individuals want to assert their innocence after conviction, they can seek representation from a nonprofit organization such as the Ohio Innocence Project, the Ohio Public Defender's Wrongful Conviction Project, private practitioners, or other organizations that advocate on behalf of claimed innocents. A prisoner's bald claim of innocence rarely is enough to begin post-conviction litigation; rather there must be some new evidence to support the prisoner's claims.[17] The attorney who advocates for their client's claimed innocence will petition the trial court for leave to file a motion for a new trial and request a hearing to assess the new evidence.[18] At this time, the decision whether to grant the request for leave to file a motion for a new trial is a purely discretionary call by the trial court judge, who is often the same judge who presided over the original trial.[19]

A major flaw within our adversarial system is the perception held by many prosecutors that innocence advocates should not be recognized as independent stakeholders within the system. Though these advocates operate as an important check on the system's integrity, prosecutors perceive them as an extension of the criminal defense bar looking for the proverbial "second bite at the apple."[20]

This perception of innocence advocates as simply criminal defense lawyers is underscored by the transcripts of proceedings assessing innocence claims in Ohio. Reading through those transcripts, you would observe a clear pattern where both the prisoners and their counsel are routinely referred to as "the defense." But on the back end of the criminal justice system, the attorneys representing the convicted individuals are not defending anything. Instead, innocence advocates are essentially the prosecutors of innocence claims and bear the burden of proving their claims. Once a claim is initiated, the prosecutor gets to choose whether to agree with the innocence claims or to defend the integrity of the original conviction through the post-conviction process.

If a defendant claims to have new evidence which, if true, would undermine the theory of guilt, that person is entitled under the law to be placed back at square one—

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[16] Young, *supra* note 11.

[17] *See* OHIO REV. CODE ANN. §§ 2953.21, 2953.23 (West 2021).

[18] OHIO R. CRIM. P. 33(B); OHIO REV. CODE ANN. § 2845.80 (West 2021).

[19] Lester B. Orfield, *New Trial in Federal Criminal Cases*, 2 VILL. L. REV. 293, 344–345 (1957).

[20] *See Ohio Prosecutors Struggle to Accept Wrongful Convictions*, INNOCENCE PROJECT (Feb. 5, 2013), https://innocenceproject.org/news/ohio-prosecutors-struggle-to-accept-wrongful-convictions/; Randy Ludlow, *Justices Annoyed Ohio Prosecutors Boycotting Bid to Prevent Wrongful Convictions*, COLUMBUS DISPATCH (Sep. 18, 2020, 1:46 PM), https://www.dispatch.com/story/news/politics/state/2020/09/18/justices-annoyed-ohio-prosecutors-boycotting-bid-to-prevent-wrongful-convictions/114080840/.

presumed innocent where the government can proceed with the prosecution in light of what is now known to be true.[21] Here lies the big problem. At present, even if a defendant claims to have this kind of evidence, that person is not legally entitled to a hearing in open court, in which the new evidence is presented by the defendant and challenged by the state.[22] Because of this flaw, it sometimes takes years for innocence advocates to advance the case to the point that they have the opportunity to present their case in open court. If a defendant is among the fortunate few who have the opportunity to present evidence at a hearing, that person is approaching the Dark Plea zone. In the time leading up to the hearing date, prosecutors present prisoners with the government's ultimate trump card. Prisoners are presented with the choice of going forward with the hearing (and risk losing) or the opportunity to walk out of prison with either the original conviction or some form of conviction remaining firmly intact. This, in essence, is the Dark Plea, the ultimate coercive tactic.

II. OHIO V. ANGELA GARCIA[23]

I first encountered what I would come to call the Dark Plea while still on the trial court in Cuyahoga County. I learned that one of my judicial colleagues had set a hearing date on a pending motion for a new trial, which had been opposed by the state. The hearing was estimated to last for about three days, based on the number of witnesses and evidence to be presented.

The case involved a woman named Angela Garcia, who in 2001 was convicted of setting her house on fire and intentionally killing her two daughters.[24] The state's theory at trial was that she was motivated by greed because of the prospect of receiving insurance proceeds for the fire.[25] Angela Garcia maintained her innocence from the start and asserted at trial that the fire resulted from an accident.[26] It took the state three trials to finally achieve a conviction (the first two trials resulted in hung juries and were declared mistrials).[27] Angela's convictions were affirmed[28] on appeal while Angela was serving the imposed sentence of life with the opportunity for parole after 49 ½ years.[29]

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[21] *See* OHIO REV. CODE ANN. § 2945.82 (West 2023); OHIO R. CRIM. P. 33(D).

[22] *See, e.g.,* State v. Dues, 8th Dist. Cuyahoga No. 105388, 2017-Ohio-6983 at ¶ 12 ("A defendant is only entitled to a hearing [on his delayed motion for a new trial based on new evidence] if he submits documents that on their face support the claim of being unavoidably prevented from discovering the new evidence.") (citations omitted). *See also* Petition for Writ of Certiorari at i, Prade v. Ohio, 140 S. Ct. 453 (2019) (No. 19-230), 2019 WL 3958376.

[23] State v. Garcia, 2002-Ohio-4179 (8th Dist.).

[24] *Id.* at ¶ 1–39.

[25] *Id.* at ¶ 27–39.

[26] *Id.* at ¶ 3.

[27] John Harper, *Mother's Murder Conviction, Life Sentence Vacated in Fire Death of Two Daughters*, CLEVELAND.COM (May 9, 2016, 8:01 PM), https://www.cleveland.com/court-justice/2016/05/mothers_murder_conviction_life.html.

[28] *Garcia*, 2002-Ohio-4179, at ¶ 150.

[29] Journal Entry, Ohio v. Garcia, 2001 WL 35905761 (2001) (No. CR 387760).

When I learned that the hearing on the new-trial motion was set to take place, it felt like something special was about to unfold. Two leading fire experts were flying into Cleveland to testify that their review of the evidence led them to believe that the "scientific" testimony used to convict Angela was no longer considered credible based on advances in the science of arson investigation. Their opinion, so I was told, was that there was no credible evidence of arson resulting from the fire that had tragically killed Angela's two daughters. At the time, I had several law students serving as externs and I encouraged them to attend the hearing. I believed it would be a great opportunity for them to observe the importance of transparency where the merits of a motion for a new trial would be debated in open court and where the state's original theory of guilt used to convict Angela would be either undermined or vindicated.

After completing my morning docket of overseeing plea and sentencing hearings, I returned to my chambers where—to my surprise—I found Angela's attorneys and their investigator sitting in my lobby. Though this case was not on my docket, they knew of my advocacy for reforming post-conviction procedures and my interest in seeing the process play out in Angela's case. They appeared to be completely dejected and distraught—as if the wind had been knocked out of them. I was full of questions. What had happened? Did they already receive an unfavorable result from the trial court? How could this be if the hearing was scheduled to last for three days?

They very quietly responded that the case had "resolved." Resolved? How? Why? That is when they told me that prior to the hearing they were approached by the prosecutors with a plea deal. The prosecutors were prepared to withdraw their opposition to a new trial on the condition that Angela agree to plead guilty to involuntary manslaughter. Further, under the plea offer, Angela would have to agree to serve an additional five years in prison rather than completing her life sentence up until her parole date. Finally, under the government's conditions, Angela would also have to admit that she was in fact guilty of the crime. The attorneys conveyed the state's offer to Angela shortly before the hearing was to start. She had very little time to consider and contemplate the offer because the judge was prepared to go forward with the hearing. While under this immense pressure Angela agreed to take the deal. As a crowd of spectators—mostly consisting of Angela's family and friends who had supported her for sixteen years while she maintained her innocence—watched in stunned surprise, Angela entered the courtroom, stood up, and tearfully entered the plea agreement offered by the state. There was no evidentiary hearing. Angela was then given a sentence calculated to require an additional five years imprisonment.[30] She was immediately sent back to prison.

The shocking outcome of the hearing was obvious from the lawyers' dejected demeanor. It was clear to me that they did not feel good about the result or that justice had been achieved. I tried to assure them that, had they not prepared such a strong case, it is likely that Angela would not have received any deal at all. Angela's attorneys had certainly performed their jobs as advocates, diligently and zealously representing their client. Yet I sat in my office for a long time after they left, thinking about the process. Assuming the prosecutors maintained a good-faith belief in the integrity of the original convictions and that Angela was in fact guilty, even considering the evidence that would come forward at the hearing, why would the state offer a plea deal before learning from the court whether she was entitled to a new trial?

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[30] Journal Entry, State v. Garcia, No. CR-00-387760-ZA (Cuyahoga Cnty. May 10, 2016).

The following morning, I met a reporter who was scheduled to be in town for three days to cover Angela's hearing for the online news organization, *The Intercept*. I told her that I believed that finding the answer to the question above would make for an interesting story. She later called me and informed me that no one from the Cuyahoga County Prosecutor's Office would agree to speak with her on the record. And, ultimately, she wrote an excellent account of what took place for *The Intercept*.[31] In the days that followed our conversation, I continued to ask myself the same question over and over until I arrived at the only logical answer I could come up with: a prosecutor *would not* have offered Angela this sort of plea deal unless, based on their assessment of the new evidence, they believed that they would lose at the new trial hearing. But, of course, this is an assessment and a realization that they would never tell Angela or her counsel.

III. LEVERAGE

Cleveland's primary source for courthouse news, Cleveland.com, ran a story about Angela Garcia's case the day after she entered her plea.[32] I remember being struck by the tone used in the small article, which I can only describe as blasé. The headline read, "Mother's murder conviction, life sentence vacated in fire death of two daughters."[33] A casual reader of that headline would likely assume that the hearing had gone well for Angela. But a knowledgeable reader might think that the original theory of guilt used to convict her in 2001 had been undermined by what is now known about the science of determining the cause of fires.[34] Instead, the article reported what had actually happened:

> Angela Garcia pleaded guilty to two counts of involuntary manslaughter and one count of arson… [The judge] sentenced her to 22 years in prison, 17 of which she's already served.
>
> Prosecutors and attorneys from the Ohio Public Defender's Wrongful Conviction Unit struck a deal before a hearing Monday where the judge was set to consider whether he would grant Garcia a new trial.[35]

As I read the article, I found it raised a new slew of questions. Why was the reporter treating this just as any other pending criminal case that was resolved through a plea deal? The prosecutor stated in the article it was important that "Garcia admitted to the involuntary manslaughter charges..."[36] But a jury had convicted Angela of

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[31] Liliana Segura, *The Fire on Harvard Avenue*, INTERCEPT (Mar. 5, 2017, 10:43 AM), https://theintercept.com/2017/03/05/did-angela-garcia-kill-her-own-daughters-arson-cover-up/.

[32] Harper, *supra* note 27.

[33] *Id.*

[34] *See* Valena E. Beety & Jennifer D. Oliva, *Evidence on Fire*, 97 N.C. L. REV. 483, 495–499 (2019).

[35] Harper, *supra* note 27.

[36] *Id.*

murder and aggravated murder.[37] Those charges were not pending; they had been resolved years ago and affirmed by the court of appeals.[38] So why did it matter now that Angela admitted guilt to different charges? The trial court accepted what was purportedly a knowing, intelligent, and voluntary plea and sent Angela back to prison to serve an additional five years. Why five years? How was that number calculated? What factors were considered by the state? Had she not been punished enough for involuntary manslaughter, the new crime she had pleaded guilty to? The innocence advocates, on the other hand, maintained their position that Angela was innocent: "We stand behind the arguments we made in our motion..."[39] Why was the public never allowed to see which side's position had merit through a public hearing on the record? None of these important questions were addressed in the newspaper article.

If I had been writing the article, I would have inquired into the dynamics of what took place off the record that led to the formulation of this agreement. I was, of course, not privy to the private discussions when the innocence advocates presented the state's plea offer to Angela. Still, I can imagine it proceeded in the following fashion, and not only in her case but in every case where a Dark Plea is offered:

> *Innocence advocate*: The state is offering to withdraw their opposition to your motion for a new trial in exchange for your freedom if you accept their plea offer.
>
> *Prisoner*: I don't understand, the new evidence we have establishes what I have maintained all along, that I am innocent and the state's theory of guilt at my trial can be shown to be false.
>
> *Innocence advocate*: I agree, but the state doesn't see it that way. And even though I believe that we will win, if the hearing goes forward, we have no assurance of that outcome.
>
> *Prisoner*: What happens if we lose?
>
> *Innocence advocate*: We will take your case to the court of appeals where I also believe you will win a new trial, but that process will take a few more years, and again, I cannot provide you with any assurance of that outcome."
>
> *Prisoner*: What happens if we lose at the court of appeals?
>
> *Innocence advocate*: Then you must serve out your life sentence, which is much longer than the five years the state is currently offering.

The above-imagined exchange is why I believe the Dark Plea is the legal equivalent of holding a gun to someone's head to extract a confession. I believe that if such an action took place on the front end of the system it would not be tolerated by most reasonable people. The public understands that a confession so coerced could not contain any indicia of truthfulness. So why, in a purportedly fair and just legal system, do we permit this to take place repeatedly when a claim of innocence was being asserted in the post-conviction system?

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[37] Ohio's statutory definitions for aggravated murder, murder, and involuntary manslaughter are found in the Ohio Revised Code §§ 2903.01, 2903.02, and 2903.04, respectively.

[38] State v. Garcia, 2002-Ohio-4179, ¶ 150 (8th Dist.).

[39] Harper, *supra* note 27.

My conclusion about the state's motivations to offer a Dark Plea during post-conviction proceedings was recently discussed by scholars in a research paper.[40] One of the authors, Mr. Keith Findley, a co-founder of the Wisconsin Innocence Project with whom I spoke at length before the publication of the article, accurately states my position:

> Justice Donnelly calls pleas during post-conviction litigation "dark pleas" and contends that they should be banned entirely. He argues, "Plea agreements are designed to resolve pending accusations of criminal acts made by the government. They should not be used to resolve charges that have already been resolved." Why? He answers that question with a rhetorical question of his own: "Why would a prosecutor, who after reviewing a prisoner's motion for a new trial, who continues to maintain a good faith basis in the guilt of the prisoner ever offer a reduced prison sentence before learning the court's ruling on a motion for a new trial?" His answer: "They would not unless they believed that the motion had merit and that the new evidence undermined the original theory of guilt and there was a good chance a new trial would be granted if the evidence warranting the new trial was presented at a hearing in open court." Moreover, he contends, plea bargaining in the post-conviction litigation process comes "at a time when the government possesses all the negotiation leverage and the prisoner has virtually none." And he laments that resolving innocence claims through such bargaining "ensures that the evidence supporting the claim of innocence never sees the light of day."
>
> Our data suggest that Justice Donnelly's concern about the possible prosecutorial motivations underlying plea bargaining and the effect that such bargaining has on the search for the truth in innocence cases may have real merit. A ban on plea bargaining during post-conviction litigation may indeed be warranted. And while some might still object that such a ban would harm innocent defendants who do not want to take the risk of a retrial, our data again suggest that that risk is minimal at best.[41]

Since the publication of this article, there has been more evidence that unless the Dark Plea is outlawed, it will continue to coerce those who profess actual innocence.

Consider the case of Jermael Burton.[42] Mr. Burton was charged in a circumstantial case with a shooting based on certain personal items identified as his, found at the crime scene. Burton maintained at trial that he was not guilty and that the belongings were not left at the scene but were taken from a glove compartment of an automobile towed by the police before the shooting even took place.[43] During its closing

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[40] Keith A. Findley et al., *Plea Bargaining in the Shadow of a Retrial: Bargaining Away Innocence*, 2022 WIS. L. REV. 533, 534 (2022).

[41] *Id*. at 593–94.

[42] Journal Entry and Opinion at ¶ 1–2, State v. Burton, 2019-Ohio-2431 (Ohio Ct. App. 2019) (No. 107054), 2019 WL 2537715, at *1; Application for Reopening Journal Entry, State v. Burton, 2020-Ohio-375 (Ohio Ct. App. 2020) (No. 107054), 2020 WL 586784.

[43] Journal Entry and Opinion, *supra* note 42, at ¶¶ 37, 52.

arguments, the state called Burton's claims a "fairytale" and consistently asserted that there was no evidence showing that the police had entered Burton's car.[44]

While serving an eleven-year prison sentence on the charges he was convicted of, Burton discovered a previously undisclosed document confirming that his automobile had been towed.[45] The document included the name of an officer who, at trial, had denied knowledge of the automobile being towed. Based on this discovery, an appellate court ordered that a hearing take place to determine whether Burton should be granted a new trial.[46] But instead of the hearing being held and the trial court assessing whether Burton's new evidence entitled him to a new trial, the prosecution reached a plea deal with Burton that reduced his sentence.[47] Later, in response to journalists, the prosecutor's office admitted that it only entered the plea deal because it was clear the trial court was going to grant Burton a new trial.[48]

In June 2023, investigative news reporter, Brian Dugger, put a spotlight on the practice of offering Dark Pleas in a series of news accounts covering the coerced pleas of Wayne Braddy, Jr. and Karl Willis.[49] Both men had spent twenty-three years in prison serving a sentence for murder charges, for which they steadfastly claimed their innocence.[50] In one of Dugger's articles on the case, a co-defendant who testified against Willis and Brady in their 1999 trial admitted to making up the story that linked Braddy and Willis to the crime.[51] Although the trial court initially granted permission to the Ohio Innocence Project to file a motion for a new trial and a request for a

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44 Matthew Richmond et al., *Improper Conduct: How Undisclosed Evidence Can Put Ohioans Behind Bars*, STATEHOUSE NEWS BUREAU (Dec. 19, 2023, 4:26 AM), https://www.statenews.org/news/2023-12-19/improper-conduct-how-undisclosed-evidence-can-put-ohioans-behind-bars.

45 Civil Appeal Journal Entry and Opinion at ¶ 7, *Burton*, 2021-Ohio-851 (Ohio Ct. App. 2021) (No. 109658), 2021 WL 1054496, at *2.

46 *Id.* at ¶ 38.

47 Journal Entry, *Burton*, No. CR-17-620576-A (Cuyahoga Cnty. Oct. 7, 2021); Journal Entry, *Burton*, No. CR-17-620576-A (Cuyahoga Cnty. Oct. 21, 2021).

48 Richmond et al., *supra* note 44.

49 Brian Dugger, *Supreme Court Justice Laments Coercive Nature of 'Dark Pleas,'* WTOL 11 (Jun. 1, 2023, 5:53 PM), https://www.wtol.com/article/news/investigations/11-investigates/11-investigates-what-is-a-dark-plea-supreme-court/512-da8c7045-c6de-48b2-81e9-201770ad3727.

50 *See* State v. Willis, No. L-00-1041, 2001 WL 201316, at *1 (Ohio Ct. App. Mar. 2, 2001); State v. Braddy, No. L-00-1049, 2001 WL 108742, at *1 (Ohio Ct. App. Feb. 9, 2001); State v. Willis, No. L-06-1244, 2007 WL 2216953, at *1 (Ohio Ct. App. Aug. 3, 2007); *see also* Dugger, *supra* note 49.

51 Brian Dugger, *Family Waits for Word in 'Guilty Without Proof' Case*, WTOL 11 (Sep. 27, 2021, 4:19 PM), https://www.wtol.com/article/news/investigations/11-investigates/family-waits-for-word-in-guilty-without-proof-case-wayne-braddy-karl-willis/512-f814cc4e-4c44-4bbc-9d57-92856a683701; *see also* Brian Dugger, *Guilty Without Proof . . . Still*, WTOL 11 (Aug. 19, 2020, 4:34 PM), https://www.wtol.com/article/news/investigations/11-investigates/new-trial-toledo-men-guilty-without-proof-murder-trial/512-bd7f3e47-e7f3-44f4-b452-50ee32c4bfd0.

hearing, which the state opposed, Braddy and Willis ultimately were denied their request to present the recantation testimony at a hearing in open court.[52] After the trial court made this ruling, Braddy and Willis appealed.[53]

The state, which opposed the hearing and the possibility of a new trial, chose not to defend its victory at the court of appeals. Instead, the prosecutor offered both men their freedom if they agreed to enter Alford pleas to amend the charges to involuntary manslaughter.[54] At the change of plea hearing, the prosecutor told the judge: "Sometimes a case needs to be over . . . This may not be the resolution any of us hoped for, but I think it is fair, I think it's just."[55]

Braddy and Willis were released into the community, forever saddled with their new convictions, and legally barred from seeking any form of compensation for the years they were, if their account is true, wrongfully incarcerated. The public was also denied the opportunity to see the merit behind Willis's and Braddy's claims of innocence. I agreed to talk with Dugger after the case was over to explain these plea agreements, which were textbook Dark Pleas. I told Dugger that these pleas could have been avoided if the law required that a public hearing take place and not leave it up to the discretion of the trial judge. Not surprisingly, the prosecutor did not agree to participate in the news story to provide a counter perspective. This news story about the Dark Plea only reaffirmed my belief that if the government is doing something behind closed doors and subsequently refuses to go on record to defend its actions, there is a good argument that they should not be doing what they are doing at all.

IV. THERE IS A SOLUTION

A criminal justice system that hinges on human decision-making will always be flawed because human beings are flawed. Human beings make mistakes. The system is ultimately designed to bring resolution to conflicts that inevitably will arise in our democracy. There will always be the false belief held by those in power, such as prosecutors and judges, that a guilty verdict will always reflect the truth due to the existing guardrails on the front end of the system.

I thought about this fact recently while reading a newspaper article that covered a decision issued by the Ohio Supreme Court. [56] In its decision—which I joined—the

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[52] *Willis*, 2007 WL 2216953, at *1.

[53] For information related to other attempts that Brady and Willis had made to assert their innocence, see State v. Willis, 2016 Ohio App. LEXIS 2316, 2016-Ohio-335, 58 N.E.3d 515 (6th Dist.); State v. Braddy, 2018-Ohio- 4904, 2018 WL 6435765 (6th Dist.).

[54] Alford pleas occur when defendants plead guilty because the record contains enough evidence to convict them of the charged crime and a guilty plea is in their interests, but they nevertheless maintain their innocence and refuse to admit committing the crime. North Carolina v. Alford, 400 U.S. 25, 37 (1970).

[55] Brian Dugger, *Toledo Men Featured in 'Guilty without Proof' Released from Prison Tuesday*, WTOL 11 (Mar. 27, 2023, 5:34 PM), https://www.wtol.com/article/news/investigations/11-investigates/guilty-without-proof-braddy-willis-wtol-11-investigates/512-480856fc-42ba-4c44-8078-386eac311f2e.

[56] Lauren Peck, *DNA Testing For a Man Convicted 30 Years Ago of Murder Granted by Ohio Supreme Court*, JOURNAL-NEWS.COM (Feb. 10, 2023), https://www.journal-

court ordered the trial court to grant the application of a prisoner claiming innocence for DNA testing of evidence collected from the victim's body by the initial investigators.[57] In the article, the prosecutor stated his belief that he was "100% certain" of the prisoner's guilt.[58] He acknowledged, though, that if the DNA results came back as inculpatory the case could finally be put to rest.[59] The prosecutor then listed several alternative reasons the prisoner could still be guilty if results ended up excluding the prisoner and undermining the state's original theory of guilt.[60]

In our adversarial system, the government and the accused are represented by lawyers who either advance or challenge what will always, however strong, amount to only a *theory* of guilt. The prospect of convincing prosecutors and judges to set aside their dogged belief that they *know* the truth and of convincing them to accept that the system has and will continue to make mistakes seems, at this point, an impossible goal. Similarly, principles like finality and closure are essential to our criminal justice system.[61] Those principles also protect victims' rights and prevent unnecessarily subjecting victims to the trauma of seeing their cases relitigated. But victims' rights are not advanced by keeping someone who is actually innocent incarcerated while the true perpetrator remains at large and free to victimize other individuals in our society.[62]

Ideally, the criminal justice system should get it right the first time and provide justice for victims and public safety for all citizens. But because the system cannot always get it right, it must provide transparency to its stakeholders, especially in areas where transparency does not presently exist. To help achieve this end, we should outlaw the use of Dark Pleas in post-conviction litigation once and for all. As a former trial court judge, I value judicial discretion in many areas. But when it comes to giving any colorable claim of actual innocence its day in court, we should take this discretionary call away from the judges and require hearings.

I am convinced that new legislation is the appropriate path to rid the system of Dark Pleas and improve the post-conviction process. If I were drafting the applicable statute, I would propose the following:

> Actual Innocence claims, Negotiated Pleas Prohibited In Post Conviction Litigation: A court shall at all times remain cognizant of the negotiating leverage between the parties during the post-conviction process. After a

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news.com/crime/supreme-court-orders-dna-testing-in-case-of-man-convicted-of-southwest-ohio-murder-3-decades-ago/SBGR4HDBZNEBLGLRAFT7ILRRW4/#.

57 State v. Scott, 171 Ohio St.3d 651, 2022-Ohio-4277, 220 N.E.3d 668, ¶ 24.

58 Peck, *supra* note 56.

59 *Id.*

60 *Id.*

61 *See* State v. Szefcyk, 77 Ohio St.3d 93, 95, 671 N.E.2d 233 (1996); Strickland v. Washington, 466 U.S. 668, 693 (1984).

62 *See* Jeanne Bishop & Mark Osler, *Prosecutors & Victims: Why Wrongful Convictions Matter*, 105 J. CRIM. L. & CRIMINOLOGY 1031, 1033, 1044 (2015). Punishing the innocent would doubly violate the fundamental objective of the criminal justice system "that the guilty be convicted and the innocent go free." Herring v. New York, 422 U.S. 853, 862 (1975).

> motion for a new trial has been filed with supporting evidence, which has been timely opposed by the government, the court shall promptly set the matter for a hearing. After the trial court conducts a hearing in open court on the pending motion the court shall issue a ruling no later than 30 days after the hearing. During the pendency of this matter, the court shall not accept a negotiated plea agreement that reduces the applicant's prison sentence conditioned upon an admission to the charges previously resolved or to amended charges related to the underlying facts. In the event the government voluntarily withdraws its opposition to the motion for a new trial prior to the completion of a hearing and a ruling from the court the court shall grant the motion for a new trial, conduct a hearing to address the issue of bond, and promptly set a new trial date for the newly pending charges.

A post-conviction system that contained the guardrails described in this proposed law would protect against languishing innocence claims. It would also force the discussions regarding coercive Dark Pleas from the back room, where they presently occur, into open court and on the record. Only by requiring this transparency would it be possible for the public to question the ethics of what is being proposed as a just resolution.

Since I began speaking out about Dark Pleas, I regularly encounter concerned advocates who voice caution against going down the road toward an all-out prohibition of Dark Pleas. They argue that the criminal justice system is broken beyond repair. And while they admit that Dark Pleas are awful, they worry that if the system closes the door on this imperfect solution, innocent people will remain in prison with no form of remedy. I have listened intently to these arguments and I do not consider them lightly. Even so, my conclusions at this point remain the same. A properly functioning criminal justice system should have zero-tolerance for wrongful convictions. When innocent prisoners and their lawyers discover new evidence that completely undermines the original theory of guilt, their claims must immediately be given a pathway for presentation in open court. Nor will these measures overwhelm our system. Innocent prisoners with new evidence are the rare and fortunate ones. There are innocent people in prison right now who have yet to discover the evidence that would allow their claims of innocence to even advance.

Of course, not every prosecutor who offers or judge who accepts a Dark Plea does so with nefarious intentions. At one end of the spectrum are those prosecutors and judges who maintain a good-faith belief in the original guilty verdict and believe the passage of time or the existence of circumstances outside of the state's control have made it impossible for the state to re-try the case. But then there are those who refuse to believe that the jury got it wrong, who are indifferent to the plight of wrongfully convicted persons, or who simply will not concede any error and want to avoid the state having to pay compensation to those who have been aggrieved. But as long as Dark Pleas are permitted, those in power will continue to use them. While it may seem harsh, if we do not eliminate these pleas, then we should stop complaining about unfairness in the post-conviction process. Such acquiescence will condemn wrongfully convicted persons and their advocates to the futile and laborious task of continually pushing the boulder of their innocence claims up the mountain as required in the current system. And—like Sisyphus—those efforts will be rewarded with the boulder rolling back down the mountain, just as it reaches its apex, through the state wielding the power of the Dark Plea. There is no reason to be surprised or outraged

at that result because we have given the state that power. And this is how power works when it is allowed to function in the dark.