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# A Plea of Convenience

An examination of the guilty plea in England & Wales

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Dedicated to the memory of M.J.A. whose experience of the criminal justice system inspired and motivated this research.

‘Make the most of your regrets; never smother your sorrow,  
but tend and cherish it till it comes to have a separate and integral interest.’

Henry David Thoreau



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## Declaration

I declare that this thesis is my own original work and that it has not been presented and will not be presented to any other University for a similar or any other degree award.

Juliet Horne

Signature: .........



## Abstract

Around 90% of criminal convictions in England & Wales are based on guilty pleas. The criminal justice process places deliberate pressures on defendants to plead guilty, undermining the traditional account of the guilty plea as a voluntary and reliable confession. However, despite the acknowledged risk of wrongful conviction, appeal against guilty plea conviction is limited.

Through empirical research and theoretical analysis, this thesis examines how the appeal courts and the Criminal Cases Review Commission (CCRC) respond to challenges to guilty plea convictions and the accounts of the guilty plea they provide to justify these responses. This entails the analysis of appellate caselaw, alongside an examination of CCRC files in guilty plea cases, an observational study of defence plea advice and hearings, and interviews with lawyers and CCRC staff in order to assess whether the accounts offered by the courts and the CCRC have any foundation in practice.

The research reveals that the criminal justice system, as designed and operated, prioritises efficiency over fairness and accuracy in its treatment of guilty pleas (reflecting Nobles and Schiff's analysis of tragic choices in the system). Despite the consequent risk of injustice, the appeal courts resist challenges to guilty plea convictions, relying on unsupportable accounts of the guilty plea as a confession, and of defence lawyers as sheltering defendants from plea pressures. In turn, the CCRC's approach to such cases is characterised by confusion and, ultimately, the prioritisation of efficiency and finality.

In response, the thesis proposes an account of the guilty plea as the defendant's prediction of the likely trial outcome (the 'defendant-assessed verdict'). While requiring procedural changes to allow defendants to be supported and informed in assessing the case, this account could provide a justification for guilty plea convictions and offer a framework for assessing challenges to such convictions in the future.





# Chapter 1 The History and Development of the Guilty Plea

## Introduction

Over 500,000 defendants plead guilty to criminal offences in England & Wales each year<sup>1</sup> and more than 90% of all criminal convictions are based on guilty pleas.<sup>2</sup> When the defendant pleads guilty he '*stands convicted simply by virtue of the word that has come from his own mouth*'<sup>3</sup> and the court never tests the evidence against him. In contrast, a conviction following a not guilty plea will be reached following a trial conducted in public under strict rules with the opportunity (in theory) for a careful sifting and weighing of the evidence

Although jury trial is presented as the identifying characteristic of the adversarial system, adversarial systems will accommodate guilty pleas provided that the State has discharged its burden of proof 'without the compelled assistance of the accused'.<sup>4</sup> The formal requirements for a guilty plea stem from this principle: it must be unequivocal,<sup>5</sup> voluntary<sup>6</sup> and personal to the defendant.<sup>7</sup> Despite the emphasis on the plea being

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<sup>1</sup> In 2014/2015 72,527 defendants pleaded guilty in the Crown Court (out of 100,865 defendants prosecuted by the CPS in the Crown Court) and 432,033 in the magistrates court (out of 563,625 CPS prosecutions in the magistrates' court) (*CPS Annual Report and Accounts 2012-2013*. London: HMSO. Annex D. At [https://www.cps.gov.uk/publications/docs/annual\\_report\\_2014\\_15.pdf](https://www.cps.gov.uk/publications/docs/annual_report_2014_15.pdf), on 17/5/16). The figure for guilty pleas in the magistrates' court excludes minor motoring matters, which are dealt with as 'proofs in absence' in the CPS statistics.

<sup>2</sup> Plea figures for all prosecutions in England & Wales are not available but the CPS casework statistics for 2014/2015 (*ibid*) indicate that 94% of those convicted in the magistrates' court, excluding proofs in absence (see above), and 91% of those convicted in the Crown Court pleaded guilty.

<sup>3</sup> Hooper, A. and Ormerod, D. (eds.) *Blackstone's Criminal Practice 2013*. (2013) OUP para. D12.73.

<sup>4</sup> McConville, M. and Marsh, L. *Criminal Judges. Legitimacy, Courts and State-induced Guilty Pleas in Britain*. (2014) Cheltenham: Edward Elgar p.62.

<sup>5</sup> *Durham Quarter Sessions, ex parte Virgo* [1952] 2 QB 1

<sup>6</sup> For example, see *Huntingdon Justices, ex parte Jordan* [1981] QB 857. This requirement was also emphasised in *R v Turner* [1970] 2 QB 321.

‘voluntary’, however, (or ‘free from duress’) guilty pleas are entered within a criminal justice system which now contains deliberate incentives to plead guilty (in the form of sentence discounts and fact and charge bargaining). As this chapter will discuss, empirical research demonstrates that these incentives, together with other aspects of the criminal justice system (including the attitudes of defence lawyers) can place considerable pressure on defendants to plead guilty.

The risk that these pressures may cause some innocent defendants to plead guilty has been widely acknowledged<sup>8</sup> but little attention has been paid to how the resulting wrongful convictions can be identified and remedied.<sup>9</sup> Even less consideration has been given to the more fundamental question which is exposed by this understanding of the risk of wrongful conviction, namely how any guilty plea conviction can be considered to be ‘safe’. This question goes to the heart of the legitimacy of the criminal justice system because, if the criminal justice system cannot present an account of what makes a guilty plea conviction a safe foundation for conviction, it cannot offer a justification for the 90% of criminal convictions reached through guilty plea.

In this thesis I consider these questions through a review of the literature, through an assessment of appeal provision for those who have pleaded guilty and through new empirical research on the plea decision and on post-appellate review of guilty plea convictions. This is the first time that a researcher has examined the work of the Criminal

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<sup>7</sup> *R v Williams* [1978] QB 373.

<sup>8</sup> The literature in this area is discussed at p.50 onwards below.

<sup>9</sup> One of the problems is that the extent of the problem of wrongful conviction by guilty plea is impossible accurately to assess. This thesis discusses (in chapter 5) examples of investigations by the Criminal Cases Review Commission in guilty plea cases and of successful appeals against guilty plea conviction but due to the limited availability of appeal (discussed in chapter 3 below) it is not possible to extrapolate from these cases to assess the extent of the problem. This chapter will argue that the existing research and an understanding of systemic pressures and incentives, demonstrates that there is an inevitable risk of such wrongful convictions occurring.

Cases Review Commission in guilty plea cases. In conducting this examination of the guilty plea, I have twin concerns. At a systemic level, my primary aim is to examine whether the criminal justice system in England and Wales, with its deliberate plea pressures and incentives, realistically presents an account of the guilty plea which justifies it as a foundation for a criminal conviction. On an individual level, my secondary aim is to examine the implications for individual defendants of the criminal justice system's approach to guilty pleas.

### **Bargained guilty pleas as the predominant mechanism for conviction**

The attitude of the criminal justice system in England & Wales to guilty pleas and plea bargaining has been described as 'ambiguous, unsettled and hypocritical'.<sup>10</sup> The accuracy of this description is illustrated by the academic literature which is critical of the guilty plea system and which provides an account of how the courts' increasing reliance on guilty pleas procured through the deliberate infliction of pressures on defendants has been ignored or sanitised in order to suit the imperatives of the criminal justice system. In this chapter I discuss that literature, starting with the development of the guilty plea system in England and Wales<sup>11</sup> before explaining how the developing reliance on bargained guilty pleas in England and Wales, together with insights provided by defendant-centred empirical research, have challenged the traditional understanding of the guilty plea as a confession.

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<sup>10</sup> Darbyshire, P. 'The Mischief of Plea Bargaining and Sentencing Rewards.' (2000) *Criminal Law Review* Nov, 894 at p.897.

<sup>11</sup> Plea bargaining in the USA has been the subject of considerable academic attention for many decades due to the overwhelming dominance of the guilty plea in that system. See Vámos, D. 'Please don't call it "plea bargaining".' (2012) 9 *Crim. L.R.* 617-630 for an analysis of some of the similarities and differences between plea-bargaining in the USA and in England and Wales. This literature review does not seek to address the American or other international literature on plea-bargaining and the guilty plea.

In the nineteenth century, trial by jury lay at the heart of the criminal justice system. Feeley's examination of records from Old Bailey cases revealed that in 1835 jury trials accounted for between 95% and 98% of cases in the Central Criminal Court.<sup>12</sup> The same study shows, however, that by 1900, 40% of Old Bailey cases were dealt with by way of guilty plea.<sup>13</sup> The guilty plea rate has now risen to around 90% and so guilty pleas dominate the criminal process. Most of these will be the result of plea bargaining. There may be express bargaining between the parties, whether leading to agreement on a lesser charge (charge bargaining) or a less serious version of the facts (fact bargaining). The most common form of plea bargaining occurs without express negotiation between the parties, however, through the operation of the sentencing discount which, in most cases, entitles a defendant who pleads guilty to a reduced sentence which, depending on the stage at which he pleads guilty, will be up to one third less than would have followed conviction at trial.<sup>14</sup> Such a guilty plea is still, in effect, a 'plea bargain' because the criminal justice system has set up a standing offer of a discount for guilty plea, which then engages all defendants in an implied negotiation over plea. Thus, the sentencing discount amounts to a third form of plea bargaining. 'The bargain, in effect, is with the law'.<sup>15</sup>

The significance of the historical shift from trials to bargained guilty pleas is to some extent contested. It is generally presented as part of a systemic move away from adversarial principles,<sup>16</sup> with their emphasis on jury trial, into 'the twilight of the adversary system'.<sup>17</sup>

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<sup>12</sup> Feeley, M. 'Legal complexity and the transformation of the criminal process: the origins of plea bargaining.' (1997) 31 *Israel Law Review* 183 at p.196.

<sup>13</sup> Feeley (ibid, at p198) suggests that the true increase in guilty pleas across the criminal justice system would be greater as these figures do not show the large number of cases which by 1900 were dealt with summarily (usually by guilty plea).

<sup>14</sup> Section 144 of Criminal Justice Act 2003.

<sup>15</sup> Ashworth, A. and Redmayne, M. *The Criminal Process*. (2010) 4th ed. OUP p.301.

<sup>16</sup> See for example Belloni, F. and Hodgson, J. *Criminal Injustice: An Evaluation of the Criminal Justice Process in Britain*. (2000) Basingstoke: Palgrave Macmillan p.204. Both Blumberg and Alschuler

McConville and Marsh<sup>18</sup> argue that guilty pleas obtained through the imposition of deliberate pressures on defendants are themselves 'intended to replace, in whole or in part, the promise of adversary justice'<sup>19</sup> (albeit that they also argue that empirical research from the early 1970s demonstrates that the ideal of the adversarial trial itself has long lacked foundation in reality).<sup>20</sup>

The account of a move from adversarialism has, however, been challenged as being based on a false understanding of the historical development of the trial. Both Langbein<sup>21</sup> and Feeley<sup>22</sup> argue that the shift to guilty pleas is in fact the result of an *increase* in adversarialism.<sup>23</sup> The traditional jury trial up to the middle of the 18<sup>th</sup> century was, they argue, relatively non-adversarial<sup>24</sup> with judges controlling the proceedings and little involvement by lawyers. Such hearings were highly efficient<sup>25</sup> so guilty pleas were unnecessary and indeed judges commonly advised defendants against pleading guilty.<sup>26</sup>

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describe plea bargaining as a consensual process between lawyers, motivated by the financial and organizational needs of the professional parties and in direct contrast to the adversarial system (see Blumberg, A. *Criminal Justice*. (1967) New York: Quadrangle. P.111 and Alschuler, A. 'The Prosecutor's Role in Plea Bargaining.' (1968) 36 *University of Chicago Law Review* 50).

<sup>17</sup> The title of chapter 3 of Blumberg's 1967 book (*ibid*).

<sup>18</sup> McConville and Marsh (note 4 *supra*)

<sup>19</sup> *Ibid*, p.216.

<sup>20</sup> *Ibid*, p.65.

<sup>21</sup> Langbein, J. 'Understanding the short history of plea bargaining.' (1979) 14 *Law and Society Review* 261.

<sup>22</sup> Feeley, M. 'Plea Bargaining and the Structure of the Criminal Process.' (1982) 7 *Justice System Journal* 338

<sup>23</sup> Feeley (*ibid*) at p.352: 'In this respect, whatever one thinks about plea bargaining, it is difficult to characterize it as ushering in the "twilight" of the adversary process. On the contrary, it appears to be a step toward a more evenly balanced relationship between the state and the accused, and as such it represents an increase not a decrease in adversariness.'

<sup>24</sup> Langbein (note 21 *supra*) at p.262.

<sup>25</sup> Feeley (note 22 *supra*) at p.344.

<sup>26</sup> Langbein (note 21 *supra*) at p.264 citing Sir Matthew Hale in *Pleas of the Crown* (1670).

Despite the flaws in this process, in the absence of legal representation and procedural protections, the trial represented the defendant's only hope of avoiding punishment. From the late 19<sup>th</sup> century onwards, the criminal process became increasingly professionalised and incorporated greater protection for defendants in the pre-trial phase.<sup>27</sup> As a consequence, Feeley argues, the unpredictability of the trial process made negotiated settlements more attractive and plea bargaining became a feasible option.<sup>28</sup> In this way, Feeley presents plea bargaining as founded on a more balanced relationship between the defendant and the prosecution than had existed historically.<sup>29</sup> Plea bargaining, rather than being a cooperative practice, should, he suggests, be seen as an adversarial one.<sup>30</sup> In essence, the contest of the trial is replaced by the contest of the negotiation.

Other writers have (without necessarily agreeing with Langbein and Feeley's interpretation of a move towards adversarialism) linked the rise of guilty pleas with the increased complexity of trials.<sup>31</sup> This has, in turn, been linked to the increased role of lawyers. As the criminal justice system developed over the late 19<sup>th</sup> and the 20<sup>th</sup> century and lawyers became more deeply embedded in the criminal process, trials became longer.<sup>32</sup>

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<sup>27</sup> For example, an increased role for defence counsel and legally trained prosecutors, an increased emphasis on rules of evidence and the possibility of pre-trial hearings. See Feeley (note 22 *supra*) at p.348.

<sup>28</sup> Feeley (note 22 *supra*) at p.346.

<sup>29</sup> *Ibid* at p.352.

<sup>30</sup> *Ibid* at p.340.

<sup>31</sup> e.g. Alschuler, A. 'An exchange of concessions.' (1992) 142 *N.L.J.* 937.

<sup>32</sup> In the U.S context, this account, too, has been challenged. In their study of criminal justice in 19<sup>th</sup> century New York, McConville and Mirsky (McConville, M. and Mirsky, C. 'The Rise of Guilty Pleas: New York, 1800-1865.' (1995) 22 *J.L.S.* 443) argued that the rise of guilty pleas cannot be shown to result from increased professionalisation but rather that it is likely to be a consequence of structural changes linked to the increased politicisation of crime in the state. With the election of judges, the politicisation of the role for the District Attorney's office and the marginalisation of juries, there was an increased political focus on resolving criminal cases swiftly. The increased reliance on guilty pleas was a deliberate element of the social and political agenda of the time in that part of the U.S.A.

Regardless of which of these accounts of the expansion of the guilty plea is accepted, the fact remains that the overwhelming majority of criminal convictions in England and Wales are now founded on guilty pleas and not on the verdict of a court after a contested trial. If the criminal justice system is to have legitimacy<sup>33</sup> then it must be possible to identify 'adequate justifications to support decisions that given persons should be deemed guilty or not guilty of specific offences.'<sup>34</sup> In the circumstances it is important to consider what justification can be offered for founding a criminal conviction on a simple plea of guilty rather than requiring the prosecution to bring evidence before an impartial court to prove the defendant's legal guilt beyond reasonable doubt.

### The traditional understanding of the guilty plea – confession and remorse

"The key to understanding the English guilty plea is that it is still considered tantamount to a confession. It is repeatedly stated in the case law that a guilty plea amounts to a confession of the crime charged."<sup>35</sup>

The guilty plea is formally a judicial confession and for most of the last century the courts relied upon the guilty plea as a confession<sup>36</sup> and a demonstration of remorse<sup>37</sup> from the

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<sup>33</sup> McConville and Marsh (note 4 supra) at p.2 distinguish the 'authority' of the courts, which is founded in the courts' decisions being supported by formal legal rationality, from 'legitimacy', which has a moral basis requiring the protection of the 'basic rights' of individuals. For further discussion of legitimacy in the context of criminal justice, see Tankebe, J. and Leibling, A. *Legitimacy and Criminal Justice: An International Exploration*. (2013) OUP.

<sup>34</sup> Greer, S. 'Miscarriages of Justice Reconsidered.' (1994) 57 *Mod. L. Rev.* 58 at p.61.

<sup>35</sup> Heberling, J. 'Conviction without trial.' (1973) 2 *Anglo-American L. Rev.* 428-472 at p.456.

<sup>36</sup> *Holdsworth's case* (1832) 1 Lew. 279: 'The defendant must in open court freely and voluntarily confess that he is guilty of the offence of which he is charged in the indictment. Confession may be made on arraignment, or at any subsequent stage of the proceedings, by withdrawal, with the consent of the court, of a plea of not guilty, and substitution of a plea of guilty.' Langbein argues in



defendant. In this way, the guilty plea was seen to provide reliable evidence justifying the court's verdict and the plea was commonly relied upon as a mitigating factor in sentencing.<sup>38</sup>

For the plea to amount to a confession and a demonstration of remorse or contrition, it must logically amount to an acceptance by the defendant of the truth of the allegations.<sup>39</sup>

The defendant's word of 'guilty' is then transformed into a conviction simply through the circumstances of its utterance.<sup>40</sup> This understanding of the guilty plea allowed the appeal courts to treat guilty pleas as reliable indicators of factual guilt and as providing sufficient evidence to establish legal guilt. In this way:

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Langbein, J. 'Understanding the short history of plea bargaining.' (1979) 14 *Law and Society Review* p.261 at p.268 that it is the continental justice systems that see the guilty plea as evidence of guilt whereas, he suggests, common law systems view the guilty plea simply as a waiver of the right to trial. It is submitted that, whilst this characterisation of common law systems may accurately describe the position in the USA, for the reasons discussed at length in this thesis, it does not accurately describe the position in England and Wales.

<sup>37</sup> Per Lord Parker in *Turner* (note 6 supra) at p.360: 'A plea of guilty, showing an element of remorse, is a mitigating factor which may well enable the court to give a lesser sentence than would otherwise be the case.'

<sup>38</sup> The guilty plea is no longer a mitigating factor (in that it does not reduce the seriousness of the offence) although it does of course entitle the defendant to a reduced sentence, depending on the stage at which he indicated his intention to plead guilty (Sentencing Guidelines Council. *Reduction in Sentence for a Guilty Plea*. 2007).

<sup>39</sup> In *Gore* [2007] EWCA Crim. 2789, the Court of Appeal said (at para. 40) that in pleading guilty the defendant 'accepted she had wilfully caused the death of her baby. She accepted the baby had been born alive and that she caused its death. As was held in *Saik*, her plea of guilty was an acknowledgement of each ingredient of the offence.'

<sup>40</sup> There is no requirement that the court formally 'accepts' the plea and the fact of conviction is indicated by the court proceeding to sentence (Lord Morris of Borth-y-Gest in *S (an infant) v Recorder of Manchester* [1970] 2 WLR 21 at p.501).

‘a plea of Guilty has two effects: first of all, it is a confession of fact; secondly, it is such a confession that without further evidence the court is entitled to and indeed in all proper circumstances will act upon it and result in a conviction.’<sup>41</sup>

This provides a justification for guilty plea convictions as being based on evidence of guilt, despite the plea having displaced the adversarial trial.<sup>42</sup>

Clearly, if the guilty plea can be relied upon as a reliable confession and demonstration of genuine remorse this would appear to provide compelling support for a conviction. Indeed, the fact that the defendant himself asserts his guilt in open court can be seen to add a symbolic weight to the finding of the court.<sup>43</sup> However, this justification for guilty plea conviction requires that the system protects the defendant’s freedom to choose whether to plead guilty or not guilty (hence the requirement that the plea be free from duress). The justification for conviction will fail if reasons exist to doubt that the guilty plea represents a genuine confession by the defendant.<sup>44</sup>

If the guilty plea is a confession then pressures and inducements to plead guilty, such as plea bargaining, can give rise to all the problems of reliability that occur when defendants are threatened or offered inducements to confess.<sup>45</sup> This risk is recognised in respect of

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<sup>41</sup> *R v Rimmer* [1972] 56 Cr. App. R. 196, at p.200.

<sup>42</sup> The guilty plea is, in itself, proof of guilt as it ‘is equivalent to conviction after trial and symbolic of the defendant’s remorse and repentance for a criminal act, attracting sentencing mitigation through that remorse.’ (McConville, M. and Mirsky, C. *Redefining and Structuring Guilt in Systemic Terms*. In: McConville, M. and Bridges, L. ed. *Criminal Justice in Crisis*. (1994) Aldershot: Edward Elgar. at p.266.)

<sup>43</sup> Duff, A. Farmer, L. Marshall, S. Tadros, V. *Trial on Trial (volume 3)*. (2007) Oxford. OUP at p.170 describe the guilty plea as a ‘performative’, in which the defendant himself fulfils one of the aims of the criminal process by admitting and condemning his own conduct.

<sup>44</sup> Greer (note 34 supra) at p.67.

<sup>45</sup> Ashworth (note 15 supra) at p.315. This observation was made as far back as 1973 by Heberling (note 35 supra).

normal confession evidence; the confession may be ruled inadmissible at trial if the police threatened the defendant or offered her an inducement to confess.<sup>46</sup> In the same way, a 'confession by way of guilty plea' could be (as a matter of fact) rendered unreliable by the defendant being offered an incentive to plead guilty.

Thus, the nature of the traditional justification for guilty pleas means that the existence of significant inducements to plead guilty undermines all convictions by way of guilty plea, even those involving defendants who are in fact guilty. Convictions by guilty plea may not, therefore, carry the necessary 'just and clear fixing of guilt'.<sup>47</sup> Consequently, the traditional understanding of guilty plea as confession has come under challenge in the last forty years due to the increased recognition, formalisation and use of plea-bargaining.

## The influence of plea-bargaining on guilty pleas

As already discussed, the overwhelming majority of defendants pleading guilty now will have been influenced by plea bargaining in one of its forms.<sup>48</sup> Plea bargaining is not an entirely modern phenomenon. According to Feeley's analysis of old Bailey records, whilst in 1835 only 3% of defendants pleaded guilty to reduced charges (i.e. as part of a charge bargain), by 1912 this had increased to 8%.<sup>49</sup> For the next sixty years, however, the application of the sentence discount and the practice of plea bargaining were informal,

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<sup>46</sup> Police and Criminal Evidence Act 1984 s.76.

<sup>47</sup> Heberling (note 35 supra) at p.437.

<sup>48</sup> Although there will undoubtedly be occasions where a defendant pleads guilty for reasons entirely unconnected with the prospect of a less serious outcome than if convicted at trial, it seems safe to assume that these cases are in the minority.

<sup>49</sup> Feeley (note 12 supra) at pp.197-198. Feeley points out that because this figure relates only to Old Bailey trials, the total figures (including summary trials) would have been shown a significantly greater increase.

unregulated and relatively undocumented.<sup>50</sup> Although there was widespread application of sentence discounts for guilty pleas<sup>51</sup> and frequent anecdotal accounts of charge and fact bargaining, these practices were both discretionary and informal and relatively little academic attention was paid to the phenomena in England & Wales. Indeed, even in the 1970s there was a common view that charge and fact bargaining were phenomena belonging to the United States legal system.<sup>52</sup>

One of the reasons why the courts were reluctant to articulate the principles of plea bargaining was undoubtedly because the practice conflicts with the 'confession' model of the guilty plea.<sup>53</sup> Despite the logic of the connection between inducements to plead guilty and the potential unreliability of guilty pleas as indicators of guilt, the courts continued to rely on the confession model of the guilty plea through most of the 20th century and the rhetoric of remorse and confession went mostly unchallenged until the late 1970s.

One reason why society was slow to recognise that pressures to plead guilty could lead to the conviction of the innocent was because there was little understanding of the linked concept of false confessions. If it was difficult to imagine that a suspect would falsely confess at a police station<sup>54</sup> then it would be all the more difficult to accept that a

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<sup>50</sup> Heberling (note 35 *supra*) at p.435: 'English plea negotiations on the other hand have only recently received official recognition and no thorough accounts of English practice exist.'

<sup>51</sup> Discussed in Heberling (*ibid*).

<sup>52</sup> Darbyshire (note 10 *supra*) at p.897. She also suggests that in the 1990s some lawyers still thought this way.

<sup>53</sup> Heberling (note 35 *supra* at p.471) argued in 1973 that it would be inappropriate for the judges in England & Wales to be involved in plea bargaining because 'plea bargaining is probably not widespread and because the English guilty plea is a confession.'

<sup>54</sup> Sir Derek Hodgson, the High Court judge who tried the P. C. Blakelock murder trial commented 'When I started at the bar in the 1940s, it simply didn't enter one's head that confessions might be unreliable. As defence counsel, we didn't think of going into how they might have been obtained.' (quoted in Rose, D. *A Climate of Fear: The Murder of P. C. Blakelock and the Case of the Tottenham Three* (1992) London: Bloomsbury Press at p.95.)

defendant might falsely confess by way of guilty plea in the court room.<sup>55</sup> The phenomenon of the false confession first came to widespread public attention as a result of the controversy over the convictions in the Maxwell Confait murder case in 1972. The Court of Appeal quashed the convictions of three young men and declared them to be innocent despite their confessions to the police.<sup>56</sup> It is likely that this case and subsequent ones in which the Court of Appeal acknowledged the possibility of false confession,<sup>57</sup> opened the door to an acceptance that a guilty plea might not always be reliable evidence of guilt.

Even if the existence of pressures to plead guilty and the risk of false confessions had been recognised, the dominant rhetoric around the legal profession, which presented the defence legal adviser as the defendant's champion, using every legitimate means in defence of his rights,<sup>58</sup> meant that it was difficult to conceive of *represented* defendants succumbing to pressures to plead guilty. The court's rhetorical commitment to the trusted status of defence lawyers was such that a barrister who represented an appellant claiming that his plea was the result of pressure from his trial counsel was thanked by the court for 'taking on a rather distasteful task.'<sup>59</sup> Heberling<sup>60</sup> was alive to the problems faced by a

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<sup>55</sup> Sir Rupert Cross said: 'The English system of criminal trials would break down if everyone charged with an offence in a superior Court were to plead not guilty. It is extremely improbable that the prospect of a reduced sentence would cause an innocent accused to plead guilty and, provided it is understood to refer only to those accused who are guilty moderate encouragement to plead is, as the Court puts it, in *R v de Hahn*, "clearly in the public interest"' (Cross, R. *The English Sentencing System*. (1971) London: Butterworths pp.153-4, quoted in Baldwin, J. and McConville, M. 'The influence of sentencing discounts in inducing guilty pleas.' In: Baldwin, J. and Bottomley, A.K. (eds.) *Criminal Justice: Selected Readings*. (1978) London: Martin Robertson.)

<sup>56</sup> *R v Lattimore* [1975] 62 Cr. App. R. 53. This case is discussed further in Coid, J. 'Suggestibility, Low Intelligence and Confession to Crime.' (1981) 139 *British Journal of Psychology*. 436.

<sup>57</sup> e.g. Hodgson [2009] EWCA Crim. 490 and Brine [1992] Crim. L.R. 122.

<sup>58</sup> See McConville *et al's* discussion at p.49 of Standing Accused (note 129 below) of Napley's account of the professional defence lawyer in Napley, D. *The Technique of Persuasion*. 2nd edition. (1975) London: Sweet & Maxwell.

<sup>59</sup> *Hall* [1968] 52 Cr. App. R. 528.

<sup>60</sup> Note 35 *supra* at p.457.

defendant complaining about pressure from their own lawyers when he said that the courts 'generally disbelieve' the defendant's account and 'phrase their judgments in terms of vague statements of professional ethics'. Even the authors of two early studies revealing claims of innocence from defendants who had pleaded guilty showed surprising confidence in the ability of lawyers and judges to protect against wrongful conviction by guilty plea. In 1971, Dell<sup>61</sup> identified a significant number of claims of innocence amongst women in prison who had pleaded guilty<sup>62</sup> and said that most inconsistent pleas resulted from police advice or pressure, or from the weight of the evidence. Despite this, Dell said she found some evidence that 'few' people who have legal advice will become inconsistent pleaders<sup>63</sup> and concluded that 'it was the failure to get advice in time, and indeed the failure to realize that advice was necessary, that led women to plead guilty to charges they denied.'<sup>64</sup> In the following year, McCabe and Purves<sup>65</sup> suggested that defendants' decisions to change their pleas from guilty to not guilty were based on defendants, lawyers and police showing a 'practical and realistic' attitude.<sup>66</sup> They placed great faith in the ability of judges to discern guilt or innocence from prosecution statements of evidence (suggesting that it was 'extremely unlikely' that such a judge would have allowed a defendant to plead guilty 'if there had been any doubt in his mind as to the guilt of the defendant.')<sup>67</sup> The only

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<sup>61</sup> Dell, S. *Silent in court: the legal representation of women who went to prison*. (1971) London: Bell.

<sup>62</sup> Of 106 women who told her that they were not guilty, 53% had entered guilty pleas (ibid at p.30).

<sup>63</sup> Ibid at p.30.

<sup>64</sup> Ibid at p.62. Dell also suggested (at p.36) that inconsistent pleas were not a problem in the higher courts and that the problem in the lower courts could be significantly reduced through greater access to legal representation before the plea stage.

<sup>65</sup> McCabe, S and Purves, R. *By-passing the jury*. (1972) Oxford: Blackwell.

<sup>66</sup> Ibid at p.26. These findings are somewhat undermined, however, by the lack of information given by the authors as to their methodology and the fact that they appear to have based the research principally on prosecution papers (see Bottoms and McClean (note 127 below) at p.125 and Baldwin and McConville (note 128 below) at p.2).

<sup>67</sup> Ibid at p.26.

research from that period which was critical of defence legal advice was Zander's study<sup>68</sup> but, despite finding that few defendants would recommend their lawyers to others, the study pointed to inadequacy of advice (with defence counsel tending to give only superficial advice on pleading guilty) rather than pressure to plead guilty.

Assisted by the courts' refusal to acknowledge the centrality of plea bargaining in the criminal process, for most of the twentieth century, therefore, the model of the guilty plea as confession and demonstration of remorse operated to justify the guilty plea as a legitimate alternative to conviction at trial. In the early 1970's, however, the practice of plea bargaining came to widespread public attention following the *Turner* case.<sup>69</sup> As a consequence, the Court of Appeal could no longer decline to notice the practice. As McConville and Marsh explain in '*Criminal Judges*',<sup>70</sup> the Court of Appeal was forced to choose between rejecting plea bargaining as in conflict with adversarial principles or to 'confer legitimacy on it as a rational procedure'.<sup>71</sup> The Court chose the latter approach.

## Turner and the crisis of legitimacy for guilty pleas

The appellant in *Turner* and his lawyers claimed that his guilty plea resulted from him receiving the impression from his (then) barrister that the judge had indicated that a guilty plea would make the difference between a custodial or non-custodial sentence.<sup>72</sup> Inherent to the appeal was the claim that the plea, far from amounting to a confession of the truth of the prosecution case and demonstration of remorse on Mr Turner's part, was in fact simply the consequence of his fear of imprisonment following conviction at trial. By the

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<sup>68</sup> Zander, M. 'Legal Advice and Criminal Appeals.' (1972) *Crim. L.R.* 132.

<sup>69</sup> *Turner* (note 6 supra).

<sup>70</sup> Note 4 supra.

<sup>71</sup> *Ibid* at p.65.

<sup>72</sup> (Mr Turner's barrister having gone to see the judge to discuss the matter)

time the case reached the Court of Appeal, Mr Turner's solicitor had given an account of these claims on BBC television<sup>73</sup> and this had attracted considerable public attention to the issue of plea bargaining.<sup>74</sup> Consequently, when deciding the appeal the Court of Appeal was faced with giving an account of the plea bargaining process that could continue to afford it legitimacy, given the confession model of the guilty plea on which the courts relied to justify guilty plea convictions. Although the judgment in *Turner* is presented as a set of guidelines for judges and counsel on plea negotiations, it represents, in fact, a carefully crafted legitimization of guilty plea convictions resulting from a bargaining process.

The Court of Appeal in *Turner* used a rhetoric of freedom<sup>75</sup> to affirm the guilty plea as the defendant's choice. In the Court's account, the defendant's freedom is purportedly protected by limiting the judge's role in plea bargaining and through the presence of the defence lawyer.<sup>76</sup> However, even at the time of the judgment, this account was duplicitous. The *Turner* judgment purports to protect defendants from judicial pressure to plead guilty (because the judge can only indicate that the sentence will take a particular form regardless of plea<sup>77</sup>) but in fact for the first time formally permitted such pressure<sup>78</sup> (as the judge can offer a discount to counsel who is then obliged to communicate it to the defendant.<sup>79</sup>) It holds up the defence lawyer as the defendant's protector who must advise

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<sup>73</sup> Ibid at p.66.

<sup>74</sup> The public debate is described by McConville and Marsh (ibid) at pp. 66-70.

<sup>75</sup> Ibid at p.71.

<sup>76</sup> *Turner* (note 6 supra) per Lord Parker at p.360.

<sup>77</sup> Ibid.

<sup>78</sup> McConville and Marsh (see note 4 supra) at p.72.

<sup>79</sup> *Turner* (note 6 supra) per Lord Parker at p.361.



the defendant not to plead guilty unless he is guilty, whilst firmly requiring her to advise the defendant about the sentencing implications of his plea 'in strong terms' if necessary.<sup>80</sup>

At its heart, the Turner judgment relies upon the judicial 'sleight of hand'<sup>81</sup> by which, provided the court defined rules governing guilty pleas are complied with, a guilty plea is deemed to signal remorse<sup>82</sup> and remorse signalled factual guilt (regardless of the real reasons for the plea).

'Put in this way, plea bargains and sentence discounts appeared to cause little conflict with adversary ideals and raised few significant ethical problems for defence lawyers. Because remorse was dependent on factual guilt, innocent people could not be put at risk.'<sup>83</sup>

For some time the Turner approach papered over the cracks between the adversarial requirements of the guilty plea and the phenomenon of plea bargaining. In 1972 the European Commission of Human Rights concluded that the guilty plea process in England & Wales satisfied the requirements of Article 6 of the Convention<sup>84</sup>. Following the Turner judgment's high profile acknowledgement of the existence of plea bargaining, however, the veil had been lifted on the practice and this led to an increasing number of guilty plea

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<sup>80</sup> Ibid at p.360.

<sup>81</sup> McConville and Marsh (note 4 supra) at p.72.

<sup>82</sup> Or, in Lord Parker's words at p.360 of the *Turner* judgment, 'an element of remorse'. See McConville and Marsh (ibid) at p.72 and Heberling (note 35 supra) at p.434 for further discussion of this phrase.

<sup>83</sup> McConville, M. 'Plea Bargaining: Ethics and Politics.' (1998) 25(4) *J.L.S.* 563.

<sup>84</sup> *X v UK* Application No 5076/71 (1972) 40 CD 64. The Commission noted that, where the defendant pleads guilty and the judge 'is satisfied that the accused understands the effect of his plea', there is no trial in the usual sense. However the Commission, having had regard to 'the rules under which the practice operates and in particular to the safeguards which are provided to avoid the possibility of abuse' said that this procedure satisfied the rights in Article 6 (1) and (2). The report of this decision does not indicate what rules and safeguards the Commission had in mind.

appeals,<sup>85</sup> meaning that the legal community could no longer avert its gaze from the ubiquity of plea bargaining and its influence on plea. As the workload of the courts increased over the coming decades, the criminal justice system became increasingly reliant on guilty pleas for the swift resolution of cases. This, in turn, led to increased judicial and policy attention being directed to the encouragement of guilty pleas, the further formalisation of the incentives to plead guilty and, as will be discussed below, a formal rejection of the link between guilty pleas and remorse and an acceptance of judicial involvement in the plea decision. These phenomena put further strain on the *Turner* account of legitimacy.

Academic criticism of these developments was significantly strengthened by the emergence of defendant-centred empirical research into the criminal process from the 1970s onwards<sup>86</sup> when evidence emerged suggesting that guilty pleas (even those from legally represented defendants within a rule-compliant process) could be leading to wrongful convictions. This represented a serious challenge to the Court of Appeal's reliance in *Turner* on the defence lawyer as bulwark against pressure to plead guilty. Later empirical research (discussed below) then demonstrated the range and power of the different pressures on defendants when making their decisions on plea. This challenged Lord Parker's account of defendants' 'freedom' to choose plea. These two strands of development have, in different ways, significantly challenged the *Turner* account of the legitimacy of guilty plea convictions and, as the following section will demonstrate, left the criminal justice with no clear account of what can be said to be 'safe' about a guilty plea conviction.

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<sup>85</sup> McConville and Marsh (note 4 *supra*) at p.75.

<sup>86</sup> e.g. Dell (note 61 *supra*) and McCabe & Purves (note 65 *supra*).

## The formalisation of plea incentives and uncoupling guilty pleas from remorse

Despite the Court of Appeal's reliance in *Turner* on the guilty plea 'showing an element of remorse', this account of the guilty plea can no longer be sustained. In 1993 the Royal Commission on Criminal Justice (RCCJ) recommended that the sentence discount for a guilty plea should be placed on a statutory footing,<sup>87</sup> noting that 'for many decades' the Court of Appeal had considered that a guilty plea would generally justify a sentence reduction of 25-30%. This discount was not to be awarded as mitigation based on the defendant's remorse but, according to the RCCJ, the principle reason for the discount was to save resources, by encouraging defendants 'who know themselves to be guilty' to plead guilty.<sup>88</sup> Following this recommendation, the sentencing discount was set out in statute<sup>89</sup> and expanded upon in sentencing guidelines.<sup>90</sup> Defence counsel must now advise the defendant of the availability of the sentence discount and record this.<sup>91</sup>

In this way, the guilty plea has formally ceased to be a mitigating factor in sentencing and instead the sentencing discount is said to derive from 'the need for the effective administration of justice'.<sup>92</sup> A striking element of these reforms is the shift in emphasis

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<sup>87</sup> Runciman, W. G. *Report of the Royal Commission on Criminal Justice*. (1993) London: HMSO, at p111. This aspect of the RCCJ report is discussed further in McConville, M. & Bridges, L. (eds.) *Criminal Justice in Crisis*. (1994) Aldershot: Edward Elgar and in chapter 4 of McConville and Marsh (note 4 supra).

<sup>88</sup> Ibid at p.110 (a 'subsidiary reason' was said to be to recognise that witnesses had been spared the trauma of testifying).

<sup>89</sup> Criminal Justice Act 2003, s.144, which replaced s.48 of the Criminal Justice and Public Order Act 1994.

<sup>90</sup> Sentencing Guidelines Council. *Reduction in Sentence for a Guilty Plea*. (2007).

<sup>91</sup> Ashworth and Blake note that defence counsel has a duty to advise the defendant of the terms of section 48 and that question 1(b) of the Judge's questionnaire (then in use) for 'plea and directions' hearings asks whether this has been done (Ashworth, A. Blake, M. 'Some Ethical Issues in Prosecuting and Defending criminal Cases.' (1998) Jan. *Crim. L. Rev.* 25). A similar question now appears in the case preparation forms currently used. This is discussed further in chapter 4 below.

<sup>92</sup> Sentencing Guidelines Council (note 90 supra).

away from the idea of guilty plea as confession, acceptance of the truth of the prosecution case and indication of remorse. The RCCJ acknowledged the risk that sentencing incentives could cause innocent defendants to plead guilty.<sup>93</sup> This amounts to an acknowledgment that the guilty plea can simply be a tactical decision by the defendant. The RCCJ's acceptance of this risk,

‘no doubt reflects the gradual replacement of the concept of the guilty plea discount as official recognition of the defendants' moral contrition with a more overtly crime control rationale which accords supremacy to administrative efficiency and bureaucratic goals’.<sup>94</sup>

This pragmatic approach was, until relatively recently, explicitly reflected in professional guidance for barristers and solicitors which permitted defence lawyers to continue to act for clients who planned to enter guilty pleas despite continuing to tell their lawyer that they were innocent.<sup>95</sup> Given that barristers are under a duty not to allow their client to mislead the court, this provision was an exception to that general duty<sup>96</sup> and contradicts the view of the guilty plea as a confession. This, again, appears to present the guilty plea as simply a tactical choice, free from any claim to truth.

The relinquishing of the connection between guilty plea and remorse highlights a conflict between plea incentives and the presumption of innocence. Sentencing incentives rely

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<sup>93</sup> RCCJ report (note 87 supra) at p.110.

<sup>94</sup> Henham, R. 'Reconciling Process and Policy: Sentence Discounts in the Magistrates' Court.' (2000) *Crim. L. Rev.* at p.438.

<sup>95</sup> This is no longer explicitly set out in professional guidelines (both solicitors and barristers codes of conducts now having been reduced to broad principles rather than specific guidance) but is still the ethical standard applied by solicitors and barristers (see note 450 below). This issue is discussed further in chapter 4 below.

<sup>96</sup> Which can be conveniently explained by the defendant (and not his lawyers) being personally responsible for his plea because 'the ultimate choice and a free choice is in the accused person' See *Turner* (note 6 supra) at p.358.

upon the notion that the defendant who pleads guilty receives a 'discount' rather than the defendant who goes to trial receiving an increased sentence. In his 2001 criminal courts review,<sup>97</sup> Lord Auld acknowledged that this distinction is a fiction, arguing that courts should openly acknowledge that, what he termed, a 'dishonest' not guilty plea (by which he meant a not guilty plea which led to conviction at trial) was an aggravating factor in sentencing.<sup>98</sup> Penalising defendants who assert their right to put the prosecution to proof creates a potential conflict with the fair trial right in Article 6(2) of the ECHR.

In *X v UK*,<sup>99</sup> the European Commission of Human Rights said that the sentencing incentives in England & Wales would not amount to a penalty for going to trial provided that they simply amounted to a reliance on a guilty plea as a mitigating factor. In this way, 'the shred which holds the logic of the English position together is the assertion that the discount is not automatic, but is extended for the defendant's showing of remorse, and not for the mere fact of his guilty plea.'<sup>100</sup> The more recent changes would appear to have destroyed that last shred but despite this, the criminal justice system has continued to rely on sentencing incentives as efficiency measures. Indeed, in 2010, the government

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<sup>97</sup> Auld LJ. *Review of the Criminal Courts of England and Wales* (2001) The Stationery Office. London.

<sup>98</sup> Ibid, chapter 11, para. 103. See also Sanders, A. Young, R and Burton, M. *Criminal Justice*. (2010) OUP at p.490.

<sup>99</sup> Note 84 supra.

<sup>100</sup> Heberling (see note 35 supra) at p.434. Lippke attempts to distinguish trial penalties (imposing a sentence higher than the otherwise appropriate sentence as a consequence of choosing trial) from 'waiver rewards' (imposing a sentence lower than otherwise appropriate as a consequence of pleading guilty). However Lippke's analysis assumes that it is possible to detect when a judge has incorporated a trial penalty in a pre-plea sentence indication. Given the number of factors influencing sentence in England & Wales and the breadth of judicial discretion in most cases, this is unlikely to be detectable. (Lippke, R. *The Ethics of Plea Bargaining*. (2011) Oxford: OUP.)

proposed to increase the maximum sentence discount for a guilty plea to 50%<sup>101</sup> (although this proposal was subsequently abandoned).

### Acceptance of increased judicial involvement in the plea decision

When deciding *Turner*, the Court of Appeal expressed the view that any indication from the judge as to the likely sentence to be imposed (other than an indication that the form of the sentence would be the same regardless of plea) would amount to undue pressure to plead guilty.<sup>102</sup> In 1993, however, the RCCJ had recommended that the *Turner* guidelines should be amended to allow the judge to indicate (only on request from the defence) the highest sentence that would be imposed if the defendant pleaded guilty.<sup>103</sup> This recommendation was not implemented but in 2001 the Auld review<sup>104</sup> returned to the subject arguing that judges should be allowed to indicate 'more precisely' the differing sentences that the defendant faced depending on his plea. Five years later, the Court of Appeal in *Goodyear*<sup>105</sup> implemented the majority of the recommendations when it issued new guidelines to replace the *Turner* guidelines which allowed defendants to seek an 'advance indication of sentence' from the judge. The judge is then permitted (but not obliged) to indicate in open court the maximum sentence that would be imposed based on the prosecution papers. The sentencing judge will be bound by this indication. Although the guidelines stipulate that only the defence can initiate the process, the judge is permitted to 'remind' the defence lawyer of the defendant's entitlement to such an indication.

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<sup>101</sup> Ministry of Justice. *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders*, Cm 7972, December 2010.

<sup>102</sup> *Turner* (note 6 supra) at p.361.

<sup>103</sup> RCCJ report (note 8 supra) at p.113.

<sup>104</sup> Note 97 supra, at pp. 434-444.

<sup>105</sup> *R v Goodyear* [2006] 1 Cr. App. R. (S) 23.

The Court of Appeal in *Goodyear* explained the change in approach by saying that ‘a very different culture’ prevailed<sup>106</sup> and concluded that allowing a judge to respond to a defendant’s request for an indication of sentence did not clash with the fundamental principle that a defendant must not be put under undue pressure. The court did not explain how the change in culture justified the changed approach.<sup>107</sup> The *Turner* judgment had indicated that its decision turned on the judge’s indication creating a risk (as a matter of fact) of undue pressure. On this basis, the only cultural changes that could justify altering this approach would be: a reduction in defendants’ vulnerability to pressure; improvements in legal representation and other aspects of the legal system which could act to insulate defendants from pressure; or a culture whereby judges and policy-makers were prepared openly to tolerate the risk of undue pressure causing wrongful guilty pleas.

McConville and Marsh’s account of the development of the guidelines on advance indication of sentence demonstrates that it is this final cultural change that is in fact reflected by the *Goodyear* decision. They explain how, by placing limits on what judges could say to counsel about the sentence implications of plea, the *Turner* judgment sought to allow judges to participate in plea bargaining while giving the impression that they were not involved (as this could amount to ‘undue pressure’ on defendants). Following the *Turner* judgment, judicial involvement in plea bargaining continued and it was common for trial judges to offer unsought and strong indications of their view of the case against the defendant and the likely effect on sentence.<sup>108</sup> When these practices were drawn to the

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<sup>106</sup> Ibid, para. 47.

<sup>107</sup> (although the context of this remark was a discussion of the developing approach to advance indications of sentence arising out of the RCCJ report (note 8 supra), the Auld Review (note 97 supra), the sentencing guidelines (note 90 supra) and the drafting of statutory provisions which would have permitted advance indication of sentence (schedule 3 of the Criminal Justice Act 2003, which was never introduced).

<sup>108</sup> For examples, see the discussion of appeal court decisions in McConville and Marsh (note 4 supra) at pp. p.74-76.

Court of Appeal's attention, however, the Court was quick to condemn them and to reassert the principle of judicial impartiality which was so key to the rhetoric in *Turner*. McConville and Marsh<sup>109</sup> argue that the continuation of judicial involvement was inevitable given the nature of the Turner guidelines. Consequently, as awareness of plea bargaining increased, judges and policy makers were forced, eventually, to address the gap between the *Turner* account of the judicial role and the reality. The solution chosen in *Goodyear* was to relax the guidelines to legitimise the practice of the courts. It was also necessary, however, for the court in *Goodyear* to give an alternative account of the guilty plea process which would provide some continuing justification for guilty plea convictions. The ways in which judges have sought to do so are considered further at p.41 below.

Since *Goodyear*, judicial involvement in plea bargaining has also been extended in cases of serious and complex frauds.<sup>110</sup> In such cases the prosecution and defence are encouraged to work together on an agreed basis of plea to be submitted to the trial judge together with sentencing submissions.<sup>111</sup> The judge is not required to accept these agreed submissions but clearly is expected to have some regard to them.<sup>112</sup>

Another further increase in judicial involvement in the plea decision resulted from the introduction of extensive case management responsibilities for judges, primarily as a consequence of the Criminal Procedure Rules (CPR). First introduced in 2005, the CPR were

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<sup>109</sup> McConville and Marsh (note 4 supra) at p.93.

<sup>110</sup> See Attorney General's Office Guidelines on Plea Discussions in Cases of Serious or Complex Fraud (2009) London and also Alge, D. 'Negotiated Plea Agreements in Cases of Serious and Complex Fraud in England and Wales: A New Conceptualisation of Plea Bargaining?' (2013) 19(1) *Web J.C.L.I.*

<sup>111</sup> These submissions should indicate the appropriate range of sentencing, supported by the prosecution evidence and defence mitigation.

<sup>112</sup> Although these provisions have been presented as a significant extension to judicial involvement in plea bargaining, Vamos (in Vamos, N. (2012) 'Please don't call it "plea bargaining"'. 9 *Crim. L. Rev.* 617-630) argues that these criticisms are misguided and that the provisions are, in fact, quite limited (particularly in comparison to the system operated in the United States.)



described by the then President of the Queen's Bench Division as creating a new process with a 'single objective: in a few words, greater efficiency and less waste'.<sup>113</sup> The rules gave judges the power<sup>114</sup> to make any direction or take any step (provided that it is not inconsistent with legislation) in pursuance of the overriding objective. A crucial element of the CPR, and the Auld review before it, is the problematic representation of criminal trials as wasteful,<sup>115</sup> and this power in turn legitimises interventionist judges in taking steps to avoid wasteful trials. This approach to case management has more recently been approved and re-asserted by the Leveson Review.<sup>116</sup> This rationalisation takes the courts a long way from the idea in *Turner* that judges' involvement in plea bargaining might put too much pressure on defendants.<sup>117</sup>

As well as empowering judges in the case management role, the CPR creates further difficulties in the context of the guilty plea process because rules require all parties, including defendants and their lawyers, to work together towards the 'overriding objective'. Although this 'overriding objective' is that 'cases be dealt with justly',<sup>118</sup> it is defined to include, inter alia, 'acquitting the innocent and convicting the guilty'. This means that defendants are, in effect, required 'to co-operate in their own conviction',<sup>119</sup> creating a clear conflict with the presumption of innocence and the consequent right of a defendant (even one who is factually guilty) to require the prosecution to prove its case.

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<sup>113</sup> Quoted in Jeremy, D. 'The Prosecutor's Rock and Hard Place.' (2008) 12 *Crim. L. Rev.* 925 at p.935 .

<sup>114</sup> Criminal Procedure Rules 2005 rule 3.5.1 (now the Criminal Procedure Rules 2015).

<sup>115</sup> Jeremy (note 113 supra) at p.935.

<sup>116</sup> Leveson, B. Review of Efficiency in Criminal Proceedings (2015) Judiciary of England and Wales. See McConville, M. 'Adversarialism goes West: Case Management in the criminal courts.' (2015) 19:3 *IJEP* 172.

<sup>117</sup> McConville and Marsh (note 4) at p.179.

<sup>118</sup> Criminal Procedure Rules 2005 rule 1.1 (now the Criminal Procedure Rules 2015).

<sup>119</sup> Jeremy (note 113 supra) at p.935.

Worse, this imposes on defence lawyers a duty to perform a truth-seeking function which is both unachievable and in conflict with their traditional role in the adversarial process.<sup>120</sup> If a defence lawyer is required to work towards the acquittal of the innocent and conviction of the guilty, this implies that her approach to the case must depend on an assessment of whether the client is innocent or guilty. If the lawyer reaches the conclusion that the defendant is 'guilty' then she will be faced with reconciling the duty to secure the client's conviction with her professional obligations to that client. The question of how defence lawyers can resolve these issues is unanswered by the Criminal Procedure Rules but it becomes particularly important in the context of the literature on defence lawyers' attitudes to their clients, discussed in the next section.

### Exposing the myth of defendants' 'freedom of choice' over plea

Part of the Court of Appeal's response to the crisis of legitimacy in *Turner* was to assert the importance of the defendant having a completely free choice on plea 'since the election must be his, and the responsibility his, to plead guilty or not guilty'.<sup>121</sup> By focusing on the importance of defendant choice in this way, the court sought to assert the reliability of the guilty plea 'confession'. For this reason, the Court was reluctant to acknowledge that counsel's advice on plea could itself overwhelm the defendant's free choice, 'however forcibly counsel may put it'<sup>122</sup> (provided that the defendant has been told that he has a free choice). The assertion that counsel had imposed undue pressure on Mr Turner so as to restrict his choice was, according to the Court of Appeal, a 'very extravagant' proposition, which could only be made out in a very extreme case.<sup>123</sup>

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<sup>120</sup> McConville and Marsh (note 4 supra) at p.171.

<sup>121</sup> *Turner* (note 6 supra) at p.356.

<sup>122</sup> *Turner* (ibid) at p.358 (i.e. however strongly counsel might advise the defendant to plead guilty).

<sup>123</sup> Ibid at p.357.

In *Turner*, the court found that the defence lawyers had consistently told the defendant that he had a free choice and the court said this would usually be sufficient. The Court then set out guidance for defence counsel, which purported to ensure that this 'free choice' would be secured. Counsel was under a duty to advise on plea (if necessary, 'in strong terms') but must emphasise 'that the defendant must not plead guilty unless he is guilty'. Counsel having done so, the subsequent plea would be deemed to be both free and accurate.

The Court of Appeal's comments in *Turner* might appear to be an assertion of the importance of free choice and factual guilt but, in fact, are only an assertion of the importance of counsel telling the defendant that free choice and true guilt are important. Provided that counsel utters the required words, the responsibility for the plea can be seen to rest on the defendant himself, in the face of counsel's 'strong advice' and of the other pressures and incentives to plead guilty.<sup>124</sup> The rules and procedures, together with the presence of legal advice, function to distract attention from systemic coercion and to fix responsibility for plea on the defendant's shoulders.

The Court's convenient and contradictory<sup>125</sup> reliance on the apparent 'freedom' of defendants was subsequently challenged by a series of defendant-centred empirical studies which identified complex systemic pressures on defendants, particularly from defence lawyers. When combined with plea bargaining and the sentence discount, these pressures could create a significant risk of innocent defendants pleading guilty. These accounts of the pressures on defendants build on Heberling's earlier description of the 'defeat of the defendant' in the face of the risks of pleading not guilty as well as the additional stress

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<sup>124</sup> For a detailed discussion of counsel's obligations in this area see Bridges, L. 'The Ethics of Representation on Guilty Pleas.' (2006) 9 *Legal Ethics* 80.

<sup>125</sup> 'These two precepts do their best to conceal the conflicts.' (Ashworth, A. Blake, M. 'Some Ethical Issues in Prosecuting and Defending criminal Cases.' (1998) Jan. *Crim. L. Rev.* at p.25.)

caused by the process of preparing and waiting for trial.<sup>126</sup> Taken together, a picture emerges from the research of compliant<sup>127</sup> and fatalistic<sup>128</sup> defendants being subjected to manipulation and bullying by defence solicitors and barristers who, having been socialised into a professional culture characterised by a belief in the guilt of their clients, generally see guilty pleas as the appropriate outcome.<sup>129</sup> This passivity often resulted from events at the police station producing an apparently strong prosecution case, coupled with strong advice from defence lawyers and the incentives of plea bargains and sentencing discounts.<sup>130</sup> In this way, early case activity was combining with other aspects of the culture and processes of the criminal justice system, including the behaviour of defence lawyers, to build towards guilty plea outcomes.<sup>131</sup>

Given that the adversarial system and the rhetoric of the legal profession assert the lawyer as protector of the accused, it is not immediately obvious why advice from defence solicitors would pressurise defendants to plead guilty. Research by McConville, Hodgson, Bridges and Pavlovic<sup>132</sup> and by Mulcahy<sup>133</sup> provided some answers to this question. Based on a detailed ethnographic study, McConville et al argued that defence solicitors in many firms operated under an ideological belief that their clients were guilty (a 'presumption of

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<sup>126</sup> Heberling (note 35 supra) at p.445.

<sup>127</sup> Bottoms, A and McClean, J. *Defendants in the Criminal Process*. (1976) London: Routledge at p.227.

<sup>128</sup> Baldwin, J and McConville, M *Negotiated Justice: Pressures to plead guilty*. (1977) London: Martin Robertson at p.62.

<sup>129</sup> McConville, M. Hodgson, J. Bridges, L. & Pavlovic, A. (1994) *Standing Accused*. Oxford: Clarendon Press, especially at p.137.

<sup>130</sup> Bottoms and McLean (note 127 supra) at p.227 and Baldwin and McConville (note 128 supra) at p.62.

<sup>131</sup> Darbyshire (note 10 supra), for example, quotes at p.902 a police officer observing that 'plea bargaining starts on the street'.

<sup>132</sup> Note 129 supra.

<sup>133</sup> Mulcahy, A. 'The Justification of Justice: Legal practitioners' accounts of negotiated case settlements in the magistrates' courts.' (1994) 34 *Brit. J. Criminology* 411-430

guilt') which led to a presumption that a guilty plea was the appropriate disposal.<sup>134</sup> This belief was learned through socialisation within the culture of a defence firm and was reinforced each time a defendant pleaded guilty. There was an ongoing cycle of belief in guilt leading to a pressure to plead guilty, leading to a guilty plea, leading to confirmation of the initial belief.

Defence barristers, too, were operating under the same presumption of guilt and were seen using a number of manipulative psychological tactics when advising on plea to ensure that their clients pleaded guilty.<sup>135</sup> No trace of the process by which the plea was achieved was discernable in court during plea and sentencing because counsel 'sanitised the record'<sup>136</sup> to obscure any protestations of innocence by the client and to secure the maximum sentence discount on his behalf.<sup>137</sup> Although counsel based their advice on the risk of conviction and the availability of the sentence discount, the study found that they assessed the risk of conviction without having paid any regard to the defendant's account.<sup>138</sup> The research provides an explanation for defendants' passivity: clients are not encouraged to give their own account and are taught that their version of events will be

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<sup>134</sup> McConville et al (note 129 supra) at p.137.

<sup>135</sup> Ibid at p.257.

<sup>136</sup> Ibid at p.262 when the authors relate an incident where, in conference, the client said 'it makes me feel sick because I didn't do it'. In court, however, counsel referred to the matter as a 'spur of the moment offence' and suggested that the court should give credit because he had 'the courage to plead guilty today'.

<sup>137</sup> As will be discussed in chapter 4, the defence advocate is formally not permitted to offer mitigation following a guilty plea which conflicts with a client's protestations of innocence given to counsel in private but McConville et al's research suggests that lawyers were not always satisfying these requirements.

<sup>138</sup> Ibid at p.256 .

defeated by the prosecution evidence and will not be accepted by the court. The adviser convinces the defendant that there is nothing to be gained by continuing with the case.<sup>139</sup>

Lawyers appear to be unconscious of the way in which their beliefs shape the outcomes of cases:

'the presumption of guilt both creates guilty pleas and makes it impossible to distinguish between the voluntary and involuntary plea, between those who might have a defence and those who do not, and between the innocent and the guilty. Since advisers assume guilt, they are over-ready to interpret ambiguous information against the client, equate compliance with guilt, and fail to notice their own role in the production of guilty pleas.'<sup>140</sup>

Instead, as Mulcahy explained<sup>141</sup> (echoing Baldwin's earlier account of 'lawyers' justice' at pre-trial hearings<sup>142</sup>), lawyers justify their plea negotiations and advice on the basis that they are achieving 'just' outcomes for all concerned.<sup>143</sup> They fail to see any compromise of their duty to their clients,<sup>144</sup> despite the behaviour being incompatible with adversarial principles.<sup>145</sup> Even if lawyers are sincerely seeking 'just' outcomes, they are poorly placed to assess what is 'just' in any given case. And even if lawyers were so equipped, the question

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<sup>139</sup> *ibid* at p.257.

<sup>140</sup> *Ibid* at p.141.

<sup>141</sup> Mulcahy (note 133 *supra*).

<sup>142</sup> Baldwin, J. *Pre-trial Justice*. (1985) Oxford: Blackwell.

<sup>143</sup> Mulcahy (note 133 *supra*) at p.426.

<sup>144</sup> *Ibid* at p.418.

<sup>145</sup> *Ibid* at p.421.

remains how such 'lawyers' justice' fits within the adversarial process and how one could justify lawyers effectively displacing the roles of the defendant and the court.<sup>146</sup>

The problem of 'lawyers' justice' is exacerbated because the defence lawyer, whose advice has such an impact on the defendant's choices, is likely to base his understanding of the case on a limited amount of material, primarily the papers disclosed by the prosecution. *Standing Accused* confirmed that the prosecution file<sup>147</sup> significantly influenced case outcomes because the lawyer does not hear the defendant's account<sup>148</sup> and the lawyers do not investigate or prepare any separate competing defence case.<sup>149</sup> Previous research by McConville, Sanders and Leng<sup>150</sup> had emphasised that the prosecution file cannot be seen as a facsimile of reality but is instead a package of documentary and other physical evidence, expert opinion and witness testimony. This itself results from a series of decisions by witnesses, police officers and prosecution lawyers in deciding what lines of enquiry should be pursued, what information revealed, what material recorded and the way in which it should be recorded. At each stage of this 'case construction', the prosecution evidence is shaped by the understandings and prejudices of the actors, which will often include their belief in the defendant's guilt.<sup>151</sup> This process of case construction is, therefore, likely heavily to influence defendants' plea decisions, through the vehicle of the defence lawyer and his or her reliance on the prosecution file.

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<sup>146</sup> Baldwin (note 142 supra) at p.88 makes it clear that the system of 'lawyers' justice' is a non-adversarial process.

<sup>147</sup> McConville et al (note 129 supra) at p.237 .

<sup>148</sup> Ibid at p.137.

<sup>149</sup> Ibid at p.237.

<sup>150</sup> McConville, M. Sanders, A. & Leng, R. *The Case for the Prosecution*. (1991) London: Routledge.

<sup>151</sup> See Cicourel, A. *The Social Organisation of Juvenile Justice*. (1968) New York: Wiley at p.53 (quoted by McConville et al (ibid) at p11): "At each stage the various participants select from the available 'facts' or create interpretations about motives, intent and the like, those propositions which are to be accorded a factual status in their particular explanation, whether this be from the standpoint of the police, witnesses, lawyers, members of the jury, or judge."

There has been significant resistance to the picture of the defence profession presented by these studies. The early Baldwin & McConville study<sup>152</sup> triggered a backlash from the profession<sup>153</sup> largely because they were so contrary to the accepted ideas about professionalism and the lawyer's role in the adversarial process. They also went contrary to the prevailing view that increased access to legal advice at all stages would help to reinforce defendant rights. These empirically founded accounts of the defendant's role contrast vividly with Feeley's historical analysis of plea bargaining<sup>154</sup> as representing a more balanced relationship between prosecution and defence, with pressure from defence lawyers being the result, he argues, of lawyers' professionalism.<sup>155</sup>

Although the account given in *Standing Accused* was influential (particularly in relation to custodial legal advice),<sup>156</sup> it was not universally accepted. In 1997, Travers published a further ethnographic study of defence lawyers<sup>157</sup> purporting to present a very different view of defence practice. Travers argued that the defence lawyers he had observed were acting skilfully, in accordance with their professional obligations and with the interests of their clients firmly at heart. Given that Travers' research was conducted in a single firm and

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<sup>152</sup> Baldwin and McConville (1977), note 128 supra.

<sup>153</sup> Writing in 2000, Baldwin described how he was subjected to a 'ferocious public attack' from the legal profession with 'intense pressure' from the Bar, the Law Society and the Home Office not to publish the book. (Baldwin, J. 'Research on the Criminal Courts.' In King, R and Wincup, E. (eds.) *Doing Research on Crime and Justice*. (2000) Oxford: OUP at pp.237-258). The extent of the attack is reflected by Sir Thomas Bingham's description of Baldwin and McConville as being 'the legal equivalent of Salman Rushdie' (Bingham, T. 'Twenty-five years of the Institute of Judicial Administration'. (1993) *Civil Justice Quarterly* 12:322-5 quoted in Baldwin (2000) at p251.)

<sup>154</sup> Feeley (note 12 supra), discussed at p.21 supra.

<sup>155</sup> Feeley (ibid) p.351.

<sup>156</sup> *Standing Accused* was relied upon by the RCCJ in its recommendation for compulsory training and accreditation of police station advisers. This recommendation was adopted and led to a national quality assessment programme for defence lawyers in England and Wales (the Criminal Litigation Accreditation Scheme Police Station Qualification).

<sup>157</sup> Travers, M. *The Reality of Law: Work and Talk in a Firm of Criminal Lawyers* (1997) Aldershot: Ashgate.



the behaviour described to some extent reflects the 'political' firm typology described in *Standing Accused*, it is possible that what he represented as a different account was in fact just a (more) partial one.<sup>158</sup> However, Travers sought to explain the apparent differences between the two accounts in methodological terms and argued that his account was more objective and persuasive<sup>159</sup> because he had articulated the defence lawyers' point of view.<sup>160</sup> In a similar vein, Tague<sup>161</sup> also sought to 'give voice' to lawyers' accounts when he relied on an analysis of the funding regime together with interviews with barristers to cast doubt on the earlier criticisms of defence lawyers. Tague argued that funding structures and the need to sustain their reputation with instructing solicitors incentivises barristers to encourage their clients to plead not guilty. Other writers have sought to suggest that *Standing Accused* may be out of date: writing in 2006, Bridges, one of the authors of *Standing Accused*, suggested that there had been a 'significant shift' in defence practice over the previous decade which had moved defence lawyers from the 'guilty plea culture' into 'one based more on adversarial principles.'<sup>162</sup>

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<sup>158</sup> Any observational account of defence lawyers will inevitably be partial but Travers research was conducted in a single firm over a period of four months, in contrast to the *Standing Accused* research which included 48 firms over a total of 198 researcher weeks. (McConville et al in Bridges, L., Hodgson, J., McConville, M. & Pavlovic, A. 'Can critical research influence policy?' (1997) 3(37) *British Journal of Criminology*, pp. 378–382 at p379.)

<sup>159</sup> Travers, M. 'Preaching to the converted? Improving the persuasiveness of criminal justice research.' (1997) 3(37) *British Journal of Criminology* pp. 359–377 at p.374.

<sup>160</sup> These methodological issues, and the response of McConville et al to Travers' claims, are discussed further in chapter 2 *supra* (at p.68 below)

<sup>161</sup> Tague, P. (2007) 'Barristers' selfish incentives in counselling defendants over choice of plea.' Jan. *Crim. L. Rev.* 3-23.

<sup>162</sup> Bridges (note 124 *supra*) at p.100. It could be argued that this 'significant shift' was partly a consequence of the professional response to *Standing Accused* and subsequent research but, as discussed below, Newman's research suggests that Bridges' view of how defence practice had changed may have been unduly optimistic.

These challenges to the *Standing Accused* account of defence lawyers were undermined by recent research by Daniel Newman<sup>163</sup> which set out to test the competing accounts. This research both confirmed the continuing relevance of Standing Accused and demonstrated why it is dangerous to accept 'at face value practitioners' own rationalizations for their (mal)practices'.<sup>164</sup> Newman specifically set out to challenge the Standing Accused account<sup>165</sup> and so he deliberately targeted 'radical' firms with the expectation that lawyers in these firms would provide better standards of representation (being, in his phraseology, 'client-centred' lawyers) than indicated by the earlier research.<sup>166</sup> Despite Newman's efforts to 'give lawyers a voice',<sup>167</sup> as proposed by Travers, his findings strongly support the *Standing Accused* accounts of defence practice.

Contrary to his expectations, Newman found a fairly consistent picture whereby the lawyers' rhetoric was client-centred but their behaviour as observed was the opposite.<sup>168</sup> Defence lawyers' gave accounts of their commitment to a social agenda,<sup>169</sup> their role in giving their clients time and protecting them from external pressures<sup>170</sup> and in educating and enabling their clients to make their own choices.<sup>171</sup> In reality, however, the lawyers he observed still denigrated their clients,<sup>172</sup> were lawyer-centred,<sup>173</sup> saw guilty pleas as the

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<sup>163</sup> Newman, D. *Legal Aid Lawyers and the Quest for Justice*. (2013) Hart: Oregon.

<sup>164</sup> McConville et al having argued, in 1997, that this was a risk of 'Travers' recipe for research' (note 158 supra, at p.379).

<sup>165</sup> Ibid at pp.109-112 and p.39.

<sup>166</sup> Ibid at p.144.

<sup>167</sup> Ibid at p.38.

<sup>168</sup> Ibid at p.144.

<sup>169</sup> Ibid at p.42.

<sup>170</sup> Ibid in chapter 4.

<sup>171</sup> Ibid at pp.108-110.

<sup>172</sup> Ibid at p.83.

<sup>173</sup> Ibid at p.103.

‘standard outcome’ for their clients<sup>174</sup> and put pressure on their clients to plead guilty.<sup>175</sup>

In the light of these findings, Newman suggests that Bridges’ description of a ‘significant shift’ in defence practice may be a ‘rather optimistic statement’.<sup>176</sup>

Newman’s research is the most recent detailed empirical study of the work of defence solicitors. Taken as a whole, the empirical evidence raises serious concerns about the ability and willingness of defence lawyers to represent their clients in an adversarial manner at the plea and pre-plea stages of the criminal process. As a consequence, there is a clear risk that defendants will be strongly advised, and quite possibly pressurised, to plead guilty despite a good chance of acquittal or clear protestations of innocence. When taken together with the other pressures to plead guilty identified in the research, the ability of defendants to exercise a ‘free choice’ on plea is revealed to be significantly compromised by the structure, culture and operations of the criminal justice system.

### **The risks to defendants and justifications for guilty plea convictions**

The developments outlined in this chapter fundamentally undermined the Court of Appeal’s efforts in *Turner* to preserve the legitimacy of the guilty plea system through reliance on the guilty plea as confession and evidence of guilt. They have also revealed a clear risk that innocent defendants may plead guilty as a consequence of systemic pressures. This risk was identified by empirical research as far back as the mid-1970s by Bottoms and McClean<sup>177</sup> and Baldwin and McConville.<sup>178</sup> 18% of defendants in Bottoms and McClean’s study who pleaded guilty were, in the authors’ assessment, ‘possibly innocent’

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<sup>174</sup> Ibid at p.113.

<sup>175</sup> Ibid at p.114.

<sup>176</sup> Ibid at p.165.

<sup>177</sup> Note 127 supra.

<sup>178</sup> Note 128 supra.

of at least one charge.<sup>179</sup> Baldwin and McConville found strong (and unsolicited) protestations of innocence to some or all charges from 37% of the sample.<sup>180</sup> Reviewing the defendants' accounts of their plea decisions, Baldwin and McConville's own assessment was that at least three quarters of the guilty plea decisions had been, in effect, made by counsel.<sup>181</sup> Following expert assessment of the files, it was shown that several defendants had pleaded guilty whilst professing innocence in cases where the assessor considered there was a good chance of acquittal<sup>182</sup> and in a few where the assessor felt the evidence did not even support a prosecution.<sup>183</sup> More recently, psychological research in the USA revealed that more than half of the innocent participants in the experiment were willing to falsely admit guilt in return for a benefit.<sup>184</sup>

The risk to the innocent presented by the guilty plea system was acknowledged by both the RCCJ<sup>185</sup> and in the Auld Review.<sup>186</sup> The RCCJ report acknowledged the unavoidable risk that sentencing discounts might cause innocent defendants to plead guilty<sup>187</sup> but the report went on to conclude that the 'benefits to the system of encouraging those who are, in fact, guilty to plead guilty' outweighed this risk. Lord Justice Auld similarly saw that the risk

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<sup>179</sup> Op cit at p.120.

<sup>180</sup> Op cit, at p.62.

<sup>181</sup> Ibid at p.84.

<sup>182</sup> Ibid at p.63.

<sup>183</sup> Ibid at p.75.

<sup>184</sup> Dervan, L. and Edkins, V, 'The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem' (2013) 103 *J. Crim. L. & Criminology*. 1 at p.34. The study revealed that more than half of the innocent participants were willing to admit guilt in return for a benefit (in comparison to 9 out of 10 guilty participants who did the same). It was unclear to what extent the benefit offered made a difference to acceptance rates. The innocent participants who were offered a deal with a greater differential between guilty plea and 'trial' were 10% more likely to accept the deal but this was not statistically significant, given the sample (p.39).

<sup>185</sup> Note 8 supra.

<sup>186</sup> Note 97 supra.

<sup>187</sup> Op cit at paragraph 42-45.

existed but was willing to accept the risk if, 'in general', sentencing incentives served 'a proper sentencing purpose and were just and efficient.'<sup>188</sup>

This focus on the supposed efficiency benefits of plea incentives is the chief mechanism by which the courts and policy makers have sought to justify their continuing reliance on guilty pleas, in the face of the challenges to the confession model of the guilty plea represented by plea bargaining.<sup>189</sup> This approach accepts the risk of wrongful guilty pleas from innocent defendants as 'collateral damage',<sup>190</sup> which is outweighed by the benefits of plea incentives.

The approach has been the subject of considerable academic criticism. The 'balancing' of efficiency against a right as fundamental as the right to protection from wrongful conviction can itself be seen as problematic:

'the right of innocent persons not to be convicted ought to be recognized as a strong right with a high value, not something to be traded off simply for supposed efficiency gains.'<sup>191</sup>

Auld, however, used 'balance' as his starting point in his report and argued that, whilst the right to a fair trial is 'as near absolute as any notion can be', issues of balance and proportionality come into play when the right is applied in different circumstances.<sup>192</sup> As discussed at p.40 above, the 'balancing' of interests is also at the heart of the several-

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<sup>188</sup> Op cit at paragraph 105 of chapter 10.

<sup>189</sup> McConville and Marsh (note 4 supra).

<sup>190</sup> Ibid at p.118.

<sup>191</sup> Ashworth, A. and Redmayne, M. *The Criminal Process*. (2010) Oxford: OUP at p319. A similar argument is made by McConville and Marsh (ibid) who assert at p.222 that it is unacceptable to apply a balancing or cost-benefit analysis in dealing with this issue.

<sup>192</sup> Note 97 supra, at para. 13 of chapter 1.

limbed definition of 'dealing with cases justly' in the Criminal Procedure Rules.<sup>193</sup> This requires all parties to have regard to balance a number of interests, including efficiency, the needs of other cases and the interests of jurors as well as 'acquitting the innocent and convicting the guilty'.<sup>194</sup>

If such a balancing process is to be conducted, it is crucial to ensure that each interest is accorded its fair weight but both the Auld Review<sup>195</sup> and the RCCJ report<sup>196</sup> notably fail to do this. Both reports tilt the scales towards 'the benefits to the system' by downplaying the risk of innocent defendants pleading guilty. They achieve this by apparently ignoring previous literature on plea bargaining,<sup>197</sup> by choosing to overlook the potential conflict with the rights in Article 6 of the European Convention on Human Rights,<sup>198</sup> by relying on unsupported assertions about the lack of impact on innocent defendants<sup>199</sup> and by conveniently dismissing evidence which contradicts those assertions.<sup>200</sup>

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<sup>193</sup> This is discussed further by McConville and Marsh (note 4 supra) at p.170.

<sup>194</sup> Criminal Procedure Rules 1.1(2).

<sup>195</sup> Op cit.

<sup>196</sup> Op cit.

<sup>197</sup> Darbyshire (note 10 supra) at p.906, referring to the RCCJ.

<sup>198</sup> Ashworth and Redmayne (note 191 supra) at p311, noting that Lord Justice Auld considered human rights issues but decided they were not affected by his recommendations.

<sup>199</sup> For example in the RCCJ's contradictory assertion (at p.111, op cit) that 'clearer articulation' of the sentence discount, despite being specifically designed to produce more guilty pleas would not increase the pressure on innocent defendants to plead guilty. This optimistic view is particularly surprising given the RCCJ's acknowledgment of the risk of false confessions. The report states that the belief that individuals will not make false statements against themselves 'can no longer be sustained (p.64) and that research has demonstrated that people may confess to crimes they have not committed 'even when proper safeguards apply' (p.64). Discussing police officers, the report states that the belief that confessions, if obtained, can be relied upon as truthful 'may tempt police officers' to apply improper pressure to suspects and that 'even proper pressure may lead to a false confession' (p.64).

<sup>200</sup> The RCCJ was willing to dismiss the findings of its own Crown Court Study (Zander, M. and Henderson, P Crown Court Study. RCCJ Research Study No.19, (1993) London: HMSO) in which barristers were asked whether they were concerned that their client may have pleaded guilty for a

The RCCJ, the Auld Review and the *Goodyear* judgment also seek to stress the ‘waste’ being created by defendants’ plea decisions by focussing on ‘cracked trials’<sup>201</sup> in order to justify increasing the pressures on defendants to enter early guilty pleas. In a detailed analysis of the ‘problem’ of cracked trials, however, McConville and Marsh<sup>202</sup> dismantle this purported connection between defendants’ plea choices and waste. They explain that a large proportion of cracked trials result from prosecution decisions,<sup>203</sup> that of those that do result from late guilty pleas, only a small percentage are the result of the defendant’s change of mind<sup>204</sup> and that regional variations suggest that cracked trial rates are related to ‘local legal culture’ rather than defendant’s decisions.<sup>205</sup> McConville and Marsh rely on data from the Crown Court Study<sup>206</sup> and judicial and court statistics to argue that, in any event, cracked trials are unlikely to cause significant waste<sup>207</sup> and that the guilty plea system

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discount despite being innocent. Although the answers suggested that as many as 1,400 defendants a year may have been doing so, the RCCJ report (at p.110) rejected this finding on the basis that the barristers questioned probably ‘misunderstood the question’ and that there was little evidence that the defendants were in fact innocent ‘of all the charges against them’. For further discussion of this study, see Zander, M. (1993) ‘The “innocent” (?) who plead guilty. (1993) 143 *NLJ* 85, McConville, M. and Bridges, L. ‘Pleading guilty whilst maintaining innocence.’ (1993) 143 *NLJ* 160 and Zander, M. ‘The Innocent who plead guilty.’ (1993) 143 *NLJ* 192.

<sup>201</sup>Baldwin (2000) (note 153 supra) comments at p.242 that ‘[t]he emphasis in a good deal of the subsequent writing on this subject has, however, shifted from a preoccupation with defendants’ rights to a concern about the administrative problems created by ‘cracked trials’, especially the way that court resources are wasted when defendants plead guilty after their cases have been listed for trial.’

<sup>202</sup> Note 4 supra at pp.98-110.

<sup>203</sup> Ibid p.99.

<sup>204</sup> Ibid at p101, discussing evidence from Zander and Henderson (1993) (note 185 supra). This data contradicts RCCJ’s assertion at p.112 of its report that ‘the most common reason’ for late guilty pleas is ‘a reluctance to face the facts until they are at the door of the court.’

<sup>205</sup> Ibid p.100.

<sup>206</sup> Note 200 supra.

<sup>207</sup> McConville and Marsh op cit, pp. 104-105.

actually increases system costs by encouraging the charging of weak cases and poor prosecution casework decisions.<sup>208</sup>

The risk that innocent defendants will plead guilty as a consequence of sentencing discounts was also downplayed by Lord Justice Auld by using language distinguishing between ‘the innocent defendant’ and ‘the guilty defendant’.<sup>209</sup> Auld relied upon this distinction to relieve the criminal process from some of its obligations to defendants so that the burden and standard of proof and the right to silence (all elements of the presumption of innocence) exist only for the benefit of ‘the innocent defendant’ and not to enable guilty defendants to ‘frustrate’ the trial process.<sup>210</sup> Similarly, ‘innocent defendants’ can apparently be protected from pressure to plead guilty through their lawyers ‘firmly’<sup>211</sup> advising them that they ‘must not plead guilty unless [they are] guilty’<sup>212</sup> whereas ‘the guilty’ respond to sentence discounts with ‘honest’ guilty pleas.<sup>213</sup> Although Auld concluded

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<sup>208</sup> Ibid pp. 106-110.

<sup>209</sup> e.g. at para. 105 of chapter 11 of the Auld Report, op cit. Sanders et al (note 98 supra) at p.492 describe this as the ‘self-serving assumption that one can increase the pressure on the guilty to plead guilty without increasing the pressure on the innocent to do the same.’

<sup>210</sup> Ibid, para. 5 of chapter 10.

<sup>211</sup> Ibid, para. 99 of chapter 11.

<sup>212</sup> *Goodyear* (note 105 supra) para. 65.

<sup>213</sup> Auld (note 97 supra) para. 103 of chapter 11. Auld disregards the possibility that a guilty plea from an innocent person might be a rational decision, as a consequence of the plea incentives. The report distinguishes ‘honest’ guilty pleas from ‘dishonest’ pleas of not guilty. Bridges (note 124 supra) at p.89 describes this as a ‘sleight of language’ on Auld LJ’s part. There are striking echoes of Bibas’s observation, in the U.S. context, that ‘the game [of the criminal process] is a static one, in which defendants know their guilt and the likely sentences after trial versus plea. They are rational and well informed, able to weigh probabilities and uncertainties. Trials set normative baselines which plea bargains simply sweeten. Innocent defendants know their innocence and will not be tempted to plead, and the categories of guilt or innocence are black and white.’ (Bibas, S. ‘Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection.’ (2011) 99 *California L.R.* 1117 at p.1134.)



that there was an unavoidable risk that innocent defendants might plead guilty, he implied that this is 'no more than a miscalculation or mistake based on poor advice.'<sup>214</sup>

By justifying pre-conviction treatment of defendants on the basis of their supposed factual guilt, these distinctions (in common with the obligation on all parties under the Criminal Procedure Rules to work to convict 'the guilty' and acquit 'the innocent'<sup>215</sup>) blur dangerously the division between legal and factual guilt which lies at the heart of the criminal process.<sup>216</sup> This creates a dangerous situation where defendants' rights may be determined by some nebulous assessment of their factual guilt, something that strikes at the heart of the presumption of innocence.

Criminal judges have further sought to tilt the scales in favour of efficiency over the protection of defendants by reliance on empty 'safeguards' which, it is argued, protect 'the innocent' from the risk of wrongful conviction by guilty pleas. In particular, and despite the empirical evidence about problematic attitudes and behaviours from some defence lawyers discussed above, the appeal courts and the criminal procedure rules assert the defence lawyer as the protector of the defendant. It is, however, no accident that defence lawyers fail to offer the support needed and, as McConville and Marsh have explained, in fact there has been a process of deliberate disempowerment of the defence by criminal judges and through developments in criminal procedure. Defence lawyers have been co-opted into what the authors characterise as a 'unitary' system of justice, where defendants, defence lawyers and the other parties are required to work together in a 'shameless production-line process' of criminal justice.<sup>217</sup>

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<sup>214</sup> Bridges (ibid) at p.89.

<sup>215</sup> Note 118 supra.

<sup>216</sup> McConville and Marsh (note 4 supra) at p.92.

<sup>217</sup> Ibid at p.254.

Although this discussion has focused on the risks presented by the guilty plea system to the factually innocent, it is also important to consider the ways in which the guilty plea system could be damaging even to defendants who are factually guilty. Meyerson<sup>218</sup> presents a compelling normative account of the defendant's 'right to be heard' in which she draws together existing social psychology literature, in particular Tyler's work on procedural justice.<sup>219</sup> She argues that the value of this right extends beyond the contribution that the defendant's account can make to accuracy of outcome. The right has intrinsic value through its contribution to defendants' self-respect which, she argues, is central to human well-being.

Although the trial is presented as the principal forum for the defendant's voice to be heard, Meyerson's arguments can be applied equally to the defendant's voice in the guilty plea process. Meyerson argues that defendants do not only value being heard because it might change the outcome of the criminal process but also because,

'the opportunity for "voice" or the opportunity to tell one's own side of the story, enhances the quality of a person's interpersonal interaction with authorities, and is consequently valued for its own sake'.<sup>220</sup>

In this way, the experience of being heard, and the defendant's consequent perception of procedural fairness, can 'cushion the impact of negative outcomes' (i.e. the conviction).<sup>221</sup>

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<sup>218</sup> Meyerson, D. 'The Moral Justification for the Right to Make Full Answer and Defence.' (2015) 35(2) *Oxford J Legal Studies* 237-265. This subject is also discussed by Ed Cape in Cape, E. 'The rise (and fall?) of a criminal defence profession' (2004) *Crim. L.R.* 72.

<sup>219</sup> See Tyler, TR. and Blader, SL, *Cooperation in Groups: Procedural Justice, Social Identity, and Behavioral Engagement* (2000) Psychology Press.

<sup>220</sup> Meyerson (note 218 supra) at p.256, citing Tyler, TR. and Blader, SL. 'The Group Engagement Model' (2003) 7 *Personality and Social Psychology Review* 349, p.351.

<sup>221</sup> Meyerson, *ibid* at note 76, citing initial research by Thibaut, J. and Walker, L. *Procedural Justice* (1975) Hillsdale N.J: Erlbaum and subsequent research by TR Tyler and others.

When defendants are denied a voice, Meyerson asserts, they are sent 'a powerful message of inferiority and social exclusion' which is 'experienced as an expression of contempt'.<sup>222</sup> Consequently she proposes that 'institutional arrangements that foster self-respect are a constitutive element of a just society' and, therefore, the right to be heard should be 'an intrinsic element of a just trial'.<sup>223</sup>

These arguments suggest that it is important to evaluate the guilty plea process not just in terms of the potential for the conviction of those who are factually innocent but also in terms of the extent to which it may deny defendants a voice in the process. It must be part of the right to be heard that a defendant should be able to choose not to be heard (i.e. choose to plead guilty rather than give an account at trial) but Meyerson's arguments suggest that the defendant's perception of the fairness of the guilty plea process and the extent to which he is able to express what he means by that plea are important matters of justice.

### The Aims of this Thesis

This account of the literature demonstrates the ways in which the system of guilty pleas has long departed from the ideal of the adversarial trial and the traditional models of the guilty plea as confession. Court of Appeal judges have been able to distract attention from the inadequacy of the confession model through rhetoric around freedom and efficiency and by distinguishing the guilty from the innocent. In this way, the courts have avoided the need to find an alternative model of the guilty plea. The literature demonstrates that the courts' efforts to justify guilty plea convictions are self-serving and inadequate. This leaves open the question of whether alternative justifications can be identified. The search for justifications for convictions are always important; if society is justly to impose punishment

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<sup>222</sup> Ibid at p.264.

<sup>223</sup> Ibid at p.265.

on those convicted of criminal offences then it must be able to provide a justification for its decision to convict.<sup>224</sup> But justifications are particularly important when, as in this thesis, one considers the issue of appeal and wrongful conviction. The appeal courts cannot identify a wrongful (or, in the language of the Criminal Appeal Act, 'unsafe') conviction by guilty plea unless they can first identify what is 'safe' about conviction by guilty plea.<sup>225</sup>

In this thesis I consider the possible accounts of the guilty plea and their sufficiency as justifications for a guilty plea system incorporating deliberate pressures and incentives on defendants to plead guilty. I will discuss three possible accounts of the guilty plea; as 'evidence of guilt'; as a 'negotiated settlement' and as a 'defendant-assessed verdict'. Each of these accounts provides different justifications for guilty plea convictions.

In order to examine these alternative accounts and the place they might occupy in the criminal justice system, after an account (in chapter 2) of the methodology adopted in the research, I examine three crucial elements of the guilty plea system: appeal against conviction (chapter 3), the plea decision itself (chapter 4) and the treatment of guilty plea convictions during post-appellate review by the Criminal Cases Review Commission<sup>226</sup> (chapter 5). The research questions associated with each element are considered below.

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<sup>224</sup> Greer (note 34 *supra*) argues at p.61 that the focus of any criminal justice system is 'the search for adequate justifications to support decisions that given person should be deemed guilty or not guilty of specific offences.'

<sup>225</sup> Greer (*ibid*) argues at p.61 that a miscarriage of justice occurs when the justifications offered for a finding of guilt are seriously defective.

<sup>226</sup> The Criminal Cases Review Commission (CCRC) was created following recommendations by RCCJ and in response to public concern surrounding the notorious miscarriages of justice of the 1970s and 1980s. The CCRC is empowered to review and investigate criminal convictions and, subject to certain conditions, can refer the case for a new appeal hearing. The CCRC's role applies equally to convictions at trial and by way of guilty plea and, as a consequence, the CCRC has a key role in assessing the safety of guilty plea convictions. This is explained further at p.43 and chapter 5 below.

Although it may be counter-intuitive to discuss appeal of guilty plea convictions *before* the plea process, this approach has been chosen because the appellate process represents the stage at which the legitimacy of guilty plea convictions are challenged and justifications are sought. Considering this element of the guilty plea system, therefore, gets to the heart of the meaning of, and justifications for, guilty plea convictions. Having considered those issues, I then turn to the reality of practice and assess the extent to which the justifications raised at the appellate stage are reflected in defendants' ordinary experiences in the criminal courts.

#### **Appeal against guilty plea convictions (research question 1)**

*How does the criminal justice system treat convictions reached through guilty pleas differently at the appeal stage from convictions through contested trials and what does this reveal about the meaning and significance of the guilty plea?*

Given the acknowledged risk that innocent defendants might plead guilty as a result of sentencing incentives and the literature revealing other pressures on defendants, it might be reasonable to expect the criminal justice system to provide a mechanism for remedying such wrongful convictions. It is striking that, despite having acknowledged the risk of wrongful conviction by guilty plea, the RCCJ, and all the reports and reforms that followed, failed to discuss how the appeal system might approach appellants who claim to be victims of the system's efficiency trade-off. In the RCCJ's passages dealing with appeals and miscarriages of justice, no attention is paid to the plight of those innocent defendants who will, inevitably, plead guilty as a consequence of the discount and other pressures to plead guilty. This is particularly striking given that the RCCJ was set up in response to public and political concern following a series of notorious miscarriages of justice in the 1970s and

1980s, and its primary recommendations purported to be aimed at avoiding or remedying miscarriages of justice.

There has also been little academic attention to appeal provision for guilty plea convictions. McConville and Marsh<sup>227</sup> consider the mechanisms used by the Court of Appeal to seek to sustain the legitimacy of guilty pleas but do not deal with the circumstances when the Court of Appeal is willing to find that a guilty plea conviction is unsafe. Additionally, there is little literature on the lack of provision for appeal against guilty plea in the magistrates' court. In chapter 3 I assess the availability of appeal remedies, including the limitations on appeal in the magistrates' and youth court, the Court of Appeal's approach to guilty pleas and the practical difficulties that defendants face on appeal.

The purpose of this part of the research is not simply to provide an account of the law on guilty plea appeals but to consider what the law and practice of the courts reveals about the *meaning* of the guilty plea in the current system. McConville and Marsh's account<sup>228</sup> suggests that the Court of Appeal uses 'techniques of legitimacy' to disguise the reality of coerced guilty pleas. Moving beyond that, however, I will consider what could give genuine legitimacy to guilty plea convictions in an adversarial system. This requires discussion of the various possible meanings of the guilty plea and on what basis they could be said safely to underpin a guilty plea conviction.

I also consider the reasons why the right of appeal is limited in respect of guilty plea convictions. McConville and Marsh reject the idea that the courts are behaving in this way for reasons associated with caseload and efficiency. They argue that this is an excuse presented by judges and policy makers and blame the judges' support for coerced guilty

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<sup>227</sup> Note 4 *supra*.

<sup>228</sup> *Ibid*.

pleas on a deep-seated historical distrust of jury trial on the part of judges. I have taken a different approach in this thesis, based on Nobles and Schiff's discussion of 'tragic choices' in the criminal justice system<sup>229</sup> and taking as a starting point the assumption that (regardless of the true costs of the guilty plea system) judges *believe* that there are efficiency justifications for the guilty plea system. This approach leads to a different interpretation of the Court of Appeal's role in the guilty plea process.

As originally presented by Calabresi and Bobbitt,<sup>230</sup> tragic choices theory suggests that, in the allocation of scarce resources, society is required to make tragic choices which compromise society's fundamental values. These choices are painful to society and so efforts are made to 'disguise' them. Applying this analysis to criminal justice, Nobles and Schiff assert that, at the pre-trial and trial stages of the criminal process, the fundamental but conflicting values of truth<sup>231</sup> and fairness<sup>232</sup> are balanced against each other. Ultimately,

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<sup>229</sup> See Nobles, R. and Schiff, D. 'The Never Ending Story: Disguising Tragic Choices in Criminal Justice.' (1997) 60(2) *MLR*. 297 and Nobles, R. and Schiff, D. *Understanding Miscarriages of Justice*. (2000) OUP at p229-259. For tragic choices analysis more generally, see Calabresi, G. and Bobbitt, P. *Tragic Choices*. (1978) New York: Norton.

<sup>230</sup> Ibid.

<sup>231</sup> Nobles and Schiff use the word 'truth' here but in this thesis I have used the word 'accuracy' in its place to denote the aim that criminal convictions should, as closely as possible, reflect the defendant's factual guilt or innocence. The concept of 'truth' and establishing its presence or absence (together with the associated concepts of factual guilt and innocence) is problematic in criminal proceedings (as Nobles and Schiff recognize and discuss at p.19 of *Understanding Miscarriages of Justice*). Saltzburg observes that 'an estimate of the results attained through evaluations of the facts in light of governing substantive principles will be neither true nor false' (Saltzburg, S. 'Lawyers, Clients and the Adversary System' (1986) 37 *Mercer L. Rev.* 647 at p.654). As Grano points out, however, this claim 'fails to demonstrate that truth discovery is not, or should not be, a dominant goal of the system' (Grano, J. *Confessions Truth and the Law*. (1993) Ann Arbor: UoMP.) For further discussion of the role of truth in the criminal process, see Lippke (note 100, *supra*) at p.220, Duff, A. Farmer, L. Marshall, S and Tadros, V. 'Introduction: Towards a Normative Theory of the Criminal Trial' and Jung, H. 'Nothing But the Truth' both in Duff, A. Farmer, L. Marshall, S. and Tadros, V. (eds) *Trial on Trial Volume 1*. (2004) Hart Publishing: Oxford.

<sup>232</sup> Nobles and Schiff explain fairness in terms of due process values in the criminal justice system (ibid at pp.25-32).

however, both are sacrificed in the interests of efficiency.<sup>233</sup> Thus, the guilty plea system can be seen to represent the deliberate prioritisation of efficiency savings over the fundamental values of truth/accuracy and fairness.<sup>234</sup>

The necessary role of the Court of Appeal, within this analysis, is to disguise the earlier tragic choices, thus protecting the public and the criminal justice system from the painful realisation that these values have been deliberately compromised.<sup>235</sup> The Court of Appeal can, therefore, be expected to provide an account of guilty plea convictions which presents them as both accurate and fair, with only exceptional cases of wrongful conviction arising from failures within the system. In this chapter I consider the extent to which this account of the appeal courts' role in the guilty plea process might offer an explanation for the limitations on appeal and for the criteria by which guilty plea appeals are adjudicated.

### **The Plea Decision (research question 2)**

*To the extent that the differential treatment of guilty plea convictions at the appellate stage is based on assumptions about:*

- *defendants' reasons for pleading guilty,*
- *the meaning of the guilty plea or,*
- *the fairness of the process that produces the plea,*

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<sup>233</sup> Damaska acknowledges the necessary trade-off between efficiency and defendants' rights in criminal justice, saying '[a]ny design of criminal procedure, even an extreme inquisitorial one, must establish a balance between these two' (Damaska, M. 'Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study.' (1973) Faculty Scholarship Series. Paper 1591. at p. 576.

<sup>234</sup> Ashworth and Redmayne make a similar point when they assert that the various forms of plea bargains sustain 'a number of perverse incentives that are liable to distort both the pursuit of truth and the protection of rights'. (Ashworth, A. and Redmayne, M. *The Criminal Process*. (2010) 4th ed. OUP at p.317).

<sup>235</sup> Nobles and Schiff (2000) (ibid) at p.4.



*are these assumptions supported by empirical evidence regarding the plea process and plea decision?*

Chapter 4 examines the plea decision itself. An examination of the meaning of the guilty plea necessarily requires an understanding of what happens in practice when defendants make plea decisions. Through an observational study of defendants being advised on plea and in court at plea hearings, together with the examination of files created by defence lawyers and the CCRC, I examine to what extent the practices of the criminal justice system can be said to promote guilty pleas which reflect any of the theoretical accounts of the guilty plea presented in this thesis. If the routine practices of the criminal justice system encourage defendants to enter guilty pleas which fail to satisfy any of the possible accounts, this will undermine the legitimacy of the guilty plea system.

**The role of the Criminal Cases Review Commission (CCRC) in guilty plea cases (research question 3)**

*What does the CCRC's treatment of applications from those convicted by guilty plea reveal about the meaning and significance of the guilty plea and about the organisation's ability to provide a safety net for defendants who are wrongfully convicted by guilty plea and who are unable to find a remedy in the appeal process?*

It is clear from the literature discussed in this chapter that it is likely that some innocent defendants will be convicted by guilty plea, whether as a consequence of systemic pressures or as a result of errors or misconduct by other actors in the criminal process. It is also clear from the discussion in this chapter and from the account of the law on appeals in chapter 3 that the appeal courts are unlikely to detect and remedy all such wrongful convictions. In the circumstances, the CCRC's role in reviewing alleged miscarriages of justice becomes very significant.

The CCRC was created following recommendations by RCCJ and in response to public concern surrounding the notorious miscarriages of justice of the 1970s and 1980s. The CCRC is empowered to review and investigate criminal convictions<sup>236</sup> and, subject to certain conditions, can refer the case for a new appeal hearing. The CCRC's role applies equally to convictions at trial and by way of guilty plea<sup>237</sup> but of particular interest is its role in guilty plea convictions in the magistrates' court. As I discuss further in chapter 3, there is no right of appeal against summary guilty plea convictions but the Criminal Appeal Act 1995 specifically empowered the CCRC to refer such convictions to the Crown Court<sup>238</sup> for appeal by way of rehearing. This means that the CCRC effectively operates as the principal gateway to appeal for the 430,000 defendants who plead guilty in the magistrates' courts each year.<sup>239</sup>

The CCRC itself has been at the heart of an intense debate, initiated largely by the Innocence Projects, as to whether the organisation prioritises cases involving procedural irregularities ('due process' cases) over the needs of 'the innocent'.<sup>240</sup> However, little academic attention has been paid to its role in guilty plea cases<sup>241</sup> and there has been no

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<sup>236</sup> The CCRC can also investigate sentences (Criminal Appeal Act 1995, ss.9-12) but this power falls outside the scope of this thesis.

<sup>237</sup> Ibid at ss.9-12. That the power extends to guilty pleas is implicit in the sections dealing with convictions in the Crown Court (ss. 9-10) and is explicit when dealing with summary convictions (in ss. 11 and 12).

<sup>238</sup> Ibid at s.11

<sup>239</sup> CPS casework statistics (note 1 supra) indicates that 432,033 CPS prosecutions ended with a guilty plea in the magistrates' court in 2014/15. These statistics only include cases prosecuted by the CPS and not by other prosecuting authorities so the total figure of guilty plea convictions in the magistrates' court will be higher.

<sup>240</sup> For example, Naughton, M. *The CCRC: Hope for the Innocent?* (2009) Basingstoke: Palgrave Macmillan. This debate is discussed further in chapter 5 below.

<sup>241</sup> Although Kevin Kerrigan (Kerrigan, K. (2006) 'Miscarriage of Justice in the Magistrates' Court.' *Crim. L. Rev.* pp. 124-139) has written about the CCRC's role in enabling defendants who plead guilty in the magistrates' court to appeal their convictions (such defendants have no other right of appeal against conviction). This issue is discussed further in chapter 5 below. Stephen Heaton's doctoral

empirical research in this area. The CCRC receives around 1400 applications each year<sup>242</sup> but refers few guilty plea convictions to the Court of Appeal and few convictions of any sort to the Crown Court. The CCRC has statutory limitations on its ability to disclose information obtained during its enquiries<sup>243</sup> and so releases little information about its work in individual cases. As a consequence, unless the conviction is referred and, therefore, results in a public appeal hearing, little information is available about the CCRC's involvement in guilty plea cases (the applicant will receive a detailed statement of reasons for the CCRC's decision but this is rarely made public by the applicant in an unsuccessful case). Although the CCRC has given access to its records to a number of academic researchers, none have considered the CCRC's approach to guilty plea cases.<sup>244</sup>

The CCRC is currently operating under severe resource constraints<sup>245</sup> and must make very difficult decisions about how to focus its resources. As already discussed, the Court of

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research (Heaton, S. *A critical evaluation of the utility of using innocence as a criterion in the post-conviction process* (2013) Unpublished PhD thesis. University of East Anglia) examined the work of the CCRC more generally but did not consider its treatment of magistrates' court convictions and the research did not address the issue of guilty pleas to any significant extent. Unpublished doctoral research by Birdling deals briefly with the CCRC's treatment of guilty plea cases, saying that the CCRC's response to such applications is 'clearly predictive' and is 'conditioned by the Court of Appeal's extremely skeptical view of applications to set aside a guilty plea'. Birdling adds that 'the onus is squarely on the applicant to provide evidence that they satisfy the Court of Appeal's criteria, and in the absence of this, the application will be dealt with in short order' (Birdling, M. *Correction of Miscarriages of Justice in New Zealand and England* (2012) St Catherine's College, Oxford. Unpublished PhD thesis at p.174-175 )

<sup>242</sup> The CCRC received 1599 applications in 2014/2015. (CCRC *Annual Report and Accounts 2014/15* at p.13 <http://www.crc.gov.uk/wp-content/uploads/2015/07/CCRC-Annual-Report-and-Accounts-2014-15.pdf>, on 16/3/16.

<sup>243</sup> Criminal Appeal Act 1995, section 23.

<sup>244</sup> Other than doctoral research by Heaton and Birdling (op cit) the only published research has been William O'Brian Jr, 'Fresh Expert Evidence in CCRC Cases' (2011) 22 Kings Law Journal 1 and Hodgson, J. and Horne, J. *The Extent and Impact of Legal Representation on Applications to the Criminal Cases Review Commission* (October 6, 2009). At SSRN: <http://ssrn.com/abstract=1483721>, on 16/3/16.

<sup>245</sup> The CCRC has seen their caseload increase by 50% since 2012 while having absorbed a funding cut of almost 23% in the period 2008-2013 (Written evidence from the CCRC to the House of

Appeal's reluctance to allow challenges to guilty pleas means that such cases are unlikely to be given leave to appeal or, if given leave, are likely to be upheld. The CCRC's current mode of operation and structural bias inevitably causes it to reflect the Court of Appeal's approach so on application to the CCRC the guilty plea is likely to act as a barrier to further investigation and, therefore, referral to the Court of Appeal. This creates a worrying situation where increasing pressures and incentives to plead guilty are likely to be heightening the risk of miscarriage of justice whilst the appeal and review systems which should be able to detect and remedy such miscarriages appear unlikely to do so. In the circumstances, it is timely to conduct an empirical study of the CCRC's work in guilty plea cases and this element of the research is discussed in chapter four.

**A justified guilty plea system? (research question 4)**

*Is it possible to identify an account of the guilty plea which could provide a justification for founding criminal convictions on guilty pleas within a system that includes plea incentives and what changes to the current system might be required in order to satisfy that account?*

The concluding chapter considers the results of the empirical research and identifies the 'defendant-assessed verdict' as the only possible model of the guilty plea which would allow for plea incentives while offering an account of what makes the resulting conviction safe. The chapter discusses what the requirements would be of a guilty plea system based on the defendant-assessed verdict model (including access to properly funded defence advice and full and timely prosecution disclosure) and what the implications for appeal rights would be. Given that these requirements have complex cost and resource

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Commons Justice Committee. December 2013. At <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/the-work-of-the-criminal-cases-review-commission/written/5320.html>, on 27/3/15.

implications which are unlikely to be attractive to judges and policy makers in the current economic environment, the thesis concludes by considering where this leaves the legitimacy of the guilty plea system in England & Wales.

## Chapter 2                      Methodology

Discussion of meaning is central to this thesis because, as discussed in chapter 1, the legitimacy of the criminal justice system's reliance on guilty pleas as a mechanism for conviction rests on the meaning of the defendant's guilty plea. Any assessment of the guilty plea system's legitimacy requires an exploration of the meaning attributed to the guilty plea by the defendant and by other system actors. Siting this exploration in a single part of the criminal justice system would not allow me to access the wide range of meanings attributed to the plea at different stages of the criminal process. The research questions, which are discussed in chapter 1, require that I explore these meanings at the plea advice stage (in discussions between defendants and their lawyers), at the plea hearing, at the appeal stage and in reviews conducted by the Criminal Cases Review Commission (CCRC).

As is common in social science research, the starting point for this research was a set of 'foreshadowed problems'<sup>246</sup> concerning the guilty plea. Although these foreshadowed problems emerged partially from the literature,<sup>247</sup> the initial trigger for my interest was more personal.<sup>248</sup> It was influenced by my earlier work as a case review manager at the CCRC and an encounter with a prisoner who gave a potentially credible account of pleading guilty to an offence he had not committed in order to avoid the threat of a significantly higher sentence at trial. Crucially, however, it was rooted in my previous experience of

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<sup>246</sup> Hammersley, M. & Atkinson, P. *Ethnography: Principles in Practice*. (1995) London: Routledge. (2<sup>nd</sup> edition) at p.21 discussing Malinowski, B. *Argonauts of the Western Pacific*. (1922) London: Routledge at pp.8-9.

<sup>247</sup> In particular, the research discussed in chapter 1 concerning defendant's experiences and the behaviour of defence lawyers.

<sup>248</sup> As Hammersley and Atkinson (op cit) observe at pp.23-24, foreshadowed problems frequently arise out of previous experiences in jobs or 'even chance encounters or personal experiences'.

informally advising a friend who was faced with a highly advantageous plea offer in relation to an allegation that he vehemently denied.

The account in Chapter 1 of the research questions and the areas of study chosen for each question demonstrate that I set out to consider justifications for founding convictions on guilty pleas from a number of different perspectives.<sup>249</sup> This multi-faceted approach to studying guilty pleas reflects the account of qualitative empirical research offered by Baldwin and Davis who assert that such research:

‘involves an attempted in-depth exploration of legal processes, typically focusing on a modest number of iterations but viewing these from a variety of perspectives and perhaps over time. The strength of this approach lies in its capacity to reflect the complexity of legal processes, and the complexity of the relationship between process and outcome.’<sup>250</sup>

It is clear that a positivist approach to research methods is unlikely to illuminate this research. Closed-question surveys and statistical analysis of numerical data are unlikely to expose the richness of meaning that is sought. Instead, the nature of the study suggests an interpretivist approach, with its focus on the meaning attributed to things by individuals. Interpretivism must be distinguished from relativism. Interpretivists do not assert that things *only* exist by virtue of meanings attributed to them. Rather, things exist in reality, but individuals relate to those things not as they are in reality, but in terms of the individual’s understanding of the thing:

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<sup>249</sup> (Through considering the response of the appeal courts and the CCRC to challenges to convictions and through considering the ways in which defendants, defence lawyers and the courts approach guilty pleas in practice.)

<sup>250</sup> Baldwin, J. & Davis, G. *Empirical Research in Law*. (2015) Oxford Handbooks Online. paragraph 5.1. At <http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199248179.001.0001/oxfordhb-9780199248179-e-039>, on 24/11/15.

‘human beings act towards things on the basis of the meanings that the things have for them, [...] the meaning of such things is derived from, or arises out of, the social interaction that one has with one’s fellows [...] These meanings are handled in, and modified through, an interpretive process used by the person in dealing with the things he encounters.’<sup>251</sup>

Although the content of statute and case law provides a starting point, the interpretative tradition observes that individuals (whether defendants, judges or researchers) can only relate to ‘the law’ through the meanings they attribute to it. For defendants, these meanings are developed through a lifetime of social interactions including, in particular, advice from their lawyers during the course of their prosecution. For this reason, in order to understand law as a social reality, it is crucial to give consideration to the meanings attributed to legal concepts. Interpretivist research methods are particularly well suited to investigate these meanings. In interpretative research, the researcher seeks to form a ‘first hand acquaintance’ with the ‘social worlds’ that are to be studied.<sup>252</sup> This frequently involves in-depth interviews and observational studies.

The interpretivist perspective can, however, be criticised for focusing on the individual (the micro-level) such that the broader structural forces at the macro-level (e.g. socio-economic structures or legal rules) are ignored.<sup>253</sup> That is not to say that the account cannot be ‘true’

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<sup>251</sup> Blumer, H. *Symbolic Interactionism: Perspective and Method*. (1969) New Jersey: Prentice-Hall p.2. Blumer was discussing the three premises which, he argued, underpinned symbolic interactionism, one of the interpretative methodologies.

<sup>252</sup> Blumer (ibid) at p.38. See also Travers, M. ‘Symbolic Interactionism and Law.’ in: Banakar, R. & Travers, M. (eds.) *An Introduction to Law and Social Theory*. (2002) Oxford: Hart at p.224.

<sup>253</sup> Grimshaw, R. and Jefferson, T. *Interpreting Police Work*. (1987) London: Harper Collins. Chapter 1. (although this criticism can be over-stated and interpretivist studies frequently discuss structural issues eg. Blumberg, A. S. ‘Practice of Law as Confidence Game’ (1967) *Law & Society Review* 1 pp.15-39.)



so far as it goes, but that it is limited. In the context of this research, this problem could result in, for example, a detailed account of the ways in which defendants and lawyers reach (or fail to reach) a shared understanding of the meaning of the defendant's plea during plea advice discussions but without insight into the ways in which the defendant's role in that discussion has been shaped by social structures. Shaping factors might include his earlier treatment by the criminal justice system, the relative social status of the defendant and lawyer and the lawyer's pre-existing expectations of 'the criminal client'.

One response to this criticism is to reject interpretivism in favour of a structuralist approach. Structuralism, however, with its focus on the macro-level, can itself be criticised for excessive determinism.<sup>254</sup> An account of the macro-level forces that apply within a research setting does not necessarily explain the ways that individual actors experience and understand those forces.

Discussion of the two approaches, interpretivism and structuralism, features heavily in socio-legal study of criminal defence lawyers. The problem of how to reconcile the two approaches had been considered by McConville, Sanders and Leng<sup>255</sup> in the context of their research into criminal prosecutions. Their response was to follow Henry<sup>256</sup> in taking an 'integrated' approach, in which interpretive methodologies were used to examine detailed micro-social interactions while at the same time taking account of the fact that, as social constructions, criminal cases are created to serve other socio-political purposes.<sup>257</sup> This 'integrated' approach, involving an exploration of 'the interpenetration of the micro-

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<sup>254</sup> Newman (note 163 supra) at p.27.

<sup>255</sup> McConville, M., Sanders, A. & Leng, R. *The Case for the Prosecution: Police, Suspects and the Construction of Criminality*. (1991) London: Routledge

<sup>256</sup> Henry, S. *Private Justice* (1983) London: Routledge.

<sup>257</sup> McConville et al (1994) (note 129 supra) at p.2 and p.11.

structures with the macro and vice versa<sup>258</sup>, was also favoured by Newman<sup>259</sup> as he sought to investigate criminal defence lawyers.

These issues featured in the debate which followed the publication of the two ethnographic accounts of defence practice in the early 1990s. In seeking to account for the apparent differences between his account of defence lawyers<sup>260</sup> and that in *Standing Accused*,<sup>261</sup> Travers sought to rely on methodological criticisms of the *Standing Accused* research.<sup>262</sup> Travers argued that spending four months observing and interviewing lawyers in a single defence firm enabled him to give a 'thicker account'<sup>263</sup> which addressed the 'actor's point of view'.<sup>264</sup> Such an account would, he argued, be acknowledged by lawyers to be more 'objective' and, therefore, would be more persuasive<sup>265</sup> than the 'partial and one-sided account' given in *Standing Accused*.<sup>266</sup> McConville et al, he suggested, had, through 'the selection and omission of evidence' articulated their own account of defence practice, being 'far too quick to make moral judgements' about the defence lawyers behaviour and presenting 'an idealized, negative version' of criminal lawyers.<sup>267</sup>

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<sup>258</sup> Henry (note 256 supra) pp.32-69.

<sup>259</sup> Newman (note 163 supra) at p.28, following Hekman's plea to 'bridge the gap' between structuralism and interpretivism (Hekman, S. *Weber, the Ideal Type and Contemporary Sociological Theory*. (1983) Oxford: Martin Robinson at p.193).

<sup>260</sup> Note 157 supra.

<sup>261</sup> Note 129 supra. These accounts are discussed further at p.47 supra.

<sup>262</sup> Note 159 supra.

<sup>263</sup> *Ibid* at p.374.

<sup>264</sup> *Ibid* at p.373.

<sup>265</sup> *Ibid* at p.374.

<sup>266</sup> *Ibid* at p.369.

<sup>267</sup> *Ibid* at p.374 and p.370.

Responding to Travers' claims, McConville et al<sup>268</sup> argued that his account, being based on a single firm observed over a period of four months, could not be said to be less partial than their account, which relied upon observations in 48 firms over a total of 198 researcher weeks.<sup>269</sup> They suggested that Travers' focus on the claims made by the lawyers themselves risked leaving the researcher 'with no source of evaluation or criticism' of those claims.<sup>270</sup>

Newman characterises this debate as a conflict between structuralism and interpretivism<sup>271</sup> and argues that both approaches were problematic. McConville et al's approach, he suggests, led to the authors 'talking over' the defence lawyers<sup>272</sup> and Travers' interpretivism leading to a lack of challenge to defence lawyers' accounts. Newman's findings provide considerable support for his criticism of Travers' approach as a means of accessing and evaluating the behaviour of defence lawyers',<sup>273</sup> in that Newman's research clearly demonstrates that lawyers behave in ways that directly contradict their own accounts of their behaviour.<sup>274</sup> It is doubtful, however, that Newman's criticism of McConville et al's approach is supported by his own research findings. Given, that Newman's 'integrated' approach led to results which to a significant extent confirmed the *Standing Accused* account of routine defence practice, it appears that his characterisation of the *Standing Accused* study as excessively structuralist, and Travers' criticisms of McConville et al's approach, were unfounded. Although there is no clear articulation in

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<sup>268</sup> Note 158 supra.

<sup>269</sup> Ibid at p.379.

<sup>270</sup> Ibid at p.379.

<sup>271</sup> (Note 163 supra) at p.28.

<sup>272</sup> Ibid at p.28.

<sup>273</sup> Which had previously been articulated by McConville et al (note 158 supra).

<sup>274</sup> As discussed at p.49 supra.

*Standing Accused* of the methodological approach that underpinned the research, the research would appear to be more consistent with the integrated approach than with Newman's characterisation of it as excessively structural.

Against the backdrop of this methodological debate, I sought to apply the integrated approach in this research. In practice this meant that, at the micro level, I sought to examine the guilty plea through study of 'micro' interactions between; defendants and their lawyers in plea discussions; between court room actors at the plea hearing; and between applicants and CCRC actors as revealed by the CCRC files. This enabled me to examine the meaning attributed to the guilty plea by the various actors in the criminal process and the pressures influencing those actors. At the macro level, I sought to examine and understand the legal, managerial, practical, financial and social structures which are capable of influencing decisions at each stage of the guilty plea process. This twin approach enabled me to examine whether, in practice, the criminal justice system supports any particular account of the guilty plea which could provide a justification for reliance on that plea as a safe foundation for conviction.

A common criticism of interpretivist methodologies is that they can lack scientific rigour and are too 'impressionistic' and 'anecdotal'.<sup>275</sup> This is an easy criticism to make of observational studies in particular, when the only record of a particular interaction is the researcher's notebook. Without a full record of all the interactions witnessed by the researcher (something which would be impractical in a long-term observational study), it is impossible for others to assess how representative a particular interaction is of the wider picture. To some extent this problem is unavoidable but it is possible to triangulate findings using other research methods to minimise the risk of the researcher presenting a

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<sup>275</sup> Travers (2002) (note 252 supra) at p.224.

distorted account. In this research, this was achieved by comparing the results of the observational study of interactions around the plea decision against the product of semi-structured interviews with defendants and lawyers and against the accounts given by applicants and lawyers in CCRC applications. These different methods are discussed in more detail in the following sections.

### Researching appeals against guilty plea convictions

After reviewing the literature, the starting point for this research was a doctrinal study, seeking to understand what the legal system ‘says’ about guilty plea convictions and the justifications offered by the courts for founding convictions on guilty pleas. The focus for this part of the research, as discussed in chapter 1, is on research question 1:

*How does the criminal justice system treat convictions reached through guilty pleas differently at the appeal stage from convictions through contested trials and what does this reveal about the meaning and significance of the guilty plea?*

This analysis of the law produces an account of the ‘law in books’ but also moves beyond this. Although the doctrinal study (with its focus on the legal regulation of guilty pleas) may look like a legal positivist endeavour, a more nuanced form of study was undertaken, one which recognised that:

‘[d]octrinal research is not simply a case of finding the correct legislation and the relevant cases and making a statement of the law which is objectively verifiable. It is the process of selecting and weighing materials taking into account hierarchy and authority as well as understanding social context and interpretation.’<sup>276</sup>

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<sup>276</sup> Dobinson, I. & Johns, F. ‘Qualitative legal research’ In: McConville, M. & Chui, W. H. eds. *Research Methods for Law*. (2007) Edinburgh: Edinburgh University Press at pp.21-22. (*emphasis added*)

Attention was, therefore, given to what court judgments reveal about judges' understanding of the meaning of the guilty plea or, at least, the accounts they seek to present as to their understanding of the guilty plea (i.e. legal rhetoric). Reading judgments can only offer limited access to judges' understandings because judgments, as texts, are created for a particular purpose and may amount to 'idealised or interested accounts'<sup>277</sup> of judges' decision making. However, without being able to observe the process of judicial reasoning in guilty plea appeals,<sup>278</sup> the court judgments represent the best source available to me. This doctrinal study also benefited from my access to CCRC files in guilty plea cases. As discussed below, during its reviews the CCRC obtains appeal papers, including judgments and single judge's written reasons. I was, therefore, able to access records of Court of Appeal's decisions in unreported guilty plea cases.<sup>279</sup>

### **Researching the CCRC's approach in guilty plea cases**

The CCRC's role in guilty plea cases is important in considering the legitimacy of guilty plea convictions because it is potentially a site of conflict between the Court of Appeal's strict approach to appeals against guilty plea convictions and the CCRC's role as the 'body of last resort' for those who have been convicted of crimes that they have not committed. As discussed in chapter 1, the nature of the CCRC's test for referral makes it inevitable that the CCRC will face difficult issues in deciding how to handle appeals against guilty plea convictions. The CCRC is also important in this context because, in the absence of a routine

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<sup>277</sup> Travers (2002) (note 252 supra) at p.214.

<sup>278</sup> Even if permission could be obtained to observe judicial deliberations in guilty plea appeals, such a study would be impractical and necessarily narrow in focus given the infrequency of full Court of Appeal hearings in guilty plea appeal cases. Most such appeals or applications for appeal are rejected by a single judge whose process of reasoning will necessarily be invisible other than through his written reasons.

<sup>279</sup> It is likely that a researcher would have significant difficulties getting permission to access such materials directly through the Criminal Appeal Office and, were consent to be given, a third phase of fieldwork would have been impractical in the context of a doctoral project.

right of appeal against summary conviction by guilty plea, the organisation is the key source of material relating to claims of wrongful conviction in such cases.

The focus of this part of the research, as discussed in chapter 1, is research question 3:

*What does the CCRC's treatment of applications from those convicted by guilty plea reveal about the meaning and significance of the guilty plea and about the organisation's ability to provide a safety net for defendants who are wrongfully convicted by guilty plea and who are unable to find a remedy in the appeal process?*

Additionally, the CCRC acts as a repository for material concerning the other research questions. The CCRC routinely obtains appeal court files, meaning that they hold documents relating to guilty plea appeals (research question 1) which would otherwise be difficult to access. In addition, CCRC files in guilty plea cases will contain accounts of applicant's explanations for pleading guilty and the reasons why their conviction may be unsafe (research question 3) together with accounts of why they have not appealed against conviction (research question 1).

### **Gaining access**

In planning this research, I anticipated that access to the CCRC could be relatively easily negotiated. I was formerly an employee of the CCRC (having worked as a case review manager in the organisation from 1997 to 2002) and I had also previously conducted research at the CCRC.<sup>280</sup> The CCRC, for its part, has a stated interest in encouraging academic research into its work, into potential causes of wrongful convictions and into the

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<sup>280</sup> Hodgson, J. and Horne, J. *The Extent and Impact of Legal Representation on Applications to the Criminal Cases Review Commission* (October 6, 2009). Available at SSRN: <http://ssrn.com/abstract=1483721>, on 16/3/16.

criminal justice system more widely<sup>281</sup> and acknowledges that it is an important repository of material relating to these issues.

As anticipated, the CCRC was receptive to the proposal for a research project considering appeal and review of guilty plea convictions, and the Commissioners granted access to CCRC files and to staff and Commissioners for this purpose. The fieldwork was conducted in the CCRC's offices in Birmingham between September and December 2013 under the terms of a research agreement. It was necessary to seek clarification of a provision in this research agreement (which had been prepared by the CCRC's legal adviser) which purported to control the researcher's right to publish material.<sup>282</sup> Following representations made to the CCRC by me and by my academic supervisor, the CCRC clarified in writing that the organisation did not seek to restrict the researcher's academic freedom, that it only required sight of the completed thesis (and not all subsequent publications/presentations etc.) and would only raise concerns or request redaction in relation to 'a breach of security, for example disclosure of information which is subject to restrictions, or which may identify a case or individual'. Given the sensitivity of the material handled by the CCRC to which I was given access and given the statutory constraints on disclosure of that material,<sup>283</sup> this requirement was considered reasonable and manageable and the agreement signed on this basis.<sup>284</sup>

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<sup>281</sup> CCRC *Annual Report and Accounts 2014/15* at p.32 At <http://www.ccr.gov.uk/wp-content/uploads/2015/07/CCRC-Annual-Report-and-Accounts-2014-15.pdf>, on 23/11/15.

<sup>282</sup> Paragraph 3.1.7 of the agreement stated that the researcher could not publish or present anything arising out of the research at any time 'unless the Commission has first been afforded the opportunity to consider their contents' and paragraph 3.1.8 stated that the Commission had the power to require the redaction of any material in proposed publications/presentations etc. about which the Commission had 'objective concerns'.

<sup>283</sup> In section 23 of the Criminal Appeal Act 1995.

<sup>284</sup> I annotated the signed agreement to refer to the CCRC's written clarification of the terms of the agreement.



## Methods

The CCRC's review work is primarily an exercise in the sourcing, analysis and creation of texts. Applicants to the CCRC must fill in a form and send associated case papers, which are scanned onto the CCRC computer system. The CCRC, the applicant and any lawyers' interactions are primarily by email or letter. Staff log the content of telephone calls in 'case records' relating to each case but the CCRC usually requests that important matters are put in writing. The CCRC gathers case materials from relevant public bodies and scans the material onto their system. Decisions are reached either by a single Commissioner (who will explain her decision in a letter or 'statement of reasons' and may record her reflections in the case record) or by a panel of Commissioners, whose discussions are minuted and who agree a formal statement of reasons to explain the decision.

Given the discussion of methodology above, it will be apparent that the nature of the CCRC's work presents some problems for the 'integrated' approach. There is little opportunity for live observation of the CCRC's work, with staff and Commissioners spending most of their time reading case papers and producing documents on screen. The most 'observable' part of the process is the committee stage but only a few committee decisions are taken each month, with those involving guilty plea cases being much less frequent than that<sup>285</sup> (and no guilty plea committees occurring while I was in the CCRC offices for this research). Most guilty plea applications are rejected at the earliest stages of the review process at which point it is likely that no oral interactions will have taken place between applicants, staff and Commissioners. In the circumstances, it was inevitable that this part of the research would need to rely on examination of documentary records, supplemented by staff and Commissioner interviews. The danger with this approach is

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<sup>285</sup> There were a total of 27 committee decisions in the three 4-month sample periods, meaning that there were usually fewer than three committee decisions each month, with only ten guilty plea committees in the sample periods (i.e. less than one guilty plea committee decision each month).

that both the documentary records and the accounts given at interview are likely to be, at least to some extent, 'presentational'<sup>286</sup> or amounting to 'justifications'.<sup>287</sup> It was important that I remained alert to this and found a way critically to evaluate the claims made in the documents and interviews (to avoid the same methodological trap which influenced Travers' research findings).<sup>288</sup>

In relation to applicants' accounts of the circumstances of their guilty plea, it is self-evident that these are interested accounts and so care must be taken in assessing their accuracy. It is important, however, not to overstate the problem of the presentational nature of the claims made in application forms. These applicants set out to persuade the CCRC that their guilty plea conviction is unsafe or in some way unjust or unreliable. There is little information available to these applicants as to what aspects of a case will cause the CCRC to find a guilty plea conviction unreliable; there are few famous miscarriages of justice resulting from guilty pleas, the CCRC gives no guidance on this on its website and in many cases the applicant will already have been advised by a lawyer that he has no grounds for appeal. This means that applicants must select what information to include in their applications (whether that information is true or an invention) based on what they think will render the guilty plea conviction unsafe. In this way, the applications are, at the least, revealing as to applicants' understanding of what makes a guilty plea conviction safe or unsafe. In terms of assessing the accuracy of these accounts, the observational study of the plea decision (research question 3, discussed further below) was designed, at least in part,

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<sup>286</sup> Presentational accounts 'concern those appearances that informants strive to maintain (or enhance) in the eyes of the fieldworker, outsiders or strangers in general, work colleagues, close and intimate associates, and to varying degrees, themselves.' Van Maanen, J. 'The Fact of Fiction in Organizational Ethnography' (1979) 24: 4 *Administrative Science Quarterly* at p.542.

<sup>287</sup> Defined by Mulcahy as 'accepting responsibility for action but denying the pejorative quality associated with it' (Mulcahy, A. 'Justification of Justice - Legal Practitioners' Accounts of Negotiated Case Settlements in Magistrates' Courts' (1994) 34 *British Journal of Criminology* 411 at p.415).

<sup>288</sup> Discussed at p.74 supra.

in order to provide a method of triangulating the claims made by applicants to the CCRC about the reasons for guilty pleas.

Turning now to material produced by the CCRC, most material examined during the research was produced for internal purposes and made available digitally to all CCRC staff, with it being entirely acceptable within the organisation's culture for any member of staff to access any of the material,<sup>289</sup> whether created by a Commissioner or an administrator. Frequent re-applications and a system of quality assurance monitoring also mean that material in closed cases is frequently re-examined by colleagues and managers. In the circumstances, it is important to consider how much the content of these records is influenced by the author's awareness that colleagues and managers will read it. The threat of judicial review by unsuccessful applicants (with case records then being potentially disclosable) is also likely to have an effect. Once again, however, this problem should not be overstated. These case records are produced in the daily routine of casework, are the primary form of communication between staff and act as the author's aide memoire in cases which could take many years to review. It is, therefore, unrealistic to think that authors will apply a fine filter to all of their case record entries.

The documents that are most obviously presentational in nature are the 'statements of reasons' (either the formal document of that name or the letter from a single commissioner which serves the same function) which are produced to explain and justify the CCRC's decision in a case. These can be seen as equivalent to a court judgment and, for the same reasons, should be approached with caution. They are, however, both interesting and revealing for this research because either they reveal the authors' actual beliefs and

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<sup>289</sup> Exceptionally, material carrying a protected status (e.g. documents relating to material carrying a security classification or subject to a public interest immunity certificate) will be accessible only to authorised staff and Commissioners.

understandings about guilty plea convictions or, at the least, they demonstrate what the authors have chosen to present and therefore what they consider to be a defensible approach to guilty plea cases. In either of these situations, they are useful for research purposes.

For all the reasons given, I was content to base the research principally on examination of the documentary records but to support this work with formal interviews with Commissioners and staff to provide additional detail and to check my understanding of what I had seen against the interviewees' accounts. This helps to reduce the risk of the researcher 'talking over'<sup>290</sup> the CCRC staff and Commissioners.

### Sampling CCRC cases

As a former employee of the CCRC and having more recently conducted research there, I had a pre-existing knowledge of the CCRC review process, the way in which materials are stored (digitally and on paper), the various search mechanisms available and the type of material that one would expect to find. In addition, I was able to draw on my experience of designing and conducting research at the CCRC in planning this fieldwork. This made the early stages of the fieldwork much more productive than for a researcher who was new to the organisation. The principal problem, however, was that the CCRC's management information system did not 'tag' cases according to plea so there was no quick way of identifying which applications related to guilty plea convictions nor establishing the number of guilty plea applications which were handled within a particular time period. After experimenting with the CCRC's data-mining software, it became apparent that the software could not reliably identify guilty plea applications.<sup>291</sup> For this reason it was

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<sup>290</sup> Newman (note 163 supra) at p.28.

<sup>291</sup> The software searches text and it was impossible to formulate search criteria which was sufficiently inclusive (so that it picked up all relevant cases) as well as narrowing the results sufficiently to be useful. Searching for "guilty plea" also produced results containing the phrase

necessary to sift all the applications in the sample period ‘by eye’ in a time-consuming process (which involved selecting the relevant case and then accessing the case records and application forms until a reference had been found to plea).<sup>292</sup> With the CCRC closing around 1400 cases each year at this time, it was decided, that it would only be possible to sift a 12-month sample of applications.

Looking at a calendar year sample would expose the sample to fluctuations in application rates caused by recently decided cases or publicity about the CCRC. It was decided, therefore to spread the twelve month sample across three calendar years, giving three individual four-month sample periods:<sup>293</sup>

**Table 1: Sample periods**

<b>Sample period</b>	<b>Dates</b>
2011 sample period	1 September 2011 - 31 December 2011
2012 sample period	1 May 2012 – 31 August 2012
2013 sample period	1 January 2013 – 30 April 2013

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“not guilty plea” (i.e. most cases) and searching for “pleaded guilty” missed some relevant cases while producing results relating to co-defendants who pleaded guilty or to the applicants’ guilty pleas in other cases.

<sup>292</sup> There was no single point where this information would always be recorded so it was sometimes necessary to scan through a few documents.

<sup>293</sup> As it turned out, during the sample periods there were two important tranches of guilty plea cases (one involving wrongful guilty pleas in immigration and asylum cases and another involving unreliable confessions in Northern Ireland during the Troubles). These tranches of cases are discussed further in chapter 5. See note 750 below for an account of how I dealt with these cases when assessing guilty plea application rates.

At this stage I did not know how many guilty plea cases were likely to be found in the sample period. I estimated that around 5% of applications would relate to guilty pleas, resulting in 70 guilty plea files to examine, but in fact it turned out to be much higher (around 23%),<sup>294</sup> resulting in 281 guilty plea cases in the sample periods. For this reason I needed to select a proportion of these guilty plea cases to examine.

During sampling I soon realised that most of the guilty plea cases were closed at the earliest stages of the CCRC process (with 73% of guilty plea applications closed as 'no appeal' cases)<sup>295</sup> and far fewer closed later following detailed case review. If I had randomly sampled one third of the guilty plea applications identified, there would have been little consideration of the more complex review work conducted by the CCRC in guilty plea cases. Within each four month period, therefore, the sample was stratified according to the stage at which the case was closed and the proportion of cases examined was varied so that 100% of guilty plea committee decisions were examined but only 1/3 of the guilty plea cases closed at earlier stages were examined. The total number of cases examined from each case stage (across the three sample periods) is set out in the table below.

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<sup>294</sup> See p.251 below.

<sup>295</sup> The stages of the CCRC review are explained further at p.208 below.

**Table 2: Cases examined within sample periods**

<b>Case stage</b>	<b>Number of guilty plea cases closed at this stage</b>	<b>Proportion sampled</b>	<b>Number of cases examined<sup>296</sup></b>
Ineligible or re-application	26	33%	10
No Appeal	205	33%	72
No Reviewable Grounds	17	33%	6
Single Commissioner decision	23	33%	9
Committee non-referral	2	100%	2
Committee referral	8	100%	8
<b>TOTAL</b>	<b>281</b>		<b>107</b>

In addition to the files examined within the three four-month sample periods, I also looked at additional guilty plea files. Because there were so few guilty plea cases referred to the appeal court and because the reasons for these referrals were of such central interest to the research (as they reveal possible causes of wrongful conviction by guilty plea and also what the CCRC's view is of wrongful conviction by guilty plea) all of these referrals since the CCRC was established were examined.<sup>297</sup> It was intended that all guilty plea cases which

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<sup>296</sup> The total examined is in some instances slightly higher than 1/3 of total closed at each stage due to rounding up within each sample period (e.g. if there were 10 guilty plea cases closed at a particular stage, four cases were examined).

<sup>297</sup> I was assisted in identifying all guilty plea referral cases by Dr Stephen Heaton who had conducted fieldwork at the CCRC which had involved examination of all referral files (although he had not focused on the issue of plea). Dr. Heaton kindly gave me access to his list of referral cases which he had identified as involving guilty pleas. This, together with the cases identified from published judgements of the Court of Appeal, gave a starting point for identification of guilty plea referral cases. The CCRC's head of knowledge management indicated that the organisation's list of guilty plea referral cases was unlikely to be complete so I supplemented the list by data mining for

reached the committee decision-making stage<sup>298</sup> should also be examined but it transpired that, under CCRC document retention policies, files relating to most non-referral cases older than ten years had been removed from the computer system.<sup>299</sup> After a very time-consuming sifting process, however (involving me sifting records of every committee decision made by the CCRC since 1997 in order to identify those involving guilty pleas) all such files which were still available were examined. This led to me examining 49 referred cases involving guilty pleas<sup>300</sup> and 15 'committee non-referral' guilty plea cases.<sup>301</sup>

Finally, I looked at another small set of files. These were either brought to my attention by Commissioners or other staff as particularly relevant to the research or were cases I had identified as interesting during sifting (but which had not then been selected during the random sampling). These files (eleven in total) were examined and notes made on their contents but the resulting data was kept entirely separate from the sampled data (as, of course, they were not randomly selected).

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'guilty plea' and 'pleaded guilty' within Statements of Reasons. This resulted in a lengthy list of documents which were then sifted by eye to identify relevant cases. I then checked the resulting list by data-mining using other search terms relating to guilty plea cases (e.g. 'plea bargaining' and the names of key judgments cited in guilty plea cases) but no further cases were then identified. This gives grounds for confidence that the list was comprehensive.

<sup>298</sup> Only cases with potential grounds for referral or with some other significant complexity were decided by a committee of Commissioners (under Schedule 1 to the Criminal Appeal Act 1995 cases can only be referred by decision of at least three Commissioners but the statute is silent as to who can reject an application. Most CCRC cases are decided by a single Commissioner).

<sup>299</sup> Some files were still available, as they had been retained due to later re-applications, complaints and judicial reviews etc.

<sup>300</sup> This total of 49 includes the 8 referral cases which fell within the sample periods (Table 2 supra).

<sup>301</sup> This total of 15 includes the 2 committee non-referral cases which fell within the sample periods (Table 2 supra).



**Table 3: Total files examined**

<b>File type</b>	<b>Number of files examined</b>
Files from sample periods	107
Additional committee referral files	41
Additional committee non-referral files	13
Additional files of interest	11
<b>TOTAL</b>	<b>172</b>

### Examination of files

Having identified the relevant cases, I examined the digital file for each case, beginning with the key documents (application, case record, decision letter or statement of reasons). I extracted basic case data from the files and entered this on a spreadsheet.<sup>302</sup> I recorded qualitative information about each case in a Word document.<sup>303</sup> Due to the security restrictions placed upon researchers at the CCRC, all notes were anonymised and were stored on a locked laptop.<sup>304</sup> I also kept a diary of the fieldwork in a Word document in which I recorded methodological points and daily observations.

I also had access to the CCRC's knowledge management materials, including training materials, Casework Guidance Notes (which provide guidance to casework staff on how to approach various casework issues), Formal Memoranda (which contain the Commission's

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<sup>302</sup> Including offence, date of conviction, venue of conviction, date of previous appeal(s), date of application, whether represented on application, date of closure, CCRC decision, appeal court decision on referral (if applicable), decision-maker

<sup>303</sup> Including a summary of issues raised by the applicant, the reason given for the guilty plea (if any), the explanation for not appealing (if any), the approach taken by the CCRC, relevant quotations from the file etc.

<sup>304</sup> I was required to complete an online security training course at the beginning of the fieldwork.

formal policies) and management reports. The CCRC's knowledge manager guided me to some key materials (as did other staff) but other materials were also identified through data-mining the CCRC computer system.

Having completed my examination of 172 files, I conducted interviews with 5 CRMs, 2 senior members of the CCRC staff and 6 Commissioners (5 serving and 1 former Commissioner).<sup>305</sup> Four of the CRM interviewees were recruited as a result of them responding to my email requesting volunteers and then a further interviewee was identified randomly (having shown no previous interest in the research project). I approached Commissioners who had been in post for more than 12 months and, of the 7 who fell into this category, 5 agreed to be interviewed.<sup>306</sup> The first two CRM interviews were treated as pilot interviews, with the interview schedule being simplified as a result of those pilots.

It was not possible generally to select interviewees randomly because there was no obligation on staff and Commissioners to participate and so some would inevitably refuse and the sample would always be biased by self-selection. The benefit of the approach I took is that the individuals who agreed to participate were likely to have some insight and enthusiasm for the subject being researched and so were likely to give fuller accounts in interview than if they had been instructed to attend an interview by managers. I

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<sup>305</sup> One of the five 'serving' Commissioners left the CCRC during the fieldwork period and was actually interviewed a few months after his departure. I also made contact with another former Commissioner who met me for a useful informal discussion about this research but who did not wish to be formally interviewed.

<sup>306</sup> One of the Commissioners did not respond to this request at all. The other (CM2) responded by asking for sight of the interview questions before deciding whether to be interviewed. I explained that it was better for all interviewees to start from the same position (without previous sight of the questions) but offered reassurance that I did not anticipate asking questions about specific cases. The Commissioner declined to be interviewed on this basis, saying that the matter was too important to be dealt with on an 'off the cuff basis'. Although I responded to this in an email giving six broad headings as to the nature of the questions to be discussed, CM2 did not respond.

recognised, however, that during data analysis it was important to take account of the fact that the interviewees were not randomly selected and so could not be assumed to be representative of the wider groups of staff and Commissioners. The interviews were semi-structured and the questions asked were very similar regardless of the job role of the interviewee.<sup>307</sup> The interviews were recorded and later transcribed.

### **Reflections on the CCRC casework**

An important aspect of the CCRC fieldwork was my status as a former case review manager. As already discussed, this status gave me an advantage in terms of accessing the CCRC and in planning and conducting the examination of cases. It meant that I was familiar with the people who were the subject of the research, my reception from staff and Commissioners was warm and open and it was easy to settle into a familiar office routine. However, it is important to acknowledge that, inevitably, this also presented challenges to the research process.

Firstly, there is a danger that a researcher who has previously worked within the organisation she is researching may feel a degree of loyalty to the staff or organisation which makes it difficult to articulate criticism. To an extent, however, this is not dissimilar to the problem that faces researchers who engage in lengthy ethnographic study involving them becoming assimilated in an organisation and building friendships with those being observed. Many researchers have expressed discomfort about how the individuals observed might react to reading the researcher's reflections on their work.<sup>308</sup>

The second challenge is that I may simply be blind to what is interesting or note-worthy about the CCRC's approach to guilty plea cases. Although interpretative research aims to achieve a close understanding of the 'social world' being studied by immersing the

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<sup>307</sup> The interview schedule is provided at annex A below.

<sup>308</sup> For an example in the context of criminal defence lawyers, see Newman (note 163 supra) at p.35.

researcher in the field, there is, in contrast, a need for the researcher to maintain a degree of distance from the field in order to have insight into what will seem entirely normal (and therefore, not worthy of notice) to those who are steeped in the routine and culture of the field.<sup>309</sup> There is a risk that, through over-familiarity with the CCRC and its work, I may have overlooked aspects of the work or culture which might have struck others as interesting or problematic.

While it is likely that I did overlook some aspects of the CCRC's work due to overfamiliarity (just as an 'outsider' researcher would be likely to have missed other aspects of the work due to a lack of familiarity), the discussion of the CCRC in chapter 5 demonstrates that I was alive to and willing to articulate problematic aspects of the CCRC's work, despite my pre-existing relationship with the organisation. In addition, the risk of a researcher missing important aspects of the research is to some extent mitigated by the process of doctoral supervision, which gives the researcher the opportunity to discuss the research with a third party and for her assumptions to be challenged.

Although there were tensions during this research between my role as a researcher and my former role as a CRM, these did not appear to constrain the research process but, rather, presented a degree of ethical difficulty for me. CCRC staff were very open with me and at times the degree of openness almost certainly went beyond what would have been afforded to a researcher who had come to the organisation as a stranger. For example, in the first week of the research, a CRM and former colleague of mine brought a large file of sensitive case material to my desk. After beginning to describe the case, the CRM stopped suddenly and asked 'Oh, just to check, you are allowed to see everything aren't you?'

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<sup>309</sup> Hammersley and Atkinson (note 246 supra) at p.9.

While I knew that the terms of my research agreement did allow me access to those files, it was problematic to be asked, in effect, to self-authorise my access to the material.<sup>310</sup>

Another difficulty arose when I identified problems with the CCRC's treatment of individual cases which, in my view, could have resulted in meritorious applications being rejected. In these instances I experienced the same sense of responsibility to the individual applicant as if I were still a CRM. In deciding what to do about these cases, it was helpful that I was examining closed files so there was no risk that my intervention could distort the material being researched (as would be the case if I intervened during 'live' observational research). When I casually queried one of these cases<sup>311</sup> with a Group Leader<sup>312</sup> to find out whether the approach taken in the case was in accordance with the CCRC guidance, the Group Leader expressed concern about the case, asked for the case number so she could investigate it and also asked to be informed of any similar cases which I might come across. I agreed to do this and passed a number of similar cases to the Group Leader during the research. The Group Leader considered those files and discussed the matter with the Director of Casework, who later told me that one of those files had subsequently been passed to a Commissioner for further consideration as a consequence of the concerns I had identified.

A different approach was taken in relation to my observations about the systemic problems concerning No Appeal cases that are discussed in chapter 5. I decided not to raise these broader issues with the CCRC management team during fieldwork in case this led to defensiveness on the part of Commissioners or staff which could disrupt the research

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<sup>310</sup> I had already checked with the CCRC's security officer that I was allowed access to all case materials and so I explained this to the CRM. The CRM appeared content with this response, continuing the discussion of the files.

<sup>311</sup> Case 164

<sup>312</sup> Group Leaders are case review managers who also manage a team of CRMs.

process. On the other hand, I felt it was unacceptable to wait until after completion of my studies (a period of around two years) to raise these concerns, as to do so would prevent the CCRC from taking any actions which might be appropriate in the light of the findings. For this reason, I discussed my concerns and some of the supporting data with the CCRC's Director of Casework at the conclusion of the fieldwork. The Director of Casework responded very positively to my comments.

My willingness to intervene in casework during my research (albeit only in ways that sought to prevent any distortion in the research process itself) may be considered unusual in socio-legal research but, I would argue, is consistent with my role in the research process. My interest in the area of study is, to a significant extent, a consequence of my professional and personal exposure to issues surrounding wrongful conviction by guilty plea. Research is not conducted in a moral vacuum and a researcher does not shed her sense of professional and personal responsibility simply because she adopts the role of researcher. Given the impetus for this research, it would be implausible to suggest that I would approach my fieldwork with no sense of concern or responsibility for those impacted by the area of study. It is critically important that a researcher balances that sense of responsibility against her responsibility to ensure that any interventions made do not undermine the integrity of the research process itself but, having addressed this concern, it would, in my view, be ethically problematic to have stayed silent in the face of informed concerns about the material before me.

### **Researching the defendant's plea decision**

Examination of the CCRC's files in relation to guilty plea applications revealed examples of guilty pleas leading to convictions that were later quashed by the appeal courts as well as to claims from those who had pleaded guilty about the reasons for their pleas and the pressures which they experienced during the plea process. The CCRC files could not, however, give me access to all aspects of the plea decision. Only a tiny proportion of guilty

plea convictions lead to applications to the CCRC (and a far smaller proportion lead to significant review work and referral by the CCRC) and so it is necessary to look beyond the organisation's files to see what happens during the plea process in a 'normal' guilty plea case. As already discussed, the claims made by applicants about the reasons for their pleas are presentational, being made for the purpose of their review application, so it is useful to triangulate these claims using alternative sources and methods.<sup>313</sup> In the circumstances, I decided to conduct an observational study of the plea decision to illuminate the various factors taken into account by defendants and their lawyers when deciding on plea and, through attending the plea hearing with the defendant, the court's treatment of the defendant during the plea process. This part of the research was primarily aimed at addressing research question 2:

*To the extent that the differential treatment of guilty plea convictions at the appellate stage is based on assumptions about:*

- *defendants' reasons for pleading guilty,*
- *the meaning of the guilty plea or,*
- *the fairness of the process that produces the plea,*

*are these assumptions supported by empirical evidence regarding the plea process and plea decision?*

Although, as discussed in chapter 1,<sup>314</sup> the existing literature on defence lawyers includes important discussion of lawyers' advice on plea, none of the research focuses on the meaning attributed to the guilty plea by defendants and their lawyers, and, since 1976,<sup>315</sup>

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<sup>313</sup>For discussion of triangulation in qualitative research, see Jick, T.D. (1979) *Mixing Qualitative and Quantitative Methods: Triangulation in Action* 24 Administrative Science Quarterly p.602.

<sup>314</sup> Page 41 supra.

<sup>315</sup> Bottoms and McClean (note 127 supra).

there have been no studies that consider the combined impact of advice on plea and the court's handling of the defendant's plea decision.

Newman's research, showing the contradictions between the observed behaviour of lawyers and the presentational accounts given in their research interviews demonstrates the importance of combining the two research methods, observation and interview, when researching in this area.<sup>316</sup> It is important, therefore, to address why this research did not include interviews with defendants, given that the meaning attributed to the guilty plea and the pressures experienced by defendants in the plea process are central elements of this research. There is undoubtedly a lack of recent defendant-centred research on this subject<sup>317</sup> and, when planning the research, I considered the possibility of including interviews with defendants. I rejected this, however due to the practical and ethical difficulties that this would have presented.

Bottoms and McClean, and Baldwin and McConville discuss the difficulties facing researchers in accessing defendants for interviews. Baldwin and McConville were able to interview 121 out of 150 defendants targeted for their research 'although in many cases only after repeated visits to a defendant's home' and they emphasized that 'considerable efforts were made to trace the more elusive defendants'.<sup>318</sup> Bottoms and McClean observed that accessing defendants for interview was the 'hardest part' of the research<sup>319</sup> (despite two full time interviewers being employed for this work) so it is clear that a single doctoral researcher would have had even more difficulty in accessing defendants. Both of

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<sup>316</sup> Newman (note 163 supra) at p.22.

<sup>317</sup> Kemp, V. 'Publication Review: Legal Aid Lawyers and the Quest for Justice' (2014) *Crim. Law. Rev.* 391 at p.393. The 1970s research by Bottoms & McClean (note 127 supra) and by Baldwin & McConville (note 128 supra) still represent the most significant work in this area.

<sup>318</sup> Baldwin & McConville (note 128 supra) still at p.4.

<sup>319</sup> Bottoms & McClean (note 127 supra) at p.23.



the defendant-centred studies relied on cooperation from the courts involved, something which was not available to me.

Bottoms and McClean accessed their defendant interviewees through prison or using the address from the court file after the case had completed (rather than through defence solicitors). This is important because seeking to interview defendants prior to case completion is ethically difficult and has significant potential to distort the plea decision. In seeking defendants' views on the guilty plea I would have encouraged them to reflect on the importance of guilt or innocence, the impact of the sentence discount and the potential for plea negotiation and the personal pressures under which they were operating. Such a discussion, taking place at a stressful and tactically crucial period, would have the potential both to disrupt the defendant's discussions with his solicitor around plea and to influence his approach to and understanding of his plea decision. Given the concerns expressed by one of the observed lawyers about the impact of asking a client to understand why I was present,<sup>320</sup> it is unlikely that defence lawyers would have allowed me to interview their clients, even if it had been ethically and methodologically appropriate to do so. Conducting interviews following case completion, as Bottoms and McClean did, avoids these ethical difficulties but still presents methodological difficulties. At this point in proceedings, the interviewee's feelings about his plea are likely to be heavily influenced by the outcome of his case (whether that is the outcome of a trial following a not guilty plea or the sentencing outcome of a guilty plea) and the account of the plea decision at this stage may be very different to the picture at the point of plea.<sup>321</sup>

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<sup>320</sup> See discussion beginning at p.103 below.

<sup>321</sup> It is acknowledged that the accounts given by applicants to the CCRC are subject to the same influences and this is recognized in the treatment of those accounts in this thesis.

If it were possible to overcome these difficulties, defendant interviews would form the basis of an extremely valuable research project but this was not possible within the constraints of this doctoral research. As it stands, the combination of access to CCRC files, observation of live plea discussions and plea hearings and interviews with defence lawyers represents a balanced approach to investigating the plea decision.

### **Choice of site and gaining access**

A researcher's access to interactions between defendants and their lawyers is inevitably controlled, in the first instance, by the lawyer and for this reason I needed to identify suitable criminal defence firms which might grant access to their lawyers and clients. The choice of location for this research was to some extent constrained by my family responsibilities during the period in question (which limited my ability to travel and stay away from home) and for this reason I initially approached firms within reasonable daily travelling distance of my home in the Midlands.

At the time that access was being sought (in spring 2014), criminal solicitors were already going through an exceptionally challenging period, with the government announcing on 27<sup>th</sup> February 2014 an 8.75% cut in their legal aid remuneration (implemented on 20 March 2014), with a further 8.5% cut to be implemented the following year.<sup>322</sup> In this context, it was anticipated that it would be difficult to persuade solicitors to grant access to a researcher who would add nothing to their profitability and who would inevitably take up valuable staff time. Any solicitor who happened to be aware of Newman's then-recently published research,<sup>323</sup> with its highly critical assessment of criminal defence work, would also be likely to have significant concerns about allowing an academic researcher to access

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<sup>322</sup> This second reduction in remuneration was actually implemented on 1 July 2015 but, at the time of writing, has been suspended.

<sup>323</sup> Although Newman's research received relatively little coverage in the mainstream media or professional publications, it was covered in the *New Law Journal* on 10 October 2013 (Robins, J. 'Out of Favour' (2013) 163 *NLJ* 7579 at p.7).

her firm.<sup>324</sup> For this reason, I made initial approaches through my contacts in the profession, in the hope that this might facilitate access. At this stage, in contrast to Newman (who deliberately targeted firms of a particular type),<sup>325</sup> I did not target firms of a particular type other than the requirement that the firm should have a reasonably busy criminal department which conducted legally aided defence work.

I made an approach by email to a former colleague, who passed the request to the partner in charge of Firm P's office in Centreville.<sup>326</sup> Firm P is a large national criminal defence firm with a number of offices across the country. This partner indicated that he was willing to allow me to observe his staff for three weeks.<sup>327</sup> Although this was a shorter period than I had planned, I accepted the offer in the hope that, once I had started the research, the firm might agree to extend the research period. As it turned out, I was able to stay for four weeks.

Two other approaches to solicitors' firms through contacts at other firms failed to achieve any response at all but an email to members of a local Law Society led to an offer of access from a director of Firm B (another national criminal legal aid firm) to the firm's office in Centreville. This offer was accepted but this offer was withdrawn shortly before the agreed start-date. The director explained that, due to 'exceptional operational reasons,' they were

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<sup>324</sup> It seems likely that one firm P lawyer was referring to Newman's research (and his 'sausage-factory' descriptor of defence firms – see note 325 below) when he suggested to me, somewhat bitterly, that a firm of the size of Firm P might be characterised as a 'chicken-factory' by certain academics.

<sup>325</sup> Newman (note 163 supra) explains at pp.30-32 that he targeted two firms that he had identified as likely to be 'radical' firms and one which was viewed by other lawyers as a 'sausage-factory' firm.

<sup>326</sup> The four Midlands settlements in which this research was conducted are referred to by pseudonyms in this thesis in order to hide the identity of the firms, cases and courts discussed (see 88 below).

<sup>327</sup> My former colleague, who helped to arrange access to this firm later indicated that it had been necessary for him to reassure this lawyer as to his own confidence in my integrity in order to obtain the consent.

'unable to accommodate' me in the Centreville office. The firm did, however, offer the firm's other Midlands offices as alternative locations. Due to difficulties in travelling to these locations, I was only able to make use of one week in each of two offices (in Middleton and Medborough) but, as there was by that time no time to identify an alternative firm, I accepted the offer. The benefit of this change of plans was, however, that I was unexpectedly able to access practices in two other Midlands cities and court centres.

It became apparent through observations of Firm P and Firm B clients that the court's treatment of defendants during first and subsequent hearings was a crucial element of the plea decision. For this reason, I added two weeks of court observations to the end of the fieldwork. The first week was conducted in the large and busy magistrates' court in Centreville. For the second week, I sought a very different magistrates' court from the large urban court centres already seen in Centreville, Middleton and Medborough. A small magistrates' court (with only two courtrooms dealing with adult defendants) was selected in Coreham, a Midlands town less than 20 miles from Centreville.

## **Methods**

The two law firms who agreed to be observed for this research had been told that the aim of the research was to understand better what factors influence plea decisions and what pressures there are on lawyers and clients in this respect. I explained that I wanted to observe conversations between defendants and lawyers when the subject of plea was discussed and that it would also be useful to read files containing plea advice letters, notes from meetings etc.

Firm P's Centreville office is led by a partner in the firm whose primary work is in serious Crown Court matters, including large-scale fraud, drug importation and homicide cases. Five lawyers worked primarily on magistrates' court cases (with some spending a

proportion of their time in satellite offices). All were qualified solicitors. The Crown Court team was made up of two advocates and two unqualified clerks (who, being engaged in the practice of law, are also referred to as 'lawyers' in this thesis).

On arrival at Firm P, I was guided by staff towards meetings and hearings they thought would be most useful in terms of hearing discussion of plea. I was encouraged to attend the office's 'diary meetings' so that I could hear what was planned for the week and then make arrangements to attend the most useful events. The firm had staff at the magistrates' court each day and I spent a significant proportion of time there but was also able to attend planned client meetings (in the office and in prison), as well as meetings between the firm's Crown Court advocates and clients at the Crown Court. I made detailed notes of observations by hand in notebooks (to avoid potential disruption caused by taking a laptop into cells and courtrooms) and these were typed up each evening. As agreed with the firms involved, no identifying information was recorded about clients or others in the case and instead each defendant and lawyer was given an anonymous reference.

While waiting with lawyers at court, I was able to observe the courts' treatment of other defendants (not clients of the firms being observed). In Firm P, I read files relating to the clients being observed and staff were also proactive in handing to me old files which they thought I might find interesting.<sup>328</sup> In contrast, I was given very little access to files at Firm B. I was able to read papers 'over the shoulder' of lawyers (with permission) while waiting at court but Firm B lawyers rarely volunteered files and, once back in the office, lawyers usually indicated that they required the files to work on.<sup>329</sup> I did not have access to files

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<sup>328</sup> I saw files relating to cases handled by Lawyers P1, P2, P3, P4 and P9.

<sup>329</sup> Staff at Firm B never refused access to a file and they frequently promised to provide a file 'later' but then failed to do so. There was nothing to suggest this was deliberate, although that cannot be ruled out. Due to the short periods of fieldwork at Firm B, I did not feel able to put pressure on lawyers to provide files. This reflects Hammersley and Atkinson's observation that access problems,

held on computer in either firm.<sup>330</sup> It is difficult to know the extent to which the research was constrained by the lack of access to computerised records but it was noticeable that lawyers in Firm P tended to print out paper copies of important forms and emails for their paper file and, when I asked lawyers about cases, they did not make reference to materials that were only available digitally (other than to prosecution evidence which was stored on disk).

Lawyers at Firm P were welcoming and appeared to be open with me and, on the whole, very willing to be observed. None of the lawyers in Firm P ever directly refused a request from me although one lawyer avoided being observed or interviewed (being, it appeared, unavailable, without ever giving any clear indication that this was deliberate). Spending only a week in each of the Firm B offices and having no prior contact with anyone in those offices, it was perhaps inevitable that these offices would feel less open to me. Both offices were significantly larger than the Firm P office in Centreville. The Middleton office had a crime team consisting of eight solicitors and one trainee legal executive but there were also other teams of lawyers in the offices so it was much busier. The Medborough office was Firm B's principal office, with a large crime team as well as a number of other large teams of lawyers in other work areas spread across a large building. There was less awareness amongst lawyers in Firm B as to what I was doing there,<sup>331</sup> lawyers rarely introduced me to colleagues unless there was a specific need to do so and, as a consequence, I had much less access to informal conversation with lawyers across the crime team. As in Firm P, much of

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although most problematic when initial access is being sought, persist, 'to one degree or another, throughout the data collection process' (note 246 supra, at p.54).

<sup>330</sup> Firm P lawyers tried to give me access to the computer system early in the research but this created technical difficulties which disrupted lawyers' work and so was abandoned.

<sup>331</sup> An email had apparently been sent to the firm's lawyers attaching the information sheet that I had prepared to inform participants about the nature of the research but lawyers did not appear to have read this.

the time with Firm B was spent at the magistrates' court, with some time being spent at the Crown Court in each city.

The table below indicates the number of observations of plea advice or discussion in each office, together with the number of additional files read (without live observations being made).

**Table 4: Cases observed and files examined**

<b>Firm</b>	<b>Plea advice or discussion observed</b>	<b>Files read (no observations made)</b>
Firm P (Centreville)	20	23
Firm B (Middleton)	9	0
Firm B (Medborough)	8	1
<b>TOTAL</b>	<b>37</b>	<b>24</b>

In the final week at Firm P I conducted interviews with all 7 lawyers who were available in the office. The interviews were recorded and later transcribed. In the two Firm B offices, I spent the final day of each week conducting interviews with the lawyers who were available and willing to be interviewed (4 in Middleton and 2 in Medborough).<sup>332</sup>

After completing the observations at Firm B, I returned to Centreville for one week to conduct observations in the 'guilty plea court' and the 'custody court' of Centreville magistrates' court. The following week was spent in Coreham magistrates' court. Because these were public hearings, I was able to access the hearings freely, although I sought consent from the court (through the usher) to me taking notes. Consent was given on each

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<sup>332</sup> As for the CCRC interviews, the interviews were semi-structured and the interview schedule (available at annex B below) used was the same for each firm.

occasion, rarely with any interest being shown by court staff or magistrates in what I was doing. The observations were more difficult in Centreville because I was required to sit in the public gallery which is screened from the body of the court (in contrast to previous weeks when the lawyers from Firm P had taken me into the main body of the court). This made it impossible for me to overhear informal conversations between lawyers before hearings. In Coreham, however, the courts were much smaller and entirely open so I was able to sit amongst the lawyers and hear more of the casual conversation. The following table shows the number of plea hearings observed (not involving clients of Firm B or Firm P) during the eight weeks of fieldwork:

**Table 5: Court hearings observed**

<b>Court</b>	<b>Number of hearings observed</b>
Centreville magistrates	3
Centreville Crown	5
Middleton magistrates	11
Middleton Crown	4
Medborough magistrates	19
Medborough Crown	1
Coreham magistrates	36
<b>TOTAL</b>	<b>79</b>

### Reflections on the plea decision research

The fieldwork with lawyers and in the courts threw up a number of methodological issues, other than those already discussed. First, I encountered an ethical difficulty in terms of obtaining informed consent from defendants to my presence during observations. The research had been planned<sup>333</sup> on the basis that, in addition to the defence lawyer being

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<sup>333</sup> I obtained ethical consent for the research from the School of Law at the University of Warwick under rules approved by the University of Warwick's Humanities & Social Sciences Research Ethics Committee.



informed of the nature and purpose of the research and of the way in which data would be stored and handled, I would ensure that either I or the lawyer would explain the same to each client observed and that it would be made clear that the client had no obligation to allow me to observe. This point was addressed in discussion with the law firms before the research began.

On the first day at Firm P, however, the difficulties presented by this approach became clear. A Firm P lawyer took me to a police station interview with a client who was suspected of a domestic assault. On entering the interview room, the lawyer introduced me to the (somewhat distressed) client as his 'colleague' who was 'subject to the same duties of confidentiality'. Later, during the recorded police interview, the lawyer again introduced me simply as his 'colleague'. After the meeting I discussed with the lawyer my discomfort about this introduction and, in particular, about the client not being fully informed of the reason for my presence or of his right to ask me to leave. The lawyer responded by arguing firmly that he, as the defence lawyer, was best placed to determine how to introduce me and that it was best to describe me as 'shadowing' the lawyer. His reasoning was that the client was under enough pressure without being asked to understand my role and to decide whether or not I should be present in the room. He said that it was 'not appropriate to engage the client in all the background' to my research. He did, however, concede to my request that, if asked directly by a client, I could explain that I was from a university and was 'researching the criminal justice system'. He pointed out that I had 'no relationship with the client', whereas his professional role was to protect his client's interests.

After discussing this issue with my academic supervisor, I accepted the lawyer's approach and in subsequent observations allowed the defence lawyers to determine the appropriate introduction. In practice, the explanation varied according to the lawyer involved and the

circumstances of the meeting. The lawyer who conducted the police station interview gave a more detailed introduction to clients who were in a less pressured situation than the client at the police station (e.g. on introducing me to a client who was at court for sentencing, the lawyer said 'This is Juliet. She's a university researcher who is shadowing us for research into the criminal justice system. She won't be writing down any names or anything but it is up to you whether she sits in or not. It's fine if you would rather she didn't.'

Although the explanations given to many clients fell short of the traditional requirements for obtaining informed consent from research participants, it was clear that (as the Firm P lawyer had pointed out) the clients were being observed at a moment of significant stress when their lawyer was requiring them to absorb and weigh a large number of conflicting issues. In these circumstances, it seemed appropriate for the client's lawyer (who was professionally obliged to protect her client's interests) to take the decision as to whether the client should be engaged in a discussion about research aims and consent. Other lawyers felt less strongly about this issue and would ask me to introduce myself to clients but, in the light of these considerations, I tended to give a far briefer explanation than I had originally planned.<sup>334</sup> It is, perhaps, reassuring to note that, on occasions when I was permitted to introduce myself, the clients showed no interest at all in what I was saying and tended to respond either by referring the question to the lawyer or simply with 'yeah, whatever', 'if you like' or 'I don't care, I'm not bothered.' No clients voiced objections to my presence at any time.

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<sup>334</sup> I explained simply that I was conducting academic research into the plea decision and that I would not record any identifying information, before asking the client if it was okay for me to stay in the room.

The second important methodological issue was the extent to which the observational research study was sufficient to enable me to get an accurate picture of plea discussions between defendants and lawyers. I was only able to spend six weeks observing defendants and lawyers and this time was split across three offices. It is important to consider whether this period of time was long enough to allow me to assess whether the lawyers are behaving naturally or whether they were performing for my benefit. This is a particularly important question given that (as discussed in chapter 4) despite the previous research which indicates that the culture of defence firms tends to lead to lawyers subjecting their clients to oppressive and bullying behaviour, I only saw one instance of such behaviour. This could be interpreted as suggesting that I had failed to access the usual behaviour of the lawyers I was observing.

Of the seventeen cases in which I observed lawyers giving plea advice to clients who had given an innocent account, there were only five in which the lawyer appeared to be making any efforts to guide the client towards a guilty plea. In the other twelve cases the lawyer offered advice on the evidence and the impact of the sentencing incentives but not with any particular emphasis on what the appropriate plea might be. In four of the five cases where the lawyer appeared concerned to highlight to the defendant the risks of the not guilty plea,<sup>335</sup> the lawyer used a light touch and simply explained the strength of the prosecution case and the risk of loss of credit. This is demonstrated by the following exchange in case B21:

Lawyer B6        ‘In terms of the weight of the evidence if [the witnesses] come to court and come up to proof and the jury believe them, then that and the experienced firearms officer means you are likely to be convicted.’

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<sup>335</sup> Cases P5, P8, P21 and B21.

Defendant      'I don't think they'll turn up.'

Lawyer B6      'Well without them they'd struggle. So if you think they won't come you might say 'I'll take my chances' but understand that if convicted then sentence will go up by a significant amount.'

The final defendant who was strongly advised about the risk of conviction was, however, subjected to oppressive behaviour of the type described in previous research. This plea advice was given on the day of the defendant's trial. My observation notes from this plea advice session record that the lawyer's 'manner is icy cold, no eye contact, no smiles, no questions' and that the lawyer rolled her eyes at me when the defendant gave his account of events. Crucially, Lawyer B2 wrongly gave the defendant the impression that he was likely to face imprisonment if convicted at trial, saying:

'There's no reason for them to make a false allegation. I think their account will be believed and you'll be convicted. If so then there's a real chance of this crossing the custody threshold because you have made them give evidence.'

When I queried later whether the defendant was really at risk of custody the lawyer replied, 'Oh, I meant a suspended custodial sentence and it's always best to give the client the worst case scenario'. After the defendant insisted on going through with the trial, the lawyer expressed her frustration to me, 'Told you didn't !! I knew he was going to want a frigging trial!' and for the remainder of the day she avoided speaking to her client as much as possible and made no attempt to explain to him what would happen in court or to offer support during the process. Crucially, this defendant withstood the pressure from the lawyer and persisted in his not guilty plea. In fact, all of the seventeen defendants whose instructions amounted to a full denial of guilt, decided to enter or continue with their not guilty pleas at the point they were observed.

One possible explanation for the relative absence of oppression seen in this research is that the lawyers observed may have been ‘putting on a performance’ of professional behaviour for my benefit. There is always a risk that a researcher’s presence will ‘distort the very thing which is the subject of the project’<sup>336</sup> and one response to this problem is to ensure that the researcher stays in an organisation long enough that she is no longer perceived to be an outsider.<sup>337</sup> It is clear I did not stay in any one firm long enough to become fully ‘embedded’<sup>338</sup> but previous research suggests that this does not preclude reliance on the behaviour observed as being ‘normal’ for the lawyers concerned. The accounts given in *Standing Accused* and by Newman indicate that the behaviour of lawyers in these lengthy observational studies<sup>339</sup> was consistent throughout the time they were studied, with little or no behaviour modification in the early stages of the research.<sup>340</sup> This makes sense given that Newman’s study suggests that lawyers are unaware of the contradiction between the presentational accounts they give at interview and the behaviour that they exhibit. They do not perceive their behaviour to be unprofessional so they see no need to modify it in the presence of a recently arrived researcher. This idea was reflected in comments by Lawyer P1 towards the end of the fieldwork when he and another lawyer were suggesting to me that I should spend time at one of the local firms which has a poor reputation in terms of their standard of defence work and their attitude to their clients. When I suggested that a firm like this might not be willing to have their behaviour observed,

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<sup>336</sup> *Standing Accused* (note 129 supra) at p.14.

<sup>337</sup> McCall, G. & Simmons, J. (1969) *Issues in Participant Observations*. New York: Addison-Wesley at p.22 and Newman (2013) (note 4 supra) at p35.

<sup>338</sup> McCall and Simmons (1969) *ibid* at p.22.

<sup>339</sup> The research for *Standing Accused* (note 5 supra) was based on spending an average of 6.5 weeks in 22 firms (but the actual time spent ranged from several months down to shorter than four weeks), with a total of 198 researcher weeks of observations (pp15-16). Newman (note 4 supra) spent four months at each of three firms followed by a month of interviews at each (p29).

<sup>340</sup> Other than the researchers in *Standing Accused* (*ibid*) noting that lawyers were more forthcoming in their opinions once they had spent more time with the researcher (p14).

Lawyer P1 replied 'Yes, but the thing is they wouldn't even think of what they were doing as being wrong so they wouldn't have any problem with you being there. They think what they do is normal.'

Prior to the observational research, I had some concern that my background as a solicitor and CCRC case review manager might make observed lawyers somewhat self-conscious and that this might change their behavior. Ethnographic literature suggests that researchers who are seen to be naïve or inexperienced in the field of study may be accepted more easily by those observed.<sup>341</sup> In fact, it became clear that few of those observed were aware of my background (despite both firms having been informed of it when access was agreed). I did not volunteer an account of my background to individual lawyers but I was open about it when asked. When I was introduced to lawyers in Firm P, the lawyer introducing me did not give an account of my background but frequently ended with the reminder that 'She's not work experience'. Questions asked later by the lawyers demonstrated that they had not been informed about my previous legal experience. At Firm B, one lawyer patiently explained to me the difference between an 'either-way' and 'summary only' offence and another lawyer mistook me for an undergraduate law student on work placement (and asked me to take a client through a legal aid form, which I declined to do). It seems unlikely, therefore, that my professional background had a significant influence on lawyers' behaviour in this research.

The authors of *Standing Accused* also relied upon examination of files of work done before the researchers arrived (which appeared to show the same behaviour as the researchers

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<sup>341</sup> Lofland, J. & Lofland, L. *Analyzing Social Settings*. (1995) California: Wadsworth pp.56-57; Fielding, N. 'Ethnography' In Gilbert, N (ed.) *Researching Social Life*. (2001) London: Sage (2<sup>nd</sup> edition) and Newman (note 163 supra) at p.34.

had observed) as indicating that they were observing the lawyers' usual behaviour).<sup>342</sup> In the same way, there was little or no conflict between the behaviour observed at Firm P and the firm's files that I examined.<sup>343</sup> There are, therefore, grounds for some confidence that the behaviour observed in this research was normal for the lawyers concerned.

Another possible explanation for the relative lack of pressure from lawyers on their clients is that the observational research focused on the wrong case stage. Most observations were conducted around first or early hearings and only three cases were observed on the day of trial<sup>344</sup> (plus one defendant observed a few days before trial).<sup>345</sup> *Standing Accused*<sup>346</sup> and the Crown Court Study<sup>347</sup> indicate that defence lawyers may be particularly prone to putting pressure on defendants to change plea on the day of trial. It is true that the single case of oppressive behaviour seen during this research occurred on the day of trial. It is impossible to discern from this research whether the lawyers observed might have been more prone to behave oppressively to their clients on the day of trial. It should be noted that I did not deliberately target earlier hearings or avoid the first day of trial (attending all first days of trial about which I was informed), but trials are relatively rare events in current criminal defence practice (particularly in the magistrates' court), making them difficult to access in any number in the period covered by this research. In any event, given that the overwhelming majority of defendants who plead guilty do so at the early stages of criminal

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<sup>342</sup> *Standing Accused* (note 129 supra) at p.14.

<sup>343</sup> As already discussed, only one file was made available at Firm B so the same assessment cannot be made of the behavior observed at Firm B.

<sup>344</sup> Cases P2, P21 and B7.

<sup>345</sup> Case B62, see also at p.183 below.

<sup>346</sup> *Standing Accused* (note 129 supra) at p.257.

<sup>347</sup> Zander M. and Henderson, P. *Crown Court Study* (RCCJ Research Study number 19) (1993) London: HMSO p.62.

proceedings rather than on the day of trial,<sup>348</sup> it is legitimate to focus attention on the reasons why those early guilty pleas are entered.

In the circumstances, these possible explanations for the relative lack of oppressive behaviour cannot be said to undermine the research design for this study.<sup>349</sup> The study does, however, have limitations (being confined to three offices of two firms) and it cannot be assumed that the same behaviour is exhibited in other firms or even in other offices of the same firms. The lawyers involved in this study exhibited professional behaviour towards defendants and yet were conscious that their advice could create significant pressure on the clients. The study does reveal, therefore, (as discussed in detail in chapter 4) that, even at its best, defence legal advice is capable of putting pressure on defendants to plead guilty.

## Data analysis

Following completion of each stage of the fieldwork, I transcribed the interviews (having removed all identifying information about those interviewed and the cases discussed). I then used a two-stage process to code the data.<sup>350</sup> I conducted an initial analysis of the data gathered during the fieldwork, printing out the material and using coloured highlighters to identify headline themes emerging from the text. The purpose of this initial stage was to get an overall sense of the material before beginning the more detailed stage of the coding process. I then used Nvivo software to analyse the data further, using the

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<sup>348</sup> Figures for guilty pleas from the 2014/15 CPS Annual Report and for cracked trials in the Criminal Court Statistics Quarterly for April-June 2015 suggest that in 2014 fewer than 8% of guilty pleas in the magistrates court and fewer than 15% of guilty pleas in the Crown Court were entered on the day of trial. (see Table M4 and Table C4 to the Ministry of Justice *Criminal Courts Statistics Quarterly for April-June 2015* and pp.69-70 of the CPS *Annual Report 2014-2015*. Cracked trials are defined at p.20 of the Guide to Criminal Court Statistics as cases ending by guilty plea on the day of trial).

<sup>349</sup> Possible explanations why these lawyers may have behaved differently to lawyers observed in previous research are discussed further in chapter 4 below.

<sup>350</sup> Esterberg, K. G. (2002). *Qualitative methods in social research*. Boston, MA: McGraw-Hill p.152.



headline themes from the initial reading stage as a starting point. As further themes emerged, they were added and I broke down initial themes into more detailed sub-themes. In addition to coding, I extracted basic statistical information from the data.

## Case referencing

Defence lawyers who were observed in this research are referred to in this thesis by a label containing a letter (representing the lawyer's firm) and a number.<sup>351</sup> CCRC staff and Commissioners are labelled according to their position and a number: 'CM' for Commissioners, 'CRM' for case review managers and 'MT' (management team) for other senior staff.<sup>352</sup> Cases examined at the CCRC are given a numerical reference.<sup>353</sup> Cases observed or files examined during solicitor observations which involved clients of the firm are referred to by the letter of the firm and a number<sup>354</sup> and cases observed in court but which do not involve clients from Firm B or Firm P are referred to by letters identifying the court centre (CEN for Centreville, MID for Middleton, ME for Medborough and COR for Coreham), together with a number.<sup>355</sup>

In describing individuals and cases in this thesis, insignificant details have been altered in order to disguise the identity of individuals involved. For simplicity, the female pronoun is used in general references to defence lawyers and CCRC Commissioners and the male pronoun is used in general references to defendants, CCRC applicants and judges.

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<sup>351</sup> e.g. Lawyer P4 or Lawyer B1.

<sup>352</sup> e.g. CM7, CRM4, MT1.

<sup>353</sup> e.g. Case 161.

<sup>354</sup> e.g. Case P16 or Case B37.

<sup>355</sup> e.g. Case CEN76.

## Chapter 3 The appellate consequences of the guilty plea

If a defendant pleads guilty the case does not benefit from detailed consideration by a court. In contrast, convictions at trial have been through a public process of sifting and weighing of the evidence. This does not mean, however, that convictions resulting from guilty pleas are more vulnerable to challenge at the appeal stage than convictions at trial. In fact, the opposite is true and appeals against guilty plea conviction are much more limited. The question arises as to why Parliament (in respect of appeals from the magistrates' court) and the Court of Appeal (in respect of Crown Court convictions) distinguish in this way between the two modes of conviction. In this chapter I consider this question, in order to examine what this reveals about the meaning and significance of the guilty plea and the consequences to defendants.

It is impossible to assess what will make a guilty plea conviction 'unsafe' without first establishing what could make a guilty plea a 'safe' foundation for conviction. The first part of this chapter discusses three theoretical accounts of the guilty plea, which could, in different ways, provide justifications for founding a conviction on a guilty plea and which would make different requirements of the guilty plea process and the provision of appeal.

Although, superficially, the appeal courts exist to correct errors made in the trial or guilty plea process, in reality the appeal courts' role is more complex than this. The second part

of the chapter argues that, when considering appeals against conviction,<sup>356</sup> the appeal courts are in fact engaged in a complex balancing of contradictory aims of finality, accuracy and fairness. Relying on Noble and Schiff's account of 'tragic choices' in the criminal justice system,<sup>357</sup> this section argues that the appeal courts' role in disguising compromises made in the lower courts is likely to conflict with the theoretical accounts of the guilty plea and, therefore, lead to a degree of confusion and inconsistency in the appellate system.

Having set out this background, the third part of the chapter discusses the law on appeal against guilty plea conviction and the circumstances in which the appeal courts are willing to go behind a guilty plea. By considering the differential appellate treatment of guilty plea convictions and convictions at trial, it is possible to examine which of the theoretical accounts of the guilty plea and conflicting aims of the appellate system are influencing the appeal courts. I argue that this analysis supports the tragic choices account of the guilty plea system and demonstrates that the appeal system cannot be relied upon to provide a remedy for wrongful conviction by guilty plea resulting from systemic or personal pressures on defendants.

## Theoretical accounts of the guilty plea

### The guilty plea as a confession and evidence of guilt

The traditional understanding of the guilty plea as a confession is fundamental to the Court of Appeal's approach to appeals against guilty plea convictions. In the words of Lord Morris of Borth-y-Gest,

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<sup>356</sup> This thesis considers only appeal against conviction and does not address issues around appeal against sentence.

<sup>357</sup> Nobles and Schiff (note 229 supra).

‘The desire of any court must be to ensure, so far as possible, that only those are punished who are in fact guilty. [...] Guilt may be proved by evidence. But also it may be confessed.’<sup>358</sup>

As already discussed,<sup>359</sup> historically the courts treated guilty pleas as a gesture of remorse, in that the plea was commonly relied upon as a mitigating factor in sentencing. For the plea to amount to a confession and a demonstration of remorse or contrition, it must logically amount to an acceptance by the defendant of the truth of the allegations. In such circumstances, the guilty plea could be described as reliable evidence of guilt. This account allows the courts to treat guilty plea convictions as reliable indicators of factual guilt (as supposedly revealed by the defendant’s confession and remorse). In turn, this establishes legal guilt (based on the plea as evidence of guilt) despite the plea having displaced the adversarial system’s traditional mechanism for the reliable assessment of guilt (the contested trial).<sup>360</sup> Breaking down the confession account of the guilty plea, however, reveals the differing ways in which the guilty plea could be seen to demonstrate reliable evidence of guilt.

Within this account, the guilty plea represents an acceptance by the defendant of the truth of the basis of plea.<sup>361</sup> In so far as the ‘facts’ in the basis of plea are within the defendant’s knowledge, this can be seen to be a confession and, therefore, very strong evidence of

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<sup>358</sup> In *S (an infant) v Recorder of Manchester* [1970] 2 WLR 21 at p.501.

<sup>359</sup> In chapter 1.

<sup>360</sup> ‘Put in this way, plea bargains and sentence discounts appeared to cause little conflict with adversary ideals and raised few significant ethical problems for defence lawyers. Because remorse was dependent on factual guilt, innocent people could not be put at risk.’ McConville, M. ‘Plea Bargaining: Ethics and Politics’ (1998) 25:4 *Journal of Legal Studies* 563.

<sup>361</sup> In *R v Gore* [2007] EWCA Crim. 2789, the Court of Appeal said that in pleading guilty the defendant ‘accepted she had wilfully caused the death of her baby. She accepted the baby had been born alive and that she caused its death. As was held in *Saik*, her plea of guilty was an acknowledgement of each ingredient of the offence’.

guilt.<sup>362</sup> For other parts of the basis of plea, the plea must amount to an acceptance that there is sufficiently strong prosecution evidence to justify conviction. Within this account, this 'acceptance' can be seen as demonstrating reliable evidence of guilt because it has been achieved through a process whereby the defendant (and, if represented, his lawyer) has examined the prosecution case in the light of the facts known to the defence and has concluded that the case is overwhelming. This acceptance of the weight of the prosecution evidence, by the party most interested in challenging it, can be seen to amount to very strong support for the prosecution case.

Even the confession account of the guilty plea relies to an extent, therefore, on the defendant's ability to assess the prosecution evidence in the case, where elements of the case fall outside his knowledge.<sup>363</sup> By way of example, consider an assault case in which the defendant, Jack, is alleged to have punched and kicked the victim to the head before fleeing the scene. The victim collapsed later that day and was found to have suffered a non-fatal brain injury. Jack was silent at police interview but later pleaded guilty to the offence of malicious wounding on an agreed basis of plea that he punched the victim repeatedly but did not kick him. In this example, the guilty plea could be seen as Jack's confession that he did indeed punch the victim several times to the head with the intention or foresight of causing some harm. However, it could only be an *acceptance* (and not a 'confession') that the prosecution evidence demonstrates that Jack's punches caused the

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<sup>362</sup> In *R v Shannon* [1974] 2 All ER 1009 the defendant pleaded guilty to a conspiracy but his (sole) alleged co-conspirator was subsequently acquitted. Lord Morris described the guilty plea as the defendant's 'own confession' and said that '[n]o one could know better than A whether he did or did not [commit the offence] and if, fully understanding what he was doing, and having skilled advice to guide or assist him, he acknowledged by way of confession to the court that he had so agreed, the law might seem to be artificial and contrarywise which required that [...] A must be held to be not guilty when he himself knew and had admitted that he was guilty.'

<sup>363</sup> The importance of the defendant having the ability to assess the evidence in the case is discussed further in this chapter at p.136 below and the difficulties facing defendants and their lawyers in doing this are discussed in chapter 4.

brain injury (because causation is not within Jack's personal knowledge). Within this understanding of the guilty plea, it will be presumed that the reason for Jack's acceptance of causation is that he is persuaded (possibly on advice from his lawyers) that the prosecution have sufficient evidence to prove causation. The finding of the court that a defendant is guilty must be based on a combination of his 'confession' and his 'acceptance'.

Seen in this light, it seems obvious that a conviction by way of guilty plea would generally be less susceptible to challenge on appeal than a conviction following trial because it is based on a combination of a confession and a recognition (on the part of the party with the most at stake) of an overwhelming prosecution case. The difficulty in challenging the conviction would be an evidential one. This means that in order to challenge the conviction within this understanding of the plea, the defendant would either have to bring evidence that undermined the reliability of his 'confession by way of guilty plea' (for example, evidence that his plea resulted from threats or inducements) or he would have to identify cogent new evidence that cast doubt on the prosecution case and outweighed the evidential value of his plea.<sup>364</sup> In the example case presented above, suppose that reliable new evidence emerged that Jack was in prison on the day of the attack.<sup>365</sup> In evidential terms this would be strong evidence that would undermine the reliability of both elements of the guilty plea (the confession and the defendant's assessment of the strength of the case against him). An additional way to challenge the conviction, in theory, would be to demonstrate a significant abuse of process, as the courts' concern to uphold the integrity

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<sup>364</sup> '[A] plea of guilty is normally regarded as an acknowledgment of guilty by the defendant (especially if mitigation is advanced to that effect) and so an appeal will need to displace that presumption.' (Taylor, P. (2012) *Taylor on Criminal Appeals* (2<sup>nd</sup> Edition). OUP at para. 9.01 [footnotes omitted]).

<sup>365</sup> In response to any objection that Jack would not have pleaded guilty in these circumstances, we will suppose that the incident occurred a number of years ago and that Jack's recollection has been confused because he had a fight with the victim around the time of the relevant assault and a few days before he (Jack) was returned to prison.

of the criminal process can justify them in quashing convictions as a consequence of an abuse of process despite compelling evidence of guilt.<sup>366</sup>

### **The guilty plea as a negotiated settlement**

As discussed in chapter 1, the traditional account of the guilty plea as a confession and, therefore, as reliable evidence of guilt, has been subjected to increasing challenge as a consequence of the criminal justice system's increasing reliance on plea bargaining in all its forms. Historically, the courts dealt with this problem by effectively operating a presumption of remorse, regardless of the real reasons for the plea<sup>367</sup> but this reliance on remorse in the face of a bargained plea was a purely rhetorical device. It is difficult to argue that a defendant who has extracted a price from the prosecution in return for his guilty plea is, by that plea, demonstrating remorse. And once the aura of remorse (with its connection to factual guilt) has dissipated, we are faced once again with the questions of the reliability of a 'confession' induced by the offer of benefits. As the Royal Commission on Criminal Justice acknowledged,<sup>368</sup> the sentence discount and other forms of plea bargaining can mean that it is a rational choice for an innocent defendant to plead guilty in order to avoid the more severe consequences of conviction at trial.

If a guilty plea conviction can no longer be relied upon as necessarily resting on a genuine confession then we must look for an alternative justification for founding a conviction on a guilty plea. One alternative might be to accept guilty pleas simply as tactical decisions by defendants, reached through a process of negotiation. This account of the guilty plea as a 'negotiated settlement' finds some support in the literature from the USA on plea

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<sup>366</sup> See p.158 below.

<sup>367</sup> Heberling, J. 'Conviction without trial' (1973) 2 *Anglo-American L. Rev.* 428-472 at p.434 citing the comments of Lord Parker in *R v Turner* (1970) 54 Cr. App. R. 352 at p.360, 'A plea of guilty, showing an element of remorse, is a mitigating factor which may well enable the court to give a lesser sentence than would otherwise be the case.'

<sup>368</sup> See p.35 supra.

bargaining.<sup>369</sup> Arguments in support of this account (which permits the acceptance of guilty pleas even from defendants who continue to assert their innocence to the court)<sup>370</sup> tend to focus on the importance of party control within the adversarial process and on a pragmatic acceptance of the benefits, to the defendant and to society, of negotiated pleas. Under this understanding of the guilty plea, the focus of the system should be on achieving a fair process which leads to a truly voluntary decision by the defendant on plea.

If the guilty plea is seen simply as a negotiated settlement in which the defendant, for reasons of his own, waives his right to require the prosecution to prove its case this will have different implications for the appeal process. In our example case, Jack (through his representatives) negotiated a settlement such that he will waive his right to challenge the cause of the brain injury, the evidence that he punched the victim and the suggestion that he intended or foresaw some harm, provided that the prosecution withdraws the allegation that he kicked the victim. In return he will be sentenced on a less serious factual basis and be entitled to receive a discount for his guilty plea.<sup>371</sup> Within the negotiated settlement account, the reasons for Jack's decision are unimportant. It may be because he has assessed the evidence and believes he will lose the case at trial but it may equally be, for example, because he is terrified of undergoing the trial process or because he wishes to be imprisoned to escape harassment from an ex-partner.

On the basis that the prosecution and any defence lawyers have followed the correct rules and processes and complied with their own professional obligations, the court is willing to

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<sup>369</sup> See, for example, Scott, R. & Stuntz, W. 'Plea Bargaining as Contract' (1992) 101 *Yale Law Journal*, at 1909-1968. See also the responses in Easterbrook, F. 'Plea Bargaining as Compromise' (1991) 101 *Yale Law Journal*, at 1969-1978 and in Schulhofer, S. 'Plea Bargaining as Disaster.' (1992) 101 *Yale Law Journal*. 1979-2009.

<sup>370</sup> As permitted by *North Carolina v. Alford*, 400 U.S. 25, 26-27 (1970) (discussed further in chapter 6 below).

<sup>371</sup> Criminal Justice Act 2003, section 144.



accept this negotiated settlement and convert it into a finding of the court. Even where there has been no express negotiation with the prosecution or with the court (in other words, no plea or fact bargain and no advance indication of sentence) a guilty plea is still, within this model, a negotiated settlement because the criminal justice system has set up a standing offer of a discount for a guilty plea which then engages all defendants in an implied negotiation over plea.

This approach to the guilty plea prioritises party control of the case over the pursuit of accuracy. Having waived his right to challenge the case in return for a benefit, any challenge by Jack to his conviction will be based upon a challenge to the fairness of the negotiation and not on the weight of the evidence. The decision to waive the right to challenge the prosecution case inevitably amounts to a gamble by the defendant because he is giving up the chance that he may be acquitted at trial or that future evidence might arise which assists his case. If the appeal courts regularly allowed defendants to appeal against the verdict on the basis of new evidence and reopened the issue of guilt this would entirely undermine the basis on which the benefit was granted. Finality becomes a central concern.<sup>372</sup> Appeal courts applying the negotiated settlement account of the guilty plea would, therefore, be slow to respond to new evidence undermining the prosecution case or even to an abuse of process, unless these matters rendered the plea process itself unfair. It might, however, be possible to attack the guilty plea conviction by demonstrating that the prosecution misrepresented the case and thus altered the balance of the negotiation or by demonstrating that the judge interfered in such a way as to undermine the defendant's negotiating position. If the process by which the settlement was reached can be

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<sup>372</sup> In the USA, plea agreements routinely require defendants to waive their appeal rights. See Leib, D. 'Vindicating Vindictiveness: Prosecutorial Discretion and Plea Bargaining, Past and Future' (2014) 123 Yale LJ 1014 and. Stephens, R. Disparities in post-conviction remedies for those who plead guilty and those convicted at trial. (2013) 103 Journal of Crim. Law and Criminology. 309.

undermined in this way then, within this understanding of the guilty plea, the defendant should not be bound by the settlement and the conviction should be quashed.<sup>373</sup>

The negotiated settlement account suffers from a critical flaw in that, in asserting the defendant's right to submit voluntarily to conviction, it fails to address the fundamental aim of accuracy within the criminal justice system.<sup>374</sup> Within this account of the guilty plea, the conviction of a factually innocent defendant who chooses to plead guilty in order to protect the true culprit from conviction or in order to be accommodated in prison over Christmas can be legitimate provided that this voluntary decision is achieved through a fair process.<sup>375</sup> For this reason, it is submitted, the account of the guilty plea as a negotiated settlement does not provide sufficient justification for convicting by guilty plea.

#### **The guilty plea as a defendant-assessed verdict**

A better account of the guilty plea within a criminal justice system that incentivises guilty pleas lies somewhere between the two extremes of 'confession' and 'negotiated settlement' and can be best described as a 'defendant-assessed verdict'. This account of the guilty plea recognises the influence of plea bargaining (and, therefore, the element of negotiation inherent in a guilty plea conviction) but also asserts the importance of accuracy as an aim of the criminal process. Within this account, the guilty plea represents the

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<sup>373</sup> One of the criticisms of the U.S literature on plea bargains as contracts is that the analysis overlooks the imbalance in negotiating power between the parties in the criminal process. Lippke asserts that the contract view of plea bargaining 'invites us to gloss over the important difference in the kinds of negotiated settlements that are reaching in existing criminal justice systems, suggesting that all of them have the sheen of respectability that comes from their being free agreements between parties who exchange things to which they are entitled.' (Lippke (note 100 supra) at p. 189.)

<sup>374</sup> Lippke (ibid) at p.219 argues that charge bargaining is unlikely reliably to produce accurate verdicts or 'the truth', and that fact bargaining is 'the apex of this ridiculousness'. He suggests that it 'is hard to imagine a legal procedure more ill-suited to discovering the truth about the crimes individuals have or have not committed.'

<sup>375</sup> This account of the guilty plea also makes it legitimate for the parties to reach plea agreements which offer an inaccurately favourable account of the defendant's actions. This form of inaccuracy is also, of course, problematic.

defendant's decision to pre-empt a likely guilty verdict at trial. This requires that the defendant be given information and legal assistance (including, where necessary, the ability to investigate the defence case) to assess what the likely verdict at trial would be. This is inevitably an imperfect assessment because it is impossible to know how the witnesses would perform at trial. It is necessary, therefore, to offer the defendant an incentive in return for giving up the opportunity fully to test the evidence. The account requires, however, that the incentive offered is not so favourable as to distort the defendant's assessment of the risk of conviction at trial.

Applying this account to Jack's case, the defendant-assessed verdict account makes no assumption about Jack's own sense of culpability (i.e. there is no reliance on the guilty plea as confession) but, unlike the negotiated settlement account, it is important that Jack reached his decision to plead guilty having assessed, with the help of his lawyer, the evidence in the case. Based on this assessment, Jack has decided that a court is likely to convict him of the offence, at least on the lesser basis. Given the availability of the sentence discount and the prosecution's willingness to accept the reduced basis of plea, Jack is willing to substitute his assessment of the evidence in place of a court's assessment at trial.

In this account Jack's conviction has some evidential basis, in the sense that Jack (the individual apparently with the most stake in avoiding conviction) has assessed the available evidence and found that it is likely to satisfy a court.<sup>376</sup> As with the negotiated settlement account, Jack has received a benefit for waiving his right to test the evidence at trial and so

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<sup>376</sup> The imperfection of the defendant's assessment of the evidence (because he does not know how the witnesses would perform at trial) is not fatal to justifications for the conviction any more than a trial court's fallibility in accurately determining guilt or innocence is fatal to general justifications for conviction at trial. As discussed at note 231 *supra*, individual trials cannot rationally be presented as a scientific search for truth.

an appeal court would be concerned that he should not readily be able to challenge that evidence on appeal. However, given that the justification for the conviction rests on Jack's assessment of the evidence in the case, he would be able to challenge the conviction if it transpired that the prosecution had withheld evidence or if his lawyer had wrongly advised him. The evidential basis for the conviction would also be undermined if he could show that he had been subjected to some form of duress in the plea process or had been impaired by a serious vulnerability (because this could mean he was unable effectively to assess the likely verdict in the case). Finally, the conviction could be undermined by new evidence which emerged after the guilty plea (even without any fault on the part of the prosecution) which changed the balance of the case. Given that Jack has received a benefit for giving up the right to challenge the prosecution case it would, however, be legitimate for the appeal courts to balance the requirements of finality and accuracy by setting a relatively high evidential bar before it permitted the case to be re-opened on the basis of potentially exculpatory new evidence.

This analysis of the accounts of the guilty plea that could underpin the guilty plea system reveals that, within all three accounts, arguments can be made that a voluntary and informed guilty plea represents a safe foundation for conviction. However, the corollary of this is that the freedom of defendants to reach voluntary and informed decisions on plea is a fundamental requirement of a safe conviction by guilty plea. Under all three accounts, therefore, the appeal courts should be concerned if the defendant's plea resulted from undue pressure (because such pressure could undermine the reliability of a 'confession', limit the defendant's autonomy in reaching a 'negotiated settlement' or limit his ability to assess the likely verdict at trial). If there is to be a claim to accuracy in guilty plea convictions (i.e. if the pure 'negotiated settlement' account is rejected), a 'safe' guilty plea conviction requires that the defendant is given adequate evidence so that (in the confession account) he can assess elements of the case outside his personal knowledge or

(in the defendant-assessed verdict account), he can assess the likely verdict. Finally, new exculpatory evidence that is sufficient to outweigh the evidential value of a voluntary plea could undermine both the confession and defendant-assessed verdict accounts of the guilty plea.

This section has considered how the various accounts of the guilty plea might, in theory, influence the approach to appeals against guilty plea conviction. In reality, however, the appeal courts are required to balance a wider range of systemic aims and values than can be accounted for in theoretical accounts of the justifications for individual convictions. For this reason, the next section discusses these systemic aims and the ways in which they might influence the law on guilty plea appeals.

### **The aims of the appeal system**

Although at a superficial level the appeal courts exist to correct errors made in the lower courts, their role is, in fact, more complex than that. When considering appeals against conviction the appeal courts are engaged in a difficult balancing of the contradictory aims of finality, accuracy and fairness.<sup>377</sup>

Finality is important because a stable criminal justice system, commanding the confidence of the public, requires that court decisions can generally be relied upon as final outcomes. In this way, the Court of Appeal has an important role in 'lending authority to the routine practices of criminal justice'.<sup>378</sup> Promoting finality also contributes to the system's pursuit of efficiency and cost-savings.

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<sup>377</sup> The Auld Review (note 97 *supra*) described the aims of the appellate system as; to do justice to the defendant and to the public; to bring finality subject to the need to safeguard the prosecution and defence from 'clear and serious injustice such as would damage the integrity of the criminal justice system'; to be readily accessible 'consistent with the proper balance of the interest of individual defendants and that of the public'; to be clear and simple; to be efficient and effective and to be speedy. (chapter 12, paragraph 2.)

<sup>378</sup> Nobles and Schiff (note 229 *supra*) at p.9.

Accuracy is important to the authority of the criminal justice system because public confidence requires that the courts are willing and able to correct decisions that appear to be fundamentally at odds with evidence becoming available at the appeal stage. Finally, the value of fairness leads to the acknowledgement that, regardless of guilt or innocence, where there has been significant wrongdoing on the part of the police or prosecution, the courts may need to quash the conviction in order to protect the integrity of the criminal process (i.e. on due process grounds).

Each of these aims makes a contribution to the authority of the criminal justice system. The literature on criminal appeals (and, in particular, on the work of the CCRC) has focused in recent years on the appropriate balance between these aims,<sup>379</sup> largely initiated by members of innocence projects whose work is directed towards those they consider to be 'factually innocent'. The role of factual innocence in the appeals process is uncertain. The Court of Appeal asserts that a 'conviction can never be safe if there is doubt about guilt'<sup>380</sup> and that a conviction will be 'unsafe' if (for example) 'it appears someone other than the appellant committed the crime and the appellant did not'.<sup>381</sup> Despite this, appellants who have identified evidence supporting their claim of factual innocence frequently look for procedural irregularities to bolster their appeal because the Court of Appeal is more likely to be persuaded by such irregularities.<sup>382</sup> The reason for this preference for procedural

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<sup>379</sup> See Naughton, M. *The CCRC; Hope for the Innocent?* (2009) Basingstoke: Palgrave MacMillan; Naughton, M. 'The CCRC: Innocence versus Safety' (2012) 58 *Crim. Law Q.* 207-244. Also, Quirk, H. 'Identifying Miscarriages of Justice; Why Innocence is not the answer' (2007) 70(5) *MLR* 759-777, Jenkins, S. 'Miscarriages of Justice and the Discourse of Innocence.' (2013) 40:3 *Journal of Law and Society.* pp.329-55 and Roberts, S. and Weathered, L. 'Assisting the Factually Innocent' (2008) *Oxford Journal of Legal Studies* pp.1-28 and Heaton, S. *A critical evaluation of the utility of using innocence as a criterion in the post-conviction process* (2013) Unpublished PhD thesis. University of East Anglia.

<sup>380</sup> Matell LJ in *R v Davis, Rowe and Johnson* [2001] 1 Cr. App. R. 115 at 131-132.

<sup>381</sup> Lord Bingham CJ in *R v CCRC ex p Pearson* [2001] 1 Cr. App. R. 141 at 146-147.

<sup>382</sup> Roberts and Weathered (note 379 supra) at p.15.

irregularity over claims of innocence is again founded on the courts' role in upholding legal authority. A finding that a jury has, through the routine application of the rules and procedures governing jury trial, reached the wrong verdict has the potential to undermine confidence in the trial process as a whole. In contrast, a decision to quash a conviction because of a breach of a procedural rule provides a 'workable basis for routine appeal process'<sup>383</sup> because, being founded on the application of a system of rules, these decisions are predictable and relatively easy to explain. As part three of this chapter demonstrates, this inevitable preference for findings of irregularity over innocence is reflected in the appeal courts' approach to guilty plea cases.

The discussion of the law in this chapter demonstrates that there is a disjunction between appeal provision in guilty plea cases and the requirements of the appeal process which proceed from the theoretical accounts of the guilty plea given in this chapter. McConville and Marsh<sup>384</sup> argue that, because the guilty plea system operated in England and Wales has deviated so significantly from adversarial principles, judges have been forced to construct a 'new set of "rational" principles' regarding guilty pleas. In order to provide the necessary rationality, such principles must be rooted in considerations of justice, fairness and equality. In this account, the appeal courts decision in *Turner* and the other cases that followed represent the courts' duplicitous efforts at demonstrating the required legitimising rationality in order to justify upholding the products of 'state-induced guilty pleas'.<sup>385</sup>

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<sup>383</sup> Nobles and Schiff (2000) (note 229 supra) at p.240.

<sup>384</sup> McConville and Marsh (note 4 supra).

<sup>385</sup> Ibid at p.65.

McConville and Marsh argue that the appeal courts' desire to encourage and uphold 'state-induced guilty pleas' arises from the judges' instinctive distrust of jury verdicts.<sup>386</sup> Nobles and Schiff's alternative interpretation of the appeal courts' role highlights the pursuit of efficiency in the criminal process. Applying their discussion of tragic choices in the criminal justice system<sup>387</sup> to guilty pleas provides a slightly different explanation for the disjunction between theoretical accounts of the guilty plea and the practice of the appeal courts. Nobles and Schiff argue that at the pre-trial and trial stages of the criminal process the fundamental but conflicting values of truth/accuracy<sup>388</sup> and fairness are balanced against each other but that, ultimately, both are sacrificed in the interests of efficiency.<sup>389</sup> In this way, the guilty plea system, with its acceptance of plea bargaining, can be seen to represent the deliberate (and 'tragic') prioritisation of efficiency savings over the fundamental values of accuracy and fairness.

Nobles and Schiff's analysis suggests that the role of the Court of Appeal is to disguise the earlier tragic choices, thus protecting the public and the criminal justice system from the painful realisation that these values have been deliberately compromised. Apparent inconsistencies in the Court of Appeal's treatment of the meaning of guilty pleas may, therefore, reflect the Court's legitimate efforts to disguise the tragic choices in the guilty plea process. Through rhetoric, the court can pretend that processes which seek economic efficiencies do not significantly impair either fairness or accuracy. This may require 'practices generally considered unhelpful to rational public policy (dishonesty,

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<sup>386</sup> See p.61 *supra*.

<sup>387</sup> Nobles and Schiff (2000) (note 229 *supra*).

<sup>388</sup> As discussed at note 231 *supra*, Nobles and Schiff use the term 'truth' here but in this thesis I have used the term 'accuracy' in its place.

<sup>389</sup> Nobles and Schiff (2000) (note 229 *supra*) at p.4.



inconsistency, hypocrisy and ignorance)'.<sup>390</sup> In individual cases, however, it will become apparent that these tragic choices will sometimes lead to miscarriages of justice.<sup>391</sup> In those cases, the appeal court cannot always disguise the injustice and so has to present this outcome as unintended.<sup>392</sup>

Both of these accounts of the appeal courts suggest that the law on appeals against guilty plea conviction is likely to be characterised by inconsistency and hypocrisy, with hostility to challenges to guilty plea convictions masked by rhetoric supporting the values of fairness and accuracy. In the discussion that follows, it will be possible to see the extent to which this is true.

### **The law on appeals against conviction by way of guilty plea**

The criminal justice system treats guilty plea convictions as being safer than trial convictions despite trial convictions having resulted from a detailed examination of the evidence by an impartial court. Parliament (in respect of magistrates court convictions) and the Court of Appeal (in respect of Crown Court convictions) severely restrict appeals against conviction by way of guilty plea and challenges to guilty plea convictions are limited to three categories of cases.

Firstly, if a guilty plea has resulted from 'wrongful' pressure to plead guilty (meaning pressure which is caused by behaviour from other actors in the criminal process which amount to a breach of procedural rules) then the plea is likely to be 'involuntary' and the guilty plea can be set aside. This can apply in both magistrates' court and Crown Court guilty pleas.

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<sup>390</sup> Ibid, p.3.

<sup>391</sup> Ibid, p.4.

<sup>392</sup> Ibid, p.4.

Secondly, if the guilty plea has resulted from some other error within the system (erroneous legal advice, an erroneous ruling or an abuse of process) then it may be quashed but it is harder to satisfy the Court of Appeal that the error has rendered the conviction unsafe than it would have been if the conviction was the result of a jury verdict. The reason why the guilty plea should make appeal in these circumstances more limited is not explicit in the judgments. If the conviction was in the magistrates' court then the limitations on direct appeal make it likely that such a case could only be appealed on referral by the CCRC.

Finally, if there has been no error within the system the guilty plea will prevent the conviction being overturned unless this is an 'exceptional case' where the appeal courts identify significant new evidence which suggests that the defendant was not guilty and which it considers to be in the interests of justice to admit. If such evidence exists then it does not matter why the appellant pleaded guilty. If the defendant pleaded guilty in the magistrates' court then the case would, in theory, need to be referred to the Crown Court by the CCRC for an appeal to be heard.

If no 'exceptional' new evidence has been identified and there has been no error in the system then the appeal courts are unlikely to be interested in systemic or personal pressures even if, as a matter of fact, such pressures induced the guilty plea. Such a guilty plea will be deemed to represent a reliable foundation for a safe conviction.

This summary of the possible grounds of appeal against guilty plea conviction obscures the complexity of the courts' treatment of these cases and, in particular, the confused treatment of magistrates' court guilty pleas. The next section will consider the different categories of cases in more detail to demonstrate the inconsistencies in the appeal courts' treatment of the cases and its incompatibility with the theoretical justifications for guilty pleas outlined above.

### Magistrates' court convictions

Following conviction in the magistrates' court, a defendant's ability to challenge his conviction is determined by the plea that he entered. A person who pleads not guilty and is convicted following a magistrates' court trial has the right to appeal to the Crown Court.<sup>393</sup> This appeal will be by way of rehearing. In contrast, a defendant who has entered an unequivocal guilty plea in the magistrates' court has no right of appeal<sup>394</sup> so that, generally, the guilty plea is a final disposal of the case.<sup>395</sup>

If the defendant can show that the plea was entered equivocally he may be able to argue that the plea was a nullity so that the case can be returned to the magistrates' court for trial.<sup>396</sup> The mechanism for this is either by application to the Crown Court<sup>397</sup> or to the High Court by way of case stated.<sup>398</sup> However, the courts define equivocal plea very narrowly<sup>399</sup> and few cases are remitted.<sup>400</sup> The issue of equivocal plea considers what went on at the

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<sup>393</sup> Magistrates' Court Act 1980, section 108.

<sup>394</sup> Magistrates' Court Act 1980, section 108 and *R v Birmingham CC ex parte Sharma* [1988] Crim. L.R. 741.

<sup>395</sup> The defendant can apply to change his plea before sentencing (whether sentencing is to be in the magistrates' court or the Crown Court) but this will be at the discretion of the judge or magistrate and should only be used 'in clear cases and very sparingly' (per Lord Upjohn in *S (An infant) v Recorder of Manchester* [1971] AC 481 at p507).

<sup>396</sup> *R v Middlesex Quarter Sessions ex p Rubens* [1970] 1 All ER 879. Guilty pleas can also be set aside based if necessary to protect a defendant from double jeopardy (*Cooper v New Forest District Council* [1992] Crim. L.R. 877).

<sup>397</sup> Taylor (note 364 supra) at note 182 cites *R v Huntingdon JJ, ex p Jordan* 73 Cr. App. R. 194, DC on this point. Also see *R v Norwich CC ex parte Estabrook* QBD, 13 March 2000 CO/1133/99 which held that the Crown Court should have made enquiry to establish whether the inconsistency between the appellants plea and her account given in the pre-sentence report was the result of duress. The court stressed, however, that 'in the absence of a suggestion that the advocate was acting as a conduit to pass on a threat or promise from the court, it is extremely difficult for a defendant to satisfy the court that she was deprived by her advocate's advice of a voluntary choice when she entered her plea of guilty.'

<sup>398</sup> Under the Magistrates Court Act 1980, section 111.

<sup>399</sup> See Taylor (note 364 supra), para 2.65 for a discussion of the categories of equivocal plea.

<sup>400</sup> Although the number of cases remitted to the magistrates' court are not recorded in the Ministry of Justice's criminal court statistics, it is known that in 1996 only 35 appeals were remitted to the

court (at the point of plea<sup>401</sup> or at the sentencing hearing<sup>402</sup>) so that, provided that the plea was 'on its face' unequivocal, the case cannot be remitted even if the appeal court is satisfied that the defendant did not intend to plead guilty;<sup>403</sup> nor will a plea be equivocal because it was based on a mistake of facts<sup>404</sup> or erroneous legal advice.<sup>405</sup> Duress from a co-defendant at court can render a plea equivocal<sup>406</sup> but this is, again, rarely found and 'duress' does not extend to the routine systemic and personal pressures experienced by defendants. It is apparent, therefore, that the requirement of unequivocality turns on a concern that there should be no overt contradiction between the conviction and the factual account being offered to the court in a guilty plea case. This is about the appearance of justice and has less to do with a concern that the guilty plea can be relied upon as being a genuine acknowledgment of the truth of the prosecution case.

Finally, defendants who have pleaded guilty can, in theory, make use of section 142(2) of the Magistrates Court Act 1980 which provides an error correction mechanism in the

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magistrates' court (Mattinson, J. 'Criminal Appeals England and Wales, 1995 and 1996' (1998) *Research and Statistical Bulletin* 3/98, London: Home Office, at table 4).

<sup>401</sup> e.g. 'guilty but..... pleas', per *R v Rochdale JJ, ex p Allwork* (1981) 73 Cr. App. R. 319, DC at 322.

<sup>402</sup> e.g. where mitigation is put that is inconsistent with the plea (*Durham Quarter Sessions, ex parte Virgo* [1952] 2 QB 1) or where the defendant's statement to the police was read out to the court and revealed a defence (*R v Marylebone JJ, ex p Westminster City Council* [1971] 1 WLR 567, DC).

<sup>403</sup> *R v Marylebone JJ, ex p Westminster Crown Court* [1971] 1 WLR 567 DC. See also the Court of Appeal's comments in *R v Drew* [1985] 81 Cr.App.R. 190 'An equivocal plea is one qualified by words which, if true, indicate that the accused is in fact not guilty of the offence charged [...] Such a plea is wholly different in character – and consequence – from the plea entered here which may have been reluctant or even wrong-headed but was in no sense ambiguous.'

<sup>404</sup> *R v Birmingham Crown Court ex p Sharma* [1988] Crim. L.R. 741

<sup>405</sup> *R (on the application of Khalif) v Isleworth CC* [2015] EWHC 917.

<sup>406</sup> In *R v Huntingdon Crown Court ex parte Jordan* 73 Cr.App.R. 194 the Divisional Court held that a plea may be set aside where it was entered as a result of duress or coercion. The defendant having said that her plea was the result of duress from her husband (which, she said, he reminded her about by nudging her during the court hearing itself) and the case was remitted on this basis.

magistrates' court (known as 'the slip rule')<sup>407</sup> but the courts have severely restricted its application. It is now clear that the courts will not use this power to provide a wider appeal mechanism in guilty plea cases.<sup>408</sup> The slip rule is, therefore, unlikely to provide a real remedy in guilty plea cases.

The limits on the statutory right of appeal may seem surprising given that the right of appeal from the magistrates' court is generally wider than from the Crown Court (in contrast to the Court of Appeal, there is no requirement for leave to appeal to the Crown Court and the appeal is heard by way of rehearing). Pattenden<sup>409</sup> suggests that the limitation on appeal from guilty pleas is, in fact, a *consequence* of the generally wider appeal rights in the magistrates' court as the high proportion of guilty pleas in the magistrates' court would mean that a right of appeal would overwhelm the appeal system.<sup>410</sup> Whatever the reason, the right to appeal by way of rehearing has always been

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<sup>407</sup> The Criminal Appeal Act 1995 amended this mechanism to make it (technically) available following conviction by guilty plea.

<sup>408</sup> *R v Croydon Youth Court, ex parte DPP* [1997] 2 Cr. App. R. 411 and also *R (on the application of Williamson) v City of Westminster Magistrates' Court* [2012] EWHC 1444 (Admin). In *Croydon*, the Divisional Court said that 'it would be wholly wrong in my judgment for it to be possible to employ section 142(2) as a method of a defendant obtaining a re-hearing as a substitute for an appeal to the Crown Court which he cannot pursue because he had unequivocally pleaded guilty'. Defence counsel sought to rely on the section permitting a re-hearing 'where it appears to the court to be in the interests of justice to do so.' The Court said that this argument would only hold if the interests of justice were to 'enable the defendant to have another bite of the cherry' and that the interests of justice also include 'the interests of the courts and the public that people who have pleaded guilty with the advice of counsel should continue to be regarded as guilty and that there should be certainty and an end to litigation.'

<sup>409</sup> Pattenden, R. *English Criminal Appeals 1844-1994*. (1996) Oxford: Clarendon.

<sup>410</sup> Under the current appeal provisions the rate of appeal from the magistrates' court is actually very low. Although exact figures are not available, comparing the Criminal Court Statistics and the Crown Prosecution Service's statistics indicates that, in 2014/2015, less than 1.5% of magistrates' court convictions were appealed. (The Ministry of Justice's Criminal Courts Statistics indicate that, in the year from April 2014, the Crown Court dealt with 5,914 appeals against summary conviction. The CPS Annual Report and Accounts 2014/2015 record 474, 687 summary convictions handled by the CPS in the same period.) This is largely explained by the fact that most magistrates' court convictions are by way of guilty plea. Appellants are also likely to be deterred by the Crown Court's

limited to those who pleaded not guilty.<sup>411</sup> As a consequence, until the Criminal Appeal Act 1995, a defendant who entered an unequivocal guilty plea in the magistrates' court could not, in theory, have his appeal overturned even if new evidence emerged which overwhelmingly indicated that he was not guilty.<sup>412</sup> This situation made it impossible to argue that convictions by way of guilty plea in the magistrates' court could be justified as being founded on reliable evidence of guilt.

In 1995, however, the Criminal Appeal Act 1995 gave the newly established Criminal Cases Review Commission the power<sup>413</sup> to refer magistrates' court convictions to the Crown Court for appeal by way of rehearing and made no distinction according to plea. The referral can be made if there is a 'real possibility' that the Crown Court will quash the conviction.<sup>414</sup> This power is potentially an important development in the treatment of convictions by way of guilty pleas in the magistrates' court in that (in theory, at least) it opens the door to complaints about the fairness or accuracy of guilty plea convictions.

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power to impose a higher sentence following an unsuccessful appeal (a power which is not available in the Court of Appeal) and will also face difficulties in obtaining legal aid for an appeal.

<sup>411</sup> This right of appeal was established in the Summary Jurisdiction Act 1879 s19 for defendants convicted of a summary offence and imprisoned *after a contested trial*. The Criminal Justice Administration Act 1914 extended this right of appeal to all convictions (regardless of the sentence) provided that the defendant had not pleaded guilty or admitted the truth of the charge. The Criminal Justice Act 1925 extended the right to appeal against *sentence* for people who had pleaded guilty but did not change the position regarding conviction appeals. See Pattenden (note 409 supra) for further discussion of the development of appeal by way of rehearing.

<sup>412</sup> . As a consequence of Magistrates Court Act 1980, section 108. There are, however, anecdotal reports of such cases being remitted on a pragmatic basis despite the lack of a power to do this and of defendants subsequently being acquitted on the basis of the new evidence. Further research is required in this area.

<sup>413</sup> Under the Criminal Appeal Act 1995, section 11(1).

<sup>414</sup> This power is discussed in Kerrigan, K. 'Miscarriage of Justice in the magistrates' court: the forgotten power of the CCRC' (2006) Feb. *Crim. L.R.* 124

In one of the CCRC's referrals to the Crown Court, *R v F (Mark)*,<sup>415</sup> the court stated that the CCRC referral power is not confined to the traditional categories of equivocal or involuntary plea but that a plea should be set aside on referral by the CCRC if it was 'an affront to justice' to let it stand. The court observed that this power should be used sparingly and only when there were 'clear cogent and compelling reasons making clear that the interests of justice require the matter to be re-opened'.<sup>416</sup> In this case, however, the court found that the defendant's plea resulted from oppression arising out of the defendant's treatment by the police and the court process. The guilty plea was set aside and the conviction quashed. There have also been CCRC referrals and subsequent acquittals as a consequence of summary guilty pleas resulting from erroneous legal advice<sup>417</sup> and when the Commission's enquiries have established that there was, in reality, no offence in law.<sup>418</sup>

This provision has left the CCRC with an important power, which could provide a remedy for guilty plea convictions made unsafe by pressure or error at the plea stage, and has the potential to affect hundreds of thousands of cases each year. The Criminal Appeal Act 1995

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<sup>415</sup> *R v F (Mark)* per HHJ Openshaw QC (This judgment is unreported but discussed by former Commissioner Laurie Elks in Elks, L. *Righting Miscarriages of Justice: 10 years of the CCRC*. (2008) London: Justice at p.330).

<sup>416</sup> *ibid*, at paragraph 7.

<sup>417</sup> See, for example, *Abwnawar, Abwnawar, Nazarian and Sohrabian v CPS Isleworth CC* 1 Nov 2005 (unreported but discussed by Laurie Elks (*ibid*) at p.332). This is one of a tranche of immigration and asylum cases in which defence lawyers failed to advise the defendants that they had a good defence in law to the charges against them. HHJ Richard McGregor-Johnson said, referring to *R v F*, that it was common ground that the appellants need to apply to change their guilty pleas but he said that, in the context of this case, this meant that they had to satisfy the court 'on the balance of probabilities that they had a valid claim to have the prosecution stayed as an abuse of process'. This approach demonstrates that the power to allow change of plea is wider than simply duress or equivocal plea.

<sup>418</sup> See, for example, *R v Muff* (unreported but discussed by Laurie Elks (*ibid*)) in which the defendant's guilty plea relating to violating a lifetime ban on possession of a firearm was founded on a mistake concerning the sentencing legislation. In effect, he was never under a lifetime ban so he could not be guilty of violating such a ban.

gives the CCRC no guidance, however, on how the power should be exercised.<sup>419</sup> Little information has been publicly available about referrals by the CCRC of magistrates' court convictions as the CCRC does not publish the reasons for its referrals and the resulting appeal decisions are unreported. For this reason, the discussion in chapter 5 below of my research data regarding the CCRC's power to refer magistrates court convictions makes a new contribution to understanding this important and complex provision.

### **Crown Court convictions**

Following conviction in the Crown Court, the defendant's ability to appeal his conviction is again significantly affected by his plea. In contrast to the magistrates' court, the limitation on appealing against Crown Court guilty plea convictions is imposed by the Court of Appeal rather than by statute.

A person who pleads not guilty and is convicted after a contested trial in the Crown Court can apply for leave to appeal to the Court of Appeal. The statutory framework provides that the Court of Appeal must overturn the conviction if it is unsafe but otherwise must uphold it.<sup>420</sup> It is for the Court of Appeal to determine in what circumstances a conviction will be 'unsafe'. In general, the court looks for some new evidence casting significant doubt on the verdict or for a significant procedural irregularity or error. Following a conviction by guilty plea in the Crown Court, the defendant has the same statutory right of appeal as a defendant in a contested case because the Criminal Appeal Act does not distinguish between the two modes of conviction. The Court of Appeal must quash a guilty plea conviction if it is 'unsafe'.

Despite the apparent simplicity of this test and the congruence between it and the test applied following trial, the Court of Appeal's approach to 'safety' in guilty plea cases differs

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<sup>419</sup> Discussed further in chapter 5 below.

<sup>420</sup> Criminal Appeal Act 1968, section 2 (as amended by the Criminal Appeal Act 1995).



in important respects from the approach to trial convictions and the court severely restricts appeal against guilty plea conviction. As the court said in *Wilford*<sup>421</sup>, it is clear that the Court of Appeal has ‘unrestricted jurisdiction’ under the Criminal Appeal Act to consider an appeal against a guilty plea conviction but ‘cases where such appeals are brought and succeed are extremely rare’. The Court of Appeal said that it is ‘rightly and for obvious reasons, very reluctant to allow a defendant to go back on a plea of guilty’. These ‘obvious reasons’ are not articulated in the judgment nor did the Court make reference to any particular understanding of the guilty plea to support its reasoning. In *Asiedu*, however, the Court clearly relied on the confession account of the guilty plea to support the safety of the conviction, observing that,

‘ordinarily, once he has admitted such facts by an unambiguous and deliberately intended plea of guilty, there cannot be an appeal against his conviction, for the simple reason that there is nothing unsafe about a conviction based on the defendant’s own voluntary confession.’<sup>422</sup>

The Court of Appeal has frequently emphasised the importance of a guilty plea being ‘voluntary’ and asserts the importance of the defendant having ‘complete freedom of choice’ regarding plea<sup>423</sup> and not being subjected to pressure or threats. In *Inns*,<sup>424</sup> the Court of Appeal said that the whole basis of the plea on arraignment was that the defendant ‘has a free choice’ and that ‘a plea made under pressure and threats was not a proper plea’.<sup>425</sup> This rhetorical commitment to voluntariness in guilty pleas could, in theory

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<sup>421</sup> *R v Wilford* [2007] EWCA Crim. 2175 at paragraph 20.

<sup>422</sup> *R v Asiedu* [2015] EWCA Crim. 714 at para. 19.

<sup>423</sup> *R v Turner (no. 1)* [1970] 2 Q.B. 321.

<sup>424</sup> *R v Inns* [1975] Crim. L.R. 183 and *The Times*, December 13, 1974.

<sup>425</sup> See also *R v Swain* (1986) Crim. L.R. 480 for a defendant who pleaded guilty under the influence of LSD and also *R. v. Smith and Beaney* [1999] 6 Archbold News 1, CA where an illiterate defendant

reflect any of the three accounts of the guilty plea discussed above but a closer examination of the Court of Appeal's approach in these cases demonstrates that this rhetoric does not reflect a genuine interest in voluntariness and informed choice.

In reality the cases demonstrate that the Court is willing to uphold guilty plea convictions in the face of evidence that the plea was entered under significant personal pressures or systemic coercion or that the plea decision was made in the absence of full and accurate information about the choice facing the defendant as a consequence of mistakes by judges or lawyers. These categories of cases will be considered first, to demonstrate how the Court of Appeal adapts its interpretation of the plea in such a way as to overcome concerns over voluntariness. After that, two very different categories of cases will be considered, those involving abuse of process or new evidence amounting to exoneration. It will be seen that, in these two types of cases, the Court of Appeal may be willing to set aside a guilty plea despite that plea being, on the face of it, entirely voluntary.

*Voluntariness under personal and systemic pressure; the immunising effect of legal advice*

As already discussed, if a conviction by way of guilty plea is to be justified on the basis that the plea is reliable evidence of guilt the voluntariness of the plea is crucial because (as a matter of fact) pressure or threats can undermine the reliability of a 'confession' and acceptance of the prosecution case. However the appeal cases concerning 'voluntariness' suggest that reliability is not the primary concern of the Court of Appeal. If it were then one would expect to see successful appeals based on systemic pressures and incentives and on psychological and social factors that will (as a matter of fact) limit some defendants'

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pleaded guilty because this was the only way he would get legal representation. The Court said that if the circumstances amounted to a denial of the defendant's free choice as to plea then the plea would be set aside.

freedom to plead not guilty.<sup>426</sup> Equally, if the Court was seeking to protect defendants' rights to exercise control over their own case it would not hold defendants to decisions which were reached under real and extreme pressure. Examination of the cases reveals, however, that defendants can be placed under great pressure to plead guilty without the courts finding that this affected the 'voluntariness' of the decision, as long as they have received legal advice and no rules have been broken.<sup>427</sup>

If the pressure on a defendant comes from sources outside the legal system (e.g. pressure from friends and family or a desire to protect a family member) or from systemic pressures which do not involve a breach of the rules (most commonly, the risk of conviction coupled with the sentencing discount) then the Court of Appeal is very unlikely to find that the defendant's freedom of choice has been curtailed.<sup>428</sup> In a recent case the Court of Appeal said that the pressure on the defendant arising from 'his desire to keep his mother out of prison and from the advice that his chances of acquittal were no more than 30%' was 'perfectly normal' and did not narrow his freedom of choice.<sup>429</sup> The Court went on to observe that it was 'far from uncommon [...] for negotiations to take place in which the

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<sup>426</sup> These pressures are discussed further in chapter 4 below.

<sup>427</sup> The House of Lords suggested that only a threat of unlawful action could amount to the level of 'extreme' pressure which, when placed on a defendant, could vitiate the plea process (Sanders, Young and Burton (note 98 supra) at p.459 discussing the extradition case *McKinnon v US* [2008] UKHL 59).

<sup>428</sup> As the court put it in *R v Wilford* (note 421 supra) at paragraph 30, 'defendants are very often subject to this kind of stress and pressure and receive advice, often strong advice, from friends and family, to which understandably they pay considerable regard. But if a defendant was fit to plead, knew what he was doing, intended to make the plea that he did and pleaded guilty without equivocation after receiving legal advice, he cannot rely on the fact that he found the decision very difficult or received the strongest possible advice from those around him.'

<sup>429</sup> *R v McCarthy* [2015] EWCA Crim. 1185 at paragraph 68.

prosecution offer or the defence invite the prosecution to accept a lesser plea from one member of the family if another pleads guilty as charged.<sup>430</sup>

Similarly, the Court of Appeal said that there was no improper pressure on a defendant<sup>431</sup> who (having been jointly charged with his wife) pleaded guilty on the assurance that this would lead to proceedings against his wife being discontinued. The impact of this assurance on the couple, who had two young children and both faced potentially lengthy prison sentences if convicted at trial, did not, in the view of the court, render the defendant's plea unreliable as a foundation for conviction. The court observed that there are,

‘always pressures on an accused person, and sometimes the factors he has to weigh in deciding how to plead make for difficult decisions. But in our judgment, the course of events here involves no fault on anyone's part. The appellant had the benefit of the most conscientious advice and he made his own free choice.’<sup>432</sup>

Despite the ritual reference to freedom of choice, these comments suggest that the lack of ‘fault’ (and not the factual impact of the pressure on the defendant's plea decision) were central to the outcome of the appeal.<sup>433</sup>

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<sup>430</sup> Ibid. The Court of Appeal did, however, quash one of the defendant's convictions (substituting a lesser offence) because they were not confident that the defendant had understood the elements of one of the offences to which he pleaded guilty.

<sup>431</sup> In *R v Herbert* [1992] 94 Cr. App. R. 230.

<sup>432</sup> Ibid at p.235. The same approach was taken by the Court of Appeal in the recent case, *R v Dann* [2015] EWCA Crim. 390, in which the defendant, in similar circumstances to Mr Herbert, signed an endorsement stating that he was innocent but that, as a result of the risk to his children of the imprisonment of their mother, ‘the pressure that this offer has put me under leaves me with no choice but to admit to something that I have not done’.

<sup>433</sup> See also *R v Parsons, Togher and Doran* (unreported, Court of Appeal, 2 November 1998) in which another defendant pleaded guilty on the understanding that proceedings would be discontinued against his wife. The Court of Appeal applied *Herbert* and said that the prosecution were entitled to make such an assurance ‘if they are satisfied that the public interest in the due administration of

This decision is important because, as is discussed further in chapter 4 below, the most pervasive pressure on defendants is that caused by the perceived risk of conviction coupled with the availability of sentence and charge bargaining. This pressure is an inevitable and accepted consequence of the guilty plea system that is operated in England and Wales and, in most cases, involves no fault on which an appeal could be founded. These ‘necessary forensic pressures’ (as the Court of Appeal described the impact of ‘realistic, forthright advice’ from counsel on the risk and consequences of conviction at trial), even combined with other personal pressures, ‘do not deprive the defendant of his freedom to choose whether to plead guilty or not guilty; rather, the provision of realistic advice about his prospects helps to inform his choice’.<sup>434</sup> The Court of Appeal makes no attempt to provide a factual basis for the assertion that defendants can make ‘free’ choices under these pressures and it seems clear that the Court is simply deeming these choices to be free. On this basis, the Court of Appeal has said (and this pronouncement has been often cited<sup>435</sup>) that a defendant who pleads guilty on advice from counsel ‘albeit unhappily and with regret’ has not lost the power to make a ‘voluntary and deliberate choice.’<sup>436</sup> Again, in *Wilford*<sup>437</sup>, the court said:

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justice is adequately reflected in the stance they took’. The court concluded that the plea was an ‘entirely voluntary and fully informed’ admission of guilt.

<sup>434</sup> *R v Nightingale* [2013] EWCA Crim. 405, at para. 12.

<sup>435</sup> For example, see *R v Kelly and Connolly* [2003] EWCA Crim. 2957 at paragraph 106, *R v Bhatti* (CACD, 19 December 2000, (unreported but quoted in *R v Kelly and Connolly* op cit) at paragraph 31, and *R v Sayed (Atlaf)* [2005] EWCA Crim. 2386.

<sup>436</sup> Lord Widgery CJ in *R v Peace* [1976] Crim. L.R. 119 as quoted (from a transcript of the judgment) by Taylor LJ in *R v Stephen Herbert* [1992] 94 Cr. App. R. 230 at p.234. The defendant in *R v Peace* had already received a pardon as a result of new evidence which significantly undermined the prosecution case (but which could not provide grounds of appeal as the case was heard under the original drafting of s(2)(1)(a) of the CAA 1968). He said that his plea was the result of counsel’s advice that the plea would avert a custodial sentence and that if his girlfriend testified for him at trial and he was convicted then she could be prosecuted for perjury.

<sup>437</sup> (Note 421 supra) at paragraph 20.

'[t]he decision whether to plead guilty is often a very difficult one. It has to be taken in circumstances of considerable stress and with all the pressures that are inherent in the situation. It is not uncommon for defendants subsequently to have second thoughts about whether they have done the right thing. But that by itself does not entitle them to revisit the decision. In all ordinary circumstances the decision — a solemn one, made in circumstances which emphasise the importance of finality — will be binding and cannot be revisited however much later developments may cause the defendant to regret it.'

<sup>438</sup>

The courts appear to be reaching a pragmatic compromise; the defendant must have a choice which is 'free', but only so far as is possible within the constraints of the guilty plea system. If the pressure to plead guilty comes from the judge or lawyers then it will only render the conviction unsafe if that pressure was 'improper' (i.e. in breach of the rules) and if it was such as to improperly inhibit the defendant's freedom of choice or gave rise to any real or perceived injustice.

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In order to reconcile its rhetorical commitment to 'voluntariness' with its willingness to overlook systemic and personal pressures, the Court of Appeal relies upon the immunising

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<sup>438</sup> See also *R v Dodd* [1982] 74 Cr. App. R. 50 and *R v Drew* [1985] 81 Cr. App. R. 190 for further discussion of defendants who enter guilty pleas while claiming to be acting under duress and then seek to withdraw their pleas. In the former case, the police accepted that the defendant was 'a frightened man' when he entered his plea and his barrister told the judge at the time that he feared the plea was a consequence of threats but the Court of Appeal found no reason to interfere with the judge's decision to refuse permission to withdraw the plea.

<sup>439</sup> *R v Nazham and Nazham* [2004] EWCA Crim. 491. This reasoning was approved in *R v Bargery* [2004] EWCA Crim. 816 at para. 21, in which the Court of Appeal found that the judge's improper indication of likely sentence amounted to the defendant being offered a choice that 'should not have been one which was put before him' and which 'must have had some considerable effect in the deliberation and discussion' that led to the guilty plea and that therefore this rendered the plea involuntary. It is clear that the impropriety of the judge's comments was crucial to the decision. If the judge had only given an indication of intended sentence regardless of plea this would not have been in breach of the rules and, therefore, the conviction would not have been unsafe.

effect of legal advice. The Court noted that, in pleading guilty in order that his wife would escape legal proceedings, Mr Herbert<sup>440</sup> 'had the benefit of the most conscientious legal advice.'<sup>441</sup> This idea that defence legal advice can protect the voluntariness of the plea, regardless of the extent of the systemic or personal pressures to plead guilty, is particularly ironic given the empirical research which has demonstrated that improper behaviour by defence lawyers can be a significant source of pressure to plead guilty.<sup>442</sup> More than that, my research findings discussed in chapter 4 reveal that even professional and sympathetic advice from a defence lawyer can increase, rather than reduce, the pressure on defendants.

In *Turner*,<sup>443</sup> the Court of Appeal set out a number of principles which should be followed when defendants are advised on plea, saying that counsel's duty was to give the defendant advice (particularly on sentence reductions) 'in strong terms provided always that it is made clear that the ultimate choice and a free choice is in the accused person'<sup>444</sup>. Counsel 'must also emphasise that the accused must not plead Guilty unless he has committed the acts constituting the offence charged.'<sup>445</sup> These comments formed the basis of the professional guidance for barristers concerning their advice to clients on plea.<sup>446</sup>

The professional guidance provided a number of supposed protections (for example, the defendant must be advised that 'if he is not guilty, he must plead not guilty') but it was

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<sup>440</sup> *R v Herbert* (see note 431 supra).

<sup>441</sup> *ibid* at p235.

<sup>442</sup> Discussed in chapter 1.

<sup>443</sup> *Turner* (note 6 supra).

<sup>444</sup> *ibid* at p358.

<sup>445</sup> *ibid* at p360.

<sup>446</sup> Bar Standards Board Written Standards for the Conduct of Cases (note 446 supra).

clear that if ‘for reasons of his own’<sup>447</sup> the defendant continues to insist on pleading guilty despite claiming to be innocent (and notwithstanding that counsel considers that the defendant has a strong case), counsel could continue to act and should not give any indication to the court that the defendant is still asserting his innocence.<sup>448</sup> Defence solicitors, too, were given similar guidance in the Law Society Guide to Professional Conduct of Solicitors.<sup>449</sup>

The status of these two sets of guidance is currently unclear because the relevant codes of conduct have been superceded<sup>450</sup> with broadly drafted ethics guidance which does not address the particular issue of representation on guilty pleas. On the basis set out in these codes of conduct, however, the guilty plea cannot be seen to be a reliable confession of the elements of the case that are within the defendant’s knowledge nor can it necessarily be seen as an acceptance by the defence of the strength of the prosecution case. These rules undermine any justification for conviction by way of guilty plea which is based on the guilty plea as providing reliable evidence of guilt. The Court of Appeal’s comments in *Turner* might appear to be an assertion of the importance of free choice and

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<sup>447</sup> Ibid at paragraph 11.5.1.

<sup>448</sup> In *R v Farooqi* 2013 EWCA Crim. 2212 at paragraph 108, the Court of Appeal referred to this as one of the ‘well-established’ exceptions to the rule that the advocate is bound to advance the defendant’s case on the basis that what his client tells him is the truth.

<sup>449</sup> Note 449 supra. Rule 21.20(5) stated that ‘If the client wishes to plead guilty, but at the same time asserts the truth of facts which, if true, would or could lead to an acquittal, the solicitor should use his or her best endeavours to persuade the client to plead not guilty. However, if the client insists on pleading guilty, despite being advised that such a plea may restrict the ambit of any plea in mitigation or appeal, then the solicitor is not prevented from continuing to act in accordance with the client’s instructions, doing the best he or she can. The solicitor will not, in mitigation, be entitled to suggest that the facts are such that the ingredients of the offence have not been established.

<sup>450</sup> The Bar Code of Conduct (which included the Written Standards) was replaced by the BSB Handbook in January 2014 and the Law Society Conduct Rules were replaced by the SRA Handbook in October 2011. Neither Handbook contains any reference to representation on guilty pleas. The Written Standards were, however, discussed by the Court of Appeal in July 2015 (in *McCarthy v R* [2015] EWCA Crim. 1185) and the clear implication of that judgment is that those standards are still applicable.



factual guilt but, as already discussed,<sup>451</sup> they are only an assertion of the importance of counsel *informing* the defendant that free choice and true guilt are important. Once counsel has done this, the plea will generally be deemed to be ‘true’.

The Court of Appeal also shows no interest in ensuring that defence lawyers base their advice on plea on a comprehensive assessment of the evidence in the case. The difficulties facing defendants and their lawyers in accessing evidence in order to make a plea decision are discussed further in chapter 4 below. There will be some cases (such as those with problematic issues around causation) in which the defendant and his lawyer cannot assess guilt without considering the prosecution evidence. This was acknowledged by the Court of Appeal in *Caley*, ‘There will certainly be cases where a defendant genuinely does not know whether he is guilty or not and needs advice and/or sight of the evidence in order to decide.’<sup>452</sup> The Court of Appeal refuses to acknowledge, however, that there are additional reasons why defendants and their lawyers should be given the opportunity to assess the evidence, even in cases where the defendant ‘knows’ what he has, or has not, done. At a fundamental level, a crucial aspect of the presumption of innocence is that defendants have a right to a trial and, as acknowledged by the Court of Appeal in *Caley*, ‘it is perfectly proper for a defendant to require advice from his lawyers on the strength of the evidence (just as he is perfectly entitled to insist on putting the Crown to proof at trial)’<sup>453</sup>. However the Court continued (disingenuously) that ‘he does not require it in order to know whether he is guilty or not; he requires it in order to assess the prospects of conviction or acquittal, which is different’.

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<sup>451</sup> See p.41 *supra*.

<sup>452</sup> *R v Caley and Others* [2012] EWCA Crim. 2821, para. 14.

<sup>453</sup> *Ibid* at paragraph 14.

In this way, the Court seeks to distinguish between guilty defendants (who are 'perfectly entitled' to delay a guilty plea in order to assess the chances of winning at trial but who should suffer a sentencing consequence as a result) and innocent defendants who, knowing that they are not guilty, will therefore apparently be unaffected by pressure to plead guilty at the earliest opportunity. Through a dogged reliance on the idea that guilty pleas are the product of a guilty mind, the Court of Appeal is thus able to conclude that both categories of defendants can safely make plea decisions without assessing the strength of the evidence in order to determine how to plead.

The Court of Appeal's analysis conveniently ignores the role of plea incentives in influencing pleas. Through the system of guilty pleas, the criminal justice system offers defendants the opportunity to waive their fundamental right to a trial and includes incentives to encourage defendants to do so. The existence of these plea incentives is the principal reason why the risk and consequences of conviction are important issues for defendants in the plea decision. If the defendant is required to decide whether to waive his fundamental right to trial in return for a plea bargain, this will require him to assess the evidence in order to weigh these incentives against the loss of the chance of being acquitted at trial (or the case being discontinued before then). Simply asserting that only defendants who 'know they are guilty' will engage in this process is an entirely inadequate response,<sup>454</sup> given that it is the system's reliance on plea incentives (together with the

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<sup>454</sup> Equally inadequate is the assertion made by the Sentencing Council in its consultation on proposals to increase incentives for defendants to plead guilty at the first hearing that the draft guideline 'explicitly states that it is for the prosecution to prove its case; the guideline does not undermine the presumption of innocence.' (discussed at pp.179 and 334 below). As McEwan observes, 'Rights to autonomy of any kind mean nothing unless those who exercise them have sufficient information and understanding of their situation to exercise their choices in their own best interests. Accused persons must have full disclosure of the case against them and any pertinent legal advice before they make decisions that will significantly affect their future. Should those features be absent, the appearance of defendant autonomy is an illusion, and control over the case

possibility of error at trial) makes it, on occasion, rational for an innocent defendant, faced with an apparently low chance of acquittal to enter a guilty plea.<sup>455</sup>

There is a further reason why it is important that defendants and their lawyers are given an opportunity to assess the evidence in the case, regardless of whether, in private, they acknowledge their own culpability. It has already been noted that the Court of Appeal is willing to set aside convictions where there has been error or misconduct on the part of the prosecuting or investigating authorities such as to amount to an abuse of process. As will be discussed below, this willingness extends to guilty plea convictions, albeit that the bar is set higher than in cases of abuse of process leading to trial convictions.<sup>456</sup> These decisions tend to turn less on the courts' concern for defendants who plead guilty following an abuse of process and more to a defence of the integrity of the criminal justice system as a whole by stigmatising and punishing (by means of quashing convictions) breaches of the laws, rules and practice directions governing the criminal process. If defendants regularly plead guilty at the earliest stages of proceedings in return for plea incentives without any assessment of the evidence (as the Court of Appeal would appear to prefer them to do), the likelihood of abuse of process being detected becomes slim and the pressure on the investigative and prosecuting authorities to maintain the highest standards of integrity is

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non-existent.' (McEwan, J. (2011) 'From adversarialism to managerialism: criminal justice in transition.' *Legal Studies*. 31:4, 519-546. At p.526.)

<sup>455</sup> Greer (note 34 supra) at p. 67. Roach also observes that wrongful conviction by guilty plea can result from defendants making 'both rational and irrational decisions to falsely concede their guilt.' (Roach, L. 'Wrongful convictions: Adversarial and Inquisitorial Themes.' (2010) *NCJ Int'l L & Com. Reg.* 387-446).

<sup>456</sup> Discussed further at page 158 below.

reduced.<sup>457</sup> This increases the risk that innocent people will be prosecuted and plead guilty on the basis of a material that is unreliable through fabrication or error.

Despite the Court of Appeal's reliance on legal advice to protect defendants from wrongful guilty pleas, there are, however, two situations in which the appeal courts recognise that there are limits to the protection afforded by defence lawyers, namely, when the pressure comes from judges or from the defendant having made a false confession to the police.

Improper pressure from judges

As discussed in chapter 1, since the decision in *Goodyear*,<sup>458</sup> the courts have been permitted to give an advance indication of sentence when requested by the defence, provided certain conditions apply. The appeal courts have been willing to quash convictions where indications have been given in breach of the *Goodyear* guidelines. However these decisions turn on there having been a breach of the guidelines, which, in the circumstances of the case, creates 'inappropriate pressures on the defendant and narrow[s] the proper ambit of his freedom of choice'.<sup>459</sup> Without such a breach, the appeal courts appear unwilling to recognise that judges may be putting pressure on defendants such as to limit their ability to make a free choice on plea.<sup>460</sup> In chapter 4 below, I discuss the ways in which judges and the management of the court process are, in fact, limiting defendants' freedom to choose plea, without breach of specific procedural rules.

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<sup>457</sup> As is the pressure on defence lawyers to mount an active defence on their client's behalf; '[a] plea bargaining system suits lazy or under-resourced prosecutors and lazy defence lawyers.' (Darbyshire, P. 'The Mischief of Plea Bargaining and Sentencing Rewards' (2000) Nov. *Crim. L.R.* 895-910 at p.904).

<sup>458</sup> *R v Goodyear* [2005] EWCA Crim. 288.

<sup>459</sup> *R v Nightingale* (note 434 supra).

<sup>460</sup> As McConville and Marsh put it at p.121 of *Criminal Judges* (note 4 supra) 'the "absence of pressure" is now re-defined to mean the absence of *improper* pressure.' Sanders, Young and Burton refer to 'the slippery use of the concepts of pressure and improper pressure' in the *Goodyear* judgment (Sanders, A. Young, R. and Burton, M. *Criminal Justice* (2010) 4<sup>th</sup> Edition. Oxford: OUP)

Pressure resulting from false confessions

Appeal courts have recognised the limits on defence lawyers' ability to insulate defendants from pressure when defendants have made false confessions at the police station. Some of these wrongful confession cases arise out of police malpractice (particularly in investigations occurring before the Police and Criminal Evidence Act 1984) and some are the result of the psychiatric or psychological issues which render the suspect vulnerable to making false confessions. For this reason, s76 of PACE 1984 provides for the exclusion of confession evidence and the appeal courts are willing to quash cases in which the defendant was convicted following a trial which featured a confession that turns out to be unreliable.

In cases where the defendant confessed to police, then pleaded guilty and then material arose which cast doubt on the original confession, the courts may go behind the guilty plea.<sup>461</sup> These cases are based on an acknowledgement that, even if the defendant subsequently tells his lawyers that he has falsely confessed, unless there is material to support his claim he is likely to receive very strong advice from his lawyers to plead guilty. In this way, the court recognises that the guilty plea is likely to have arisen either from the same difficulties that gave rise to the original unreliable confession (e.g. a desire for notoriety, suggestibility etc.) or that it is the result of the unsafe confession creating a strong prosecution case which, in conjunction with the sentence discount, gives rise to an overwhelming pressure to plead guilty. Either way, the court recognises the conviction to be unsafe.

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<sup>461</sup> For example, see the magistrates' court case (on reference by the CCRC) of *R v F* (note 415 supra) and the Northern Ireland Court of Appeal cases of *Hindes & Hanna* [2005] NICA 36 and *McMenamin* [2007] NICA 22. See also the 'new exculpatory evidence' cases of *Holliday, Lee and Foster* at p.164 below.

It is tempting to see these cases as of historical interest only;<sup>462</sup> many are pre-PACE<sup>463</sup> cases in England & Wales or are 1970s cases arising out of the Troubles in Northern Ireland. They remain interesting, however, because they represent an acknowledgment by the courts that subsequent legal advice on plea cannot necessarily immunise defendants from pressure to plead guilty following a false confession, and indeed may increase the pressure as a consequence of the high risk of conviction. The courts' understanding of the risk of false confession and the limitations on the power of defence lawyers to protect defendants from the consequences of such a false confession does not, however, extend to an acknowledgement of the risk of 'false confession by guilty plea' from represented defendants.

*Pressure caused by mistakes by lawyers and judges: the sanitising effect of the 'voluntary' guilty plea*

Cases involving mistakes by lawyers and judges provide further evidence that the Court of Appeal's approach to safety of guilty plea convictions is based on shifting ground where the concerns for voluntariness, due process and informed choice can be outweighed by elevating (without explaining) the evidential significance of the plea itself.

Errors by lawyers

In rare cases where guilty pleas are shown to have resulted from fundamental errors by lawyers, the Court of Appeal is ready to set aside the plea.<sup>464</sup> The most severe form of error occurs in 'no offence in law' cases. These are cases in which the 'offence' charged is

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<sup>462</sup> Indeed, one CCRC Commissioner who was interviewed for this research referred to the phenomenon as historic (see p.288 below).

<sup>463</sup> Police and Criminal Evidence Act 1984.

<sup>464</sup> E.g. *R v Mohamed (Abdalla)*; *R v V(M)*; *R v Mohamed (Rahma Abukar)*; *R v Nofallah* [2011] 1 Cr. App. R. 35 CA in which the defendants had not been advised about the existence of a defence to the charge relating to the possession of false identity documents and this rendered their convictions unsafe.

not, in fact, an offence known to law<sup>465</sup> or the facts admitted by the defendant in pleading guilty did not amount to the offence charged.<sup>466</sup> In these cases the conviction can be set aside, even if it is founded on a guilty plea.<sup>467</sup> The continuing conviction of those who, on the agreed facts, have patently not committed an offence undermines the integrity of the criminal justice system so it is easy to see why the Court of Appeal is willing to overlook guilty pleas in such cases.

In *Boal*,<sup>468</sup> the Court of Appeal effectively extended this category of cases to include situations where, although it was not possible to say that there was no offence in law or on the admitted facts, erroneous advice by defence lawyers leads the defendant to plead guilty and thus deprives the defendant of what was 'in all likelihood a good defence in law'. In this situation the Court of Appeal may be willing to quash the conviction but it sets a high threshold and will only intervene exceptionally and where 'it believes the defence would quite probably have succeeded and concludes, therefore, that a clear injustice has been

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<sup>465</sup> *R v Whitehouse* [1977] 65 Cr. App. R. 33. For a more recent case, see *R v Nolan and another* [2012] EWCA Crim. 671.

<sup>466</sup> *R v Forde* [1923] 2 KB 400 at 403 applied in *R v Saik* [2006] UKHL 18. In *Forde*, Avory J summarised the case law stating that a conviction arising out of a guilty plea could only be appealed on two grounds, (a) that the appellant 'did not appreciate the nature of the charge or did not intend to admit he was guilty of it' or (b) that the admitted facts did not amount to the offence charged. It is now clearly established that the right of appeal in guilty plea cases is wider than suggested in *Forde* (per Rix LJ in *R v Connolly* [2003] EWCA Crim. 2957 at para. 105).

<sup>467</sup> If the law has changed since the guilty plea was entered so that the facts no longer amount to a valid offence then the Court of Appeal can quash the conviction but will only 'very rarely and in exceptional circumstances' give an extension of time and leave to appeal (*R v Clark* [2001] EWCA Crim. 884, *R v Richards* [2002] EWCA Crim. 3175). The Court will look for a 'substantial injustice' (and *R v McGuffog* [2015] EWCA Crim. 1116). The same test is applied in relation to convictions following jury trial (*R v Graham (H.K.)*; *R v Kansal*; *R v Ali (Sajid)*; *R v Marsh* [1997] 1 Cr. App. R. 302 in respect of 'no offence in law' and *R v Cottrell* [2007] EWCA Crim. 2016, in respect of change of law) so this ground of appeal reveals nothing about the differences between the two forms of conviction.

<sup>468</sup> *R v Boal* [1992] 95 Cr. App. R. 272 at p.278.

done.<sup>469</sup> In *Emmett*,<sup>470</sup> Lord Steyn referred to *Boal* as authority that the Court of Appeal can consider cases where the plea of guilty was induced by a 'fundamental mistake of fact or law'.

In *Boal*, the Court was effectively looking for circumstances in which there was no offence in law on the facts as would quite probably have been established at trial (if the defendant had not pleaded guilty). In that sense, *Boal* is less about lawyers' errors and their impact on plea and more about the court being satisfied overall that the facts do not amount to the offence charged. More common, however, are cases where faulty legal advice has denied the defendant the opportunity to put a less-strong defence to the jury. In such cases the Court of Appeal is far more reluctant to go behind the guilty plea and applies a more stringent test than is applied in relation to convictions following not guilty pleas.<sup>471</sup> In *Boal* the court said that a guilty plea would not be set aside simply because 'some possible line of defence has been overlooked' but in a later case the court said that a guilty plea conviction could be quashed if 'the facts were so strong as to show that the plea was not a true acknowledgement of guilt'.<sup>472</sup>

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<sup>469</sup> Ibid at p.278. See also the immigration and asylum appeal cases where defence lawyers failed to advise clients about the existence of a defence - *R v Jaddi* [2012] EWCA Crim. 2565, *R v Mateta and others* [2013] EWCA Crim. 1372. The magistrates court cases in this category are considered at p.134 supra.

<sup>470</sup> *R v Emmett* [1998] 1 Cr. App. R. 247 at 253.

<sup>471</sup> Where incompetent legal advice in a trial case results in evidence or a possible line of defence not being put before the jury at trial, the defendant must show that this incompetence led to identifiable errors or irregularities in the trial which themselves rendered the process unfair or unsafe (*R v Day* [2003] EWCA Crim. 1060). In a Privy Council case (*Boodrum v Trinidad and Tobago* [2001] UKPC 20) it was suggested that the trial conviction could only be upheld if the Court is satisfied that the jury would have inevitably convicted if the defence had been fully and properly conducted. This decision was discussed, apparently with approval, by the Court of Appeal in *R v Kyle Bester* [2006] EWCA Crim. 3092 at para. 15 onwards.

<sup>472</sup> *R v Saik* [2004] EWCA Crim. 2936 at para. 57. The conviction was upheld by the Court of Appeal but the House of Lords subsequently quashed the conviction on other grounds.



It is interesting to consider what it is about a guilty plea that makes the Court of Appeal require that the defence denied as a result of the lawyer's error should be stronger in guilty plea cases than in convictions at trial. If the Court of Appeal was seeking to protect the defendant's right to make a free and informed decision on plea then it seems that such cases should lead to successful appeals; all three accounts of the guilty plea suggest that the defendant should make his decision to plead guilty based on proper advice and adequate information.

The Court's approach seems to be based on the understanding of the guilty plea as a confession so that the guilty plea is *prima facie* evidence of guilt and an indication of a strong prosecution case. On this basis the appeal court would be looking for something substantial to outweigh the evidence of guilt arising out of the plea and so the appeal would only succeed if the application of the correct legal advice revealed a strong defence case to counterbalance this. In this way, the 'clear injustice' required by the *Boal* judgment appears to be founded on the likelihood of acquittal (i.e. the court's assessment of the strength of the evidence) and not on the circumstances of the plea.<sup>473</sup> However, by relying on the guilty plea as a confession and evidence of guilt, this argument overlooks the fact

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<sup>473</sup> For an interesting case where the Court of Appeal appeared to extend the availability of appeal against guilty plea based on wrongful advice see *R v W* [1999] Crim. L.R. 87 (CA Crim. Div.) where counsel advised the defendant to plead guilty to part of the indictment (in the belief that this would reduce his chances of conviction on the other part of the indictment through excluding certain evidence). When the trial judge ruled that the prosecution could bring evidence of his guilty pleas in support of the remaining counts, the defendant sought to withdraw his guilty pleas but the judge refused. The full judgment is not available so it is difficult to determine the reasoning behind the decision to quash the conviction but the Court of Appeal said that the plea was a tactical decision which was entered when the defendant had not admitted his guilt and purely on the basis of his counsel's erroneous advice. It seems likely that, having been a tactical decision based on faulty advice whilst asserting innocence, the Court of Appeal considered that this case was not reliable as a confession and did not reflect a genuine assessment of the strength of the prosecution case and so it could not be relied upon as evidence of guilt. Whilst this interpretation may be attractive, it is difficult to reconcile with the Court of Appeal's approach in cases involving erroneous rulings by the trial judge where the guilty plea is taken to be an 'admission of the truth of the facts with which he is charged' (*R v Eriemo* [1995] 2 Cr. App. R. 206 at p.210, discussed at page 155 below).

that the cogency of the evidence of guilt provided by the guilty plea may be completely undermined if the plea was induced by the defence lawyer's unduly pessimistic advice to his client.

There is also an interesting contrast revealed here in the Court of Appeal's attitude towards advice from defence lawyers. In relation to 'involuntary' pleas, I have already explained<sup>474</sup> that the Court of Appeal purports to rely upon the defence lawyer and her 'conscientious advice' to insulate the defendant from undue pressure to plead guilty. This approach represents the lawyer as exerting a powerful influence on the defendant so as to shield him from undue pressures. The cases discussed above show that, in contrast, *errors* by the same lawyer are unlikely to be seen to undermine the defendant's guilty plea (unless application of the correct advice reveals the evidence to be heavily stacked in the defendant's favour). In these cases, the erroneous advice is neutralised by the guilty plea.

Errors by judges

In relation to erroneous rulings by judges, defendants who plead guilty face more difficulty in challenging their resulting convictions than those who are convicted at trial. Again, the guilty plea appears to be potentially capable of neutralising the error. Defendants who plead not guilty will have their conviction quashed following an erroneous ruling by a trial judge unless the Court of Appeal is satisfied that if the error had not been made then the only reasonable and proper verdict would have been guilty.<sup>475</sup> Where the defendant has entered a guilty plea after an erroneous ruling on a point of law by the trial judge, a series of cases has established that this will only render the conviction unsafe if that erroneous ruling was conclusive on the established facts as to the guilt of the defendant (and not simply because the erroneous ruling was one factor in the defendant's decision to plead

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<sup>474</sup> At p.110 supra.

<sup>475</sup> *R v Davis, Johnson and Rowe* [2001] 1 Cr. App. R. 115 adapting the reasoning of the court in *Stirland v DPP* [1944] A.C. 315, HL.

guilty).<sup>476</sup> This category of cases appears to be an extension of the ‘no offence in law’ situation.<sup>477</sup> It is also clear that an appellant in such a case must first overcome the guilty plea before consideration is given to whether the judge’s ruling was wrong<sup>478</sup> so that the wrongness of the ruling alone is insufficient.<sup>479</sup>

Once again, when considering why a guilty plea is treated as neutralising judicial error (even though the plea may have been partly induced by impact of the erroneous ruling on the chances of acquittal) in a way that a conviction at trial does not, the explanation appears to turn on the confession account of the guilty plea. The cases on judicial error show that the Court of Appeal seeks to justify the differing treatment of guilty pleas here by relying upon the guilty plea as (generally) constituting an acceptance of the truth of the prosecution case. In *Chalkley and Jeffries*,<sup>480</sup> the Court said that, where the defendant’s change of plea resulted from the judge wrongfully admitting strong evidence that rendered his case on the facts hopeless, that guilty plea would normally be regarded as,

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<sup>476</sup> In *R v Chalkley and Jeffries* [1998] 2 Cr. App. R at p92 Auld LJ said that the conviction would be unsafe if the erroneous ruling left the defendant ‘with no legal escape from a verdict of guilty on [the admitted] facts’ whereas the conviction would not be unsafe where it resulted from the defendant realizing that, ‘as a result of a ruling to admit strong evidence against him, his case on the facts is hopeless’.

<sup>477</sup> Per Auld J in *Chalkley and Jeffries* (ibid) at p.91, explaining that, once the judge’s error is corrected, on the admitted facts the defendant could not in law have been convicted of the offence.

<sup>478</sup> *R v Llewellyn and Gray* [2001] EWCA Crim.1555.

<sup>479</sup> In the same way, in *R v Clarke* [1972] 1 All ER 219, the defendant claimed that that her shoplifting was the result of various factors which had made her forgetful and that she had lacked necessary mens rea for theft. The Recorder had wrongly ruled that this defence amounted to a defence of insanity. The Court of Appeal recognized that this erroneous ruling had caused the defendant to plead guilty to avoid a finding of insanity. It was a combination of the error and the founding of the guilty plea on that error that gave rise to the unsafety.

<sup>480</sup> *R v Chalkley and Jeffries* (note 476 supra) at p.94.

‘an acknowledgement of the truth of the facts constituting the offence charged’.<sup>481</sup>

In *Eriemo*,<sup>482</sup> Glidewell LJ said that such a defendant should maintain his not guilty plea in order to maintain his right to appeal and that,

‘if he pleads guilty this plea is an admission to the facts with which he is charged.’

In *Greene*<sup>483</sup> a change of plea following the trial judge’s decision to admit the defendant’s confessions was the ‘crucial event’, which (unless the wrongful ruling rendered acquittal ‘impossible’),

‘serves as an admission of the truth of the contents of the confession.’

In *Rajcoomar*,<sup>484</sup> the defendant’s plea (which resulted from his recognition that the judge’s ruling to admit the strong prosecution evidence made his case hopeless),

‘was a clear acknowledgment of the truth of the offence charged’.

These decisions amount to a strong defence of the finality of a guilty plea and demonstrate how a guilty plea can, in law, counteract the effect of an error by the judge. In *Chalkley and Jeffries*,<sup>485</sup> Auld LJ did set out limited circumstances in which an erroneous ruling could render the conviction unsafe saying that,

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<sup>481</sup> Although Auld LJ also re-asserted at p.94 the ‘basic rule’ that the conviction would be quashed if the plea was mistaken or without intention to admit the truth of the offence charged.

<sup>482</sup> *R v Eriemo* (note 473 supra).

<sup>483</sup> *R v Greene* (reported as *R v Whelan* [1997] Crim. L.R.659). See also *R v Asiedu* [2015] EWCA Crim. 714, at para. 20.

<sup>484</sup> *R v Rajcoomar* [1999] Crim. L.R. 728 (CA) Crim. at p.729.

<sup>485</sup> At p.91 (note 476 supra).

‘it is only where an erroneous ruling of law, coupled with the admitted facts, makes acquittal legally impossible that a plea of guilty can properly be said to have been “founded upon” the ruling so as to enable a successful appeal against conviction.’

Auld LJ then went on to explain why other erroneous rulings would not give grounds to go behind the guilty plea saying:

‘The fact that an erroneous ruling of law as to the admissibility of certain prosecution evidence drives a defendant to plead guilty because it makes the case against him factually overwhelming will not do. It does not make it impossible for him to maintain his innocence as a matter of law or of fact, it merely makes it harder’.<sup>486</sup>

The implication of this passage, and of the subsequent cases that rely on it, is that a defendant who claims to be innocent is expected to maintain a not guilty plea, even in the face of an error by the judge which makes it harder to secure an acquittal, and that a guilty plea in these circumstances will be taken by the Court of Appeal to be an acceptance of the truth of the prosecution case. This approach becomes even more severe when the erroneous ruling is accompanied by strong (but erroneous) advice from counsel that the defendant can plead guilty and then appeal his conviction on the basis of the judge’s ruling. Even here, the guilty plea will be seen as an acceptance of the truth of the prosecution case because the defendant ‘could not have been, and was not, advised to plead guilty if in fact he was truly innocent’.<sup>487</sup>

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<sup>486</sup> Although key aspects of the judgment in *Chalkley and Jeffries* which relate to the meaning of ‘unsafe’ have been disapproved, these parts of Auld LJ’s reasoning was considered in *R v Togher and others* [2001] All ER 463 at para. 36 and the Court said it did not wish to question that passage.

<sup>487</sup> *R v Thomas* [2000] 1 Cr. App. R. 447 at p.457.

Thus, the defendant is successfully fixed with responsibility for the plea, counteracting both the judge's (potentially) erroneous ruling and defence counsel's erroneous advice about the possibility of appeal. If, following such a guilty plea, defence counsel presents mitigation implying guilt then this will provide further support for the conviction.<sup>488</sup> In *Llewellyn and Gray*,<sup>489</sup> the Court of Appeal was particularly critical of such mitigation, saying (at paragraph 35) that 'If there is any question of an abuse of process in the present case, it would seem to us to lie in pleading guilty and mitigating and obtaining sentence on one basis, and then in seeking to reverse that stance in order to undermine the conviction'. The court's reasoning would suggest that, where an innocent defendant pleads guilty, the wrongfulness of the 'false' guilty plea and mitigation would somehow outweigh the wrongfulness of the judge's ruling and render the conviction safe. This contrasts with cases involving conviction at trial where counsel can offer mitigation based on the facts as found by the jury without undermining the defendant's ability to challenge the jury's findings on appeal.

The question arises as to why the Court of Appeal should be so keen to rely on the guilty plea as an acceptance of guilt in these cases so as to overcome possible errors by the judge. The answer to some extent lies in the nature of the contested evidence in these cases, which has tended to be highly probative (e.g. covert tape recordings of conversations between defendants<sup>490</sup> or a confession<sup>491</sup>). In the circumstances, it is easy to see why the Court of Appeal would believe that the decision to plead guilty was a reflection of the defendants' factual guilt as demonstrated by the tapes or confessions. The problem with this reasoning is that, if the trial judge's decision to admit the evidence was wrong, the

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<sup>488</sup> *Chalkley and Jeffries* (note 476 supra) and *R v Hewitson* [1999] Crim. L.R. 307.

<sup>489</sup> Note 478 supra.

<sup>490</sup> *Chalkley and Jeffries* (note 476 supra) and *R v Hewitson* (note 488 supra).

<sup>491</sup> *R v Greene* (note 483 supra).

guilty pleas would effectively be founded upon (and upheld on the basis of) inadmissible evidence.<sup>492</sup> The law provides for the exclusion of unlawfully obtained evidence, not because it is inevitably unreliable, but because of the potential for its admission to have such an adverse effect on the fairness of the proceedings.<sup>493</sup> It is difficult to see why a guilty plea from a defendant who cuts his losses in expectation of a reduced sentence and in the hope of an appeal should remedy this unfairness. The Court of Appeal's approach cannot be reconciled with the due process values underlying the power to exclude improperly obtained evidence.

Having discussed the categories of cases where the Court of Appeal is willing to overlook pressure on defendants resulting from personal and systemic factors or mistakes by lawyers and judges, it is now necessary to consider the two categories of cases where the Court of Appeal *is* willing to set aside voluntary and unequivocal guilty pleas and quash guilty plea convictions. These are the two very different categories of abuse of process and new exculpatory evidence. Examination of the reasons why such convictions are quashed reveals the real focus of the Court of Appeal's concern in relation to guilty plea convictions.

#### *Abuse of process – the uncertain effect of the guilty plea*

It is well established that, where there has been serious prosecutorial misconduct amounting to an abuse of process, the Court of Appeal 'will give serious consideration to whether justice required the conviction to be set aside'<sup>494</sup> and a conviction by a jury may be set aside despite the defendant having had a fair trial and there being no doubt about guilt.

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<sup>492</sup> The Court of Appeal concluded that the tape recordings in *R v Chalkely and Jeffries* (op cit) were in fact admissible but, as in *Llewellyn and Gray* (note 478 supra), Auld LJ was discussing (at p.81) whether the guilty plea could be challenged irrespective of whether the judge's ruling was correct.

<sup>493</sup> Police and Criminal Evidence Act 1984, section 78.

<sup>494</sup> *R v Togher* (note 486 supra) per Lord Woolf CJ at paragraphs 33 and 36.

<sup>495</sup> This line of authority reflects due process values in prioritising the integrity of the criminal justice system over the conviction of the (apparently) factually guilty. On that basis, one might expect that the fact that the defendant had pleaded guilty would have no effect on the availability of appeal; the issue would be solely the severity and impact of the abuse. That this is not the case is demonstrated by *Smith*,<sup>496</sup> in which some of the defendants pleaded guilty while some were convicted at trial. It subsequently emerged that the prosecution had wrongfully withheld evidence that would have given the defendants significant cross-examination material on a central part of the defence case and could have had an effect on the verdicts in the case.

The Court of Appeal's treatment of these two groups of defendants differed according to their plea. In relation to those who pleaded not guilty, the Court of Appeal said this alone justified quashing the convictions. The Court said that the position of those who pleaded guilty was different. If the undisclosed evidence could only have assisted in cross-examination then this would be insufficient to render the conviction unsafe. This part of the *Smith* judgment was founded on the decision in *Togher*.<sup>497</sup> In that decision, the Court said that, where a defendant pleads guilty and it is subsequently discovered that there had been an abuse of process, the court may also quash the conviction but only if 'it would be inconsistent with the due administration of justice' to let the conviction stand.<sup>498</sup> The non-

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<sup>495</sup> *Togher* (ibid) approving *R v Mullen* [1999] 2 Cr. App. R. 143, CA and rejecting the approach in *Chalkely and Jeffries* (note 476 supra) which had said that a conviction would not be rendered 'unsafe' (under the amended appeal criteria following the Criminal Appeal Act 1995) solely as result of an abuse of process or procedural irregularity.

<sup>496</sup> *R v Smith* [2004] EWCA Crim. 2212.

<sup>497</sup> *Togher* (see note 486 supra).

<sup>498</sup> *Togher* (ibid) at para. 36. However in *Togher* the abuse of process was insufficient to justify interfering with the defendants' freely entered guilty pleas (para. 65). Under the pre-1995 appeal criteria, it had been clear that an abuse of process could render a conviction 'unsatisfactory' and therefore lead to it being quashed despite a guilty plea. *R v Schlesinger* [1995] Crim. L.R. 137, *R v Blackledge* (1996) 1 Cr. App. R. 326.



disclosure must also have deprived the defendant of ‘evidence going to innocence or guilt’ and not just material which the defendant could have used to attack the credibility of a prosecution witness.<sup>499</sup> The requirement for the guilty plea to be ‘founded upon’ the irregularity is important and there must be a ‘strong and determinative causal connection’ between the two.<sup>500</sup>

Notwithstanding the more limited availability of abuse of process arguments in guilty plea cases, it may be possible to rely upon the abuse of process in an appeal if the undisclosed material should have led the prosecution to withdraw proceedings<sup>501</sup> or if it was likely to have changed the outcome of the defendant’s pre-trial application for stay of proceedings. This latter point was highlighted in *Smith* when the Court said that the question was whether the material could have had a causative impact on a tenable abuse argument at the stay application. If it did so then they were denied a fair trial and their convictions were unsafe despite the guilty pleas and despite the defendants having admitted the offences in the Newton hearings. The Court of Appeal emphasised that the defendants

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<sup>499</sup> *Togher* (ibid) at para. 65, approved and followed in *R v Early and others* [2002] EWCA Crim. 1904.

<sup>500</sup> *R v Kelly and Connolly* (note 435 supra) in which the Court analysed the circumstances of Connolly’s guilty plea carefully but concluded that the plea, which followed the conviction for murder and sentencing to death of the co-defendant, Kelly, was founded on Kelly’s conviction (which was wrongful by reason of a significant disclosure failing) and set against the backdrop of the death penalty, the plea bargain on offer and the advice from counsel which ‘went to the very limit’ of what his duty allowed. The Court said that ultimately the test is the safety of the conviction. Interestingly the Court said that prosecution counsel had raised factors supporting the safety of Connolly’s conviction but the Court said that these were ‘neither here nor there’ given that Kelly’s conviction (as the alleged principal offender) was unsafe and Connolly’s plea had been undermined.

<sup>501</sup> *R v Montague-Darlington* [2003] EWCA Crim.1542. A defendant who pleaded guilty but was subsequently informed that the prosecution had wrongly withheld sensitive (but, the Court of Appeal ruled, disclosable) material did not have a fair trial because the prosecution conceded that they would have withdrawn proceedings rather than disclose the evidence. See also *R v Brown* [2006] EWCA Crim.141 in which the conviction was quashed on the basis of evidence, which the Crown accepted suggested that the confession and guilty plea had been obtained by duress and/or there was an abuse of process. In contrast, in *R v Asiedu* [2015] EWCA Crim. 714, the non-disclosure was not, in itself, an abuse of process and had no impact on the defendant’s plea which was an ‘unambiguous admission’ which ‘unequivocally establishes his guilt’ (paragraphs 34-35).

“were entitled to a proper determination of the issue as to whether or not they should be arraigned”.<sup>502</sup>

It is difficult to explain the rationale for the Court of Appeal’s approach in *Smith* and it remains unclear why an abuse of process should have less impact on a guilty plea conviction than on a conviction at trial.<sup>503</sup> One possibility is that the guilty plea is deemed to be a partial waiver of the defendant’s right to complain of abuse of process, but this is not articulated in the judgments and such an approach would be problematic given that remedies for abuse of process exist as much to protect the criminal justice system more widely as to protect the rights of the individual defendant in the case. Further confusion is provided by the Court of Appeal’s comments in another abuse of process case when it said that the overall test is that ‘a conviction is generally unsafe if a defendant has been denied a fair trial.’<sup>504</sup> Although this sounds straightforward, it raises a number of questions in the light of the courts’ shifting approach to guilty plea cases. First, how does the Court approach the question of whether a defendant was ‘denied’ a fair trial as opposed to choosing to waive his right to a fair trial (by voluntarily pleading guilty)? Secondly, in what circumstances will this general rule not be applied (i.e. when a defendant who has been ‘denied’ a fair trial will still be held to his guilty pleas)? In *Early*<sup>505</sup> the court said that, where there are disclosure failings supported by prosecution witnesses giving dishonest evidence to the trial judge, this is likely to lead to the conviction being quashed even if there is strong evidence of guilt. The Court also said that a defendant who pleads guilty at an early

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<sup>502</sup> *R v Smith* (note 496 supra) at para. 21.

<sup>503</sup> As Nobles and Schiff observe, in guilty plea cases (and in contrast to trial convictions) ‘only the most severe irregularities, and only where these are unknown to the defendant at the time of pleading guilty, may justify an appeal against conviction.’ (Nobles, R. and Schiff, D. *Due Process and Dirty Harry Dilemmas*’ (2001) 64 Mod. L. Rev. 911 at p.917.)

<sup>504</sup> *R v Early* (note 499 supra) at para. 10.

<sup>505</sup> *Ibid*

stage should not be put in a worse position than a defendant against whom proceedings were abandoned after late disclosure arising out of an application for stay.<sup>506</sup>

The *Smith* case also demonstrates an interesting (and problematic) overlap between abuse of process and erroneous decisions by a trial judge. Suppose that the relevant material in *Smith* had actually been disclosed and the defendants had relied upon it in their application for a stay on the grounds of an abuse of process but that the trial judge had erroneously ruled against them. In these circumstances, those defendants who maintained their plea would have had their convictions quashed.<sup>507</sup> However the guilty pleas of the remaining defendants are likely to have been seen as admissions of guilt.<sup>508</sup> This means that a defendant who pleads guilty, knowing of the facts of an abuse of process but having had the trial judge wrongfully reject the abuse argument, should be considered bound by his plea whereas the defendant who pleads guilty, being entirely unaware of the circumstances of the abuse of process, is not. The distinction would appear to depend on whether or not the defendant was in full possession of the facts at the time that the plea was entered. If so, he is expected to maintain his not guilty plea (thereby risking a higher sentence) and hope to challenge the judge's decision on appeal. If he changes his plea,

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<sup>506</sup> Ibid at para. 10.

<sup>507</sup> According to *Togher* (see note 486 supra) at para. 33, the Court of Appeal is 'most unlikely' to uphold a conviction in these circumstances.

<sup>508</sup> *Rajcoomar* (note 484 supra) in which the Court said that, even if the trial judge's ruling was wrong, the principle in *Mullen* (note 134, supra) did not apply to defendants who had pleaded guilty following the ruling. The court in *Togher* (ibid) considered this point (at para. 36) and appeared to accept it (simply saying that this reasoning does not apply where the defendants were unaware of the abuse of process when they entered their plea).

that plea would appear to override both the misconduct by the prosecution and the trial judge's erroneous decision on stay.<sup>509</sup> Such is the power of the guilty plea.

*Exceptional cases - new exculpatory evidence*

On the face of it, a voluntary and unequivocal guilty plea resulting from a rule-compliant criminal process should provide a safe foundation for a conviction. Unfortunately, as already explained, the Court of Appeal's narrow definition of 'involuntariness' leaves scope for defendants 'voluntarily' to plead guilty to offences which they have not committed because they were put under overwhelming pressure to plead guilty through systemic or personal pressures. In the normal course of events, such defendants will not be able to overturn their conviction. Rare cases show, however, that appeals may be successful provided that there is significant new evidence (admitted under section 23 of the Criminal Appeal Act 1968)<sup>510</sup> which renders a conviction unsafe despite the guilty plea. In such cases, the Court of Appeal's approach to the safety of the conviction appears to mirror its approach to fresh evidence cases arising from jury verdicts.<sup>511</sup>

Even as far back as 1909, the appeal courts were willing to set aside a conviction by way of guilty plea when it transpired that the defendant had been in prison on the day of the offence.<sup>512</sup> The courts are reluctant, however, explicitly to acknowledge this more generous aspect of guilty plea appeals and tend to give a very narrow account of the

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<sup>509</sup> *Rajcoomar* (ibid) appears to conflict with *Montague-Darlington* (note 501 supra) which said that the defendant could not have had a fair trial if he should not have been tried at all. For further discussion on this point see Clare Barsby's case comment to *Rajcoomar* at [1999] Crim. L.R. 728.

<sup>510</sup> Section 23 allows the Court of Appeal to admit new evidence if it is necessary or expedient in the interests of justice, having had regard to whether the evidence is capable of belief, whether it appears to afford any ground for allowing the appeal, whether it would have been admissible in the trial proceedings and whether there is a reasonable explanation for the failure to adduce it at trial.

<sup>511</sup> In such cases the Court will not try to second guess what effect the new evidence would have had on the jury but will reach its own view on the impact of the fresh evidence. As a court of review, however, the court will be slow to interfere with the verdict of the jury that heard the evidence at trial. *R v Pendleton* [2002] 1 WLR 72, HL

<sup>512</sup> *R v Verney* [1909] 2 Cr. App. R. 107

potential grounds for challenging guilty plea convictions. In 1923 in *Forde*,<sup>513</sup> Avory J summarised the case law on guilty plea appeals stating that a conviction arising out of a guilty plea could only be appealed on two narrow grounds, (a) that the appellant 'did not appreciate the nature of the charge or did not intend to admit he was guilty of it'<sup>514</sup> or (b) that the admitted facts did not amount to the offence charged. Despite subsequent cases which have established that the right of appeal in guilty plea cases is wider than suggested in *Forde*,<sup>515</sup> the courts continue to refer to the *Forde* grounds.<sup>516</sup>

In its judgments in these fresh evidence cases, the Court of Appeal is careful not to investigate or discuss the circumstances or meaning of the wrongful guilty plea but appears content to quash the conviction regardless of whether the defendant's plea was 'voluntary', 'unequivocal' and intended to amount to an admission of guilt.<sup>517</sup> In *Lee*,<sup>518</sup> for example, the defendant made confessions to the police and pleaded guilty to eleven indictments relating to a number of arson attacks in the 1970s, including 27 counts of manslaughter by reason of diminished responsibility. When the pleas were entered they

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<sup>513</sup> *R v Forde* [1923] 2 KB 400 at 403.

<sup>514</sup> For a classic example of this type of case, see *R v Phillips* [1982] 1 All ER 245 in which the defendant pleaded guilty 'in a hopeless muddle and very confused' to charges which the prosecution had agreed would not be pursued.

<sup>515</sup> Per Rix LJ in *R v Connolly* [2003] EWCA Crim.2957 at para. 105. As discussed below, the Court will now go behind guilty pleas in certain circumstances where there is an abuse of process or where there is new evidence which dramatically undermines the prosecution case. Even at the time *Forde* was decided, its formulation of the right to appeal in guilty plea cases was much more restrictive than the statutory test which was then in force. The Criminal Appeal Act 1907 had introduced a new system of appeals which allowed for appeal on the grounds of a wrong decision of law or a 'miscarriage of justice' (see Pattenden, note 49, supra at pp6-10). This is clearly wider than the formulation in *Forde*.

<sup>516</sup> See, for example, *R v White (Anthony Alan)* [2014] EWCA Crim.714; CA. The CCRC also relies on these criteria for appeal in its legal advice on guilty pleas (see note 774 and p.221 below).

<sup>517</sup> In *R v Brady* [2005] 8 Archbold News 1, CA, the court observed that once the fresh evidence had shown the conviction to be unsafe, it did not matter why the unequivocal plea had been made.

<sup>518</sup> *R v Lee (Bruce)* [1984] 1 W.L.R. 578.

were clear and unequivocal and were, according to the Court of Appeal, quite properly accepted by the judge. After the conviction, evidence emerged which suggested that the defendant may have confessed out of a desire for notoriety. There was also new evidence which was capable of undermining other aspects of the prosecution case. The Court of Appeal said that 'the fact that the applicant was fit to plead, knew what he was doing, intended to make the pleas he did [and] pleaded guilty without equivocation after receiving expert advice' was 'highly relevant' to whether the convictions were (as then required) unsafe or unsatisfactory but that it could not in itself prevent the Court quashing the conviction. The Court of Appeal admitted the new evidence and quashed some of the convictions but in doing so it stressed that the decision,

'is not intended to provide any general precedent. Indeed, it is our view that the occasions, on which this court will allow evidence to be called, after there has been an unequivocal plea of guilty, will be very rare. We regard this case, as indeed do both counsel, as wholly exceptional, if not unique.'

The Court of Appeal heard another such 'exceptional' case later that year. In *Foster*<sup>519</sup> the defendant confessed and pleaded guilty to a rape. Four years later another man admitted and was convicted of the same rape. Mr Foster was granted a free pardon but also sought have the conviction set aside by the Court of Appeal. As in *Lee*,<sup>520</sup> the court said it appeared that Mr Foster was fit to plead, knew what he was doing, intended to make the pleas he did and pleaded guilty without equivocation after receiving expert advice. Despite this, the new evidence was admitted under s23 and the court found that it rendered the convictions unsafe or unsatisfactory. The Court noted that it 'is rare of course

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<sup>519</sup> *R v Foster* [1985] QB 115.

<sup>520</sup> Note 518 supra.

to allow fresh evidence to be heard after a plea of guilty has been made. The circumstances must be exceptional.'

In *Holliday*,<sup>521</sup> the defendant confessed and pleaded guilty to two robberies. New evidence subsequently came to light which the Crown accepted was 'clear evidence' that another man had committed one of the offences and that the admissions in interview in relation to that offence were unreliable. The Court of Appeal focused entirely on the matter of the defendant's guilt or innocence and avoided any analysis of the significance of the defendant's guilty plea. The Court concluded that:

'as a matter of practice the cases in which this Court will go behind a plea of guilty are few and far between. The circumstances will have to be exceptional, but we would not wish to define what every category of exceptional circumstances might be. The bottom line is whether the conviction is unsafe.'

The Court concluded that this case was exceptional and that the conviction was unsafe.<sup>522</sup> In another judgment, the Court of Appeal quashed a conviction based on a guilty plea when two eye-witnesses to a robbery confirmed that they knew the appellant and that she was not the person they saw and referred to 'this extraordinary case'.

These decisions demonstrate that, even if a guilty plea is viewed as a waiver of the defendant's right to challenge the prosecution case, such a waiver is not absolute and can be set aside in cases involving significant exculpatory evidence. In terms of the weight of evidence required in order to displace an 'unequivocal and voluntary' guilty plea, the cases discussed above involve new evidence which appears to demonstrate that the defendant

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<sup>521</sup> *R v Holliday* [2005] EWCA Crim.2388.

<sup>522</sup> See also *R v Brady* [2004] EWCA Crim. 2230 when the Court of Appeal quashed a conviction based on an unequivocal and voluntary guilty plea following the admission of new evidence from eye-witnesses that the appellant was not the culprit. The Court said it was an 'extraordinary case.'

could not be guilty of the offences to which he pleaded guilty. These cases could be termed 'exonerations'. It is not clear whether similar decisions would be made where the evidence, whilst not amounting to exoneration, undermined a fundamental part of the prosecution case. In this context it is interesting to note that the Court of Appeal in *Lee*<sup>523</sup> stated that they were 'far from sure' that the defendant was innocent of the offence but that there was a 'possibility' that the fire was started by accident and that, despite the unequivocal guilty plea, the court was 'left with doubts, the benefit of which must be given to Lee'. Clearly this is a much lower test than a requirement for exoneration.<sup>524</sup>

Although it is impossible to criticise the Court of Appeal for quashing convictions in the face of new evidence demonstrating that the defendant was not responsible for the crimes, these decisions raise significant problems for the Court's approach in other guilty plea cases. *Lee*, *Foster* and *Holliday* demonstrate that it is possible for a defendant who is fit to plead and properly advised to plead guilty, intentionally and unequivocally, despite being entirely innocent. Such a conclusion is difficult to reconcile with the Court of Appeal's determination in other cases to rely on guilty pleas as a confession and an acknowledgment of the truth of the prosecution case. It is clear, now, why the Court of Appeal is willing to quash these convictions with so little discussion of the factors that gave rise to the false guilty plea. Indeed, in an early 'new evidence' case,<sup>525</sup> in which the Court of Appeal accepted that the defendant was innocent of the offences, the court made no comment at

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<sup>523</sup> In the Court of Appeal's full but unreported judgment dated 9 December 1983 at pp.64-65.

<sup>524</sup> Another interesting case in this context is *R v Bhatti* CA 19 December 2000 (unreported but discussed in *Kelly and Connolly* – see note 435 supra) in which the prosecution's unwitting use of a 'fatally flawed' expert report which was at the heart of the prosecution case was a serious irregularity (albeit not an abuse of process) on which the guilty plea (which was 'voluntary and unequivocal' and 'made with the benefit of counsel's advice') was founded. This decision was particularly generous to the defendant because the defence had access to an expert report at the time of his plea that would have provided a basis to challenge the prosecution expert.

<sup>525</sup> *R v Forbes* [1968] 52 Cr. App. R. 585.



all on the risk that other defendants might be making similar decisions but, instead, was keen to stress the case was a very good illustration 'of the great care that the police take, not only to see that a guilty man is brought to conviction, but to see that an innocent man is freed.'

This case, and others like it, reveal the Court of Appeal seeking to uphold the authority of the criminal justice system while obscuring problems within it. As already discussed, Nobles and Schiff's analysis suggests that, when faced with obvious injustice resulting from earlier tragic choices '[t]he difficulty facing those who must treat the inevitable as mistakes is how to respond without undoing the deliberate choices represented by the method of trial.'<sup>526</sup> If the Court of Appeal failed to remedy cases involving clear and compelling evidence that the defendant who pleaded guilty is not, in fact, guilty, this would result in public attention and in the curtain being lifted on the tragic choices which are being made at the trial stage. If the Court of Appeal were to address in their judgment the causes of these wrongful guilty pleas then, again, public attention would be drawn to the tragic choices that are implicit in the guilty plea process. The Court must, therefore, act swiftly to deal with these cases. As Nobles and Schiff observe, the Court of Appeal's 'constructions of miscarriage of justice must uphold fundamental values, without providing evidence of a need for radical reform.'<sup>527</sup>

The defendants in these cases had their convictions quashed because crucial evidence subsequently came to light, not through the normal disclosure process or through the work of the defence team during the preparation of the case, but through external events. In his judgment in *Foster*, Watkins LJ observed that 'This is, fortunately for the good name of justice, a very unusual story we have to tell'. Although it seems likely that Watkins LJ was

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<sup>526</sup> Nobles and Schiff (2000) (note 229 supra) at p.4.

<sup>527</sup> Ibid at p.235.

intending to express the rarity of wrongful conviction through guilty plea, in fact all that can be said is that it is unusual for wrongful convictions by way of guilty plea to come to light. Once one accepts that innocent people may plead guilty ('for reasons of their own'),<sup>528</sup> any guilty plea case could be a 'new evidence' case and the only way to find out is to look for the new evidence. Given the difficulties faced by those imprisoned following a guilty plea in investigating or obtaining legal assistance to investigate their case, it is likely that the CCRC will be best placed to look for such new evidence. As I will discuss further in chapter 5, deciding when to do this is a significant problem for the CCRC.

## Conclusion

The Court of Appeal's approach to guilty plea cases cannot be said to reflect any one account of the guilty plea. Far from seeking to ensure that guilty pleas are genuinely voluntary and reliable confessions of guilt or that they represent reliable assessments by defendants of the balance of the evidence in the case, the appeal courts are instead engaged in a complex balancing of competing interests.

I argued in the first part of this chapter that all three theoretical accounts of the guilty plea require that guilty plea convictions should be truly voluntary and based on accurate and sufficient information (although the different accounts require different degrees of information). Each account also requires that the system upholds the fairness of the plea process and, if the system is to make any claim to accuracy of outcome, the appeal process should make provision for the admission of significant new exculpatory evidence. In contrast, in the second part of the chapter I argued that, when considering guilty plea appeals, the appeal courts are, in fact, likely to prioritise the authority of the law. This requires that the courts' decisions tend to promote finality following guilty plea unless there has been obvious injustice. The concern for finality and the authority of the law also

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<sup>528</sup> Bar Standards Board Written Standards (note 446 supra) at para. 11.5.1.

suggests that the courts will prefer to base successful appeals on due process concerns rather than innocence concerns and that courts will seek to disguise the guilty plea system's deliberate prioritisation of efficiency over fairness and accuracy at the first instance.

My analysis of the law on appeals in the third part of this chapter reveals that the Court of Appeal relies heavily on accounts of the guilty plea as a confession and, therefore, as evidence of guilt. This account provides perhaps the most intuitively attractive justification for restrictions on the availability of appeal in guilty plea cases but this account would require the courts to have regard to all the problems of reliability that beset 'normal' confession evidence.<sup>529</sup> The case law on 'voluntariness' of plea demonstrates that, although the Court of Appeal shows a rhetorical commitment to 'voluntariness', (which would suggest that the court was looking for matters which might render the 'confession' unreliable), it is willing to overlook personal and systemic pressures. These pressures could, in fact, undermine the voluntariness and, therefore, the reliability of guilty plea convictions as indicators of guilt. Instead, in determining the voluntariness of the plea, the court looks for mistakes or impropriety from actors within the criminal justice system, (such as a breach of the Goodyear guidelines by a judge or erroneous legal advice from a lawyer), and will not consider either systemic incentives or (generally) the personal circumstances of the defendant. This is a technical form of 'voluntariness' that reflects due

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<sup>529</sup> As discussed in chapter 1 and see Ashworth, A. *The Criminal Process*. (2010). ) 4th ed. OUP p.315. Put briefly, confession evidence may be ruled inadmissible at trial as a consequence of (for example) the defendant being offered an inducement to confess. This is because the inducement may render the evidence unreliable. In the same way, a 'confession by way of guilty plea' could be (as a matter of fact) rendered unreliable by the defendant being offered an incentive to plead guilty.

process concerns over a genuine commitment to defendants being able to make 'free' choices over plea such that their pleas reflect a genuine acceptance of guilt.<sup>530</sup>

When the appeal courts identify errors by lawyers or judges, or other 'due process' problems, they are willing to remedy them but in doing so they set a higher bar in guilty plea appeals than in trial cases and they rely on the guilty plea as a confession (or acceptance of 'the truth' of the prosecution case) to justify this, without any consideration of the reliability of that 'confession'. In this way, the courts appear to be prioritising the conviction of the factually guilty (as, supposedly, demonstrated by the guilty plea) over due process concerns. Although it is not explicit in the judgments, it is possible that the courts are treating the guilty plea as a waiver of rights in these cases such that the appeal courts feel able to overlook the abuse of process in cases where they have little doubt over the factual guilt of the appellant.

Finally, the courts are willing to remedy inaccurate convictions in the rare cases where the appellant can demonstrate this by striking new evidence but with little discussion that might draw attention to the problems in the guilty plea system that allow such convictions to occur. This unwillingness to acknowledge the possibility of systemic problems in the guilty plea process provides support for Nobles and Schiff's tragic choices analysis of the appeal courts' role.

On a practical level, the guilty plea system exists largely in order to resolve criminal cases swiftly and efficiently so there is inevitably an interest in achieving finality by limiting

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<sup>530</sup> McConville and Marsh (note 4, *supra*) at p.87 present this as the appeal courts endowing the defendant with 'an imputed personality' as 'an individual with fundamental rights in control of and hence responsible for any and all decisions that are required to be made.' This, they argue, allows the courts to avoid giving defendants individual treatment, as would be required if their actual personality was recognised.

appeals. If it were easy to challenge a guilty plea conviction then the 'system benefits'<sup>531</sup> would be greatly diminished and the authority of the law would be damaged by the possibility of such large numbers of convictions being open to challenge. This is why appeal courts prioritise finality in their decisions. What is problematic (but, applying tragic choices analysis, also inevitable and rational) is the way that the Court of Appeal seeks to hide this prioritisation of system benefits and acceptance of pressure and coercion behind rhetoric around freedom and voluntariness. As Nobles and Schiff point out, disguising tragic choices and maintaining the rhetorical status of fundamental values may require the use of 'practices generally considered unhelpful to rational public policy (dishonesty, inconsistency, hypocrisy and ignorance)'.<sup>532</sup>

Thus, the apparent inconsistencies in the Court of Appeal's treatment of the meaning of the guilty plea may reflect its efforts to disguise the criminal justice system's prioritisation of efficiency through guilty plea conviction over the fundamental values of accuracy and fairness. The appeal courts' aim in guilty plea cases is not to determine whether the plea is reliable as an indication of guilt and has been fairly achieved but rather is to preserve the efficiency savings achieved through the guilty plea process whilst paying sufficient regard to defendants' rights to minimise or disguise any injustice. This understanding illuminates the criminal justice system's reliance on the convenient illusions of defendant autonomy and the protective role of the legal adviser as cover for the system's inevitable prioritisation of the 'system benefits' of guilty pleas and to disguise systemic coercion in the plea process.

The rhetorical attachment to the guilty plea as confession allows the courts to present their decisions to uphold guilty plea convictions as being based on the evidence in the case, or

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<sup>531</sup> Which, in the opinion of the RCCJ, justified the offer of the sentence discount (see p.35 supra).

<sup>532</sup> Nobles and Schiff (2000) (note 229 supra) at pp.3-4.

even 'the truth'. The courts thereby sustain the rhetoric that the system of plea bargaining retains a strong element of truth-seeking rather than being a set of tactical manoeuvres designed to prioritise efficiency concerns by incentivising negotiated settlements. At the same time, the courts' emphasis on compliance with the existing rules governing plea negotiations and its insistence that, within those rules, the defendant has a 'free choice' over plea, enables the court to show its commitment to due process and defendant autonomy. This, while upholding the products of the system of incentives and pressures to plead guilty.

The RCCJ was willing to compromise the interests of innocent defendants in order to achieve 'system benefits'.<sup>533</sup> Such a compromise demands that the system should provide an appeal mechanism that will remedy the resulting wrongful convictions. This chapter has suggested that the appeal system's unwillingness to provide routine remedy for wrongful convictions by guilty plea occurring as a consequence of systemic or personal pressures is, in itself, an inevitable compromise. That cannot, however, be the end of the discussion. The RCCJ sought comfort in the likelihood that most defendants who plead guilty do so because they are, in fact, guilty but this complacent assertion disguises the potential scale of the problem. Given that around 500,000 defendants each year plead guilty to all charges against them in England and Wales,<sup>534</sup> even if only one in 500 of these were innocent, this would result in 1,000 wrongful convictions each year. It is important, therefore, to consider the role of the Criminal Cases Review Commission in providing a safety net for those who are wrongly convicted and who have been unable to obtain a remedy through the normal appeal process.

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<sup>533</sup> According to the RRCJ (note 8 supra) the risk of the innocent pleading guilty 'cannot be wholly avoided' and 'it would be naïve to suppose that innocent persons never plead guilty' (because of the sentencing discount) but this risk is outweighed by 'the benefits to the system and to defendants of encouraging those who are in fact guilty to plead guilty' (paragraphs 42-45).

<sup>534</sup> *CPS Annual Report and Accounts 2014-2015*. London: HMSO, Annex D, Charts 3 and 7.

The most significant demonstration of the prioritisation of system benefits is the unavailability of appeal against guilty plea convictions in the magistrates' court (where the overwhelming majority of guilty plea convictions occur). It cannot be argued that the standards of justice in the magistrates' court make wrongful guilty pleas less likely to occur in that court than in the Crown Court so the only explanation for the differing appeal provision can be that the criminal justice system is more willing to accept the risk of unremedied wrongful guilty pleas in the large numbers of summary cases than it is in Crown Court cases. In providing for referral of summary guilty plea convictions by the Criminal Cases Review Commission, Parliament may have been intending to demonstrate a concern for accuracy and fairness in summary convictions. Unless the CCRC can demonstrate its ability reliably to identify and refer wrongful summary convictions by guilty plea, however, this provision will be shown to be mere window-dressing. Unfortunately, as chapter 5 will discuss, there are reasons to believe that the CCRC cannot reliably offer remedies to those wrongly convicted by guilty plea in the magistrates' court.

Before that discussion, it is important to give further consideration to the plea decision itself. The foregoing analysis of case law demonstrates that the meaning of the guilty plea does have real consequences for defendants because it affects the availability of appeal. A defendant entering a negotiated plea who believes he is participating in a tactical process offered by the criminal justice system to avoid the costs of trial may be disconcerted to discover that, following the discovery of new evidence, an abuse of process or an error by his lawyers, his plea may be taken by the appeal court to express a genuine acceptance of the truth of the prosecution case.

The Court of Appeal relies on a shifting understanding of the guilty plea with heavy reliance on the guilty plea as confession, while the criminal justice system takes a conflicting approach in seeking to promote plea bargaining (even at the expense of the innocent being

pressurised to plead guilty) and accepting as unproblematic the idea of a defendant pleading guilty while continuing to protest his innocence privately to his lawyer. The literature suggests that the appeal courts' reliance on the defence lawyer's ability to protect her client from pressure is problematic given that many lawyers operate under a presumption of their clients' guilt and may be subjecting their clients to considerable pressure to plead guilty. More than this, given the systematic incentives and pressures to plead guilty, it is possible that lawyers, even acting properly, may be contributing to the pressure on their clients rather than offering them protection. In the next chapter I consider, therefore, the plea decision itself and, in particular, how lawyers approach advising their clients on plea. I discuss how the plea process looks in the light of the appeal courts' assertions about guilty pleas, the extent to which the process promotes guilty pleas that are voluntary, informed and unequivocal, and the influence of efficiency considerations on the guilty plea process.





## Chapter 4 The plea decision

An examination of the meaning of the guilty plea necessarily requires an understanding of what happens in practice when defendants make plea decisions. If the routine practices of the criminal justice system encourage defendants to enter guilty pleas which fail to satisfy any of the possible accounts of the guilty plea presented in this thesis, this will undermine the legitimacy of the guilty plea system. This chapter discusses my observations of plea discussions between defendants and their lawyers, observations of plea hearings in magistrates' and Crown courts and examination of files created by defence lawyers and the CCRC. It sets out to assess to what extent the practices of the criminal justice system can be said to promote guilty pleas which reflect the possible accounts of the guilty plea.

In chapter 3 I argued that, despite frequent assertions from judges that defendants 'plead guilty because they are guilty', all defendants, when deciding on plea, (whether factually guilty or not) need to assess the risk and consequences of conviction at trial. The first part of this chapter discusses the difficulties facing the defence in making this assessment, particularly at the early stages of the criminal process. This creates a risk that the defence will overestimate the risk of conviction and that this will distort defendants' pleas.

The second part of the chapter considers the various ways in which defendants' pleas can be distorted by pressure from defence lawyers; pressure from the courts; defendants' own vulnerabilities and financial pressures. It will be argued that these pressures make the plea less likely to represent a genuine acknowledgment by the defendant of his guilt or a realistic assessment of the likely verdict at trial.

The final part of the chapter will consider defence lawyers' and courts' treatment of 'inconsistent pleas'. Defendants who enter guilty pleas whilst continuing to assert their innocence create ethical difficulties for defence lawyers. Although traditionally such pleas would be hidden from the court by the formal requirement for guilty pleas to be 'unequivocal', my research demonstrates that courts may be turning a blind eye to equivocality or even pressurising defendants to withdraw equivocal elements of their accounts in order to achieve the desired outcome of an efficient case resolution by guilty plea.

## Difficulties in assessing the risk and consequences of conviction at trial

The Court of Appeal's approach to appeals against guilty plea convictions rests on the purported assumption that (barring some significant error or impropriety by those involved in the criminal process) defendants plead guilty because they know they are guilty.<sup>535</sup> The Court's approach is both convenient and efficient as, by arguing that (except in exceptional circumstances<sup>536</sup>) a defendant 'knows what he has done', the Court justifies seeking guilty pleas from defendants at the earliest stages of the criminal process, without sight of the prosecution evidence or opportunity to investigate possible defence evidence. Chapter 3 discussed the objections to this approach and argued that, as a consequence of plea incentives, all defendants, (whether innocent or guilty) are engaged in a plea negotiation during the criminal process. In order for the plea process to be fair, therefore, defendants need to be able to assess the risk and consequences of conviction at trial to decide whether

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<sup>535</sup> Discussed in chapter 3 *supra*.

<sup>536</sup> Discussed in *R v Caley* (note 452 *supra*) at paragraph 14.

to waive their fundamental right to a trial.<sup>537</sup> This assessment should include the evidence in the case, together with any procedural or tactical issues which could influence the outcome. Although there is a danger that this assessment of the risk and consequences of conviction at trial will override considerations of factual guilt and innocence, it is an unavoidable consequence of the system's reliance on plea incentives.<sup>538</sup> It cannot, despite the court's rhetoric, be blamed on guilty defendants who are 'playing the system.'<sup>539</sup>

Defence lawyers told me that the risk and consequences of conviction at trial were central to defendants' plea decisions,<sup>540</sup> as illustrated by the responses given when asked in interview what defendants take into account regarding plea,

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<sup>537</sup> Sanders, Young and Burton (note 98 supra) at p.439. It is, of course, an element of the Article 6 Right to a Fair Trial that the defendant should be 'informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him' (Article 6(3)(a) of the European Convention on Human Rights).

<sup>538</sup> Discussed further in chapter 3 (from p.136).

<sup>539</sup> This phrase is used in the Sentencing Council's consultation (note 455 supra) on a new guideline for sentencing guilty pleas. It is proposed that the full 1/3 discount should only be available to defendants who enter a guilty plea at the first hearing (for summary offences), the allocation hearing (for either-way offences) or the first hearing in the Crown Court (for indictment only offences). After this, the discount will be no more than 1/5. The consultation provides for an exception (at p.24) where the defendant 'genuinely does not know whether or not he is guilty' (giving the example of a defendant with amnesia) but says this 'is not an invitation to "play the system"'. In this situation, the defendant could get the full third discount provided he entered his plea as soon as he received the necessary disclosure and advice. A second exception applies if the prosecution has failed to provide the initial details by the beginning of the day of the first hearing but this does not apply to those charged with summary offences (because, the Sentencing Council suggests at p.25, 'the issues in such cases are likely to be more easily resolved' by the time the hearing begins).

<sup>540</sup> Existing research demonstrates that those who have been convicted of offences based their plea decisions on an assessment of the risk and consequences of conviction at trial (see Hedderman, C. and Moxon, D. *Magistrates' Court or Crown Court? Mode of Trial decisions and sentencing*. (1992) Home Office Research Study No.125 London: HMSO). Research on behalf of the Sentencing Council (note 943 below) reached a similar conclusion. Although the Sentencing Council has suggested in its consultation on guilty plea sentencing (*ibid*, at p.10) that this finding was 'not representative of offenders more widely' it is not clear on what basis the Council reached that conclusion.

‘What’s going to happen to me and what is the impact of the guilty plea as opposed to a not guilty plea and does that mean I’m going to prison or not?’<sup>541</sup>

‘Reduction in sentence is a huge factor’<sup>542</sup>

‘Sentence, I think, and “Am I going to go to prison for this?”’<sup>543</sup>

‘Whether they are going to prison or not, is the first one. The second one is how long will their sentence last and three is how much it’s going to cost them. Four, criminal convictions: will it affect their future job prospects. And that’s it.’<sup>544</sup>

In contrast to judges’ assumptions about why defendants plead guilty, the lawyers interviewed did not mention the issue of factual guilt or innocence in this respect.<sup>545</sup> This is despite the question referring to all clients (and not just those who were pleading guilty).<sup>546</sup> These answers suggest, therefore, that considerations of sentence may predominate over the issue of guilt or innocence.

The assessment of the risk of conviction was central to the plea discussions observed between defendants and lawyers.<sup>547</sup> The key issues discussed were the apparent strength of the prosecution case (based on the material available at that point) and the defendant’s

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<sup>541</sup> Lawyer P9.

<sup>542</sup> Lawyer P8.

<sup>543</sup> Lawyer PL3.

<sup>544</sup> Lawyer BL8.

<sup>545</sup> There was one exception, Lawyer B1, who mentioned the issues of costs consequences and the risk of custody as relevant factors for defendants but then continued, ‘to be honest, the main thing comes down to whether they’ve done it or not’.

<sup>546</sup> Having answered the question ‘When you advise a client on plea, what are the factors that you take into account?’, the lawyers were asked ‘What factors do you think clients take into account?’

<sup>547</sup> During the observational research with defence lawyers, live plea discussions and advice were observed in 37 cases. In a further 24 cases the defence lawyers’ files, including notes and advice letters which dealt with plea discussions, were examined although no live discussions were observed.

account. All but two of the defence lawyers who were interviewed mentioned that these were both factors they took into account in advising on plea.<sup>548</sup> It was more difficult to discern in observations how these issues actually influenced the defendants' final plea decisions (defendants were not asked by their lawyer to give an explanation for their plea choice and few volunteered any such explanation).

Given the appeal courts' reliance on advice from defence lawyers as an important safeguard against wrongful conviction by guilty plea, the lawyers' focus on these issues is significant. It is important, therefore, to consider the extent to which the criminal justice system facilitates the defence's assessment of the risk and consequences of conviction at trial.<sup>549</sup> It will inevitably be difficult for an unrepresented defendant to make such an assessment and, given the recent increase in unrepresented defendants, this should be a source of considerable concern.<sup>550</sup> This research, however, focused on represented defendants and demonstrates that legal advice does not eliminate the difficulties in reaching a realistic assessment of the risk and consequences of conviction. In the discussion that follows I first explain the difficulties in assessing the strength of the prosecution case, particularly given the courts' focus on guilty pleas being entered as early as possible, at a

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<sup>548</sup> The remaining two lawyers referred to one of these issues each. Lawyer P8 only referred to 'the law' and the client's instructions (saying 'if their instructions are that they've committed the offence I'd advise them to plead guilty') and lawyer B8 referred only to 'the strength of the evidence' as revealed by the prosecution papers. Additional factors mentioned by the lawyers were the likely impact of plea on sentence; tactical issues which could affect the prosecution's ability to prove the case (such as whether the witnesses in a domestic violence case might turn up) and one lawyer (Lawyer P4) mentioned the client's previous convictions and their personal circumstances as relevant issues.

<sup>549</sup> Taking into account systemic pressures and the way these are 'mediated in practice by lawyers, court officials, magistrates and judges.' Sanders, Young and Burton (note 98 supra) at p.439.

<sup>550</sup> Recent research by Transform Justice identified concerns from prosecutors, judges and magistrates about the increasing number of litigants in person and the difficulties facing these defendants in making a plea decisions. See Gibbs, P. Justice Denied? The experience of unrepresented defendants in the criminal courts. (2016) Transform Justice Report. At <http://www.transformjustice.org.uk/justice-denied-unrepresented-defendants-in-the-criminal-courts/>, on 28/4/16.

time when little prosecution material is available. After this, I discuss the difficulties faced by defendants and their lawyers in assessing the strength of the defence case, including the danger that defence lawyers may be prone to place undue weight on prosecution materials, at the expense of fairly assessing the potential for evidence to support the defence account. Finally, I discuss the difficulty in assessing the consequences of entering a not guilty plea.

### **Assessing the strength of the prosecution case**

Observations of plea discussions demonstrate that defence lawyers evaluate the prosecution case, even if the defendant has admitted guilt. Although a court would willingly take a guilty plea from an unrepresented defendant in these circumstances,<sup>551</sup> the presumption of innocence (and the consequent right of a defendant to put the prosecution to proof) means that a represented defendant should receive advice from his defence lawyer about any difficulties that the prosecution might face in proving its case at trial. As Lawyer P5 put it, 'If they've admitted it to me, I will still check the evidence'. Although in such cases, the lawyer's eventual advice was almost always to plead guilty,<sup>552</sup> there were a number where, before reaching this conclusion, the lawyer discussed possible problems facing the prosecution achieving convictions. In one case, for example, the lawyer identified a mistake of law by the prosecution,<sup>553</sup> which led to the prosecution withdrawing

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<sup>551</sup> There would be no apparent reason for his guilty plea to be resisted by the court in these circumstances given that the court is only required to assess whether that plea represents a clear acknowledgment of guilt (see page 207 below).

<sup>552</sup> Of the 37 cases in which live plea discussions were observed, 18 involved clients whose accounts amounted to an admission to the offence or to a lesser offence. Only one of these 18 defendants was advised to plead not guilty (for tactical reasons - see note 555 below). The remaining were advised to plead guilty to the full offence (in the 11 cases where their account was consistent with the prosecution case) or to a lesser offence or on a lesser factual basis (in the six cases where the account indicated guilt but to a lesser degree than the prosecution alleged). All of these 18 defendants followed the advice given.

<sup>553</sup> In Case P56, the defendant suggested he would plead guilty to an aggravated charge of taking a vehicle without consent arising out of his driving a hire car whilst uninsured and without a licence

the charge. In another, despite the client first announcing ‘What I want to do this morning is to throw my hands up to it’, Lawyer P1 responded saying ‘Okay but let’s check the file first. I know you want to throw your hands up but let’s just make sure you really should. Let’s see what’s there because you don’t want to plead guilty if there’s some reason not to.’<sup>554</sup> A third lawyer persuaded a nervous defendant to maintain his not guilty plea because the prosecution witness was considered unlikely to turn up on the day of trial.<sup>555</sup>

Regardless of the defendant’s account to his lawyer, therefore, the defence lawyer needs to be able to assess the strength of the prosecution evidence in order to advise on plea. This may be difficult, however, at an early stage of proceedings, when defendants are expected to enter their plea. The problem is exacerbated by rules which limit the file preparation work done by the police and prosecution in cases involving ‘anticipated guilty pleas’.

### *Early pleas and disclosure*

The criminal procedure rules (CPR) seek to ensure that courts take the defendant’s plea as early as possible in proceedings.<sup>556</sup> This duty ‘does not depend on the extent of advance information, service of evidence, disclosure of unused material, or the grant of legal aid’ and ‘exceptions to the [duty] are rare and must be strictly justified.’<sup>557</sup> The justices’ legal

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but with the consent of the hirer of the car. Lawyer P1 insisted on checking whether the prosecution had correctly charged the offence and, having asked a colleague to deliver a copy of Blackstones’ to court from his office, the lawyer established that the prosecution had got the law wrong.

<sup>554</sup> Case P4, Lawyer P1 (albeit that, after taking instructions and reading the prosecution papers, Lawyer P1 agreed that the guilty plea was appropriate).

<sup>555</sup> Case B62.

<sup>556</sup> Criminal Procedure Rules 2015. Rule 3.9(2) requires that, at every hearing, ‘where relevant’ the court must take the defendant’s plea and that, if no plea can be taken, the court must find out what is the likely plea.

<sup>557</sup> Per the then senior presiding judge’s practice note for the judiciary on the CPR. Leveson, LJ. (2009) *Essential case management: Applying the Criminal Procedure Rules*. Footnote 3. At [://www.judiciary.gov.uk/publications/applying-criminal-procedure-rules/](http://www.judiciary.gov.uk/publications/applying-criminal-procedure-rules/). On 8 March 2016.



adviser must ask, inter alia, whether the defendant has been advised 'about the potential effect on sentence of a guilty plea'.<sup>558</sup> Even as early as the first hearing, therefore, the defence lawyer must advise her client on plea, (whether on how to plead or on delaying the plea, with potential consequences for sentence). This advice will become more crucial if the proposed new sentencing guideline on early guilty pleas<sup>559</sup> is adopted, as this further incentivises plea at the earliest hearings.

It is important to consider what prosecution material the defence will receive at this point. The prosecution's initial disclosure obligations only arise after the defendant enters a not guilty plea or the case is sent to the Crown Court.<sup>560</sup> Disclosure before the plea (and particularly for the first hearing) is regulated by Codes of Practice and guidance. The guidance to police and prosecutors distinguishes between cases where the prosecution anticipates a guilty plea and those where the defendant is expected to plead not guilty. This distinction influences the file preparation and the material available to the defendant and his lawyers at the first hearing, and thus affects the plea decision. Although it is the prosecution's disclosure obligation, it is the police who are responsible for categorising the case according to 'anticipated plea' and thus setting the parameters of the file preparation.

### *File preparation*

The police should categorise a case as an anticipated guilty plea if, either, (a) the suspect has 'clearly and unambiguously admitted the offence and indicated no defence or (b) the suspect has not denied the offence or otherwise indicated that it will be contested, AND the commission of the offence and identification of the offender can be established by

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<sup>558</sup> CPR (op cit) rule 24.2(2).

<sup>559</sup> See the discussion of the Sentencing Council Consultation at note 539 supra.

<sup>560</sup> Criminal Procedure and Investigations Act 1996, section 1.

evidence from a police officer, other independent reliable witness or a good quality visual recording of the offence.<sup>561</sup>

The file preparation requirements vary in different categories of cases, ranging from a 'simple straightforward' anticipated guilty plea to an anticipated not guilty plea. In essence, in the most 'straightforward' (in the officer's view) cases, the police need only provide a case summary, which should include a summary of what the defendant said at interview and the impact on any victim. In contrast, in a case where a not guilty plea is anticipated (and in all Crown Court cases), the National File Standard requires the officer to provide the Crown Prosecution Service with a fuller file, including key witness statements,<sup>562</sup> a witness list and the previous convictions of key prosecution witnesses. There is no requirement to prepare a schedule of unused material in magistrates' court anticipated guilty plea cases, although this is required where a not guilty plea is anticipated.<sup>563</sup> This means that the CPS file will often be very slim at the time of the first hearing.

### *Early disclosure in magistrates' court cases*

The prosecution must provide the defence with 'initial details' of the prosecution case no later than the beginning of the day of the first hearing.<sup>564</sup> The initial details must be

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<sup>561</sup> National File Standard. May 2015. At [https://www.cps.gov.uk/publications/directors\\_guidance/dpp\\_guidance\\_5\\_annex\\_c.pdf](https://www.cps.gov.uk/publications/directors_guidance/dpp_guidance_5_annex_c.pdf), on 8/3/16. The second part of this provision was criticized by the Magistrates' Court Disclosure Review, which observed that the part (b) test would lead to categorization of cases as 'anticipated guilty pleas' when the defendant had given a 'no comment' interview at the police station, whereas such cases will frequently lead to not guilty pleas and trials. The Review suggested that only full admissions by the suspect should lead to a guilty plea categorization. (Magistrates' Court Disclosure Review. (2014) At <https://www.judiciary.gov.uk/wp-content/uploads/2014/05/Magistrates'-Court-Disclosure-Review.pdf>, on 16/3/16.

<sup>562</sup> (excluding, for example, statements dealing with lawfulness of arrest or continuity of exhibits)

<sup>563</sup> Paragraph 6 of the Code of Practice to the Criminal Procedure and Investigations Act 1996.

<sup>564</sup> Criminal Procedure Rules 2015, rule 8.

sufficient to allow the defendant and the court 'to take an informed view on plea'.<sup>565</sup>

Where the defendant is in custody, the initial details need only include a summary of the circumstances of the offence and details of the defendant's criminal record. If the defendant is on bail, however, he must also receive a summary of his account at interview and any written witness statement or exhibit that the prosecutor 'then has available and considers material to plea',<sup>566</sup> together with any available victim impact statement.<sup>567</sup>

Although these rules do not distinguish on the basis of anticipated plea, it should be noted that the material which the prosecutor 'then has available' will be determined by the file preparation work done by the police under the rules already discussed and the prosecutor's assessment of what material he considers material to plea is likely to be influenced by the anticipated plea. In addition, the Criminal Practice Directions<sup>568</sup> expand upon these rules and provides for more extensive disclosure in anticipated not guilty plea cases than in guilty plea cases.<sup>569</sup> It should be noted that the purpose of this extended

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<sup>565</sup> It must also include sufficient for the court and parties to reach a view on trial venue, case management and sentencing (Amendment number 4 to the Criminal Practice Directions 2015 at paragraph 3A.4). There is also a requirement under the common law that the prosecutor give advance disclosure of certain additional material. This duty was discussed by Kennedy LJ in *R v DPP, ex parte Lee* (1999) 2 Cr. App. R. 304 at paragraph 9, who gave examples including material that might enable the defendant to make an application for stay on the grounds of abuse of process; material which might enable the defendant to argue for reduced charges or material which might assist the defence at trial and which will be less effective if disclosure is delayed ('e.g. names of eye witnesses who the prosecution do not intend to use').

<sup>566</sup> (or material to trial venue or to sentence.)

<sup>567</sup> Criminal Procedure Rules 2015, rule 8.3.

<sup>568</sup> Amendment number 4 to the Criminal Practice Directions 2015.

<sup>569</sup> Where the prosecution anticipates a not guilty plea, paragraph 3A.12 (ibid) sets out the material that must be provided before the first hearing, 'unless there is good reason not to do so'. The list of material is very similar to the list set out in the Criminal Procedure Rules but expands on the description of the material required, saying that the statements and exhibits disclosed should include 'any relevant CCTV that would be relied upon at trial and any streamlined forensic report' and that the prosecution should also provide 'an identification of any medical or other expert evidence that the prosecution is likely to adduce in relation to a victim or the defendant' (para.

disclosure in anticipated not guilty plea cases is stated to be to assist the court ‘in order to identify the real issues and to give appropriate directions for an effective trial’,<sup>570</sup> rather than in order to assist the defendant in making a plea decision.<sup>571</sup>

### *Early disclosure in Crown Court cases*

In Crown Court cases, the defendant will have an opportunity to ‘indicate’ his likely plea at the magistrates’ court but will not necessarily lose credit for failing to indicate a guilty plea.<sup>572</sup> Many defendants encounter the first significant pressure to enter a plea once the case has been sent to the Crown Court. If he enters a guilty plea at the first hearing, he will usually be entitled to full credit for a guilty plea whereas if he declines the offer, the credit will drop to one quarter by the time of the next hearing.<sup>573</sup> Provision is made for some limited disclosure to assist the defence with this decision<sup>574</sup> but this is still less than the

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3A.12). It also requires service of information about potential applications relating to special measures, bad character or hearsay.

<sup>570</sup> *ibid*, paragraph 3A.12.

<sup>571</sup> The Stop Delaying Justice delegate pack (prepared by senior members of the judiciary, magistrates and justices’ clerks) indicates that the decision to limit the amount of prosecution material provided at the first hearing was a consequence of the courts failure properly to manage cases when the police had provided ‘a full file of papers’. The pack states that ‘we, the judiciary in the magistrates’ courts, must accept our responsibility [...] We must do our best with the papers that are now provided.’ (Stop Delaying Justice initiative delegate pack (Nov. 2011) at p.5. At <https://www.lccsa.org.uk/stop-delaying-justice/>, on 12/5/16) It is striking that the fault here is said to lie with the courts and yet it is the defendant who is disadvantaged by the limited provision of papers.

<sup>572</sup> In some Crown Courts defendants lose part of their credit at this stage but in others (including those courts observed for this research) they will not. See *Caley* (note 452 *supra*) at paragraph 67. The Sentencing Council is currently consulting on changes to the system of credit for guilty plea (see note 539 below).

<sup>573</sup> *Caley* (note 452 *supra*) but also see note 572 *supra*.

<sup>574</sup> The National Guilty Plea Scheme (endorsed by Leveson LJ in Leveson, B. Review of Efficiency in Criminal Proceedings ((2015) Judiciary of England and Wales) lists the material needed for this hearing, which is very similar to as the ‘initial details’ provided in the magistrates’ court. Local versions of the scheme (endorsed in Paragraph 3A.6 of the Criminal Practice Directions 2015) may make different requirements: in Centreville, the prosecution must serve papers on the defence ‘sufficient to enable the defence to assess the strength of the case against their client’ and the

Initial Disclosure that will be provided if the defendant enters a not guilty plea. Lawyer P2 said that the material is often not served anyway.<sup>575</sup>

### *Impact of the limited disclosure*

This account of the rules governing pre-plea disclosure demonstrates that, when defendants and their lawyers are considering plea at 'the first opportunity', they must do so based on limited material. In cases considered by the police to be 'simple straightforward guilty pleas', they may only have a case summary.<sup>576</sup> Lawyer P2 said that this creates a 'massive pressure' on defendants to plead guilty without properly assessing the prosecution case. This, in turn, creates a high risk of 'the wrong people' pleading guilty,

'and one of the reasons is that their solicitors can't advise them yet. I can't tell you on an AI [advance information] pack whether or not their continuity is intact. I can't tell you whether they've got all the statements they're saying they've got. I can't tell you whether they've got the CCTV or what the photographs show because they haven't served them yet [...] I have to worry about all those incidents where defendants for whatever reasons and often against my advice say 'Hell with this, I want to plead guilty, I want my credit.'

The last-minute disclosure of Initial Details exacerbates these problems. Lawyer B14 observed that 'you're not given the papers 'til the day of the hearing and [...] it's hard to try

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prosecution is required to serve an EGP notice if the 'initial prosecution assessment is that a guilty plea is likely to be forthcoming'.

<sup>575</sup> As a result, Lawyer P2 said, "you may get to sentencing in the Crown Court [after pleading guilty at an EGP] with little more than the police officer's summary of the case.'

<sup>576</sup> During observations, one case was observed (Case P65) in which the prosecution file contained only a case summary. The defendant in this case gave the defence lawyer an entirely innocent account (alleging police misconduct) and entered a not guilty plea despite being advised that there was a risk that the charge might be increased when the file was reviewed by the CPS (see p.229 below).

to sit down and advise a client properly about plea without sitting down and reading through the paperwork.<sup>577</sup> The situation was worsened by low staffing levels at Lawyer B14's office (resulting from reduced income from criminal legal aid) which meant she had many hearings each morning,

'effectively there's five of us doing magistrates' court work so if we have like one person off or one person in a police station we're struggling so [...] you're under that time pressure to actually deal with the cases quite quickly'.

Faced with limited information about the prosecution case and knowing that, if the client is going to plead guilty, he should do so as early as possible, solicitors at early hearings still need to assess the risk of conviction. Inevitably, they must to some extent rely on material prepared by the prosecution, their opponent in the adversarial process. Yet, that file is a construction of material created by (or gathered and edited by) actors who are likely to have a commitment to the defendant's guilt.<sup>578</sup>

All but three of the lawyers recognised that relying on the prosecution's Initial Details when advising on plea was problematic.<sup>579</sup> Lawyer P2, for example, said it was a 'big problem'

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<sup>577</sup> The planned introduction of service of Initial Details by email may alleviate this problem to some extent by allowing lawyers to read papers in advance. In Middleton defence lawyers had agreed a protocol with the CPS whereby they received the Initial Details electronically a few days before the first appearance. This appeared to work very well but this was not operating in Medborough or Centreville and there will always be cases where the material cannot be served in advance. For example, chaotic scenes were observed in Middleton magistrates' court when a client (Case B15) was arrested for breach of bail and papers were not available for the hearing, which led to the defence solicitor becoming engaged in a frustrating, time-consuming and (for the defence firm) expensive battle to access papers so that the client's case could be heard.

<sup>578</sup> Sanders, Young and Burton (note 98 supra) at p. 470 observe that 'the prosecution case as it exists on paper, [...] far from allowing defendants to make a realistic assessment of their prospects of acquittal, paints a systematically distorted portrait of 'the facts' which may mislead the defendant into believing that there is no option to plead guilty.' See also the literature on case construction discussed in chapter 1, in particular *Case for the Prosecution* (note 150 supra).

<sup>579</sup> Two of these lawyers suggested that it was mostly safe to rely on the prosecution papers but both conceded that on occasion there would be problems (Lawyer P9 acknowledging that 'there is a

and acknowledged that ‘I’m taking the Crown Prosecution Service on trust, and they’re taking the police on trust.’ Lawyer B1 said that ‘the system is always that the prosecution serve their good case and we don’t get the bad case ‘til four weeks later.’

Although Lawyer P5 suggested that the case at trial generally reflects the prosecution papers, he emphasised that this was not true of the prosecution case summary, ‘I will happily say that the case summary which is written by the officer in the case is usually either embellished or exaggerated or slanted in some way shape or form. It overplays the evidence and often uses emotive language.’ Lawyer P2 implied the same point when he referred to ‘the police officer’s, in inverted commas, “balanced summary” of what the evidence will be’.<sup>580</sup>

Other lawyers focused on the fact that the case can look different at trial than it did on paper. Lawyer P3 said ‘I’ve run many a trial where, on paper, it looks as though the evidence was strong and the witnesses don’t come to proof and you come out of court with a not guilty when you expected that they would be convicted’. Similarly, Lawyer P1 said that sometimes ‘the evidence just does not come out in the way you expected it to... it’s credit for guilty plea is in my view too much of a carrot [...] if you say you’re not guilty

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lot of trust being placed in the prosecution and they are not always very accurate in what they do’ and gave accounts of a number of cases where the prosecution case weakened as the case progressed and Lawyer B13 acknowledging that ‘sometimes evidence comes out differently in the flesh than it appears on paperwork. Sometimes when you run a trial what might look like a strong case on paper can evaporate and vice versa it can get worse’). One defence legal adviser, who was not a qualified lawyer, was confident that it was safe to rely on the prosecution file because it would contain statements made by witnesses who could be prosecuted if they lied. Although he acknowledged that there had been cases where witnesses had lied in statements he had confidence that ‘they are always found out at court. Somehow they are always found out.’

<sup>580</sup> A recent report by the National Audit Office (NAO Report. Efficiency in the Criminal Justice system. HC 852 Session 2015-16 1 March 2016) reports (see figure 8) the Criminal Justice Joint Inspectorates’ finding that the summary of evidence submitted by the police was classed as adequate in only 72% of files.’ Although it is not clear whether the inadequacies in the remaining 28% of cases favoured the prosecution or the defence, this finding may provide some explanation for the lawyers’ caution about the case summaries.

you ought to have the opportunity for a trial without the pressures of your solicitor saying to you “Well, you know, there’s your credit.” ’

Given these issues, defendants could be advised to delay their plea until sufficient material has been disclosed to make the assessment of the case more reliable. The Law Society’s guidance to solicitors on plea in the absence of disclosure<sup>581</sup> purports to address this problem but simply suggests that the solicitor ‘should make both the court and your client aware of any problems this may present.’ It also suggests that, if the solicitor advises the client to delay plea pending further disclosure, she should ask the court to make a note of the reasons for the advice.

A number of lawyers spoke about giving such advice but they acknowledged that it is risky. The courts may not accept that the defendant was entitled to delay the plea until further disclosure was made and so may withhold the sentence discount.<sup>582</sup> Although Lawyer B2 said that magistrates in Middleton would usually allow full credit if the reason for the delayed plea was the late disclosure of prosecution evidence, in contrast, Lawyer P1 described district judges in Centreville responding to such a submission with ‘Well I hear what you say about the [evidence] but your client knows whether he’s done it or not’.<sup>583</sup> Lawyer P2 reported similar comments being made by Crown Court judges in Centreville. On suggesting to a judge that the focus on the defendant’s knowledge of his own guilt conflicted with the presumption of innocence, the judge responded that ‘We’re not saying

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<sup>581</sup> Law Society Practice Note Criminal Plea in Absence of Full Disclosure. At <https://www.lawsociety.org.uk/support-services/advice/practice-notes/criminal-plea-without-disclosure/>, on 20/3/16 (issued in response to concerns about the guidance from Leveson LJ about this matter, which is discussed at note 557 supra).

<sup>582</sup> In *Ali and Mahmood* the Court of Appeal held that a defendant is not entitled to a substantial sentence discount if he waits until the prosecution have served all their material and decided how to put their case before pleading guilty (*R v Ali and Mahmood* [2008] 1 Cr. App. R. (S) 69).

<sup>583</sup> Lawyer P1.



it to you. We're saying it to your client. We're not obliging you to do anything about it. We're giving your client the opportunity to decide whether they want to save everyone the cost and the time in putting the prosecution to proof in their case. And they must understand if they make that decision they will lose credit for their plea.'

The problem is made worse because the CPS routinely fails to serve relevant material until shortly before the trial, or even on the day of trial<sup>584</sup> (in breach of the time limits for disclosure which are set out in standard directions in each court). This means that the defence may not have the material needed for the plea decision until the day of trial, by which time their client risks losing almost all his sentencing credit.

Lawyers know that, if they advise their client to delay plea pending further disclosure, the client bears the risk that the further disclosure may lead to a conviction (whether by trial or later guilty plea) and loss of credit.<sup>585</sup> If, however, they advise their client to prioritise the sentence discount and enter a plea without seeing all relevant material, he may miss the opportunity to be acquitted or negotiate a reduced charge or factual basis. In such cases, the evidence will never be prepared for trial and it is impossible to know how the evidence

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<sup>584</sup> CPS casework information indicates that in 2014-15 the prosecution did not comply adequately with their initial disclosure obligations in 51% of sampled files (HM Crown Prosecution Service Inspectorate's internal casework information, cited in the NAO report (note 580 supra) figure 8. Lawyers P8, B14 and B1 spoke about the CPS routinely serving the unused schedules and additional statements shortly before or on the day of trial. The Magistrates Court Disclosure Review (note 561 supra) reported similar claims from defence lawyers (at paragraph 57) and suggested that such late disclosure rarely has consequences for the prosecution. It is important to note that these figures (and my research) relate to the period before the recent Better Case Management reforms were introduced which aims to improve the timeliness of prosecution disclosure. However in discussing the reforms recently, the National Audit Office expressed concern about the lack of effective sanctions when parties do not fulfill established procedures (ibid, paragraph 4.10) and it is not currently possible to be confident that the changes will address the difficulties which face the defence in assessing the balance of the case at an early stage in proceedings.

<sup>585</sup> As Newman observed, the sentence discount means that 'the criminal justice system ensures that truly active defence can come at considerable cost to the client.' (Newman (note 163 supra) at p.147.)

may have looked. Files examined during this research, however, reveal cases where the defendant was advised to withhold plea pending further disclosure and where evidence later emerged which led to a reduced charge/basis which reflected the defendant's account.<sup>586</sup> If the lawyers had given different advice or if the defendants had succumbed to the pressure to plead guilty early, this evidence would never have emerged.

Existing research evidence about the poor quality of charging and prosecution case files also supports the view that it can be in the clients' interests to delay plea pending fuller disclosure.<sup>587</sup> It is crucial, therefore, that solicitors continue to be confident to advise clients to delay plea until adequate disclosure is given. Given the literature demonstrating that many defence lawyers operate under a presumption that their client is guilty, and the material discussed below which indicates that legal aid funding pressures may incentivise defence lawyers to resolve magistrates court cases by guilty plea at the earliest opportunity,<sup>588</sup> there is a risk that defence lawyers may be reluctant to advise clients to delay plea.

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<sup>586</sup> E.g. Cases P46 and P47, where later disclosure led to a reduced factual basis and Case P14, where very late disclosure of evidence damaging to the prosecution case led to the prosecution reducing the charges on the indictment.

<sup>587</sup> A recent report by the National Audit Office (note 580 supra) indicated that cases were poorly charged, poorly reviewed and case files were poorly prepared. The report discusses evidence that 18.2% of police charging decisions were incorrect and that, although incorrect charging decisions should be picked up by the CPS before court, '38.4% of cases were not reviewed before reaching court' (ibid, para. 13). It also cites Her Majesty's Crown Prosecution Service Inspectorate's internal casework information showing that in 2014-15 the prosecution failed to comply adequately with their initial disclosure obligations in 51% of sampled files. (ibid, figure 8) See also Baldwin, J. 'Understanding Judge Ordered and Directed Acquittals in the Crown Court (1997). *Crim. L. Rev.* 536 which found that large numbers of cases were being dismissed as a result of serious problems in the prosecution case and that these problems did not come as 'a bolt out of the blue' but had been overlooked by prosecutors (p.539). Baldwin reports prosecutors arguing that there was 'no point' in preparing a good file because defendants would plead guilty anyway (p.548).

<sup>588</sup> Discussed from p.192 below.

Defendants need to be able to assess the strength of the prosecution case. The material in this section concerning disclosure and the pressure for early pleas demonstrates that the criminal justice system is constructed so as to make this very difficult, even for represented defendants. So far, these problems relate to the assessment of the prosecution case but, as the next section will demonstrate, the defence also faces significant problems in assessing the strength of the defence case.

### **Assessing the defence case**

In an adversarial system of justice, the prosecution case is clearly only half the picture. To assess the risk of conviction, the defence must also consider the evidence that might be available to support the defence case. The starting point for defence evidence will be the defendant, who may be able to give evidence, but the lawyer should also consider whether there is likely to be any further defence evidence available.<sup>589</sup> It was striking, therefore, that potential defence evidence was only discussed in 12 of the 37 cases in which live plea discussions were observed and there was usually no comment on the potential for the defendant's account to amount to evidence (which it would do if the defendant testified in his own defence).<sup>590</sup> On further analysis, it was possible to identify a proper explanation for the absence of discussion of defence evidence in the remaining cases<sup>591</sup> but even in the cases where evidence was discussed, such discussion was limited.<sup>592</sup>

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<sup>589</sup> It should be noted that if the defendant has given an account of the offence that amounts to an admission of guilt, his lawyer is not permitted to present a positive defence case and can only assist the defendant in putting the prosecution to proof. In such a situation, the defence lawyer will not need to consider possible defence evidence.

<sup>590</sup> Out of 37 cases in which live plea discussions between defendants and defence lawyers were observed, only 12 included discussion about potential defence evidence (other than general discussion about the 'account' that the defendant was giving to the lawyer).

<sup>591</sup> In many cases (11 of the 25 in which there was no discussion of potential defence evidence), the defendant gave his lawyer an account that was consistent with guilt and so the defence lawyer would not be permitted to present a positive defence case at trial. Other proper reasons included (a) the defendant being advised to enter a not guilty plea and doing so, meaning that there would have been an opportunity for further advice about potential defence evidence at a later date (5 cases), (b)

There is also an underlying issue regarding lawyers' approach to the prosecution and defence evidence. This issue is important given the literature revealing that many criminal defence lawyers operate under an ideological presumption of the client's guilt that displaces the need to test and challenge the prosecution case or to construct a defence.<sup>593</sup> All but two of the lawyers who were interviewed used the phrases 'the strength of the evidence' or 'the evidence' when the context reveals that they were in fact referring to the strength of the prosecution evidence as, supposedly, revealed by the prosecution file.<sup>594</sup> This is demonstrated by the following remarks, when lawyers were explaining which factors they take into account in advising on plea:

'Well first thing I do is whizz through the evidence with them so they know exactly what it is and then I take their instructions.' (Lawyer P3)

'I never take instructions from anyone about the offence until I've read the evidence or heard the evidence.' (Lawyer B5)

'The strength of the evidence' first, and then, "what's their account?" ' (Lawyer P4)

'The strength of the evidence, so how much evidence there is against them.'  
(Lawyer B14)

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the lawyer having identified a legal argument which might provide a defence and being engaged in actively pursuing an end to the prosecution or a plea bargain on this basis (three cases), (c) the lawyer seeking to agree a plea bargain based on the defendant's partial admission (one case) and (d) the defendant being advised to give no indication of plea until the first Crown Court hearing at which point further disclosure and plea discussions would take place (two cases).

<sup>592</sup> See discussion at p.194 below.

<sup>593</sup> *Standing Accused* (note 129 supra) at p.137.

<sup>594</sup> The exceptions were two lawyers in Firm P, one of whom used the phrase 'the strength of the case against him', instead of 'the strength of the evidence' and the other who used very careful phraseology which distinguished the two saying, for example, 'can the prosecution prove the case against him?' and 'do we have a defence in law [...] and if yes, will it fly?'

‘If they’ve admitted it to me, I will still check the evidence.’ (Lawyer P5)

‘The strength of the evidence,’ which the lawyer placed in opposition to, ‘if there’s anything that would assist their case were they to go to trial.’ (Lawyer B2)

The use of the phrase ‘the strength of the evidence’ synonymously with ‘the contents of the prosecution file’ is indicative of the prosecution file carrying a significantly different status than the defendant’s account. Thus, the file appears to have a status as ‘evidence’, even when the file may contain little more than the police summary of the offence and despite the lawyers’ comments about the potential unreliability of that file. Given the literature on prosecution case construction, this is particularly problematic. The same status is not, however, afforded to the defendant’s account.

None of the lawyers made any reference to the term ‘evidence’ in relation to the defence case when asked about what factors they take into account when advising on plea. None made any reference to possible defence witnesses, defence expert reports or documentary evidence. Apart from two lawyers,<sup>595</sup> lawyers’ only references to the defence case were in terms of their client’s ‘instructions’,<sup>596</sup> ‘account’,<sup>597</sup> ‘their side of the story’,<sup>598</sup> ‘what your client is going to say’<sup>599</sup> or ‘what the client says about it.’<sup>600</sup>

The lawyers’ failure to mention possible defence evidence in relation to the risk of conviction may reflect the fact that most of the lawyers interviewed worked principally on

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<sup>595</sup> Lawyer P2 said he asked, ‘Do we have a defence in law [...] if yes, will it fly?’ and Lawyer B2 also mentioned considering ‘if there’s anything that would assist their case were they to go to trial’.

<sup>596</sup> Lawyers P1, P3, B5, P8, and B13.

<sup>597</sup> Lawyers B14, P4, and P5.

<sup>598</sup> Lawyers B5 and P9.

<sup>599</sup> Lawyer B8.

<sup>600</sup> Lawyer B14.

magistrates' court cases<sup>601</sup> so that much of their plea advice is given at court on the day of the first hearing. At this stage the lawyer will usually only have the initial details together with any information related by the client. This information is likely to be seen simply as 'the client's account' or 'their side of the story'.

It may not even be easy for the lawyer to obtain 'the client's account' in order to advise on plea. Given the number of cases defence lawyers may be given in a single morning in the magistrates' court,<sup>602</sup> they can be under pressure to spend very little time with each client.<sup>603</sup> During observations, defence lawyers were frequently unable to obtain Initial Details from the prosecution until immediately before the morning's proceedings began and the usher then put pressure on the lawyer to be ready for the case to be called. Lawyers were also trying to balance the need to meet, advise and reassure clients who were waiting outside court whilst also taking instructions from those who were in the court cells. In Medborough and Middleton magistrates' courts there appeared to be few restrictions on accessing clients in the court cells but, in Centreville, a reduction in conference rooms in the cells had caused problems. Lawyers were forced to queue to see their clients (for which queuing time the lawyer was not being paid) and signs on the walls of the conference room urged lawyers not to spend more than 15 minutes with their client 'to help each other and for the court not to be held up.'<sup>604</sup>

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<sup>601</sup> Although six of the thirteen lawyers interviewed said they did both magistrates' court and Crown Court work, all but one of these lawyers spent the majority of their time on magistrates' court cases. Two of those interviewed worked as clerks preparing Crown Court cases and the remaining four lawyers worked only on magistrates' court cases.

<sup>602</sup> See the comments of Lawyer B14 discussed at p.189 *supra*.

<sup>603</sup> See *Standing Accused* (note 129 *supra*) at p.164 for further discussion of the difficulties of juggling cases at the magistrates' court.

<sup>604</sup> This sign was produced by the company responsible for running the court custody suite. The provision of facilities for solicitors to meet with their clients at the magistrates' court does not appear to have improved since the description given in *Standing Accused* (note 129 *supra*) at p.162.

As a consequence of the system forcing lawyers to advise clients on plea quickly, with little opportunity for thought or enquiry and with only the barest of information, defence lawyers who advise at the magistrates' court are encouraged to treat the prosecution file as somehow correlating to 'the evidence' and to view the defence case as simply 'the client's account'. These lawyers are advising on plea at time when there is little opportunity to assess the possibility of defence evidence.

The literature suggests that such attitudes to the defence case can also be an aspect of lawyers' 'presumption of guilt' as identified by the research in *Standing Accused*<sup>605</sup> and confirmed recently by Daniel Newman.<sup>606</sup> Although the lawyers' behaviour observed in my research was different to those accounts,<sup>607</sup> there were intimations in interviews that some lawyers were reading a willingness on the part of the defendant to discuss a guilty plea as somehow correlating to factual guilt.<sup>608</sup> In phrases that chime with the courts' rhetoric on guilty pleas, Lawyer B8 said that the defendants' willingness to 'enter that conversation' (i.e. about a possible guilty plea) reveals that,

'they are guilty of something and what you learn with working in crime for so long is that if you entertain that conversation with a client and you say 'Look, you can get 33% off your sentence, off any sentence, if you plead guilty at the earliest opportunity', the fact that your client wants to engage in that conversation suggests that he's either guilty of the offence or guilty of something.'

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<sup>605</sup> Note 129 supra.

<sup>606</sup> Note 163 supra.

<sup>607</sup> This is discussed in chapter 2 where possible explanations for the different accounts are offered.

<sup>608</sup> Other lawyers, in contrast, were able clearly to articulate the pressures on innocent defendants to plead guilty and why this might lead to wrongful conviction, as demonstrated by other quotations in this chapter.

Similarly, Lawyer B1 suggested that 'if someone is completely not guilty of an offence they will have a trial no matter what. I think that's abundantly clear and you can always tell as well.' Given these views, it is easy to see why one of these lawyers might not place much weight on 'the defendant's account' if that defendant has asked anxious questions about the risk of conviction and the implications of his plea on sentence.

Even if the defendant resists the pressure to plead guilty at the first hearing, it may be difficult for the defence to identify and gather evidence to support his case. When defence lawyers were observed discussing potential defence evidence, it was striking how little investigative work was planned. In the twelve cases in which defence evidence was discussed, seven involved potential defence witnesses. In three of these cases the defendant or his family were left to contact the witnesses, whilst in four the lawyer was to pursue the issue. Two cases concerned the possibility of a defence expert report and this was left to the lawyer. One case concerned documentary evidence held by the defendant, who agreed to provide it to the lawyer. Another involved a detailed discussion of potential defence evidence but the lawyer concluded that none was available due to lapse of time. Finally on the day of trial one defendant claimed to have two potential defence witnesses but due to a breakdown in communication his lawyer had not been told about them. There was no discussion about what the witnesses might say and the lawyer told the client it was too late to pursue the evidence.

These accounts of the limited efforts being made to gather defence evidence contrast with the resources available to the police in investigating the case. Lawyer P8 highlighted the lack of equality of arms in gathering evidence for trial, describing the difficulty in accessing witnesses who might support her client's account,



‘It’s fine when they know them and you can get a statement from them but when it’s a public place you can’t always get those details back so you do lose out on witnesses through the fact that the police haven’t asked the right questions.’

Sometimes, she said, she would only become aware of a potential defence witness from unused material and she feared that other witnesses would never come to her attention at all,

‘I’m sure there’s other occasions when the police just don’t get statements from people who contradict them because they can’t help with their investigation. They are supposed to be impartial but a lot of time the police see their role as gathering evidence for a conviction so I think they would dismiss somebody who was saying something to the contrary.’

The disparity between the resources available to the defence and the prosecution can lead to defeatism which can undermine the defence lawyer’s willingness even to investigate the case. As Lawyer B8 put it when explaining her reliance on ‘the paper file’ when advising on plea,

‘If on paper they’ve amassed all this evidence, regardless of what your client is going to say, how are they going to get past this evidence and if its that damning such as forensics and cell site analysis, your client can say what he wants but it’s not going to get past what’s on paper.’

As already discussed, it is only important to assess the prosecution and defence evidence because plea incentives press the defendant to consider relinquishing his right to trial. This means that the third part of this decision will be an assessment of the impact of plea on the consequences of conviction and it is to that subject that the chapter now turns.

### Assessing the impact of plea on the consequences of conviction

Although some research suggests that it could be difficult to predict the impact of a guilty plea on sentence because courts may apply the sentence discount inconsistently,<sup>609</sup> the lawyers observed for my research advised their clients on the basis that the sentencing guidelines would be correctly applied. As well as considering the sentence discount, however, defendants and their lawyers must consider if a fact or charge bargain might be available. This would further affect the sentencing outcome and, in the case of a charge bargain, would reduce the seriousness of the conviction.<sup>610</sup> As already discussed in chapter 1, the literature<sup>611</sup> suggests that charge and fact bargaining can lead to defendants being pressured into pleading guilty to offences that they have previously denied in order to avoid the threat of going to trial on the full charges or facts.

Although I identified some examples of defendants being put under pressure as a consequence of plea offers,<sup>612</sup> in many cases charge and fact bargaining did not take this oppressive form. Instead, it was a mechanism for seeking to achieve a case outcome which was consistent with the defendant's account of his culpability and his desire to avoid

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<sup>609</sup> See the research discussed by Sanders, Young and Burton (note 98 supra) at pp. 446-450. Recent statistical analysis of data from the Crown Court sentencing survey, however, found 'a substantial degree of agreement' between sentencing of guilty pleas and the sentencing guideline although there are also some departures from the guidelines (Pina Sanchez J, *An Empirical Analysis of the Determinants of Guilty Plea Discount*, (CCSR, 2014). At [http://www.academia.edu/5863301/An\\_Empirical\\_Analysis\\_of\\_the\\_Determinants\\_of\\_Guilty\\_Plea\\_Discount](http://www.academia.edu/5863301/An_Empirical_Analysis_of_the_Determinants_of_Guilty_Plea_Discount), on 4/4/ 16.

<sup>610</sup> Under the Code for Crown Prosecutors, the prosecutor should only accept a reduced plea if they think that the court will be able to pass a sentence matching the seriousness of the offending and 'must never accept a guilty plea just because it is convenient'. (CPS Code for Crown Prosecutors (2013), paragraph 9.2. At [https://www.cps.gov.uk/publications/docs/code\\_2013\\_accessible\\_english.pdf](https://www.cps.gov.uk/publications/docs/code_2013_accessible_english.pdf), on 18/5/16.)

<sup>611</sup> See p.43 supra.

<sup>612</sup> Discussed at p.228 below

trial.<sup>613</sup> In these cases the defendant had given his lawyer a 'partially guilty' account of the incident i.e. he had acknowledged some culpable behaviour but only such as would support a lesser offence or a lesser factual basis. If charge or fact bargaining had not been available, the defendant would have been faced with pleading guilty to the full facts/charge (and thus accepting a degree of culpability beyond that which was supported by his account) or with proceeding to trial, with all the risk that entails.

If the defendant is to receive appropriate credit for his plea in such cases, it will be important both that the defendant is represented and that the defence lawyer has the opportunity to negotiate with the prosecution at the earliest stages. This will sometimes be problematic. Cases where there is only a small difference between the prosecution account and that given by the defendant (which will often be suitable, therefore, for a plea or charge bargain) may well be designated as anticipated guilty pleas. In the magistrates' court, anticipated guilty pleas are prosecuted by Associate Prosecutors (a CPS employee who is not a lawyer) who are not authorised to enter into plea negotiation.<sup>614</sup> The defendant may, therefore, have to choose between either pleading guilty to secure the full sentence discount or pleading not guilty pending further discussion with the prosecution and therefore risking loss of credit.<sup>615</sup> Once again, a defendant is disadvantaged by his case being designated as an anticipated guilty plea.

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<sup>613</sup> In 6 of the 37 cases in which plea advice was observed, defendants were advised to offer guilty pleas to lesser charges or on a less serious factual basis because this reflected their own factual account of the offence. In each case the defendant accepted the advice. The outcome of the cases varied depending on the reaction of the prosecution and the court to the plea offer.

<sup>614</sup> In some cases Crown Prosecutors will mark the file to 'pre-authorise' the acceptance of a particular plea but this requires forethought and does not allow the prosecution to respond to arguments presented by the defence lawyer in negotiations on the day of the hearing. In other cases the Associate Prosecutor may be willing to act outside her authority and agree a plea bargain on the assumption that it will be retrospectively authorised by the Crown Prosecutor.

<sup>615</sup> If the difference is on the factual basis then the defendant can offer a plea on that basis but still risks loss of credit should the prosecution reject it and the defendant lose a Newton Hearing.

This section has argued that the routine operation of the criminal justice system limits the ability of the defendant, even with the benefit of a lawyer, to reach a realistic assessment of the risk and consequences of conviction. There is a danger that the defence may overestimate the strength of the prosecution case, and underestimate the strength of the defence case. This, in turn, increases the risk of defendants pleading guilty despite giving an innocent account and having realistic prospect of acquittal at trial. The adversarial system requires some degree of challenge to the prosecution case, if only so that the police and prosecution do not become so reliant on defendants entering guilty pleas without challenge that the quality and integrity of their work deteriorates. The material discussed in this section reveals cause for concern.

### **Distorting the defendant's assessment of the risk and consequences of conviction at trial**

To compound the difficulties facing the defence in reaching a realistic assessment of the risk and consequences of conviction at trial, the defendant's assessment can be distorted by pressure from defence lawyers, pressure from the courts, the defendant's personal vulnerabilities and funding pressures. These pressures (many of which have no necessary correlation to the strength of the evidence or the defendant's factual guilt) may reduce the defendant's freedom of choice on plea and disrupt the reliability of the guilty plea as a foundation for conviction.

#### **Deliberate pressure from defence lawyers**

Having reached a view on the risk of conviction and the 'right' plea for the client, the lawyer must communicate that view to the client. This is reflected in the defence lawyer's professional obligation 'to give the accused the best advice he can and if need be, advice in strong terms. This will often include advice that a plea of Guilty, showing an element of remorse, is a mitigating factor which may well enable the court to give a lesser sentence

than would otherwise be the case'.<sup>616</sup> On the client entering a not guilty plea, the defence lawyer is also obliged to confirm<sup>617</sup> that the defendant understands that 'he or she will receive credit for a guilty plea' and that 'a guilty plea may affect the sentence and any order for costs.'<sup>618</sup>

Research evidence casts doubt on the quality of defence lawyers' advice to clients about plea and suggests that defendants who assert their innocence are at risk of being manipulated and bullied by defence lawyers who seek to persuade them to enter guilty pleas (whether for 'lawyer-centred' selfish reasons, or as a consequence of a 'presumption of guilt').<sup>619</sup> Examination of CCRC files during fieldwork<sup>620</sup> reveals many claims from defendants that they were 'forced' or 'bullied' by their defence lawyer into pleading guilty.<sup>621</sup> Such behaviour could distort defendants' pleas so that the plea could not be seen as reflecting the defendant's knowledge of their own guilt or a reliable 'defendant-assessed verdict'.

With one exception,<sup>622</sup> lawyers were not observed behaving oppressively during this research. Of the seventeen cases in which lawyers were observed giving plea advice to clients who had given an innocent account, there were only five in which the lawyer

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<sup>616</sup> *Turner* (note 6 supra) at p.360.

<sup>617</sup> In the preparation for trial forms.

<sup>618</sup> Question 6 in Criminal Procedure Rules Part 3: Preparation for trial in a magistrates' court. At <http://www.justice.gov.uk/courts/procedure-rules/criminal/docs/2014/crimpr-part3-magistrates-courts-trial-preparation-form.pdf>. (8 March 2016).

<sup>619</sup> *Standing Accused* (note 129 supra) at p.137. Newman (note 163 supra) at p.113.

<sup>620</sup> Discussed at p.310 below.

<sup>621</sup> It is not possible to determine whether any or all of these CCRC applicants really did feel bullied or forced by their defence lawyer. Some of these claims may simply be a convenient but false explanation for their guilty plea, intended to bolster the application. However, it is also possible that some of these defendants were indeed subjected to oppressive behaviour.

<sup>622</sup> Discussed at p.107 supra.

appeared to be making any efforts to guide the client towards a guilty plea. Apart from the single exception, none of these lawyers put undue pressure on their client. Crucially, all of the seventeen defendants whose instructions amounted to a full denial of guilt, including the defendant who was bullied, decided to enter or continue with their not guilty pleas at the point they were observed.<sup>623</sup>

This data does not, however, undermine the accounts given in other research of unprofessional behaviour by defence lawyers. The methodology discussion in chapter 2 considers whether the lack of bullying observed can be ascribed to the lawyers observed 'putting on a show' of professional behaviour for researchers or the cases observed being the 'wrong' cases to see bullying because most were first or early hearings. I concluded that these factors do not explain the lack of bullying behaviour observed during this research.

This raises an interesting question as to why the lawyers observed for this research should be less inclined to exhibit bullying behaviour towards their clients. Two possible explanations are revealed by the research data. Firstly, the culture within the teams of lawyers observed for this research may have simply been different to that in the firms criticised in earlier research. A small minority of the firms discussed in *Standing Accused*<sup>624</sup> were described as 'political' practices, characterised by a genuine commitment to the client, with highly motivated members of staff and a strong sense of social commitment.<sup>625</sup> Newman acknowledges that his research does not allow him to determine whether or not other firms are truly 'radical'.<sup>626</sup> Interviews with and (crucially) observations of Firm P

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<sup>623</sup> See discussion beginning at p.106 supra.

<sup>624</sup> Four out of the 48 firms discussed.

<sup>625</sup> *Standing Accused* (note 129 supra) at p.20.

<sup>626</sup> Newman (note 163 supra) at p.150.

lawyers suggest that the professional culture of the Centreville office had a strongly defendant-centred approach, which was heavily influenced by the supervising partner.<sup>627</sup>

This partner took a leading local role in responding to government policy proposals, arguing against measures, which, in his view, threatened to impede defence representation. He also acted as a 'peer-reviewer' for the Legal Aid Agency, one of the requirements of which is that his own work is rated at the highest levels under the review standards for defence advice and work.<sup>628</sup> This lawyer's interview contained references to government policy, the social condition of defendants, academic research and media coverage of criminal defence. Much of the interview was a passionate defence of defendants' rights. In contrast to Newman's research, this lawyer's claims in interview were consistent with his observed behaviour and with comments from his colleagues about expectations within the office. Another Firm P lawyer commented that lawyers from other firms do put pressure on their clients to plead guilty but that no one in his office would do so, 'because God help them if [the supervising partner] finds out!'

The second factor, which was highlighted by lawyers from both firms, was that the size of the firms provided shelter from some of the financial pressures which can influence lawyers' plea advice and result in defendants being put under pressure to plead guilty. This claim requires further examination.

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<sup>627</sup> It was not possible to discern during observations at Firm B any similar sense of strong leadership on professional culture, although the answers given by the partner in charge of that team were defensive of the rights of defendants and critical of government policy decisions affecting the work (albeit to a lesser extent than expressed by the lawyer in Firm P). Firm B lawyers did not make any reference to the professional culture of the firm so it is unclear whether this issue can explain the lack of oppressive behaviour seen in the two Firm B offices.

<sup>628</sup> Legal Aid Agency *Independent Peer Review of Legal Advice and Work Final Process* (2013) London: LAA (scheme devised for the LAA by the Institute for Advanced Legal Studies).

### *Fee incentives in the magistrates' court*

Lawyers indicated that the legal aid fee structure for cases concluded in the magistrates' court<sup>629</sup> makes it financially advantageous for lawyers in magistrates court cases if, either,

(a) the case concludes at the first hearing by guilty plea (as the fixed fee scheme generates a relatively favourable payment for a relatively small amount of time expenditure) or

(b) if the case goes to trial or a guilty plea is entered on the day of trial (in which case the amount of work generated could well push the case out of the standard fees so that it is remunerated on hourly rates).

As Lawyer B13 put it 'if we're on a fixed fee and the case is dealt with at the first hearing and the sentence is done there and then, that's the best outcome for us because we've got the fixed fee for doing one hearing rather than two or three. But if the case is going to trial then the amount of work that you would do would mean that very often you get paid for what you do'.

This pattern of incentives could lead lawyers to run up substantial work on trial cases in order to maximise their remuneration.<sup>630</sup> Lawyers' answers in interviews pointed, however,

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<sup>629</sup> Lawyers' legal aid fees for cases which conclude in the magistrates' court are generally determined by fixed fees which depend on the outcome of the case and the geographical area in which the lawyer is based (see Schedule 4 to the Criminal Legal Aid (Remuneration) Regulations 2013). The fixed fee does, to a limited extent, vary according to the amount of work done in that there are two bands of fixed fees ('lower' and 'higher' standard fees) and the rate paid depends on the notional value of the time spent by the lawyer on the case (so that, if the time spent is valued above the 'lower standard fee limit' the lawyer will be paid at the higher standard fee). It is also possible for cases to 'break out' of the fixed fee scheme if the number of hours spent on a case take it above a 'higher standard fee limit' (in which case work is remunerated under hourly rates). These are, however, exceptional cases and would rarely involve guilty pleas.

<sup>630</sup> Lawyer P8 said that lawyers are incentivised to over-prepare the case to get into the higher bracket 'I'm sure matters go to trial that probably don't belong at trial [...] and then it will crack on the day of trial. I think from talking to other people that that definitely goes on.' Several lawyers in Firm P also spoke disapprovingly about a former colleague who had been known for advising his clients to enter initial not guilty pleas but then 'the vast majority of those would mysteriously end up guilty plea on day of trial' (Lawyer P1). This process (which the lawyers suggested was aimed at



to a greater risk that the incentives could make lawyers favour guilty pleas at the first hearing. The scenario considered least financially advantageous was where the case generates a middling amount of work (e.g. the lawyer attends a number of hearings before a guilty plea is entered). The risk is that, being unable to guarantee in advance that a case will generate enough work to justify billing outside the standard (fixed) rates, lawyers might prefer the case to end on a guilty plea at the first hearing. Lawyer P5 said that the magistrates' court funding creates pressure to 'get it knocked on the head quickly' and, as Lawyer P8 noted, this can mean some lawyers advising a guilty plea at the first hearing 'without really reading the papers'. Lawyer B2 said the fixed fees meant that she needed to be 'quite efficient and speedy' and try to avoid adjournments if the client was going to enter a guilty plea in the magistrates' court.

### *Fee incentives in the Crown Court*

Lawyers who were experienced in Crown Court work did not give consistent accounts of the Crown Court funding regime incentivising particular plea advice.<sup>631</sup> Two lawyers<sup>632</sup> suggested that funding might make trials more attractive to lawyers than 'quick' guilty pleas but Lawyer B8 said that the funding arrangements did not incentivise advising on plea in a particular way (saying that fixed fees had 'evened out' the incentives). The other lawyers interviewed had no clear view on this. Lawyers did, however, raise concerns about

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maximising the legal aid fees under the system then in force) was presented as being at odds with acceptable practice within the office and having played a part in that lawyer's departure from the firm.

<sup>631</sup> Crown Court fees are higher than those paid in the magistrates' court and are differently structured. Fees are paid as fixed fees but the fixed fees vary depending on the number of pages of prosecution evidence, the category of the offence and the case outcome (meaning that cases which go to trial receive higher fixed fees than those which crack shortly before trial and those which end in a guilty plea or other termination at an earlier stage). Examples given in the Criminal Legal Aid (Remuneration etc.) (Amendment) Regulations 2015 indicate that litigators' fixed fees for Class C cases (less serious violence, damage or drugs) with less than 500 PPE would be £400 for a guilty plea, £474 for a cracked trial and £668 for a trial (NB. these figures pre-date the decision in January 2016 to suspend the previous year's 8.75% fee reduction, see note 980 below).

<sup>632</sup> Lawyers P5 and P4.

the way Crown Court fees could disadvantage a defence lawyer who commits the appropriate level of work to preparing the case and thus disincentivise active defence representation. Lawyer B8 said that the Crown Court funding regime made it difficult to commit the necessary amount of work to preparing a trial. The fee calculation includes a page-counting element, which pays no regard to the quantity of unused material or defence evidence, meaning that lawyers are not specifically remunerated for examining this crucial part of their work. In addition, only physical pages of prosecution evidence count, meaning that evidence served in digital formats is not included unless it consists of scanned physical pages.<sup>633</sup>

If the funding regime does not fully remunerate a proper analysis of the case, and given that defendants are expected to enter a plea at least at the first hearing in the Crown Court at which point the defence lawyer will not have received full disclosure of the prosecution case,<sup>634</sup> there is a risk that lawyers may be tempted to advise their client to plead guilty without first having done the appropriate amount of work to establish the risk of conviction at trial.

### *Lawyers susceptibility to fee incentives*

This research has not included a detailed analysis of legal aid funding arrangements and how the solicitors' and barristers' earnings can vary in different cases according to pleas. This type of analysis of has been attempted previously<sup>635</sup> but the complexity of the

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<sup>633</sup> There may be a large quantity of digital evidence. In Case P6, the lawyer received and analysed 19 DVDs full of prosecution evidence. His file contained a running record of the material as he sought to identify which individual pages from the DVDs had been scanned from a paper document and so could count towards his fixed fee calculation.

<sup>634</sup> See p.185 *supra*.

<sup>635</sup> Tague, P. 'Barristers' selfish incentives in counselling defendants over choice of plea' (2007) *Jan Crim. Law Rev.* 3-23 and Barry, J. *A Barrister's Role in the Plea Decision: An analysis of drivers affecting advice in the Crown Court*. (2010) Unpublished PhD thesis. QMUL. In 2007 Tague analysed the Graduated Fee Scheme then in force and argued that (albeit that the picture was complex, finely balanced and depended on a number of factors) the scheme was marginally more likely to

schemes and the number of variables influencing remuneration in a particular case is such that it is difficult to draw clear conclusions from this analysis.<sup>636</sup> In any event, to some extent the reality of how legal aid payments vary matters less than how lawyers *perceive* the payments to vary according to plea. It is, after all, the lawyers' perception of the impact of plea on funding that has the potential to influence advice.

The lawyers' accounts show that they perceive the legal aid funding mechanisms, in some circumstances, to reward defence lawyers who elicit guilty pleas from their clients.<sup>637</sup> In particular, it is perceived to be advantageous for defence lawyers to resolve large numbers of magistrates' court cases with early guilty pleas. As already indicated, the lawyers interviewed insisted that the size of their own firms offered some shelter from the financial incentives to recommend guilty pleas.<sup>638</sup> Lawyer P9, for example, said that no one in his office in Centreville would advise a client on the basis of the firm's financial interests ('there's no way that would happen here') but said that the pressures in small firms were much worse and,

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incentivise trials than guilty pleas. Following reforms to the funding regime, Barry's PhD research applied a similar analysis and found that the then-new regime 'strongly incentivised late cracking of trials in chambers where there are 'spare' briefs available' (p.219).

<sup>636</sup> In Scotland, however, research by Tata and Stephen found that the changes to the Scottish funding regime created profound effects, including a reduction in guilty pleas at first appearances, an increase in middle term guilty pleas and a slight reduction in trials (Tata, C. and Stephen, F. 'Swings and roundabouts: do changes to the structure of legal aid remuneration make a real difference to criminal case management and case outcomes?' (2006) *Crim. L.R.* p.722).

<sup>637</sup> This is consistent with Newman's finding that guilty pleas are favoured by defence lawyers for financial reasons, mainly as a consequence of fixed fees. (Newman (note 163 supra) at p.125.)

<sup>638</sup> None of the lawyers interviewed indicated that they personally allowed their plea advice to be affected by financial considerations and nothing observed during plea advice meetings or during informal conversations between lawyers revealed any obvious conflict between these claims in interview and the reality of the lawyers' practice in advising on plea. See, however, p.170 for a discussion of some indications that financial considerations could be leading to pressures from the management of one firm regarding other (non-plea) advice to clients.

‘in a smaller firm, with one person, two people, you know everything counts and everything counts in this firm but more so in terms of them justifying their existence. Or it could be that this is the way that their boss tells them to do it. I don’t know.’

Other Firm P lawyers also denied that any pressure was applied by the firm and explained that the volume of their work acted as a buffer,

‘We don’t work that way I suppose because we’re such a big firm we’ve got that buffer so we don’t. But we’re not a firm that works that way. [...] We’re not the biggest firm in Centreville but we’ve got the offices in other cities that do I think work as a buffer but yeah I think its volume. Some you make a loss, some you don’t. But it would never, us as a firm, stop us, we’re all quite moral here.’<sup>639</sup>

Firm B lawyers had similar views. Lawyer B5 (in Middleton) said ‘We’re lucky we have systems in place that we’ve invested in so that we can do the stuff we have to do, like the letters and the follow up and everything that the franchise requires us to do under the legal aid contract.’ However, she went on to say, ‘I think a lot of criminal lawyers aren’t bothered, I don’t think they’ve got the time to be bothered and I don’t think they work for firms that financially allow them to be bothered’ (and she referenced exceptionally low trial fees quoted for privately funded clients which, she suggested, made it impossible for the case to be properly prepared). Lawyer B1 agreed, ‘We’re the largest firm in Middleton so we don’t have the pressures.’

These accounts of why smaller firms would experience greater funding pressures are potentially credible but the research data does not permit any further assessment of this. There was, however, some evidence that one funding provision had created pressure on

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<sup>639</sup> Lawyer P4. Lawyer P5 gave a similar account.

some of the observed lawyers to tailor their advice to clients. This issue does not relate to plea advice but it is relevant to this discussion because it suggests that larger firms may not be immune from the pressures of funding incentives. This provision regulates funding in cases in which defendants have elected jury trial and means that lawyers whose clients elect jury trial receive a very low payment if that case ends in the Crown Court before trial.<sup>640</sup>

There was evidence that this funding mechanism (which, as I discuss in chapter 6, appears to be specifically designed to persuade lawyers to discourage their clients from electing Crown Court trial) caused a reaction in one of the observed firms at a national level which was intended to make the firm's lawyers think carefully about the fee consequences of the advice they gave. The firm introduced a mechanism whereby a lawyer attending at the police station could place a marker on the file to highlight a risk of the case ending by guilty plea in the Crown Court. One lawyer confirmed that this marker related to the trial election funding provision. Another lawyer from the firm told me that the firm's national management had issued a directive stating that clients in such cases should not be 'allowed' to elect jury trial. The lawyers told me that their supervising partner sheltered them from the pressure created by these changes to tailor their advice to clients but one hinted that the pressure was having an impact when he asked, rhetorically, 'So how often

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<sup>640</sup> This funding provision determines litigators' fixed fees in cases where the defendant has elected trial in the Crown Court and the case does not proceed to trial 'either by reason of pleas of guilty or otherwise' (Schedule 2 of the Legal Aid Remuneration Regulations 2013 as amended by the 2014 amendment regulations). In such cases, the normal litigators fee scheme (which pays rates according to the volume of evidence, the stage at which the case ends and the offence type) does not apply and instead the litigator gets a fixed fee of £330.33 (Sched. 2 para. 11). The same rule applies to advocates (see Sched. 1 para. 9) and the fee for them is £194 (Sched. 1 para. 10). This fee has to cover all the firm's work in the magistrates' court work as well and the lawyers complained that the fee was entirely inadequate to cover the work done in these cases and were particularly concerned that it applies even if the case ends as a consequence of a prosecution error. The fee consequences of this provision for lawyers who mounted an active (and successful) defence of a teenager are painfully illustrated in Broadley, S. Leader article. (2015) Law Society Gazette 29 June 2015 at p.10.

do you think nowadays we advise our clients to elect Crown Court Trial? And how ethical is that, potentially?’

These lawyers may (as they suggested) have been resisting the pressure to tailor their trial election advice as a result of the support they were receiving from their supervising partner. Alternatively it is possible that these lawyers were giving presentational accounts, which hid the reality of their actions. It is not necessary for the purpose of this research to establish which of these two possibilities is correct.<sup>641</sup> There are, however, grounds to suspect that these fee provisions are capable of encouraging lawyers, even in larger firms, to prioritise their own remuneration ahead of their clients’ interests when giving advice. This is in direct conflict with lawyers’ professional obligations and provides grounds for concern that funding provisions relating to plea could have a similar effect.

#### Pressure from the court

Despite the criminal courts theoretically standing impartially over proceedings, judges, magistrates and court staff can themselves become engaged in the process of pressurising defendants to plead guilty (whether for efficiency reasons or because they consider this to be in the defendants’ best interests).<sup>642</sup> Pressure can be exerted directly on the defendant

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<sup>641</sup> One lawyer insisted that he was able to continue to advise his clients properly on venue, despite the directive from national management. Although I did not see this lawyer advising on venue, his claim to be able to withstand the pressure is supported by a file that I read having selected it at random from a pile on another lawyer’s desk. In this file, which related to either-way charges, the same lawyer had recorded his thoughts on the likely trial venue, saying ‘Will advise him re risk of being DNSST [deemed not suitable for summary trial]. I presume CPS will say SST [suitable for summary trial] though, but on facts a court could send it up. Unlikely to be advantageous to client to elect but also need to canvass that.’ There were only three cases in the research in which I saw a defendant being advised on trial venue (all handled by the other firm) but in each case the lawyer knew that the case was likely to be sent up to the Crown Court. On this basis there was no risk of incurring the reduced fee (because the defendant was not, himself, electing trial). In each case the lawyer advised the client that there was no reason to object to the case being sent to the Crown Court.

<sup>642</sup> As discussed in chapter 1, McConville and Marsh argue that judges have deliberately shed their neutrality in the forty years since the decision in *Turner*. (McConville and Marsh (note 4 supra) at p.87.)

during plea hearings or indirectly by pressurising the defence lawyer who may, in turn, pass on that pressure to the defendant.<sup>643</sup>

Some instances of good practice were observed in the courts during this research. There were, for example, a number of cases observed where magistrates, district judges or legal advisers took proper steps to ensure that unrepresented defendants were not unduly hurried into entering a plea.<sup>644</sup> However, courts did not consistently demonstrate a concern to protect defendants from pressure and a number of instances were observed during this research or described by lawyers where, by drawing the defendant's attention to the risk of conviction and the impact of plea on sentence, judges and other court staff heightened the pressure on defendants to enter guilty pleas. Such behaviour occurred in both the magistrates' and the Crown Court.

One way in which a judge may heighten pressure on defendants to plead guilty is simply by increasing the sentencing incentives.<sup>645</sup> In a large conspiracy case handled by Firm P

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<sup>643</sup> Darbyshire discusses claims by one judge about 'northern courts' (apparently including one midlands court in particular) where judges and barristers would work together to procure guilty pleas. She later concludes that her observations on plea bargaining found evidence that 'the "Northern" circuits reputation for endemic plea negotiation was real; neither historic nor a rumour. It was the normal way of proceeding [...] The judges were part of this local culture and facilitated it, without getting involved in negotiations.' (Darbyshire, P. *Sitting in judgment: the working lives of judges* (2011) Oxford: Hart at p.200 and p.208). Additionally, in Darbyshire, P. *Judicial case management in ten Crown Courts*. (2014) *Crim. L.R* 1, 30-50, Darbyshire discusses (at p45) a resident judge who gave a detailed account of his efforts to put pressure on defendants in order to crack trials.

<sup>644</sup> e.g. In Case CEN13 when a justices' legal adviser strongly advised a defendant who was produced by video link from prison not to enter a plea until he had received legal advice and then ensured that the magistrates' adjourned the proceedings to a later date to facilitate this. This reflects the justices' legal adviser's duty to assist unrepresented defendants (Criminal Procedure Rules 2015, rule 24.15).

<sup>645</sup> A recent statistical analysis of Crown Court sentencing survey data (Pina-Sanchez, note 609 supra) indicated (at p.12) that 6.8% of guilty pleas were resolved with sentence reductions higher than 33%. This phenomenon was especially concentrated in the courts of Nottingham and Derby.

lawyers but heard in Medborough Crown Court,<sup>646</sup> the trial judge offered all defendants in the trial a 40% discount for a guilty plea.<sup>647</sup> The Firm P client was already serving a lengthy prison sentence and, according to Lawyer P2, was likely to lose at trial so he was content to accept the judge's generous offer. However Lawyer P2 expressed concern about several other minor defendants who were represented by other firms. These defendants, in his view, should have run their cases to trial and a number had 'powerful defences'. Lawyer P2 feared that the offer of a 40% discount and the sight of the alleged ring-leaders entering guilty pleas had defeated the resolve of these defendants to contest the case.

Judges' obligations to manage cases effectively<sup>648</sup> can conflict with their theoretically impartial role when it comes to the defendant's decision on plea. This can mean that, even after a defendant has entered a not guilty plea, he may still be subjected to pressure from the court. In one case in Centreville magistrates' court<sup>649</sup> the district judge tried to persuade the unrepresented defendant to change his not guilty plea on an assault charge to guilty.<sup>650</sup> After the judge explained credit for guilty pleas he challenged the defendant about his account of events and suggested he was unlikely to be believed (asking at one point, 'Why would the nurse lie about this? [...] She says you deliberately swung out at her leg'). When the defendant continued to dispute the nurse's account, the district judge said

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<sup>646</sup> Case P17. This case was not observed but the file was examined and it was discussed with Lawyer P2.

<sup>647</sup> Although the current sentencing guideline indicate that the reduction for a guilty plea should range from one third down to one tenth (Sentencing Guidelines Council. *Reduction in Sentence for a Guilty Plea*. (2007) at para. 4.2), there is no specific statutory bar or sentencing guideline that prohibits judges from offering greater discounts. It is not clear how high the discount offer would have to go before the appeal courts would be concerned about the potential for the offer to undermine the guilty plea.

<sup>648</sup> Criminal Procedure Rules 2015, rule 3.2.

<sup>649</sup> Case CEN77.

<sup>650</sup> Gibbs (note 550) reports (at p.11) a similar court observation of a district judge trying to persuade an unrepresented defendant to plead guilty.



to the prosecution lawyer 'Well there it is, there will have to be a trial. I've done my best to avoid it but I can't see any way around that'. However, on noticing that the duty solicitor had arrived in court, the judge asked him to speak to the defendant. When the duty solicitor failed to make any progress in persuading the defendant to change his plea (telling the judge, 'I'm not sure how far we're getting with this'), the judge finally conceded, saying 'We're going to have to put it down for trial.'

Having received legal advice and consistently maintaining a not guilty plea does not necessarily protect defendants from further pressure from the court. In one case,<sup>651</sup> the magistrates' court legal adviser had a 13 year old defendant brought into court on the morning of his trial with only his solicitor present in order that she (the court legal adviser) could 'explain the sentence discount' to him. The child, who suffered from attention deficit hyperactivity disorder and was on the autistic spectrum, had firmly denied guilt to his lawyer and maintained his not guilty plea until that morning. According to the solicitor (who had, after some hesitation, consented to this process), the court legal adviser's intention in this unusual procedure was to help persuade the defendant to change his plea to guilty.<sup>652</sup>

Lawyer B14 confirmed that district judges in Medborough also put pressure on clients to enter guilty pleas by saying 'Does your client know he'll lose his credit?' She said district judges sometimes have 'a bit of a shout at the client' because they do not like the plea. Clients tend to be shaken by these incidents and, she said, need reassurance that they will not have the same district judge at trial.

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<sup>651</sup> This case was not observed but was discussed with the lawyer involved and the firm's file was examined.

<sup>652</sup> Unsurprisingly, the legal adviser's efforts paid off and the boy pleaded guilty but the solicitor said that she remained troubled about whether his plea had been a genuine reflection of his guilt.

Lawyers said that Crown Court judges, too, sometimes put considerable pressure on defendants over their plea. In two Middleton Crown Court cases,<sup>653</sup> Firm B lawyers were observed preparing their clients for significant pressure from the judge in response to their planned not guilty pleas at the plea and case management hearing. Before meeting the client in case B21, Lawyer B6 told me that he expected the client to plead not guilty, that the judge 'will have none of it' and that the defendant should 'expect some rather strong comments about the strength of the evidence and credit for guilty plea'. In case B26, Lawyer B7 told the client that 'the judge may try and make one of us compromise. I think he will put a lot of pressure on you to make you plead guilty.' She continued,

'I don't know how he will push it. He may say if you plead guilty I won't send you to prison. You've never said you admit to the full allegations so I've said no. He'll make all sorts of comments. I know what he's like. [...] he cannot make you plead guilty but he may try and really squeeze your bits. I just need to warn you about that because I don't want it to be a surprise when you get in there.'

Although, in the event, the judge did not put pressure on those two defendants, both lawyers told me that he was 'legendary' for doing so if 'he doesn't like the plea'.<sup>654</sup> These claims were to some extent supported by the judge's behaviour in another case on the same morning when he was observed seeking to persuade an appellant to withdraw his appeal to the Crown Court. On this occasion the judge warned the appellant that he faced a possible increase in sentence and costs order if his appeal failed (saying to defence counsel, 'I know you know this but I want the appellant to hear it from me') before adding,

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<sup>653</sup> Cases B21 and B26.

<sup>654</sup> Lawyer B6.

somewhat menacingly, 'This is not a threat. Judges do not threaten people before them.'<sup>655</sup>

As well as putting pressure directly on defendants, trial judges can impose pressure more subtly through the defence lawyer.<sup>656</sup> In a plea and case management hearing at Centreville Crown Court, the judge, having heard the client plead not guilty, turned to defence counsel to ask 'Have you advised your client about the system of credit for guilty plea?' Advising on credit for guilty pleas is one of the basic professional requirements of a defence lawyer (and the lawyer must confirm in trial preparation forms that they have done this) so the only purpose for the judge raising this question can have been to indicate his discontent with the plea. Counsel confirmed that she had given the appropriate advice and, in this instance, the court moved on.

Two very experienced Crown Court advocates<sup>657</sup> were observed discussing a highly interventionist judge in a large drug importation case<sup>658</sup> who put considerable pressure on defendants and lawyers to enter pleas despite defence barristers' protestations. Lawyer P6 described the judge going 'ballistic' in response to two other lawyers in the case explaining why their clients would not be entering pleas at the plea and case management hearing<sup>659</sup> and announcing, 'I want a plea right now because he knows whether he's done it or not'. Following the judge's outburst, both defendants entered pleas. One pleaded not

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<sup>655</sup> Case MID16.

<sup>656</sup> As McConville and Marsh observe, 'there can be no guarantee at a plea hearing that defence counsel will encounter a judge who is impartial, fair-minded and open to argument. Instead, judges may be biased, bigoted and closed to alternative viewpoints.' (McConville and Marsh (note 4 supra) at p.148.)

<sup>657</sup> Lawyers P6 and P2.

<sup>658</sup> Case P6.

<sup>659</sup> In one case, Lawyer P6 said, this was because the barrister had not had the unused schedule from the prosecution and in the other because he had not had a chance to speak to his client at court and take instructions.

guilty and the other, guilty. Lawyer P2 confirmed that he had received similar treatment from the same judge in an earlier directions hearing in the case when he refused to indicate his client's plea because, as he put it, 'I've got a case summary without a single statement and I'm not going to assume its accurate in a case like this, a massive conspiracy. There are going to be more people on the indictment. I don't even know who I'm supposed to be conspiring with'. In this instance, he said, both Lawyer P6 and the client had withstood the pressure and refused to enter a plea.

Although these accounts demonstrate that lawyers can assist their clients by preparing them for pressure from judges or simply by standing up to highly interventionist judges during plea hearings, court room observations of lawyers from other firms suggest that to some extent defence lawyers can be complicit in the court's behaviour. In Middleton magistrates' court, for example, a solicitor and court usher discussed their frustration with an unrepresented dyslexic defendant who was refusing to plead guilty because he could not read his papers and he wanted to seek legal advice.<sup>660</sup> In Medborough magistrates' court, a defence lawyer making an application to vacate a trial (due to delays in prosecution disclosure) signalled to the court that his client was difficult and that, once the additional evidence arrives, 'I will once again have some stern advice for my client'.<sup>661</sup>

Similarly, in Centreville magistrates' court, a defence solicitor responded positively to pressure from the district judge after his client pleaded not guilty to an assault charge. The district judge asked the defence lawyer in open court whether the client had seen photographs of the alleged victim's injuries. The defence solicitor confirmed that he had but then offered to speak to his client again. He showed the photographs to the client again and explained (in a reversal of the burden of proof) that the court would 'want to

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<sup>660</sup> Case MID2.

<sup>661</sup> Case MED20.

know' how the alleged victim got the bruising. Given that the solicitor had already advised his client, this second episode of 'advice' can only have been intended to put pressure on the defendant to change his plea to guilty. The client, however, continued to insist that he was not guilty and the case was listed for trial.<sup>662</sup>

The way in which the magistrates' courts are managed is also likely to be capable of distorting defendants' perceptions of their risk of conviction in summary cases, and so make guilty pleas more likely. On arrival at the magistrates' courts, the police's categorisation of the case by plea will frequently be used to determine which court the case will be listed in, with some courts being designated to deal only with anticipated guilty plea cases. In Centreville, lawyers, magistrates and court staff referred to one court as the 'guilty plea court.'<sup>663</sup> Although, at the time of this research, Middleton, Coreham and Medborough magistrates' courts were allocated cases according to whether the defendants were in custody or on bail, court staff in Medborough told me that the system was changing, 'We're going back to having guilty plea and not guilty plea courts.' In future, she said, ushers would select the appropriate court, based on the Initial Details.

There is a risk that this system of court allocation, while efficient, acts as a signal to defendants whose cases are allocated to 'the guilty plea court' that the court considers this to be the appropriate plea. Other court actors, including the defence lawyer and magistrates, may develop a similar presumption that a guilty plea is the appropriate outcome.<sup>664</sup> This method of listing could also financially incentivise defence lawyers to elicit

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<sup>662</sup> Case CEN78.

<sup>663</sup> In Case CEN8 I heard a prosecutor complaining to the justices' legal adviser about a set of papers 'Why've I got these? This is supposed to be the guilty plea court'.

<sup>664</sup> The court usher in Centreville's 'guilty plea court' was working hard to achieve the efficient disposal of cases by guilty plea. When Lawyer L1 was greeting his new client outside the court, the usher interrupted the greeting to ask 'Is it a guilty plea, Mr [L1]?' (Lawyer L1 answering, somewhat tetchily, that he planned to take instructions before answering that question). The same usher twice

guilty pleas from their clients. The court officer in Medborough who told me about the planned guilty plea court sought to reassure me about this, saying, 'but you'll be able to move a case out of the guilty plea court', in reality, however, this may be unattractive to a hard-pressed defence lawyer. Lawyers showed great interest in where their clients' cases appeared on the court list, with places early on the list being highly sought after as they enable lawyers to get through cases quickly. If a case is moved from one court to another then it will usually be added to the end of the new court's list for that morning. A solicitor who waits for three hours for her client's case to be heard will not be remunerated for this waiting time.

#### **Defendants' vulnerabilities.**

Lawyer P2 argued that all defendants in the criminal justice system are to some extent vulnerable, with some having particular difficulties:

'Clients in this field are often from the low socio-economic groups, they are very frequently people who are vulnerable, either by dint of their being victims of crime, victims of sexual abuse, suffering with poor health, being subject to substance dependency, you know, so someone subject to their desire to get their next fix will do anything so that they can get out of the court or police station earlier and they are often rabbits in the headlights when they are not subject to those vulnerabilities. Just being in the CJS makes you a vulnerable person in my view, although that's a very left-wing view, but it's a left-wing view formed of years of experience of otherwise competent people, who can't cope in a court, who are intimidated by going into a court opened by Queen Victoria where the court room is oak panelled in a secure dock'.

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handed another lawyer a Statement of Means form (which would have been required if a guilty plea was entered) when the lawyer had actually twice requested a trial preparation form (which was needed because the defendant was pleading not guilty).

Clients observed during plea discussions often mentioned their discomfort with the process they were going through and their desire to 'get it over with'.<sup>665</sup> One defendant,<sup>666</sup> for example, accepted that he was guilty of the offence charged (a common assault against a teenager) but denied the most serious elements of the prosecution's account of the facts (including that he had threatened to kill the victim). Having taken his lawyer's advice that he should contest the factual account at a Newton Hearing, the defendant showed considerable distress at being required to wait for that hearing to be resolved and persistently told his lawyer 'I just want it over with. It's been hanging over me for months'. This defendant was persuaded to continue with the Newton Hearing as a result of considerable support from his lawyer (who persisted with the advice, 'Never accept something you haven't done. Especially not in a court of law') and his accompanying daughter<sup>667</sup> (who observed 'it's better to deal with it longer than to deal with it shorter and for worse').<sup>668</sup>

It is likely that some defendants who say they want to 'get it over with' are factually guilty, can see little point in contesting a charge and are simply happy to accept the sentence discount in return. One client,<sup>669</sup> for example, who had a long history of theft from shops in

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<sup>665</sup> Similar feelings were expressed by defendants in the Crown Court who were interviewed in a recent study (Jacobson, J. Hunter, G. and Kirby, A. *Inside Crown Court: Personal Experiences and questions of legitimacy*. 2015 Bristol, Policy Press at p.193).

<sup>666</sup> Case P32.

<sup>667</sup> Another defendant also said that his daughter had helped him to overcome his fear of trial and to maintain his not guilty plea. He told his lawyer, 'I'm not going to plead guilty. I didn't do it. My daughter said to me, I told her I was so stressed that I was going to plead guilty and she said "Don't do it Dad, if you didn't do it, don't plead guilty"'.

<sup>668</sup> The lawyer later told me that this client's account had 'fallen apart' during the Newton hearing and so the court had rejected his basis of plea and convicted him on the full facts, with consequent loss of credit. In fact, therefore, the defendant would have been better off pleading guilty at the first hearing. This case demonstrates how difficult it is to determine what is the right plea for a client.

<sup>669</sup> Case P4.

order to finance his drug addiction, greeted his lawyer on the morning of his first appearance at the magistrates' court with the words, 'Well what I want to do this morning is to throw my hands up to it.' The lawyer took instructions and checked the Initial Details but concluded that the defendant was right to plead guilty.

In other instances, however, it is unclear whether the defendant's desire for the case to conclude has any connection to his acknowledgment of guilt or his acceptance that the prosecution case is overwhelming. Lawyer P2 spoke about how difficult the criminal process can be for many defendants 'because it is incredibly stressful. Time off work to attend court, time off work to go and see your solicitor to go through the papers (if you've got a solicitor who takes instructions). Time off then for the trial.' Lawyer P8 said that fear of giving evidence at court was a strong factor in defendants pleading guilty. She said that part of her role was to try to persuade her clients that trials were not as dramatic as they perceived from film and television accounts and that they would be able to cope with the testifying.

Although it may seem irrational to prioritise case completion over the opportunity potentially to obtain an acquittal at trial, solicitors' answers when questioned about this in interviews indicate that this is a factor that influences their clients' pleas. Lawyer P2 said the delay in getting to trial was a particular concern for defendants who were in custody. Far from considerations of guilt and innocence, these defendants are focused on how quickly they can get out of prison. This could contribute to wrongful guilty pleas. In Medborough the delay in Crown Court cases between being sent for trial and first hearing in the Crown Court was 17 weeks in many cases.<sup>670</sup> Lawyer B13 said that this created difficulties for her clients who were focused on getting the process 'over and done with'. In

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<sup>670</sup> Defendants who were in custody or who were charged with serious violence or sexual offences would have a hearing in two weeks (Lawyer B13).



case B62, for example, a defendant came to see his solicitor a few days before his trial and told her how much he was dreading the prospect. Eventually he asked the solicitor, 'What happens if I just say guilty, I'm not bothered, I just want to get rid of it?' After the solicitor discussed his fears and advised him not to change his plea, he continued, 'What if I drink myself to sleep again on the day of the trial? It's really getting to me'. His solicitor advised him to turn up for the trial and promised that they could 'have a chat' then but advised him to telephone her in the meantime if he was struggling. He told her 'I just want it to go away'.

As well as the fear of the trial process, defendants' fear of their possible sentence can overshadow the fundamental question of guilt or innocence. Lawyer P9 said that this can make it difficult to communicate to clients the information they need for their plea decision and that 'probably they filter a lot of it out and all they hear is what will happen to them.' Lawyer P2 described this phenomenon as 'litigation neurosis' and said that all defendants suffer from this to a degree, particularly if they are at risk of a prison sentence.

### **Financial pressures**

Another significant factor in defendant plea decisions which was mentioned by lawyers (but to which the Court of Appeal pays no regard) is the cost consequences of plea decisions. These can arise for defendants who are not eligible for legal aid and so must fund their own defence, but they can also exist for legally aided defendants, many of whom have to contribute to their defence costs.<sup>671</sup> Lawyer B13 said that guilty pleas can sometimes result from financial considerations,

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<sup>671</sup> Means assessment for criminal legal aid is complex but a single person with no children will not receive legal aid for magistrates' court proceedings if he earns more than around £22,000 and there is no legal aid for Crown Court proceedings if the defendant's household disposable income is more than £37,500. Defendants earning less than £22,000 but more than £12,500 may also be excluded from magistrates court legal aid on financial grounds and defendants who receive legal aid in the Crown Court are likely to be required to pay contributions if their income is above around £12,500.

‘...sometimes it’s what’s the cheapest way out for them [...] so sometimes they’ll say “Well, it’s cheaper if we deal with it today and I’ll plead guilty today”.’

*(a) Defence costs*

Lawyers were concerned about financial pressures on privately funded clients caused by the differential costs of legal assistance in going to trial rather than pleading guilty. Lawyer P13, when asked if funding could influence plea said ‘Private case, always.’ Lawyer P3 said ‘in relation to private paying clients [funding] is in the back of your mind because of the rates are sort of £190 per hour, plus VAT is probably charged. In readiness for trial they’re looking at between £2-3,000 and I’m always quite conscious about that as well, in terms of doing what’s necessary and nothing more than that.’

One client,<sup>672</sup> who was charged with driving offences, was told that the private costs of his defence would be around £500 plus VAT for a guilty plea at the first hearing but around £1800 to £2500 plus VAT for a trial. Even if he were to be acquitted, these costs would not be fully recoverable. Although privately funded defendants who are acquitted at trial will usually be able to recover a proportion of their defence costs, this is limited to what those costs would have been at legal aid rates<sup>673</sup> even though the defendant will have been forced to pay higher (private) rates in order to secure representation. This provision means that even defendants who expect to be acquitted at trial (i.e. including defendants who are factually innocent and have identified strong evidence in their favour) may face financial incentives to plead guilty if they are ineligible for legal aid.<sup>674</sup> I observed one explaining to

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See Legal Aid Agency detailed guidance on criminal legal aid means testing. At <https://www.gov.uk/guidance/criminal-legal-aid-means-testing>, on 8/3/16.

<sup>672</sup> Case P11.

<sup>673</sup> Prosecution of Offences Act 1985, as amended by Schedule 7 of Legal Aid, Sentencing and Prosecution of Offenders Act 2012.

<sup>674</sup> A recent report by the charity Transform Justice cites examples of defendants, who were subsequently cleared at trial, considering pleading guilty due to the threat of unrecoverable defence

her client on the telephone that he was financially ineligible for legal aid and that she could deal with his guilty plea at the first hearing for around £250 plus VAT. Going to trial would, however, cost around £1,000 plus VAT and he would only recover half of this if acquitted. She told this defendant, whose job was at risk if he was convicted and who emphatically denied guilt (and had refused an offer of a caution for that reason), 'It's not fair. You're being taxed on being innocent but that's the system.'<sup>675</sup>

Even defendants who receive legal aid may be required to pay a monthly contribution to their costs if theirs is a Crown Court case<sup>676</sup> (there is no system of contributions in the magistrates' court) and this, too, can act as a strong disincentive to proceed to trial. Although these contributions are likely to be fully recoverable if he is acquitted, the contributions can still cause financial pressures during the (possibly lengthy) process of preparing for trial.

#### *(b) Prosecution and Court Costs*

Regardless of whether defendants are legally aided, they face increased financial consequences if convicted at trial because of the imposition of prosecution costs orders. Under s18 of the Prosecution of Offenders Act 1985, the courts can<sup>677</sup> order convicted defendants to pay an amount that is 'just and reasonable' towards the expenses reasonably incurred by the prosecution. The prosecution will inevitably incur significantly greater costs in proving the case at trial than they would in simply preparing Initial Details and attending a first hearing for a guilty plea.

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costs. Gibbs, P. *Innocent but broke*. (2015) Transform Justice Report At <http://www.transformjustice.org.uk/wp-content/uploads/2015/10/TRANSFORM-JUSTICE-INNOCENT-BUT-BROKE.pdf>, on 8/3/16.

<sup>675</sup> Lawyer B1 offered to obtain the prosecution papers, review them and advise him on plea without charge so that he could then decide what to do.

<sup>676</sup> See the Legal Aid Agency guidance (note 671 *supra*).

<sup>677</sup> The Costs in Criminal Cases (General) Regulations 1986 make it clear that such an order should be made by the court if the defendant has the means to pay.

For a period, a defendant's plea also had a significant financial impact on conviction as a consequence of the operation of the (now abandoned) Criminal Courts Charge (CCC). This charge was introduced in 2015<sup>678</sup> and meant that a defendant who was convicted at trial would be charged up to 5½ times as much as someone who had pleaded guilty.<sup>679</sup> The CCC, and particularly the differential outcome depending on plea, was the subject of considerable criticism. Media coverage<sup>680</sup> highlighted concerns from magistrates<sup>681</sup> and campaign groups<sup>682</sup> that it might have been causing innocent defendants to plead guilty. This, and other criticisms, led to the charge being abandoned in December 2015.<sup>683</sup> Despite the risks created by the CCC during its short life, it may, at least, have led to an (entirely unintended) benefit to the criminal justice system through raising awareness of the risk of wrongful conviction by guilty plea.

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<sup>678</sup> Inserted by Criminal Justice and Courts Act 2015 into the Prosecution of Offences Act 1985 ss21A-21F and commencing in April 2015.

<sup>679</sup> The charges varied according to offence type, venue and plea. A summary offence would result in a charge of £150 on a guilty plea or £520 after trial. An either-way offence in the magistrates' court would be charged at £180 on a guilty plea or £1,000 after trial. A conviction in the Crown Court would be charged at £900 for a guilty plea or £1,200 after a trial. (Prosecution of Offences Act 1985 (Criminal Courts Charge) Regulations 2015 No. 796).

<sup>680</sup> e.g. '*Lady Hale joins chorus of concerns over criminal courts charge*' The Guardian 20 October 2015, '*Magistrates' leader decries 'last straw' of court charge*' Financial Times 18 October 2015.

<sup>681</sup> Media reports suggest that more than 50 magistrates have resigned over the CCC ('*Magistrates resign over court charges*' The Telegraph 9<sup>th</sup> September 2015) and the Magistrates Association gave evidence to the Justice Select Committee about their members concerns on 27 October 2015.

<sup>682</sup> In particular, the Howard League ran a high profile campaign against the CCC.

<sup>683</sup> This is discussed further at p.333 below.

### Defence lawyers magnifying systemic pressures

Defence lawyers are obliged to give their client advice on plea, and advice to plead guilty may be given 'in strong terms.'<sup>684</sup> When those convicted by guilty plea say that their lawyer 'made them' plead guilty, this could simply mean that their willingness to go through a trial was compromised by the lawyer's proper advice on the risk and consequences of conviction, together with the other pressures in the system already described. Although theoretically and rhetorically the courts expect the defence lawyer to act as a bulwark against these pressures,<sup>685</sup> the discussion above has demonstrated that defence lawyers may overestimate the strength of the prosecution case and give insufficient consideration to possible defence evidence. In the circumstances, it is doubtful that defence lawyers are capable of acting as safeguards against wrongful guilty pleas. The pressure in this situation comes from the systemic incentives but it is the defence lawyer who articulates the dilemma to the innocent defendant and so is experienced as the source.

Plea bargaining can be a source of pressure. While plea bargaining was used constructively in some observed cases where the defendant had already conceded guilt to a lesser extent than the prosecution alleged,<sup>686</sup> for a defendant who fully denies guilt, their lawyer's advice on the possibility of a plea bargain can create considerable pressure. In one case, a particularly vulnerable child defendant who had consistently denied guilt, was (according to the defence lawyer's file notes) on the day of his trial for robbery offered the opportunity to plead guilty on a lesser basis. After much deliberation (and, as discussed at p.216 above, an unusual intervention from the justices' legal adviser) the boy pleaded guilty. His

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<sup>684</sup> '...provided always that it is made clear that the ultimate choice and a free choice is in the accused person'; *Turner* (note 6 supra) at p.358.

<sup>685</sup> As discussed in Chapter 3, the appeal courts demonstrate great confidence in the ability of advice from a defence lawyer to assist defendants in making the right decision on plea and rely on this to support the safety of guilty plea convictions.

<sup>686</sup> See discussion at p.201 supra.

solicitor told me that she remained deeply concerned that his plea may simply have been the result of the pressure he was placed under.

Pressure was also put on defendants in three cases<sup>687</sup> by 'reverse plea bargaining' after the prosecution under-charged the defendant (in the sense that the prosecution's Initial Details revealed an allegation of a more serious offence than that charged). In each case the defendant gave an innocent account of events (or one which amounted to guilt on a less serious charge or factual basis). The lawyers advised that the appropriate plea was guilty but warned of the risk that the charge might increase when the CPS reviewed the file. The defendants had to decide whether to enter a guilty plea at the first hearing, on facts that he denied, in order to avoid the risk of facing more serious charges later. In each case the defendant, with sensitive support from their defence lawyers, refused to enter a guilty plea on the basis required by the prosecution. The pressure, however, is evident.<sup>688</sup>

Where the defendant plans to enter a plea which matches the lawyer's assessment of the 'right' plea, the plea advice will be straightforward. Where, however, the client expresses an intention to enter the 'wrong' plea, by pleading not guilty when, in the lawyer's opinion, he is likely to be convicted at trial, the task becomes very sensitive. In such cases there is a danger that the defendant will experience the combination of the plea advice and the other pressures as oppressive.<sup>689</sup>

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<sup>687</sup> Cases P65, P68 and P32.

<sup>688</sup> In Case P68 the CPS did indeed subsequently increase the charge (from malicious wounding charge to wounding with intent and possession of a firearm with intent). In Case P32 the charge was not increased and in Case P65 the outcome is not known (having not been resolved during the research period).

<sup>689</sup> Defence lawyers can also have difficulty with 'the wrong plea' when defendant give an innocent account but express an intention to plead guilty. The cases of 'inconsistent pleas' raise significant concerns for defence lawyers and are discussed below (from p. 237 below).

The lawyers interviewed for this research were aware of this problem. If the lawyer believes that the client's account may be rejected at trial then, given the sentencing incentives, the client (regardless of his factual guilt or innocence) needs to understand this in order to decide on plea. As Lawyer P2 explained, he has to assess whether the defence would 'fly',

'because I have to make a judgment not only of 'well technically that's a defence' but if it's a ragingly ridiculous defence that's never going to run [...] I can't just identify a defence and let that go. I have to make a judgment, "Will the magistrates or jury buy this?" and advise them on what my views are.'

Lawyer P8 agreed:

'Obviously it's part of my role to say that to the person, to try to get them to look from an outside perspective how it will sound. I'm sure sometimes implausible defences are true but a lot of the time it's about managing their expectations because we have to be realistic about possible outcomes. There's no point going in all guns blazing and saying "Oh we'll fight this," if realistically the outcome is going to be a guilty verdict.'

The advice given to defendants in these cases is given in two parts. First the defendant is advised that, as his account is an innocent account, the appropriate plea is not guilty. Secondly, however, he is advised about the risks and consequences of that plea. For example, on hearing a client give an entirely innocent account of events on the morning of the plea and case management hearing, Lawyer B6<sup>690</sup> talked through the evidence and the sentencing incentives and then concluded, 'Ok if you're saying you've not done it then on

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<sup>690</sup> Case B21.

those instructions you should plead not guilty, but knowing what I've said about the risk of conviction and the discount.'

Although this advice is proper, the conflict between the two parts of the advice (i.e. 'I must advise you to plead not guilty but this is why I think you will suffer a worse fate if you do so') means that it can be experienced as, at best, confusing and, at worst, manipulative. The advice will be even more confusing for defendants suffering from specific vulnerabilities which, albeit that they may be 'fit to plead' within the narrow legal definition of the term,<sup>691</sup> could make it particularly difficult for them to cope with the criminal process and to withstand personal and systemic pressures to plead guilty. This could lead to vulnerable defendants being at higher risk of pleading guilty to 'escape the criminal courts'.<sup>692</sup>

Lawyers were aware of these problems and explained that they are particularly acute with respect to young clients. As one solicitor told me, 'it is sometimes worrying how much influence we have as defence lawyers. It is a responsibility and I sometimes wonder if my advice is too firm. Especially in the youth court.'

The following extract is from a defence solicitor's advice to his young client about his plea.<sup>693</sup> It shows his difficulty in complying with the lawyer's professional obligation to advise about the benefits of guilty pleas without pressurising the boy to withdraw his innocent account:

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<sup>691</sup> Vulnerability and fitness to plead are two different issues. (Cooper, P. Identifying Vulnerability in witnesses and defendants. (2014) The Advocates Gateway Toolkit 10. Paragraph 1.12 At <http://www.theadvocatesgateway.org/toolkits>, on 28/4/16.)

<sup>692</sup> Described by Sanders, Young and Burton (note 98 supra) at p.460. See also chapter 5 for a discussion of the vulnerabilities identified in CCRC applicants.

<sup>693</sup> The solicitor mentions the referral order, a sentence available only for young people, which is discussed further at p.234 below.



‘Now you have said you know nothing about this robbery. I’m going to say this to you because I have to say it to every client. If you committed the offence and were guilty then if you pleaded guilty you would get a lesser sentence. I say that to everyone, I have a duty to. It’s not that I’m saying I don’t believe you. Also, if you plead guilty the court have to give you a referral order – that is the lowest level of penalty that a youth offender can get and you can only get it if you plead guilty. I’m only saying that because I have to. I’m not saying you should plead guilty. I’m only saying what I’m obliged to tell you.’

This was an experienced solicitor who appeared conscientiously to be trying to moderate the impact of the advice he was required to give. The young defendant persisted in his not guilty plea following this advice (at least at that hearing). These are, however, complex messages that lawyers are required to convey to their clients and some defendants, particularly young ones, will inevitably struggle to understand what their lawyer is trying to communicate. In this context, it is important to appreciate that young defendants are placed under particular systemic pressures.

There are no special rules about plea bargaining in cases involving children and young people and so no specific protections. Recent research has also specifically cast doubt on the quality of legal representation in youth court cases, suggesting that firms frequently use the youth court as a training ground for inexperienced lawyers. This can lead to inadequate representation, with children being advised by lawyers who lack basic youth court knowledge.<sup>694</sup>

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<sup>694</sup> Independent Parliamentarians’ Inquiry into the Operation and Effectiveness of the Youth Court June 2014 pp. 30-31. At <http://www.ncb.org.uk/what-we-do/policy/youth-courts-inquiry>, on 25/3/15.

One of the consequences of the low age of criminal responsibility in England & Wales is that young children are subjected to the stress of attending the criminal courts and many will fear the process. Although there is a presumption that defendants under the age of 18 will be tried in the youth court,<sup>695</sup> which is intended to be less formal and less intimidating than other courts,<sup>696</sup> many child defendants enter pleas or are tried in the adult courts, including before adult juries in the Crown Court.<sup>697</sup> Although trial judges are required to make adjustments to Crown Court trial proceedings to meet the needs of young people,<sup>698</sup> concerns remain that the Crown Court is too intimidating an environment for the trial of young defendants.<sup>699</sup>

Even in the youth court, defence lawyers say that child defendants are intimidated by the prospect of facing a trial and that this can influence plea. As one lawyer explained 'its amazing how the children who have denied doing anything wrong and say they want to plead not guilty, once you've explained what the trial involves, what's going to happen, then they decide to plead guilty.'<sup>700</sup> Another lawyer said that many of his young clients

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<sup>695</sup> Children and Young Persons Act 1933, s46.

<sup>696</sup> The youth court is part of the magistrates' court and decisions are taken by a panel of lay magistrates or single district judge who must all be specially trained. The youth courts apply the same substantive laws as the adult courts and the usual laws of evidence apply but proceedings are not public and must not be reported. The court surroundings and proceedings are somewhat less formal than in the adult courts and child defendants are entitled to public funding for their legal representation.

<sup>697</sup> This can arise because the case is connected with a case against an adult and so will be tried in the court appropriate to that adult, because the defendant is charged with one of a number of serious offences or even simply because the youth court is closed on the day the young defendant is brought before the court (Youth Justice Working Group Policy Report (2012) *Rules of Engagement* London: Centre for Social Justice p.88).

<sup>698</sup> Practice Direction: (Crown Court: Trial of Children and Young Persons) 2000. This followed the decision of the European Court of Human Rights concerning the child defendants in the James Bulger case, *R v United Kingdom and T v United Kingdom* [1999]

<sup>699</sup> Youth Justice Working Group Policy Report (2012) *Rules of Engagement* London: Centre for Social Justice para 3.2.3.1.

<sup>700</sup> Lawyer B11.

have difficulty concentrating for any length of time and that as a consequence, the prospect of a day in court is unbearable:

‘And I’ve had many youth defendants say to me, “I’m just going to plead guilty, I can’t sit there all day” and you have to sit down and persuade them, “Look you can’t just plead guilty because you don’t want to sit there all day.” ‘

In addition to the normal plea incentives, young defendants are subjected to a significant further plea pressure which does not apply to adults. Young defendants who have no previous convictions and who plead guilty to an imprisonable offence in the youth court or magistrates’ court must in most circumstances<sup>701</sup> be sentenced with a referral order. This is a mild community penalty which is not available to those convicted at trial. It simply requires the recipient to attend meetings with a youth justice panel where steps will be taken to address the causes of the offending. Crucially, the conviction will be ‘spent’ at the end of the referral order period and so the conviction has limited impact on the defendant’s future job prospects.<sup>702</sup> The referral order plays a central part in the youth justice system; in 2014/2015 referral orders were imposed on over 12,000 young defendants (around 40% of all young defendants convicted that year).<sup>703</sup> When referral orders were introduced some commentators suggested that this was likely to increase the

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<sup>701</sup> The referral order is mandatory in such guilty plea cases unless the offence is so serious that the court considers a custodial penalty to be necessary (Powers of Criminal Courts (Sentencing) Act 2000, s 17). The courts also have a discretion to impose a referral order on ‘second-time’ young defendants who plead guilty and those who plead guilty to non-imprisonable offences.

<sup>702</sup> Although, crucially, in common with other spent convictions, it must be disclosed in relation to occupations which are an exemption to the Rehabilitation of Offenders Act 1974 (e.g. working with children). The conviction would also appear on an enhanced criminal records check (known as an enhanced Disclosure and Barring Service check).

<sup>703</sup> Youth Justice Board *Youth Justice Annual Statistics: 2014 to 2015*. London: Ministry of Justice.

number of guilty pleas from young defendants and lead to miscarriages of justice,<sup>704</sup> although there is only very limited research evidence on this.<sup>705</sup>

During fieldwork, a defence solicitor described the impact of the lawyer's obligation to advise young defendants about the referral order,

[he] says he didn't do it but I'm going to have to advise him about credit for guilty plea but more importantly about the fact that he can only get a referral order if he pleads guilty – but try explaining that to a 15 year old lad. In fact that's one of the strongest pressures I think anyone is put under – the idea that that sentence is only available to you if you plead guilty'.

It is striking that these lawyers expressed concern about the degree of influence their advice had over their clients given that Newman found that, although lawyers exercised control over their clients, the lawyers in his study did not appear to see this as problematic.<sup>706</sup> Once again, the lawyers involved in my research exhibit a greater awareness than those in Newman's study<sup>707</sup> but the problem - the pressure exerted by lawyers in their plea advice - is clear. As Alschuler observed in 1975,<sup>708</sup> the plea bargaining system is 'necessarily destructive of sound attorney-client relationships.'

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<sup>704</sup> Sanders, Young and Burton (note 98 supra) at p.461.

<sup>705</sup> Some early research indicated that referral orders may have increased the guilty plea rate amongst young defendants charged with more serious offences and that young people on referral orders often deny their offences when meeting the Youth Offending Panel during the referral process. See Cap Gemini Ernst & Young (2003) *Research into the issues raised in 'The introduction of the referral order in the youth justice system'* London: Youth Justice Board, p.36.

<sup>706</sup> Newman (note 163 supra) at p.126.

<sup>707</sup> But both findings conflict with Travers' assertion that lawyers' control of their clients is an academic stereotype. (Travers (note 159 supra), discussed by Newman (ibid) at p.127.)

<sup>708</sup> (albeit in the U.S. context), Alschuler, A. The Defense Attorney's Role in Plea Bargaining' (1975) 84:6 Yale Law Journal. 1179 at p.1180.

## Inconsistent pleas

This chapter has described the difficulties facing defendants and lawyers in assessing the risk of conviction and the other pressures on defendants to enter guilty pleas. These can lead to the problem of inconsistent pleas,<sup>709</sup> where defendants tell their lawyers that they are innocent but decide to enter guilty pleas anyway. The court's treatment of these defendants, and the problems facing defence lawyers in dealing with them, reveal some of the hypocrisy and confusion created by the system's encouragement of plea pressures.<sup>710</sup>

As has already been explained, a decision by a factually innocent defendant to plead guilty can be a rational response to the pressures and difficulties discussed in this chapter. In theory, as explained in chapter 1, the criminal justice system deals with this problem by asserting the principle that only those who are guilty should plead guilty and by requiring criminal defence lawyers to reiterate the importance of that principle to clients who contemplate entering an inconsistent plea.<sup>711</sup> These exhortations could only remedy the problem of inconsistent pleas if they were generally effective in discouraging such pleas but, because they are not, criminal defence lawyers are permitted to continue to represent

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<sup>709</sup> Many of the lawyers observed used the term 'pleas of convenience' to describe this situation. To avoid the implication that defendants necessarily experience these pleas as 'convenient' (on the contrary, these pleas may often cause significant distress), I have chosen to use the alternative term, 'inconsistent pleas'.

<sup>710</sup> Although lawyers are not permitted to mislead the court, or to continue to act for a client who they know to be misleading the court, an exception is made for inconsistent pleas. Sanders, Young and Burton (note 98 supra) observe (at p.487) that 'the criminal justice system appears to be prepared to tolerate some frauds more than others.' The courts justify the exception by asserting that the plea is personal to the defendant and so the defence lawyers bear no responsibility. See Bridges, L. (2006) *The Ethics of Representation on Guilty Pleas*. *Legal Ethics* 9, 80 and McConville, M. 'Plea Bargaining: Ethics and Politics.' (1998) 25(4) *J.L.S.* 563 at pp.567-568 for detailed analysis of this issue.

<sup>711</sup> *Turner* (note 6 supra). See also Ede, R. and Edwards, A. *Criminal Defence* (2<sup>nd</sup> edition) (2002). London: Law Society. At p115, 'Exceptionally your client may tell you that he is 'innocent' but insist on pleading guilty and ask you to represent him. It is not improper to continue to act, but unwise. Discuss carefully and, if appropriate, try to persuade your client to plead 'not guilty': but if you fail, advise your client fully and, in particular, that, in mitigation, he cannot assert his innocence. If that is accepted you may continue, but confirm your advice in writing. If in doubt withdraw.'

a client who enters an inconsistent plea. Despite this uncomfortable accommodation of inconsistent pleas, the system maintains the illusion of internal consistency by requiring, (a) that lawyers cannot say anything during plea and sentencing proceedings which could suggest that their client has entered an inconsistent plea and (b) by providing that, in theory, any such indication given by the defendant should lead to the guilty plea being rejected as equivocal.<sup>712</sup>

There are two key points of difficulty relating to inconsistent pleas. The first relates to the defence lawyer's role in advising clients who may be contemplating an inconsistent guilty plea. The second issue relates to the court's treatment of equivocal pleas, particularly in the light of the court's obligation to assess whether the plea represents a clear acknowledgment of guilt. Having explained these difficulties, I will argue that they result from distasteful compromises made by the criminal justice system to obscure the reality that systemic and other pressures are causing defendants to enter unreliable guilty pleas (which do not reflect the defendant's understanding of his guilt or a realistic assessment of the weight of the evidence).

#### **Lawyers' treatment of inconsistent pleas**

Most of the lawyers interviewed expressed some concern about advising defendants who were contemplating inconsistent pleas.<sup>713</sup> Lawyers said that, having understood the defendant's reasoning, they would try to persuade him not to plead guilty. Where the defendant could not be dissuaded from their inconsistent plea, however, lawyers had two ways of dealing with the discomfort this caused. The first approach (taken by Lawyers P5 and P9) involved eliminating the inconsistency by requiring the defendant to articulate a

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<sup>712</sup> *Durham Quarter Sessions, ex parte Virgo* [1952] 2 QB 1.

<sup>713</sup> Although two lawyers said that they could not remember ever dealing with this situation (BL8, PL3).

new factual account of the offence, which amounted to an admission of guilt. As Lawyer P9 put it, 'You have to make sure that they are saying, "I have committed the offence."' '

In taking this approach these two lawyers appear to have been motivated by a concern that the client should only plead guilty if he is guilty.<sup>714</sup> Changing the account can also benefit the defendant because the defence lawyer can then offer mitigation. Requiring the defendant to give a 'guilty account' of events does not, however, necessarily reduce the likelihood of wrongful guilty pleas.<sup>715</sup> Lawyer P9 recognised that on occasion defendants may end up parroting whatever they are required to say in order to be permitted to enter the guilty plea<sup>716</sup> As a result, the approach will inevitably create further conflicting pressures on an innocent defendant who, having concluded that his best course is to

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<sup>714</sup> As well as asserting this in interview, the observed behaviour of both lawyers suggested this was indeed their motivation. Lawyer P5 was observed giving considerable support to defendants who had instructed him that they were not guilty (or were only guilty on a lesser basis) but who were tempted to enter a guilty plea. In these cases he appeared to be genuinely seeking to ensure that the defendant was not pressurised into entering an inconsistent guilty plea. Lawyer P9 selected two files for me to read because, she said, the two cases still caused her considerable concern that her clients (in Cases P22 and P23) might have entered their guilty pleas wrongfully as a result of the pressure they were under.

<sup>715</sup> As Blume and Helm argue in the context of Alford pleas in the USA, requiring defendants to confess guilt in order to plead guilty is unlikely to prevent innocent defendants pleading guilty but is simply likely to drive such pleas 'underground'. (Blume, J. and Helm, R. 'The Unexonerated: Factually Innocent Defendants who Plead Guilty' (2014-2015) 100 *Cornell L. Rev.* p.157.)

<sup>716</sup> Lawyer P9 also said she was concerned that this is what happened in the youth court Case P22 (discussed at p.216 supra). The need for defendants to fabricate a guilty account in order to satisfy the requirements of the guilty plea process has echoes of records of medieval interrogations. Remensnyder discusses a transcript of the inquisition of Elvira del Campo in Spain in 1568. On being told that she must tell her inquisitors what she had done Elvira repeatedly asked 'Tell me what you want me to say for I don't know what to say.' Her inquisitors said they would release her if 'she would tell the truth' and she is recorded to have replied 'Senores, tell me, tell me it.' (Remensnyder, A. 'Torture and Truth: Torquemada's Ghost' in Chazelle, C (ed.) *Why the Middle Ages Matter: Medieval Light on Modern Injustice.* (2012) Abingdon: Routledge at ch.12.

wrongfully admit guilt, is now required to give his lawyer a false factually guilty account to support his plea. As Alschuler wrote,<sup>717</sup>

‘pressing even defendants who recognize their guilt to confess might generate resentment more often than it would prompt catharsis and repentance [...] Pressing innocent defendants to confess would generate only a sense of victimization and of the cruelty and hypocrisy of our legal system.’

The second approach (which reflects the professional guidance for defence lawyers) is simply to ask the defendant to sign a ‘file endorsement’ (a statement which is prepared by the lawyer for signature by the client). This endorsement confirms that the defendant has been advised that he should only plead guilty if he is guilty and that he understands that by pleading guilty he is acknowledging the truth of the prosecution case. This approach was taken by most of the lawyers interviewed, most of whom highlighted the endorsement as a means to protect themselves from professional criticism,

‘It’s a case, I think, of covering yourself, making sure you’ve detailed your advice, make sure they understand that, make sure that they’ve signed something which confirms they’ve been advised in those terms, but none the less that they want to plead guilty. So they’ve got their eyes open and they are asked to sign those instructions, or that advice, to say that they’ve received it.’<sup>718</sup>

‘I explain and I get them signed up, the file endorsed, “I’ve have been advised that my account amounts to a denial and that by pleading guilty I accept the prosecution case in its entirety.” And sometimes I’ll specify that, “the prosecution

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<sup>717</sup> Alschuler, A. ‘Straining at Gnats and Swallowing Camels’ (2002-2003) 88 *Cornell L. Rev.* 1412 (in the context of debate around whether defendants should be able to enter ‘Alford pleas’ in the USA).

<sup>718</sup> Lawyer B13.



case and particularly the witness statement of so and so” and, “I have been advised that amounts to a denial and that I shouldn’t plead guilty but I decline that advice.” And anyone who doesn’t get someone signed up in that position is a fool because they are certainly going to come back, and once they’ve pleaded guilty you then get some clients who want to vacate their pleas.’<sup>719</sup>

These comments reflect a lawyer-centred approach to the problem of inconsistent pleaders, with lawyers concerned about protecting themselves from criticism rather than on protecting their clients from wrongful conviction by guilty plea. A more nuanced account of the file endorsement was, however, given by one of the most experienced lawyers interviewed who contested my suggestion that the endorsement exists primarily to protect the lawyer. Lawyer P2 argued that the main purpose of the endorsement is to ensure that the client understands and accepts the consequences of his decision. He explained that he prepares very detailed endorsements, setting out clearly all the consequences of a guilty plea. In many cases, he claimed, on reading this lengthy endorsement ‘the penny drops’ and the client decides to maintain his not guilty plea. Protecting the lawyer from future complaints was, he said, a secondary purpose, ‘So there’s an element there of arse covering but there’s an element too of reinforcing the advice. People like to reflect.’<sup>720</sup>

Although file endorsements are capable of operating in the constructive way described by Lawyer P2, many of the file endorsements seen during observations and in CCRC files were brief and formulaic. While such an endorsement is effective in protecting the defence lawyer from criticism, it is difficult to see it as effective in protecting the defendant from

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<sup>719</sup> Lawyer P1.

<sup>720</sup> Although one should not discount the possibility that Lawyer P2’s account of his use of file endorsements is a presentational account, in fact the account coincides with the approach taken by Lawyer P2 when observed during this research and in the files which were examined.

pressure to enter a wrongful guilty plea. In addition, the file endorsement will actually serve to damage the prospect of the defendant challenging his conviction at a later date as it is likely to be relied upon by the appeal courts and the CCRC as demonstrating that the guilty plea was both voluntary and informed. As Lawyer P2 put it, 'it's hugely damaging, hugely damaging.'<sup>721</sup>

### **The court's role in relation to inconsistent guilty pleas**

The Criminal Procedure Rules<sup>722</sup> (CPR) set out the courts' role in accepting guilty pleas and state that the court 'may' convict a defendant who has pleaded guilty without receiving evidence if 'the court is satisfied that the plea represents a clear acknowledgement of guilt'.<sup>723</sup> The Crown Court's obligation was previously expressed differently, with practice directions<sup>724</sup> requiring the judge to consider whether the plea was 'a proper plea on the basis of the facts set out by the papers' and stating that sentencing could only take place if the judge is 'satisfied that the plea is properly grounded. It is not apparent how the authors of the previous practice directions expected judges to assess the propriety of the plea or the contents of 'the papers'. In reality, in a hard-pressed courtroom, the court is in no position to look behind a guilty plea to determine whether it is properly grounded. Indeed, as discussed already, by incentivising guilty pleas at the earliest stages of proceedings, the 'sentence discount' results in most guilty pleas being entered before the prosecution has even prepared a full file of evidence (let alone provided it to the defence or to the court so that they can assess the prospects of conviction at trial). It is presumably in acknowledgment of this practical difficulty that the obligation has been diluted to the current focus on a 'clear acknowledgement of guilt'.

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<sup>721</sup> Lawyer P2 (original emphasis).

<sup>722</sup> Criminal Procedure Rules 2015.

<sup>723</sup> Ibid, in rule 24.7 (magistrates' court) and rule 25.4 (Crown Court).

<sup>724</sup> Consolidated Criminal Practice Direction 2011. Paragraph IV.45 (now revoked).

Despite this requirement, and the plea being automatically converted to a finding of the court on sentence,<sup>725</sup> the CPR does not indicate what steps the court might take to ensure that the plea does indeed represent a clear acknowledgment of guilt. The trial court should refuse to accept a guilty plea if it appears to proceed from fear, duress, weakness or ignorance,<sup>726</sup> but there is no colloquy (a process used in the USA in which the court questions the defendant to establish the reasons for the plea) and the defendant will not give any account of the reasons for the plea or the process that led to it. It appears, therefore, that in the absence of any obvious indication to the contrary, the court is entitled to take the fact of the guilty plea as sufficient acknowledgement of guilt. If the defendant enters a guilty plea while uttering words which appear to contradict that plea, the court will have reason to doubt that the plea 'represents a clear acknowledgment of guilt'. In theory, the court should make enquiry of the defendant and, if he persists in his equivocation, refuse to accept the guilty plea. Court observations in Centreville, Middleton, Medborough and Coreham suggest, however, that, in practice, courts may ignore equivocation or put pressure on the defendant to withdraw the element of equivocality.

Lawyer P5 (based in Centreville) said that 'in days gone by' no magistrates' court legal adviser would accept an equivocal plea from a defendant but that the position has changed. This lawyer felt that the pressure of court lists was now causing legal advisers to fail in their duty to investigate and address equivocality, 'I don't think legal advisers step in as much as they should do.' He explained that even 'if it's a long drawn out process that you have to explain the law to the defendant and the case takes half an hour rather than five minutes, you've got to do that, you can't have someone entering a guilty plea like that.' Lawyer B5 (based in Middleton) also spoke about equivocal pleas saying 'a good legal

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<sup>725</sup> *R v Cole* 1965 2 QB 388.

<sup>726</sup> *Ibid.*

adviser will say it's an equivocal plea and I can't accept it, you need to take some advice' but went on to say that '[t]here's some legal advisers wouldn't.'

A district judge was observed (in Centreville magistrates' court)<sup>727</sup> responding properly to the unrepresented defendant giving an exculpatory account when mitigating after entering a guilty plea. Having asked a few questions to ensure he understood what the defendant was saying, the district judge suggested that the defendant should see the duty solicitor. The following exchange then took place:

Defendant: 'I'd rather plead guilty and get it out of the way'.

District judge: 'I understand but the court has a duty to you as well as to the public. I can only let you plead guilty if you are sure you are guilty. You need to see a duty solicitor. Tell him what you just told me. The duty solicitor will advise you about your plea.'

Defendant: 'What if I plead guilty to get it out of the way?'

District judge: 'I can't let you. This is a court of justice as well as law. I must be sure that you are saying you are guilty.'

[The case was then adjourned for the defendant to seek advice]

Although this treatment of an equivocal plea was exemplary, the Firm P lawyer<sup>728</sup> who was present in court at the time expressed the view that no other district judge in Centreville would have taken the same action and nor would the vast majority of court legal advisers (observing that the court legal adviser in this case 'wasn't taking any interest either').

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<sup>727</sup> Case CEN85.

<sup>728</sup> Lawyer P1.

Lawyer P3<sup>729</sup> later explained that the district judge in this case was new, in training and being observed in court. This, he suggested, explained why he had handled the equivocal plea properly on this occasion.

Two other equivocal pleas were observed but neither of them were handled appropriately. In another Centreville magistrates' court case, the court was observed ignoring an equivocal plea from a vulnerable and unrepresented defendant who had serious mental health and drug problems (including schizophrenia and bipolar disorder).<sup>730</sup> He was produced by video link from prison. When the charges were put, the defendant replied 'guilty' to each one but on the last occasion he added, 'I don't know what I've pleaded guilty to!' The court ignored this comment and proceeded to sentence the defendant to ten weeks imprisonment.

Even if the justices' legal adviser reacts to an equivocal plea, she may simply pressurise the defendant into withdrawing the equivocal element of his account, rather than encouraging the defendant to reconsider his plea. This was observed in the magistrates' court in Middleton when an unrepresented defendant entered a guilty plea to a charge of driving with excess alcohol.<sup>731</sup> When asked to give his account of the offence in mitigation, the defendant said that he 'wasn't too sure about the [breath alcohol] reading'. He explained that he had only drunk two pints of beer and that his doctor had told him that the high reading (which indicated three times over the limit) could be the result of his medical condition. The court legal adviser appeared frustrated and said,

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<sup>729</sup> Lawyer P3.

<sup>730</sup> Case P19. A firm P lawyer was representing this defendant on a contested CRASBO hearing which was being heard at the same time (which is how I was informed about the defendant's vulnerabilities). However this solicitor was not instructed in relation to the shoplifting charges being put to the defendant (as legal aid had not been granted). The lawyer had informed the court of this and took no part in the plea process.

<sup>731</sup> Case MID4.

‘You pleaded guilty to this so that indicates to us that you accept the reading [...]  
You were offered a duty solicitor but you refused. You’re not going to persuade  
the magistrates that the reading was caused by alcohol in acid reflux from your  
stomach rather than in the air from your lungs by yourself. You should have asked  
to see the duty solicitor.’

The adviser said, quite properly, that the hearing could be adjourned for the defendant to seek legal advice but, without pausing for a response, went on to explain that a driving rehabilitation course would enable the defendant to shorten his driving ban. He said that the defendant could take the course ‘if the magistrates deal with the matter this morning’ (although the offer of the course was not conditional on the timing of the plea). The defendant was not actually asked during this exchange if he wanted to see a duty solicitor, the charge was not put to him again and, having indicated that he would like to do the rehabilitation course, the court proceeded to sentence.

If courts are willing to overlook equivocality,<sup>732</sup> this may reflect a grass-roots acceptance of a form of Alford plea, whereby in the USA a defendant may be permitted to enter a guilty plea while telling the court he is innocent.<sup>733</sup> Because there is no colloquy in England & Wales, there is less need for an Alford plea system. The swift and formulaic approach to entering a plea leaves little opportunity for a represented defendant to say anything that contradicts his guilty plea. Unrepresented defendants may, however, be more likely to contradict their plea when invited to mitigate (as was the case in two of the three ‘equivocal plea’ cases observed) and if represented defendants were to be asked to explain the reasons for their pleas, it is likely that equivocality would then emerge.

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<sup>732</sup> Newman reports such an incident, where a client was persuaded to enter a guilty plea to a charge of lesser severity while continuing to assert her innocence to her solicitor as well as ‘her youth worker, the clerk and the bench – even as she was sentenced.’ (Newman (note 163 supra) at p.118.)

<sup>733</sup> *North Carolina v. Alford*, 400 U.S. 25, 26-27 (1970).

The propriety of Alford-style pleas has been the subject of considerable academic discussion in the USA<sup>734</sup> and this discussion bears directly on the criminal justice system's efforts to support the legitimacy of the guilty plea system given the system of plea incentives. For this reason, Alford-style pleas are discussed in more detail in chapter 6 below. For the purposes of this chapter it is sufficient to note that, although in the USA uncomfortable conversations about the reasons for the plea are conducted in open court, in England and Wales (in theory at least) these difficult conversations are left between defendants and their lawyers. The plea is then 'sanitised',<sup>735</sup> either by the defendant being forced to change his account to his lawyer or by signing an endorsement which will prevent him complaining about his treatment, and then presented to the court as a genuine acceptance of guilt. The material discussed in this section suggest that growing numbers of litigants in person may be causing these conversations to infiltrate the court room and heavy case management obligations on judges and magistrates may lead courts informally to relinquish the requirement for the guilty plea to be an unequivocal confession (or, at least, a 'clear acknowledgment of guilt').

## Conclusion

This chapter set out to consider the extent to which the criminal justice system can, in practice, be said to promote guilty pleas which reliably reflect the defendant's acceptance of his own guilt or a realistic assessment by the defendant of the likely verdict at trial. It has discussed a wide range of factors which could distort defendants' plea decisions so that they do not satisfy either of these requirements. Despite the Court of Appeal's reliance on the lawyer as a safeguard against wrongful guilty pleas, it has been argued that the defence

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<sup>734</sup> For example, the exchange between Alschuler and Bibas in; Bibas, S 'Harmonizing substantive criminal law values and criminal procedure' (2003) 88 *Cornell L. Rev.* 1361; Alschuler, A. 'Straining at Gnats and Swallowing Camels' (2003) 8 *Cornell L. Rev.* 1412 and Bibas, S. 'Bringing Moral Values into a Flawed Plea-bargaining System' (2003) 8 *Cornell L. Rev.* 1424.

<sup>735</sup> *Standing Accused* (note 129 supra) at p.262.

lawyer, even if acting properly and in accordance with her professional obligations, plays a critical part in the criminal justice system's deliberate efforts to procure guilty pleas from defendants. Pressures are first applied at a stage in the proceedings when defendants have little chance of accurately evaluating the prospects of conviction, through 'perverse incentives' which render the guilty plea unreliable as evidence of factual guilt. The system places the defence lawyer as the lens through which these pressures are focused. Even a conscientious and highly skilled defence lawyer faces enormous difficulty in protecting her clients from pressure to plead guilty and defendants may experience legal advice as oppressive even if they are not necessarily victims of unprofessional behaviour from their lawyers.

If the guilty plea system was designed to encourage guilty pleas that reflect genuine guilt, it would not permit judges, magistrates and other court staff to put pressure on defendants, it would encourage courts to investigate the reasons for guilty pleas and it would seek to reduce the impact of systemic and personal pressures which could distort plea. If the system was designed to ensure that defendants' guilty pleas were based on an assessment, by the person most affected by the outcome of the case, of the likely verdict at trial, it would encourage defendants and their lawyers to assess the available defence and prosecution evidence in the case.

This chapter has demonstrated that the criminal justice system is designed and operates in such a way that guilty plea cannot be said reliably to represent either a genuine acknowledgement of guilt or a defendant-assessed verdict. Crucially, this is not simply a



consequence of the everyday practices of the criminal process but is also attributable to the rules and procedures which govern those practices.<sup>736</sup>

The discussion in chapter 3 has already demonstrated that wrongful guilty plea convictions resulting from the routine operation of the criminal justice system are unlikely to be remedied on appeal. The next chapter will consider the role of the CCRC as a safety net in relation to these wrongful convictions.

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<sup>736</sup> As McBarnet pointed out in 1981, '[t]he pressures to plead guilty lie not just in negotiations, informal liaisons and bureaucratic interests, but also in the legal system itself.' (McBarnet, D. Conviction. (1981) London: Macmillan. p.78.)

## Chapter 5: The CCRC's role in reviewing guilty plea convictions

The Criminal Cases Review Commission was established by the Criminal Appeal Act 1995 (CAA 1995) independently to investigate and review alleged miscarriages of justice. Created as a response to the infamous miscarriages of justice of the 1970s and 1980s, the CCRC began its work in 1997 with,

‘a unique and important role in helping to secure justice, promote confidence in the criminal justice system and contribute to minimising miscarriages of justice in the future.’<sup>737</sup>

This ‘unique and important role’ extends to the CCRC providing a route to the appeal courts for those who have pleaded guilty. The CAA 1995 gives the CCRC powers to review criminal convictions<sup>738</sup> and, if certain conditions are satisfied,<sup>739</sup> to refer those convictions to the relevant appeal court for a further appeal. This referral power applies to Crown Court convictions<sup>740</sup> and those in the magistrates’ court,<sup>741</sup> whether founded on a guilty plea or a trial.<sup>742</sup>

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<sup>737</sup> The words of a former Chair of the CCRC, Zellick, G. ‘The CCRC: Reviewing Miscarriages of Justice’ (2004) *The Barrister*. Issue 20.

<sup>738</sup> The CCRC also has a power, under the CAA 1995, to review and refer sentences but this thesis only deals with the organisation’s power in relation to convictions.

<sup>739</sup> These conditions are set out in section 13, discussed further at p.253 below.

<sup>740</sup> CAA 1995, section 9(1) (England & Wales) and section 10 (Northern Ireland).

<sup>741</sup> *Ibid*, section 11 (England & Wales) and section 12 (Northern Ireland).

<sup>742</sup> In relation to Crown Court guilty pleas this is implicit in the sections 9 and 10 but in relation to summary convictions sections 11(2) and 12(2) specifically state that the power arises ‘whether or not he pleaded guilty’.

Guilty plea convictions are not an insignificant issue for the CCRC which, from its early days, has struggled to manage its limited casework resources in the face of large numbers of applications.<sup>743</sup> In recent years this challenge has become more acute as the number of applications has increased by 74%<sup>744</sup> while the CCRC's suffered a real terms cut in funding of 30%.<sup>745</sup> As the CCRC's Chair told MPs recently, in real terms 'for every £10 that my predecessor had to spend on a case a decade ago, I have £4 today.'<sup>746</sup> After examining what my research reveals about the extent of the CCRC's work in guilty plea cases, this chapter will discuss the ways in which the CCRC's resource problem is exacerbated by the statutory framework governing its referrals. The chapter then draws on the research data to demonstrate that the confusion and inconsistency of the appeal courts' treatment of guilty plea convictions has been mirrored in the CCRC's application of this statutory framework to guilty plea applications.

More than that, I will argue that the CCRC has, in its case screening processes, itself been engaged in the tragic prioritisation of efficiency over the remedying of wrongful conviction by guilty plea. The CCRC devotes considerable resources to the investigation of some guilty plea applications, whilst a small number of Commissioners has been disposing of large numbers of guilty plea applications through a highly abbreviated process, which risked overlooking meritorious cases. Recent efforts by the CCRC to resolve some of the

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<sup>743</sup> This problem was the focus of the first Report of the Home Affairs Select Committee into the work of the CCRC in 1998 (Home Affairs Committee, *The Work of the CCRC*, 27 January 2004, HC 289 2003-04).

<sup>744</sup> Oral evidence from Richard Foster (Chair of the CCRC) taken by the Justice Committee on 14 January 2014, (HC (2013-14) 971, Q 1). This increase followed the CCRC's introduction of an 'easy read' application form in 2012 (which was intended to improve the CCRC's accessibility to applicants with literacy and other communication difficulties).

<sup>745</sup> Supplementary evidence from the CCRC to the Justice Select Committee (Justice Committee, *The Work of the CCRC*, 25 March 2015, HC 850, 2014-15, CCR0055).

<sup>746</sup> Richard Foster (note 744 supra).

inconsistencies in its approach have further prioritised efficiency over the protection of those who have been wrongly convicted by guilty plea.

This chapter argues that these problems at the CCRC do not reflect a lack of concern for the problem of wrongful conviction by guilty plea on the part of the Commission but, instead, are a consequence of the tragic compromises made at the plea stage and in the appeal courts. Taken together, however, these problems suggest that the CCRC cannot be relied upon to provide a safety net for those who wrongfully plead guilty as a consequence of systemic or personal pressures to plead guilty.

### **The CCRC's role in guilty plea cases**

Although, in theory, the CAA 1995 gives the CCRC a crucial role in remedying wrongful convictions by guilty plea, little has been known previously about how the CCRC fulfills this role in practice. The CCRC has not previously gathered statistics on whether the conviction being reviewed was the result of a guilty plea or followed a trial.<sup>747</sup> For that reason, I set out to examine the extent of the CCRC's work in guilty plea cases, including how many applications the CCRC receives for review of guilty plea conviction and how many of the CCRC's conviction referrals were founded on guilty pleas.<sup>748</sup>

By examining files during the three sample periods<sup>749</sup> I established that approximately 23% of applications made to the CCRC were seeking review of guilty plea convictions (although

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<sup>747</sup> Although the CCRC has a casework information system which records data about its work, it does not record the plea on which the conviction was based.

<sup>748</sup> As discussed in chapter 2 (note 297 *supra*) Dr Stephen Heaton had previously conducted fieldwork at the CCRC examining referral cases for his doctoral research and he generously provided me with access to his list of referral cases. This provided a valuable starting point for the research.

<sup>749</sup> There were three four-month sample periods, 1 September 2011 - 31 December 2011, 1 May 2012 - 31 August 2012 and 1 January 2013 - 30 April 2013. See chapter 2 for a full account of the methodological approach to this fieldwork.

this figure varies in the three sample periods between 18.5% and 25%).<sup>750</sup> Although 23% is low in comparison to the overall proportion of convictions by guilty plea, it is a higher percentage than most CCRC staff and Commissioners predicted.<sup>751</sup>

From its establishment in 1997 until 31 December 2013, the CCRC had referred 542 cases to the appeal courts.<sup>752</sup> Analysis of those referrals for this research has established that 49 of those cases (i.e. around 9% of referred cases) were referrals of guilty plea convictions,<sup>753</sup> 39 of which led to convictions being quashed by the appeal court.<sup>754</sup>

It is apparent, therefore, that guilty plea convictions represent an important part of the CCRC's work. However, the statutory framework within which Parliament has required the CCRC to operate gives rise to a number of difficulties in interpreting the CCRC's powers and responsibilities. In this chapter I will show that the difficulties arise from the interaction

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<sup>750</sup> Totalling cases for over the three sample periods gives 281 guilty plea convictions out of 1204 total applications = 23.3%. Figures for percentage of guilty plea convictions in individual sample periods are as follows: SP1=18.5%, SP2=24.8%, SP3=25%. The sample periods included two large tranches of cases involving particular sources of miscarriage of justice, both of which were predominantly guilty pleas, one tranche being immigration and asylum cases (arising out of the decisions discussed at p.134 and p.149 supra) and the other the 'false confession' cases associated with the decisions in *Hindes & Hanna* and *McMenamin* (note 461 supra). In order to test the possibility that the high proportion of guilty plea applications was a temporary phenomenon as a consequence of these two tranches, the statistics were adjusted to remove both tranches of cases to see whether it significantly changed the picture. It did not. The adjusted figures showed approximately 21% of applications being for review of guilty plea convictions (adjusted figures showed 235 guilty pleas out of 1143 applications which is 20.6% (SP1= 17.5%, SP2=21.8%, SP3=21.3%). Clearly guilty plea convictions represent a significant proportion of CCRC casework.

<sup>751</sup> The figure most commonly suggested by CCRC staff when asked about this at interview was 5% although some of those asked (principally those who had been involved in the stage 1 screening process and who, as discussed below, will therefore have seen more guilty plea cases) gave higher estimates (ranging from 10% to 20%).

<sup>752</sup> CCRC referrals spreadsheet, last accessed January 2014.

<sup>753</sup> 30 cases involved guilty plea convictions in the Crown Court and 19 involved guilty plea convictions in the magistrates court (two of which were in the youth court).

<sup>754</sup> With eight convictions upheld (all Crown Court convictions) and two appeals abandoned by the appellant (cases 3 and 33). As discussed at p.265 below, this 'success rate' is higher than the overall success rate in CCRC cases.

between the statutory conditions for referral which are set out in the CAA 1995, the limitations on appeal against guilty plea convictions discussed in chapter 3 and the resource issues facing the CCRC.

Section 13 of the CAA 1995 sets out conditions which must be satisfied before the CCRC can refer a conviction to the appeal courts. These conditions are the same whether the conviction was summary or on indictment and whether it was by guilty plea or at trial:

- a) The CCRC must consider that there is 'a real possibility' that the appeal court would quash the conviction if it were to be referred<sup>755</sup> and
- b) unless there are exceptional circumstances,<sup>756</sup> this real possibility must be based on new evidence or argument (i.e. that was not 'raised in the proceedings that led to' the conviction nor in an previous appeal or application for leave to appeal)<sup>757</sup> and
- c) unless there are exceptional circumstances,<sup>758</sup> the convicted person must previously have appealed, or sought leave to appeal against conviction.<sup>759</sup>

The test requires the CCRC to predict the appeal courts' approach and also gives the CCRC a wide discretion, in 'exceptional circumstances', to refer cases which do not meet all the normal conditions for referral. The combination of the wide discretion and predictive test, which will be discussed further below, in turn exacerbate the CCRC's difficulties in determining which cases merit expenditure of the CCRC's investigative resources.

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<sup>755</sup> CAA 1995 s13(1)(a).

<sup>756</sup> *Ibid*, s13(2).

<sup>757</sup> *Ibid*, s13(1)(b).

<sup>758</sup> *Ibid*, s13(2).

<sup>759</sup> *Ibid*, s13(1)(c).

The CCRC has broad powers to investigate, including obtaining relevant documents from public bodies<sup>760</sup> and requiring the appointment of a police officer to make enquiries on its behalf.<sup>761</sup> The Commission is also expressly empowered to take any steps it considers appropriate to investigate a case.<sup>762</sup> Parliament clearly intended the CCRC to have the discretion to cast its net widely in search of miscarriages of justice<sup>763</sup> and yet this can result in lengthy and expensive enquiries.

Given these broad powers and discretion, it is important to note that the statute is silent on how the CCRC should decide which applications merit investigation and the use of the CCRC's powers, and which can safely be dismissed with little work being done. The conditions set out in section 13 of the CAA 1995 govern the referral of cases but they do not restrict the CCRC's powers to review or investigate in order to make a referral decision. This distinction is important because, as this chapter will demonstrate, the CCRC uses the section 13 conditions as a screening mechanism to determine which cases it should further investigate. While this allows the CCRC swiftly to sift out a large proportion of cases (and in this way protects the organisation's resources), it is potentially problematic because these decisions are usually being made based on limited information.

Over time, the CCRC has developed streamlined processes for rejecting unpromising cases soon after receipt. This 'screening' process<sup>764</sup> seeks to identify cases which, in the view of a

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<sup>760</sup> Ibid, s17.

<sup>761</sup> Ibid, s19. This power has recently been extended by the Criminal Cases Review Commission (Information) Act 2016 to allow the CCRC, with judicial oversight, to access material held by private organisations. This power did not exist during the research period.

<sup>762</sup> Ibid, s21

<sup>763</sup> Section 14 of the CAA 1995 allows the CCRC to refer any case (i.e. not just cases which are the subject of an application) and requires the CCRC to take into account representations received from any source together with any other matters it considers relevant.

<sup>764</sup> The process has taken different forms and different names over the CCRC's history but is referred to in this chapter as 'screening'.

single Commissioner,<sup>765</sup> have no prospect of referral, even were further work to be undertaken. During my sample periods, the screening process focused on identifying and screening out the following categories of cases:

1. **Ineligible** cases (e.g. foreign convictions).
2. **Re-applications** based on issues previously raised and dismissed by the CCRC.
3. **No Appeal** cases (e.g. cases which have not been the subject of appeal proceedings and where there are no apparent exceptional circumstances).
4. Applications which raise **No Reviewable Grounds** (i.e. no issues which, if investigated, have a prospect of giving rise to a real possibility).

The No Appeal and No Reviewable Grounds screening stages add a second layer of prediction to the decision-making process. Not only must the decision-maker predict the appeal court's approach to the case if it were referred,<sup>766</sup> she must also predict whether more extensive CCRC enquiries might identify material giving rise to a real possibility and (if required) 'exceptional circumstances'. The discussion that follows will demonstrate that such predictions are complex in guilty plea cases, potentially making the cases more

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<sup>765</sup> Most CCRC cases are closed by a single Commissioner who makes the decision alone. Schedule 1 of the CAA 1995 stipulates that referrals must be made by at least three Commissioners but makes no such requirement for the rejection of cases. Under CCRC casework procedures, the only cases which reach a committee of three are those which are potential referral cases (as the statute requires that references are made by three Commissioners) or those which are particularly complex or difficult. The remaining cases are either rejected by a single Commissioner, the application having been first reviewed by a case review manager, or are rejected by a single Commissioner acting alone (in the case of Ineligible, Re-applications and No Appeal cases).

<sup>766</sup> The 'exceptional circumstances' provision discussed earlier in the chapter means that the CCRC has the power to refer a case despite it not having previously been the subject of appeal proceedings. This means that the CCRC cannot simply automatically reject cases which have not previously been appealed and must give some consideration to the existence of exceptional circumstances.



difficult to 'screen' and, in turn, having implications for the CCRC's management of its caseload.

Given that almost a quarter of CCRC applications are for review of guilty plea convictions,<sup>767</sup> the CCRC might be expected to have developed clear and detailed strategies for dealing with these difficult questions so that guilty plea cases can be screened and, where necessary, reviewed effectively and consistently. My examination of the written accounts of Commissioners' decisions<sup>768</sup> in guilty plea cases (discussed, in the next two sections, in relation to Crown Court and magistrates' court convictions) reveals, however, a broad and inconsistent range of approaches to guilty plea convictions. The CCRC's written guidance discussed in this chapter<sup>769</sup> conflicts with the approach taken in cases which are referred, which itself conflicts with the approach taken at the screening stage. These problems are a consequence of two issues highlighted already in this thesis; the lack of a coherent account of what makes a guilty plea conviction 'safe' or 'unsafe' within the current system and the prioritisation of efficiency in order to manage heavy caseloads.

### **Applying the real possibility test to Crown Court guilty pleas**

The 'real possibility' test requires the CCRC, when considering whether to refer an application, to predict how the Court of Appeal would respond to the case if it were referred. Real possibility is not defined in the Act but the Court of Appeal has held that it

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<sup>767</sup> Discussed at p.233 supra.

<sup>768</sup> In each case, the reasons for the decision are set out either in a formal 'Statement of Reasons' or in a letter to the applicant (depending on the complexity of the case). As a consequence, it is possible to examine of these accounts of the CCRC's reasoning in order to seek to understand the approach taken by the decision-makers.

<sup>769</sup> It should be noted that the written guidance discussed and referenced in this chapter is, except where specifically mentioned, the written guidance in force during the fieldwork period and the sample periods. More recently (and after I gave the CCRC an account of my initial research findings), the CCRC has altered its policy on the treatment of No Appeal cases (as discussed in detail at pp.296-301 below).

means more than ‘an outside chance or a bare possibility’ but less than a ‘probability or a likelihood or a racing certainty.’<sup>770</sup>

The predictive nature of the real possibility test means that unpredictable decision-making by the appeal courts will cause difficulties for the CCRC. The discussion of the case law in chapter 3 demonstrates that the Court of Appeal generally deems the guilty plea to be an acceptance by the defendant of ‘the truth of the prosecution case’; the defence lawyer is deemed to protect the ‘voluntariness’ of the guilty plea and the court confines appeals to narrow and generally technical categories of cases. The real possibility test would, therefore, appear to require the CCRC to mirror this approach and to reject guilty plea cases which fall outside these limited categories of cases. However, case law also demonstrates that, occasionally, compelling new evidence will cause the Court of Appeal to set aside ‘voluntary and unequivocal’ guilty pleas. This complexity means that the CCRC’s staff and decision-makers need to have a nuanced understanding of the law in this area and the possible ways in which the Court of Appeal may approach these cases.<sup>771</sup> The CCRC’s internal guidance in this area is, however, of limited assistance.

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<sup>770</sup> *R v Criminal Cases Review Commission ex p Pearson* [2000] 1 Cr. App. R. 141 at 149 per Lord Bingham CJ. The most recent Justice Committee report recommended that the CCRC should be ‘less cautious’ in its application of the real possibility test (House of Commons Justice Committee Report *The Work of the CCRC* 25 March 2015, HC 850 at para. 20.) The test for referral contrasts with the Scottish CCRC’s test, which requires the SCCRC to find that a miscarriage of justice may have occurred and that it is in the interests of justice that a reference should be made (Criminal Procedure (Scotland) Act 1995 s194C, inserted by the Crime and Punishment (Scotland) Act 1997). There is some dispute as to the degree of difference between the two tests in reality. Duff argues (in P Duff, “Criminal Cases Review Commissions and ‘deference’ to the courts: the evaluation of evidence and evidentiary rules” [2001] *Crim. L.R.* 341-362 at p.344) that the tests are significantly different whereas the SCCRC in the Final Report of its 10<sup>th</sup> Anniversary Research argued that both tests require the Commissioners to seek to mirror the approach of the appeal courts (SCCRC 10<sup>th</sup> Anniversary Research Final Report 2009 at p.10).

<sup>771</sup> Nobles and Schiff argue that there will always be exceptional cases which cannot be remedied by reference to the routine practices of the Court of Appeal so that the CCRC should ‘strain at the standards of the court’ by referring cases which are at the margins of the real possibility test.

The CCRC prepared a Casework Guidance Note,<sup>772</sup> which gives an account of the Court of Appeal's approach to guilty plea cases.<sup>773</sup> Having (correctly) stated that it 'will be a rare event' for the Court of Appeal to overturn a guilty plea conviction,<sup>774</sup> the document then lists a number of issues which have previously lead to a conviction being quashed.<sup>775</sup> The guidance note concludes<sup>776</sup> (somewhat unhelpfully) that the test in a guilty plea conviction case will be,

'whether there is a real possibility that the Court of Appeal will not uphold the conviction. However, the Court has repeatedly made it clear that only very unusual circumstances will persuade it to quash a conviction following a plea of guilty.'

My examination of the CCRC's thirty referrals of guilty plea convictions to the Court of Appeal<sup>777</sup> demonstrates that the principal issues leading to referral in each case all fall

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(Nobles, R., Schiff, D. (2005) The CCRC: Establishing a workable relationship with the CA. *Criminal Law Review*, pp173-189.)

<sup>772</sup> 'Casework Guidance Note 'Appeals against conviction following a plea of guilty' (obtained from CCRC system in September 2013. This document was marked as being 'currently under quite major reconstruction' and it had been so since at least 2012. The reasons for this are discussed further at p.295 below. MMT2 confirmed that the Commissioners (some of whom are not legally qualified) are likely to get their understanding of the law on guilty pleas from this document.

<sup>773</sup> When issuing advice and guidance to Commissioners and casework staff, the CCRC uses two main types of document. These are Formal Memoranda, which focus on policy matters and are published on the CCRC website, and Casework Guidance Notes, which tend to be more practical and which are not published.

<sup>774</sup> In this context the document outlines the judgments in *Forde* (note 466 supra) and *Kelly and Connolly* (note 435 supra).

<sup>775</sup> The issues listed are duress, erroneous legal advice, confusion over the counts, judge's error in law, prosecution error, prosecution malpractice (including abuse of process and false confession), 'overwhelming new evidence' and improper indications of sentence.

<sup>776</sup> In paragraph 45.

<sup>777</sup> Of the 49 guilty plea conviction cases referred to the appeal courts, 30 were Crown Court convictions which were, therefore, referred to the Court of Appeal (see note 753 supra).

within the list of issues in the guidance note.<sup>778</sup> Unsurprisingly, given the nature of the real possibility test, these referrals also fall squarely within established narrow pathways where historically the Court of Appeal has been willing to go behind guilty plea convictions.<sup>779</sup>

The principal reasons for these referral decisions are set out in the table below:

**Table 6: Referrals of Crown Court guilty plea convictions to the Court of Appeal (April 1997 to December 2013)**

Principal issue for referral	Cases
Abuse of process and/or erroneous advice from defence lawyers (relating to the defendant's status as an asylum-seeker)	7
Abuse of process (other than asylum/human-trafficking cases)	7
Guilty plea following a false confession resulting from police misconduct	6
New evidence	3
Erroneous legal advice (including 'no offence in law')	3
Abuse of process or erroneous legal advice (relating to the defendant's status as victim of human trafficking)	2
Change of law	2
<b>Total</b>	<b>30</b>

Despite these referrals being consistent with the examples in the guidance note and the categories of guilty plea appeals generally favoured by the Court of Appeal, it is important to look beyond the CCRC's referrals when considering its treatment of guilty plea cases. These thirty referral cases represent a tiny proportion (around 0.2%) of the decisions made by the CCRC in its lifetime. When I examined the CCRC's Statements of Reasons and decision letters in applications which were rejected<sup>780</sup> the appearance of consistency fell

<sup>778</sup> With the exception of two guilty plea convictions which were referred as a consequence of a change of law, which is not mentioned in the guidance note.

<sup>779</sup> As discussed in chapter 3.

<sup>780</sup> The CCRC refers to applications in cases which are rejected as 'non-referrals' and this term is used in the same way in this thesis.

away. It was apparent that there was no shared understanding of the law on guilty plea appeals and no consistent or coherent approach to the real possibility test in these cases. Different approaches were applied by different decision-makers. Although this problem is unsurprising given the inconsistent and confused approaches to guilty plea appeals discussed in chapter 3 above, it creates a risk that meritorious applications may be treated unduly severely by some decision-makers at the CCRC.

CM1, who ‘screened out’ a large number of cases (rejecting 15% of the randomly sampled No Appeal cases), stated in his decision letters that ‘the only basis upon which a conviction resulting from a guilty plea may be overturned is if there is compelling evidence that the plea is not a voluntary one.’<sup>781</sup> By focusing the test on the voluntariness of the plea, CM1 set the guilty plea up as a barrier to consideration of the evidence in the case. As he said in some of his letters,<sup>782</sup> the conviction is ‘founded on the guilty plea and not on the evidence in the case’. This means that evidence which might, for example, undermine the integrity of two prosecution witnesses could have ‘absolutely no bearing’ on the safety of the conviction because those witnesses said nothing about whether the plea was voluntary.<sup>783</sup> In another case,<sup>784</sup> CM1 refused to make enquiries regarding potential retraction evidence from the key prosecution witnesses and rejected the application at the No Appeal stage. He said that the reliance on potential retraction evidence was ‘entirely misconceived’ because the witnesses ‘will not be able to shed any light upon the advice received from his

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<sup>781</sup> Case 82 – letter setting out reasons for the decision not to refer. This phrase is echoed in some of his other cases (Cases 67, 88, 98, 85, 93, 119 and 88 - the latter two of which were ‘no reviewable grounds’ cases).

<sup>782</sup> e.g. Cases 85 and 112.

<sup>783</sup> Case 98.

<sup>784</sup> Case 112.

lawyers at trial nor upon his state of mind and his perceptions.’<sup>785</sup> This approach was also reflected in the statement of reasons in a referral case<sup>786</sup> in which some of the prosecution witnesses had been roundly discredited in later cases. The CCRC observed that the defendant was convicted on the basis of ‘his own acceptance of guilt and not on the evidence of [the discredited witnesses]’ and that therefore the discrediting of the witnesses could not alone render the conviction unsafe.<sup>787</sup>

CM1’s insistence that the evidence in a guilty plea case is irrelevant because the conviction is founded on the guilty plea is problematic given that, as discussed in chapter 4 above, in deciding to plead guilty, the defendant will inevitably be influenced by the apparent strength of the prosecution case. If the prosecution evidence turns out to be seriously flawed, this should affect the safety of the conviction, regardless of the plea. As discussed in chapter 3 above, case law demonstrates that, occasionally, compelling new evidence will cause the Court of Appeal to set aside ‘voluntary and unequivocal’ guilty pleas. This means that, even if a conviction appears to be founded on a clear and voluntary guilty plea, the CCRC should be alive to the possibility that an investigation, using its unique powers, could lead to new material and a ‘real possibility’. As a consequence, it will not necessarily be safe for the CCRC to reject such cases without further investigation.

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<sup>785</sup> This decision was particularly striking because the application was accompanied by reliable new information suggesting that the defendant was susceptible to entering wrongful guilty pleas and had previously done so (the Commissioner decided that this was a matter that the applicant could take to the Court of Appeal himself).

<sup>786</sup> Case 64.

<sup>787</sup> Despite this view, the case was referred because the CCRC found that the plea resulted from oppression by the discredited witnesses and that this undermined the guilty plea on which the conviction was founded. Interestingly, the CPS took a slightly different approach in deciding not to contest the referred appeal and did not focus on the reasons for the guilty plea but reasoned that, had the prosecution known then what had been discovered about these witnesses, they would properly have offered no evidence. The Court of Appeal’s judgement suggests that the court approved of the CPS’s ‘perfectly proper’ reasoning.

It is unclear whether CM1's focus on the plea itself is a consequence of framing the guilty plea as evidence of guilt or as a waiver of a right to challenge the conviction. His dismissal of the relevance of other evidence in the case suggests it may be the latter. CM1's approach contrasts with the approach of other Commissioners who purport to base their convictions on a broader assessment of the evidence in the case.<sup>788</sup> This approach (which could be characterised as a 'holistic' approach, in that the Commissioner purports to look at the entirety of the case in reaching his decision) is based on a different understanding of what makes a guilty plea conviction safe. For CM1 it is sufficient to have a guilty plea that has not been undermined as being involuntary. For other Commissioners, however, the picture is more complex and the evidence in the case is relevant to the safety of a conviction.

The holistic approach was presented in rejection letters written by seven Commissioners<sup>789</sup> who conducted No Appeal screening. One Commissioner, for example, used standard paragraphs in his letters which explained why courts are reluctant to go behind guilty pleas before commenting on his overall assessment of the application,

'In practice, in view of the exceptionally strong nature of the evidence against you, it seems to me that it was an entirely sensible decision on your part to plead guilty, with a view to obtaining mitigation of sentence. [...] Overall, therefore (and leaving aside the question of whether exceptional circumstances could be identified), I am afraid that your very full submissions to the Commission can do nothing to overcome the basic problems that prevent a referral of your conviction to the

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<sup>788</sup> For example, CM3 in Case 104 states that he has reviewed the Crown Court file and he is 'entirely satisfied that you were right to plead guilty given the overwhelming weight of the evidence against you'.

<sup>789</sup> CM2, CM3, CM9, CM4, CM5, CM6 and CM7. (e.g. CM5 explained when interviewed that his approach was to see whether the guilty plea 'makes sense on paper').

Court of Appeal – your guilty pleas, and the strength of the evidence against you.

In summary, I have seen nothing in the paperwork in your case that casts doubt on the safety of your conviction.’

Whilst the holistic approach appears to allow Commissioners to take into account a broader assessment of a guilty plea case than the approach taken by CM1, further examination of these rejection letters reveal further important inconsistencies in the Commissioners’ approaches. Different Commissioners give very different interpretations of the law in their decision letters. CM2 (who closed 21% of the sampled No Appeal cases) used standard paragraphs including the statement that the guilty plea would be set aside only if the guilty plea ‘was not your choice but was entered equivocally’ (which appears to conflate the concepts of involuntary and equivocal plea). CM3 focused on the need for ‘overwhelming fresh evidence which demonstrates that the appellant did not commit the offence’<sup>790</sup> and CM4 looked for ‘proof of innocence.’<sup>791</sup> Finally, CM6 states that ‘The only way in which the Court of Appeal will allow a guilty plea to be re-opened is when there has been a ‘material irregularity’ in the proceedings, where there has been duress on the defendant to enter the plea or an error at law.’<sup>792</sup>

Taken together, the different Commissioner accounts of the law in these letters cover most of the relevant issues in guilty plea appeals. Individually, however, they do not necessarily give what they purport to give; that is an accurate picture of the range of circumstances that can, on rare occasions, lead to a guilty plea conviction being overturned. The different

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<sup>790</sup> In Case 81 and Case 83. CM4 explained at interview that he was looking for ‘evidence to show that a conviction may be quashed.’

<sup>791</sup> Cases 99 and 102. In interview MMT1 told me that he found it surprising that this phrase was used in CCRC decisions and MMT2 told me that his view was that the level of evidence required in such cases would be ‘way short of exoneration’.

<sup>792</sup> Case 144.



tests outlined could lead to very different outcomes in different cases. Nor do these individual accounts of the law on guilty plea appeals and the need for ‘exceptional circumstances’, taken alone, reflect the portfolio of guilty plea cases that the Commission has referred in the past.<sup>793</sup>

Some CCRC staff were aware of some of these problems and expressed concern that the CCRC may be taking too narrow an approach to the law on guilty pleas.<sup>794</sup> When asked about the differences between the ‘strict approach’ and the ‘holistic approach’ to the law on guilty pleas by Commissioners, MMT1 said that both were within ‘a range of possible responses which the Commission could sensibly give’ but suggested that some of the cases discussed in this chapter might have represented ‘an overly legalistic approach’ by former Commissioners.<sup>795</sup> When asked about these issues in interview, case review managers (and those who had previously worked as case review managers but had subsequently progressed to management roles) were overwhelmingly in favour of the holistic approach.<sup>796</sup> A number of case review managers also emphasised that it was important that the law should not be interpreted too narrowly because, despite the Court of Appeal’s ‘noises’ about overturning guilty pleas, ‘they are perfectly happy to do that if the justice of

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<sup>793</sup> See Table 6 supra.

<sup>794</sup> Heaton (note 241 supra) appears to have been alive to this problem when he referred (at pp. 304-405) to the danger that Commissioners response to cases involving ‘common assertions’ could become ‘almost a reflex’.

<sup>795</sup> CM7 identified case review managers (rather than Commissioners) as the source of the problem, commenting that ‘a lot of CRMs take the view that the case law is there as a mechanism to beat down guilty pleas by saying you won’t pass the first hurdle. I don’t think they apply it as flexibly as they could’. There was, however, no indication in the sampled cases that case review managers were taking this approach.

<sup>796</sup> Only CRM7 appeared to support CM1’s narrow interpretation of the law, saying that he would tell applicants that *‘you’re going to have to show that for whatever reason yours was an equivocal plea’* (although, on further questioning, CM7 could not explain what he meant by ‘equivocal plea’). CRM7 appeared to believe that there was a presumption against review of guilty plea convictions (saying *‘I know we are not going to review guilty pleas unless there is a good and valid reason for us doing so’*).

the system requires it'.<sup>797</sup> Similarly, CRM1 said that 'the law on guilty pleas is a little bit more open than I think generally speaking people at the Commission think it is. I think there is more scope to refer guilty plea cases.'

The CCRC's 'success rate' in appeals resulting from CCRC referrals is higher in guilty plea cases than in its referrals generally.<sup>798</sup> This might indicate that the CCRC is being more cautious in its Crown Court guilty plea referrals than in other cases and provide support for CRM1's comment. However, the high success rate in guilty plea cases is influenced by the tranche of immigration and asylum cases so it is difficult to evaluate the significance of these figures. What is clear from my research, however, is that the CCRC had not managed to give any guidance to its staff on what sort of 'very unusual circumstances' might amount to a real possibility other than the brief list in the guidance note. If staff are correct, however, that an overly narrow approach was being taken to real possibility, this is likely to have led to the rejection of some meritorious cases. This is not only a problem in Crown Court convictions. As the next section will demonstrate, the situation was worse in magistrates' court cases.

### Applying the real possibility test to magistrates' court guilty pleas

It is particularly difficult to apply the predictive real possibility test to guilty plea convictions from the magistrates' court because the Crown Court's appellate function does not extend

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<sup>797</sup> CRM4.

<sup>798</sup> Of the 49 guilty plea referral cases identified in this research, appeal decisions are available for 47 (two appeals having been abandoned). Of these 47 cases, 39 resulted in the conviction being quashed, a 'success rate' of 83%. According to the CCRC's own figures, the long term 'success rate' for all references (which would include both guilty plea convictions and those following trial) was 70.4%. (Criminal Cases Review Commission, *Annual Report and Accounts 2013/14*, HC 207, at p.21). However the 'success rates' in guilty plea cases will be heavily influenced by the tranche of immigration and asylum cases which were all successful except one.

to guilty plea convictions.<sup>799</sup> Other than cases referred by the CCRC, therefore, there is little case law on which the CCRC can base their predictions in magistrates' court guilty plea cases. This means that the CCRC will, through its referrals, considerably influence the law's development. Further problems are created because the Crown Court rarely gives detailed reasons for appeal decisions and decisions are rarely reported so are unlikely to lead to the development of a coherent body of case law.

The CCRC's guidance note on guilty pleas<sup>800</sup> explains that there is no right of appeal against guilty plea convictions in the magistrates' court but then states that there are 'a few exceptions' to this rule before setting out a brief account of the law on equivocal plea, appeal by way of case stated and the 'slip rule'.<sup>801</sup> Beyond saying that an equivocal plea is one that is 'ambiguous, or capable of more than one interpretation' the document does not explain the term in detail nor does it explain the limited interpretation generally applied by the courts (which requires the plea to be equivocal on its face).<sup>802</sup> This part of the document ends with the optimistic assertion that 'with all those possible ways of putting things right, it should be quite rare for the Commission to see magistrates' court guilty plea cases.'<sup>803</sup> In fact, although the CCRC receives fewer summary guilty plea

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<sup>799</sup> Prior to the CAA 1995, the only power that the Crown Court had was to remit those guilty pleas which were invalid due to duress, equivocality or as a plea in bar.

<sup>800</sup> The CCRC's guidance on guilty plea appeals from the magistrates' court is contained in the same Casework Guidance Note which sets out the approach of the Court of Appeal (see note 772 *supra*).

<sup>801</sup> The slip rule is discussed in chapter 3 at p.103 *supra*.

<sup>802</sup> In *Drew* (note 403 *supra*) the Court of Appeal said that an equivocal plea is one 'qualified by words which, if true, indicate that the accused is in fact not guilty of the offence charged [...] Such a plea is wholly different in character – and consequence – from the plea entered here which may have been reluctant or even wrong-headed but was in no sense ambiguous.'

<sup>803</sup> This generous interpretation of the availability of appeal against guilty plea conviction in the magistrates court is repeated in the CCRC document 'Questions and answers about the CCRC' which states that if you pleaded guilty in the magistrates court 'it may be possible to appeal against your conviction'. The document explains the standard process for appeal to the Crown Court and recommends that the applicant takes legal advice and attaches the appeal form under CPR rule 63.3.

conviction applications than those from the Crown Court, my research demonstrates that 43 such applications were closed during the three four-month sample periods.<sup>804</sup>

Moving on to the test for referral in magistrates' court guilty plea cases, the Casework Guidance Note relies upon the judgment in *R v F*<sup>805</sup> as establishing that, if the CCRC refers a conviction to the Crown Court, 'there will be a burden on the defence to establish that the guilty plea was involuntary, or otherwise equivocal' before the Crown Court will rehear the case. This interpretation of the judgment in *R v F* is incorrect, because the court in *R v F* stated that the CCRC referral power is not confined to the traditional categories of equivocal or involuntary plea but that a plea should be set aside on referral by the CCRC if it was 'an affront to justice.'<sup>806</sup> The guidance is, therefore, unduly narrow. Additionally, although the guidance document cites *Abwnawar*,<sup>807</sup> it does not address the broader interpretation in that judgment of the decision in *R v F* which allowed for a guilty plea to be set aside on the basis of abuse of process.<sup>808</sup> The guidance ends with a slightly broader formulation of the CCRC test for referral; 'Is there a real possibility that the Crown Court, after hearing evidence on the matter, will conclude that the plea falls short of being a voluntary and informed admission of guilt.' Taken as a whole, however, this guidance note

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<sup>804</sup> The CCRC's management system records venue in relation to each application, with three options: Crown Court, magistrates' court or 'Scheduled' (relating to terrorism offences in Northern Ireland). This data, combined with my identification of guilty plea applications suggests that, during the sample periods, the CCRC closed 43 summary guilty plea conviction applications and 281 Crown Court guilty plea conviction applications.

<sup>805</sup> The court in *R v F* (Mark) (unreported) but discussed in Elks, L. (2008). *Righting Miscarriages of Justice: 10 years of the CCRC*. London: Justice at p330 onwards (an appeal following a CCRC referral to the Crown Court) helpfully issued a detailed judgment.

<sup>806</sup> Paragraph 7 of the judgment in *R v F* (see discussion at chapter 3 supra)

<sup>807</sup> *Abwnawar, Abwnawar, Nazarian and Sohrabian* (note 417 supra).

<sup>808</sup> HHJ McGregor-Johnson said that it was common ground that the court should adopt the procedure in *R v F* 'whereby the burden was on the appellants to apply to change their guilty pleas. In the context of this case that meant that they had to satisfy us on the balance of probabilities that they had a valid claim to have the prosecution stayed as an abuse of process'

sets out a very limited interpretation of the real possibility in magistrates' court guilty plea cases.

Despite this narrow account of the law in the CCRC guidance, the research shows that, in practice, the CCRC has taken a wider approach to the real possibility test when it refers cases to the Crown Court, and has not focused solely on whether the plea was 'voluntary and unequivocal'. The research identified 19 magistrates or youth court guilty plea conviction referrals. The table below sets out the principal issues on which these cases were referred.

**Table 7: Referrals of magistrates' court guilty plea convictions to the Crown Court (April 1997 to December 2013)**

Principal issue for referral	Cases
Abuse of process and/or erroneous advice from defence lawyers (relating to the defendant's status as an asylum-seeker)	14
Abuse of process (non-asylum/trafficking cases)	2
Guilty plea following a false confession resulting from police misconduct	1
Erroneous legal advice (including no offence in law)	2
<b>Total</b>	<b>19</b>

The reasoning in these referred cases reveals that the CCRC adopted the broader approach outlined in the judgment in *R v F*, rather than the narrow approach from the guidance. For example, the statement of reasons in case 55 relies upon the 'affront to justice' passage in the *R v F* judgment and on the reference in *Kelly and Connolly*<sup>809</sup> to the rare circumstances in which an unequivocal and intentional plea of guilty can lead to an unsafe conviction. On this basis the CCRC concluded that there was a real possibility. Although the referrals to the Crown Court during the sample periods are dominated by the atypical batch of cases

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<sup>809</sup> Note 435 supra.

involving asylum seekers, the CCRC took this broader approach in all types of cases, and not just in the asylum cases.

The research interviews supported this broader interpretation of the law on appeals to the Crown Court. All of the case review managers and management staff interviewed (seven in total) rejected the idea implied by the guidance that the test for referral to the Crown Court should be confined to the 'equivocal or duress' categories.<sup>810</sup> None of the Commissioners interviewed sought to defend the approach set out in the casework guidance note (most did not know what the document said until they were told during the interview).<sup>811</sup>

Some Commissioners were, however, concerned that guilty plea applications were being rejected at the screening stages as a consequence of a more narrow approach being taken. CM7 was concerned that the risk of the CCRC wrongly screening out cases was particularly acute in cases deemed by Commissioners to be 'minor', which, he observed, will inevitably be magistrates' court cases. CM7 referred to one case in particular which involved 'a very minor offence but it generated what was potentially a massive miscarriage of justice - foul play on the part of the police. For some reason it's not sexy, it's not interesting, people don't want to invest a lot of time in it, it's difficult to get a Commissioner interested in it'. He went on to say, 'the combination of a fairly minor case and a guilty plea are two fairly high hurdles to cross before you can get anybody remotely interested in it'.

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<sup>810</sup> CRM6 had initially told me that *R v F* did confine it to these categories but it became clear that his interpretation of 'equivocal' was much wider than reported cases would support and included all cases where a judge was persuaded that the defendant was wrongfully convicted, whether or not the plea itself could be attacked. Interestingly, this CRM had many years experience in the magistrates' court and told me that his understanding of 'equivocal' was based on this practical experience.

<sup>811</sup> CM7 agreed that the guidance was inconsistent with the reasoning in the immigration and asylum referral cases. CM5 said that the test was wider and that, in reality, the court will look at 'the global argument', asking if the conviction should not stand, and then working backwards to find that the plea should be set aside.

CM7 and CM4 both said that the risk of wrongful conviction by guilty plea was particularly high in the magistrates' court.<sup>812</sup> CM4 said that there is 'a lot of ignorance definitely out there' in relation to appeals against magistrates' court guilty pleas and suggested that there was a need for the Commissioners to spend some time agreeing how to address applications involving magistrates' court cases.

There was evidence in the sampled cases that some cases were being rejected on the basis of the narrower approach set out in the CCRC guidance. In Case 174, for example, the applicant pleaded guilty on the day of trial in the magistrates' court but sought to have her plea set aside the next day, claiming that she had been put under undue pressure by counsel. The statement of reasons twice states that 'the only issue' for the CCRC to consider is 'whether [the applicant's] plea was unequivocal' and bases this decision upon the test in *Forde*<sup>813</sup> and the narrow interpretation of *R v F*. Overall, however, the overwhelming majority of decisions to reject magistrates court guilty plea applications are founded on the absence of previous appeal (discussed in the next section), rather than on the question of a real possibility, so there was relatively little discussion of the law on magistrates' court guilty pleas in the rejection letters.

This discussion demonstrates that there has been considerable confusion and inconsistency in the CCRC's approach to the real possibility test in magistrates' court cases. As the next section will demonstrate, the position of those who sought review of their magistrates' court guilty plea conviction became even more confused and perilous because of the CCRC's treatment of the issue of 'exceptional circumstances' to overcome the lack of previous appeal.

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<sup>812</sup> They said this was due to the number of unrepresented defendants, the levels of legal aid remuneration and limited disclosure.

<sup>813</sup> Note 513 supra.

## **‘No appeal’ cases and exceptional circumstances in guilty plea cases**

The requirement in the CAA 1995 that cases should not normally be referred by the CCRC unless they have previously been the subject of appeal proceedings is intended to ensure that the CCRC does not usurp the role of the appeal courts as the first port of call for those who wish to appeal their convictions. Despite this requirement, the research data demonstrates that more than 73% of applications to the CCRC for review of guilty plea convictions were cases in which the applicant has not previously appealed or sought leave to appeal against conviction.<sup>814</sup> Before examining how the CCRC has dealt with these cases, it is important first to consider why so few applicants in guilty plea cases have appealed against their conviction.

### **Barriers to appeal**

Chapter 3 discussed the way that appeal against conviction by guilty plea is limited by Parliament (in respect of summary convictions) and the Court of Appeal (in respect of Crown Court convictions). There are also, however, practical barriers and other disincentives to appealing against a guilty plea conviction. The defence solicitors interviewed for this research said it was very rare to be approached for advice on appeal against a guilty plea conviction.<sup>815</sup> Lawyer P2 expressed concern about the rarity of such approaches saying that ‘we’re not getting the enquiries in the cases where it looks like it was a plea of convenience’ and that he would ‘expect to see a lot more of that work’ given

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<sup>814</sup> 73% of the guilty plea cases closed in the sample periods were closed at the No Appeal stage. 32% of other cases were closed at the same stage. The proportion of applications which had not been appealed will be higher than this because many no appeal cases will proceed to review (and possibly to referral) on the basis that, as already discussed, the CCRC has identified possible exceptional circumstances. No data is available at present on the proportion of guilty plea cases getting through to the later stages of the CCRC process which are ‘no appeal’ cases.

<sup>815</sup> Lawyers B5, B2, B14 and P9 could not recall ever having been approached about an appeal against a guilty plea conviction. Lawyers P8, B1, P3, and P4 said they had been approached once. Lawyers B8, P5 and P1 recalled three such occasions.



the pressures on defendants.<sup>816</sup> Lawyers suggested that the explanation for the absence of enquiries is that, when advising on plea, they tend to present the guilty plea to the client as a final outcome: it would be wrong to permit a client to plead guilty thinking that he could easily change his mind later and appeal. As a consequence, lawyers suggested, clients are given the impression that they cannot appeal against such a conviction.

There are also other disincentives to appealing against conviction by guilty plea. Clients must be warned that those who unsuccessfully seek leave to appeal to the Court of Appeal face the possibility of a ‘loss of time direction’, meaning that the time served in prison by the appellant between lodging his application for leave to appeal and its dismissal will not count against his sentence.<sup>817</sup> The Court of Appeal can make this order if it considers the application ‘wholly without merit’ even if counsel advised that there were grounds for appeal.<sup>818</sup> Although the amount of ‘time lost’ is unlikely to be more than a few weeks,<sup>819</sup> it is easy to see why the risk might dissuade someone serving a short or medium prison term.<sup>820</sup> A person who pleads guilty in the magistrates’ court but (unusually) has grounds to challenge that conviction<sup>821</sup> not only faces the possibility of his sentence being increased

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<sup>816</sup> Interview with Lawyer P2.

<sup>817</sup> Criminal Appeal Act 1968 s29(1) and s31(2)(h). This can only be made if leave is refused and cannot be made if the case was referred by the CCRC or if the trial judge gave a certificate. See Taylor, P. *Taylor on Criminal Appeals*, 2nd edition, (2012) Oxford: OUP, chapter 11 for further discussion of this power.

<sup>818</sup> R v Gray [2015] 1 Cr. App. R. (S) 27 and R v Jeffers [2015] EWCA Crim.1435.

<sup>819</sup> Ali and Tiwari, v Trinidad and Tobago [2006] 1 WLR 269, discussed in *Taylor on Appeals* (note 817 supra) at para 11.07.

<sup>820</sup> Research suggests that appellants are indeed dissuaded from appealing due to the fear of a loss of time direction. (see Plotnikoff, J. and Woolfson, R. ‘Information and advice for prisoners about grounds of appeal’ (1993) RCCJ Research Study 18. London: HMSO at p.81 and Justice. *Remedying Miscarriages of Justice*. (1994) London: Justice, discussed in Pattenden (note 409 supra) at p.115).

<sup>821</sup> e.g. on the basis that it is an equivocal plea (see chapter 3 supra).

on appeal<sup>822</sup> but, if he receives legal aid and his income is over a certain limit, he can be required to pay a fixed costs contribution of £500 if his appeal is dismissed or abandoned.<sup>823</sup>

It is likely to be difficult to obtain funded representation for an appeal. Initial advice on appeal against conviction (whether in the magistrates' court or in the Crown Court) is covered by the existing (legal aid) representation order.<sup>824</sup> This means that a client who is convicted should receive this advice from his existing lawyer. In almost all cases involving guilty pleas this advice, coming from the lawyer who represented the defendant in his plea, is likely to be negative. As one Commissioner and experienced criminal defence lawyer put it, once the defendant has pleaded guilty 'the only rational advice' that his solicitor or barrister can give is that there are no grounds for appeal against conviction. In these circumstances, the lawyer receives no additional payment for giving this negative advice.<sup>825</sup> In the unlikely event that the existing lawyer advises that there are grounds for appeal (e.g if new issues come to light shortly after sentence) then funding is available,<sup>826</sup> although the

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<sup>822</sup> This power is available even if his appeal is only against conviction (s48 SCA 1981). This provision does not apply if the case is referred by the CCRC (s11(6) CAA 1995).

<sup>823</sup> *Taylor on Appeals* (note 817 supra) para. 16.29. Research by Plotnikoff and Woolfson (note 820 supra) suggests, however, that counsel may not comply with their duty to advise on appeal. One in four prisoners said that they had not received advice on appeal within the time limits for lodging notice of leave to appeal.

<sup>824</sup> *Ibid* para. 16.01.

<sup>825</sup> CM5 suggested that, in order to avoid this unremunerated work, lawyers may simply fail to tell a client who pleads guilty that they are entitled to advice on appeal.

<sup>826</sup> For appeal from a summary conviction, this work is funded through a representation order provided that the appellant satisfies the interests of justice test and an (income-based) means test. (*Taylor on Appeals* (note 817 supra) para. 16.24). For appeal against Crown Court conviction, the work will be separately funded through the Court of Appeal. If leave is granted then (non-means tested) legal aid will usually be granted for counsel only (funding can extend to a solicitor or additional counsel in certain circumstances but this may be limited to cover only specific work). If leave is refused by the single judge then there is no further legal aid funding available (other than for written advice on the possibility of renewing the application for leave to the full court). (*Taylor on Appeals* (note 817 supra) paragraphs 16.37 to 16.42.)

current rates of pay mean that it is difficult for firms to cover their costs doing appeal work. The experienced criminal appeals lawyer Steven Bird says that 'undertaking this type of work on public funds is not something that any firm would do as a sound business strategy.'<sup>827</sup> Lawyer P2 referred to this problem similarly when interviewed for this research, saying that this work is 'a pretty unattractive prospect which is why a lot of firms don't touch it with a barge pole. You could walk into twelve firms in [the county] before someone agreed to take on a case like that.'

Having received negative advice from his original lawyer, the potential appellant can seek further advice but, again, this funding is limited. If (as is likely in such cases) the client has previously received negative advice on appeal, the scheme will not fund further advice if the advice was 'recent' and where it appears that all issues have been considered.<sup>828</sup> Otherwise, the new firm can give advice under the legal aid 'Advice and Assistance' scheme if the client is financially eligible<sup>829</sup> and if he satisfies the 'sufficient benefit' test<sup>830</sup> but if it becomes apparent that the sufficient benefit no longer exists, work must stop.<sup>831</sup> In all the circumstances, it may be difficult for a defendant who has pleaded guilty to persuade a solicitor that there is 'sufficient benefit' in giving him further advice on appeal. Only if the

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<sup>827</sup> Bird, S. 'Public Funding for Criminal Appeals.' (2015) CALA conference presentation. London. November 2015.

<sup>828</sup> SCC 2010 Specification Part B (note 830 below) at para.11.5. *Taylor on Appeals* (note 817 supra) suggests 'recent' means about 6 months (footnote to para.16.96). If, however, there may be a problem with the previous advice or the proceedings, further advice may be justified (para. 11.6.)

<sup>829</sup> The financial test includes income and capital limits so that the test can exclude even those in prison if they have capital over £1000 (excluding the equity in their home but including their partner's capital).

<sup>830</sup> Ibid para. 16.44. The sufficient benefit test requires that 'there is sufficient benefit to the client, having regard to the circumstances of the matter, including the personal circumstances of the client, to justify work or further work being carried out': Legal Aid Agency. *Standard Crime Contract 2010 Specification Part A*. Para. 3.10. At <https://www.gov.uk/government/publications/standard-crime-contract-2010>, on 8/3/16. This funding is restricted to £300 (Criminal Legal Aid Regulations 2013 Schedule 4, paragraph 8) but this can be extended on application to the Legal Aid Agency.

<sup>831</sup> Ibid, para. 3.12.

application for leave were granted would legal aid be granted through the Court of Appeal as set out above.<sup>832</sup>

If the prospective appellant is unable to persuade a solicitor to take on his appeal on legal aid rates, he might consider funding this privately but this is likely to be prohibitively expensive. As Lawyer P2 pointed out, a client will be reluctant to fund the 'open-ended' work that would be required for a complex appeal, given that the solicitor is likely to have told him that he had limited prospects of success. He could make the application without representation but, although it is not technically necessary to be represented to apply for leave to appeal, in reality it is very difficult to do so without legal advice.<sup>833</sup> By the time the appellant reaches this position he is likely to be 'out of time' for his appeal which raises an additional procedural hurdle.<sup>834</sup> If the convicted person is in prison, he will have great difficulty in accessing case papers and information on grounds for appeal against conviction by guilty plea. He will also need to complete the relevant appeal forms. Given these problems, it is likely that only a very resilient and determined person will persist in making an unrepresented application for leave to appeal in the face of previous negative advice from lawyers.

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<sup>832</sup> Note 826 supra.

<sup>833</sup> Plotnikoff and Woolfson's research (note 823 supra) suggests that unrepresented appellants are less successful in their applications for leave to appeal even though they are not necessarily without merit and the RCCJ report (note 87 supra at chapter 10, paragraph 23) expressed concern about this 'disadvantage'.

<sup>834</sup> A defendant convicted in the magistrates' court must lodge notice of appeal within 21 days or will need leave to appeal. In deciding whether to grant leave, the judge will consider the reasons for the delay and the merits of the proposed appeal (*R (on the application of HMCE) v Maidstone Crown Court* [2004] EWHC 1459). A person convicted in the Crown Court must lodge notice and grounds of appeal within 28 days of conviction (Criminal Appeal Act 1968, s18 and Criminal Procedure Rules, rule 68.2(1). Extensions can be sought in certain circumstances). If this time limit is missed, an application must be made for leave to appeal out of time and the Court will consider the prospects of success (*Marsh* (1936) 25 Cr. App. R. 49, CCA) and the reasons for the delay (*Rigby* (1923) 17 Cr. App. R. 111).

In the circumstances, the CCRC's role as a potential safety net in such cases becomes of critical importance in ensuring that those who are wrongfully convicted by guilty plea as a consequence of systemic or other pressures have some remedy. Unfortunately, as the following discussion demonstrates, the CCRC cannot be relied upon to fulfil this role. I will argue that the primary reason for this is the CCRC's prioritisation of efficiency in the treatment of No Appeal cases, which is a consequence of high application rates and resourcing issues. This discussion of No Appeal cases is important because it demonstrates how the barriers to appeal and resource pressures at the CCRC combine to limit the remedies for wrongful conviction by guilty plea.

#### **The CCRC's approach to No Appeal cases**

Given the legal and practical barriers to appeal in guilty plea cases, it is unsurprising that so few applicants in guilty plea cases have previously applied for leave to appeal against conviction. It is clear that the CCRC is aware of these barriers. When Commissioners and other CCRC staff were asked why so many of the applicants who had been convicted by guilty plea had not been to appeal, most said that this was the result of the unavailability of appeal from the magistrates' court,<sup>835</sup> the difficulty in getting positive advice from the existing lawyer<sup>836</sup> and the difficulty in getting funding for advice from another lawyer.<sup>837</sup> CM3 said that he personally 'wouldn't even dream of' trying to complete the 'appallingly bad' Form NG (the form which must be completed to apply to the Court of Appeal for leave to appeal).<sup>838</sup> He commented that, without funding for an appeal, an unrepresented appellant is 'stuffed'.

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<sup>835</sup> Mentioned by CM3, CM5, MMT1, MMT2.

<sup>836</sup> Mentioned by CM5, CM7, MMT1, MMT2, CRM6, CRM1.

<sup>837</sup> Mentioned by CM3, CM5, CM7, CM10, MMT1, CRM1.

<sup>838</sup> Interview with CM3.

If someone in this situation asks the CCRC to use its powers to review his conviction, the CCRC will only be able to refer that case if it has identified exceptional circumstances to overcome the lack of prior appeal proceedings (in addition to satisfying the other requirements of the CAA 1995). The discussion below will demonstrate that the CCRC has found it difficult to establish a consistent approach to what might amount to 'exceptional circumstances' to overcome the lack of appeal and that guilty plea cases (which are unlikely to have been appealed before) are at a very high risk of being rejected as No Appeal cases, with little or no investigation being carried out.

When the CCRC receives an application from a person who has not sought leave to appeal against his conviction, in circumstances where there are no obvious 'exceptional circumstances' to overcome the lack of appeal, there are two possible responses. One response is to investigate the case as normal, aware that, if that investigation leads to the identification of a 'real possibility' then it will also be necessary to identify 'exceptional circumstances' if the referral is to be made. Once the CCRC has identified a real possibility that the case will be quashed by the appeal courts, the case might more easily then be considered to fall within the 'exceptional' category that would justify a referral in the absence of appeal.

The alternative approach (and one that has enormous efficiency benefits for the CCRC) is simply to reject the application without further enquiry on the basis that there has been no prior appeal. This approach is based on the fact that, as has already been discussed, the CCRC was created to be a last resort for applicants who had already exhausted the normal appeal process. Those applicants who still have a right to apply for leave to appeal (albeit that this will usually be an 'out of time' application) arguably do not need to use the CCRC process. On this basis, it can be argued that, unless exceptional circumstances can be identified at the No Appeal screening stage, the CCRC should not look further at the case to

consider whether there is a real possibility. Such an approach allows the CCRC to ‘screen out’ large numbers of cases at the NA screening stage having simply determined that there are no exceptional circumstances to overcome the lack of appeal.

Confusingly, both approaches are reflected in the CCRC’s guidance and policy which was in force during the sample and fieldwork periods<sup>839</sup> and which dealt with this issue. The Formal Memorandum on exceptional circumstances appears to support the second approach, suggesting that the case can be rejected if the Commissioner cannot identify likely exceptional circumstances at the No Appeal stage.<sup>840</sup> The CCRC’s guidance on ‘no appeal cases’ contains a similar provision<sup>841</sup> and states that, if it becomes apparent at any stage that there are no exceptional circumstances then (even if a real possibility has been identified) as a general rule the case should be closed and the applicant be invited to go to the appeal courts himself.<sup>842</sup> It also suggests that the existence of a real possibility is not in itself sufficient to amount to exceptional circumstances; the fact that the use of the CCRC’s powers has produced, or might produce, fresh evidence giving rise to a real possibility is not necessarily sufficient; and that a change of law will not normally be enough.<sup>843</sup>

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<sup>839</sup> ‘Casework Guidance Note: Exceptional Circumstances’ (obtained from CCRC system in September 2013 and produced in July 2011) and ‘Formal Memorandum: Exceptional Circumstances’ (obtained from CCRC system in September 2013 and that version last updated 21 January 2013). Since this fieldwork was conducted the CCRC has implemented a new approach to No Appeal cases and this is discussed further at p.296 below.

<sup>840</sup> It states that, when reviewing an application at the No Appeal stage, the Commissioner must consider whether an investigation might give rise to both a real possibility and exceptional circumstances (Formal Memorandum (ibid) at paragraph 12).

<sup>841</sup> The guidance note (note 839 supra) sets out a ‘guiding principle’ that the Commission ‘should only review applications’ (note that it says ‘review’, not ‘refer’) which properly fulfil the section 13 requirements ‘unless there is good reason to justify a departure from that general rule’.

<sup>842</sup> Casework Guidance Note (note 839 supra), paragraphs 45-50.

<sup>843</sup> Formal Memorandum (note 839 supra). The Formal Memorandum goes on to state, however, that (in contrast to the unpublished casework guidance note) if a case gets through the ‘no appeal’ screening stage, the case reviewer should look for a real possibility as normal and will only consider exceptional circumstances to overcome the No Appeal should a real possibility be identified, at

However, the guidance note then contradicts these statements when it asserts that ‘no application will be rejected out of hand simply on the basis that the pre-conditions in s13 are not met’ and that the case must be examined ‘to the extent that it is necessary to make a fair and informed decision about real possibility and exceptional circumstances’.<sup>844</sup> This would appear to support the first, more generous, approach discussed above.

There is further uncertainty when it comes to the CCRC’s policy on applications involving guilty pleas in the magistrates’ court. Given the limitations on appeal from the magistrates’ court, it is unclear whether it is appropriate to reject such cases on the basis that they have not previously been appealed. The Formal Memorandum mentions this issue and requires that all No Appeal cases where the applicant is ‘legally barred from pursuing an appeal’ should be considered by a Commissioner to determine whether an investigation might give rise to a real possibility and exceptional circumstances.<sup>845</sup> However no guidance is given on whether the lack of appeal rights could itself amount to ‘exceptional circumstances’. As this chapter will later discuss, since the research period, the CCRC has changed its guidance on this issue.<sup>846</sup>

Despite the relatively strict approach to No Appeal cases set out in the guidance, it is clear from the cases examined for this research that, in practice, once the CCRC has identified a ‘real possibility’ in a case, it has taken a very generous approach to finding ‘exceptional

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which point the decision-maker(s) will then need to decide whether any such exceptional circumstances exist.

<sup>844</sup> Ibid, at paragraph 15.

<sup>845</sup> Formal Memorandum (note 839 supra), paragraph 12.

<sup>846</sup> See p.296 below.



circumstances'. My examination of the referred cases reveals that 39 of the 49 guilty plea cases referred by the CCRC were No Appeal cases<sup>847</sup> so the CCRC had to identify 'exceptional circumstances' in those cases to overcome the lack of prior appeal proceedings. An examination of the Statement of Reasons in each case reveals the CCRC's explanation for its finding of exceptional circumstances and this is set out in the table below:

**Table 8: Exceptional circumstances justifying referral of cases in the absence of appeal (April 1997 to December 2013)**

<b>'Exceptional circumstances' cited in referral Statement of Reasons</b>	<b>Number of cases</b>
It was necessary to use CCRC powers to investigate the case	11
The case was one of a tranche of similar cases which should be heard by the same court	11
The applicant pleaded guilty in the magistrates' court so had no right of appeal	9
The law had changed since the applicant was convicted	2
The co-defendant's case was being referred and they should be heard together	1
The applicant had previously received legal advice that there were no grounds of appeal	1
The information giving rise to the real possibility was not known about at the time of the conviction	1
Given the lapse of time since the conviction, it is not feasible for the applicant to mount his own appeal	1
The vulnerability of the applicant at the time of the conviction and initial decision not to pursue an appeal together	1
The exceptionality of the case	1
<b>Total</b>	<b>39</b>

<sup>847</sup> Only six of the 30 referrals to the Court of Appeal and only four of the 19 referrals to the Crown Court had previously been the subject of conviction appeal proceedings.

It is difficult to identify a coherent approach to exceptional circumstances from these cases. Many of the decisions appear to be founded on the CCRC having already conducted the review; this may make it expedient for the CCRC to refer the case to the appeal court (with supporting materials), rather than requiring the applicant to make his own application for leave to appeal out of time.<sup>848</sup> In other referred cases, the CCRC simply appears to consider why the applicant did not appeal at the normal time after conviction, rather than why the applicant could not now bring his appeal without the CCRC's help. Given the uncertainty about the policy on No Appeal in magistrates' court guilty plea cases, it should be noted that in nine cases the 'exceptional circumstances' arose out of the absence of appeal rights in the magistrates' court.

This analysis demonstrates that, once an investigation has been conducted and a 'real possibility' identified, the CCRC has had little difficulty in finding some 'exceptional circumstances' to overcome the lack of appeal.<sup>849</sup> Given this, it seems clear that the question of whether exceptional circumstances exist should be considered after the CCRC has investigated whether there is a 'real possibility'. This approach reflects the views expressed by case review managers in the research interviews, who all said that they did not feel unduly constrained by issue of finding exceptional circumstances to overcome the

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<sup>848</sup> This would explain the cases which involve 'one of a tranche of cases' or the referral of the co-defendant's case. It would also explain why it is relevant that the CCRC needed to use its powers to review the case (at first sight it would appear that this issue provides justification for investigating the case in the absence of a previous appeal, rather than for referring it).

<sup>849</sup> Although there were occasions when guilty plea cases which had been investigated by the CCRC were rejected by a committee (of 15 guilty plea cases which reached committee but were then rejected, nine had not previously been to appeal), analysis of these decisions suggests that the absence of previous appeal proceedings was rarely determinative; the committee having reviewed the issues in the case and then focused on their finding that there was no real possibility, while also commenting on the absence of exceptional circumstances. There was, however, one case in which the committee stated that the absence of exceptional circumstances to overcome the lack of previous appeal meant that the CCRC 'has not reviewed any of the matters raised by [the applicant] in relation to his conviction' (Case 50).

lack of appeal and that their fundamental aim in investigating a case was to look for a real possibility.<sup>850</sup> However such an approach would raise significant problems for the CCRC as it suggests that the organisation could not use the absence of previous appeal and lack of exceptional circumstances as grounds for rejecting an application unless it has already conducted an review to establish whether there is a real possibility (i.e the CCRC could not rely on No Appeal as an early screening mechanism). This would create significantly more work (and resource problems) for the CCRC.

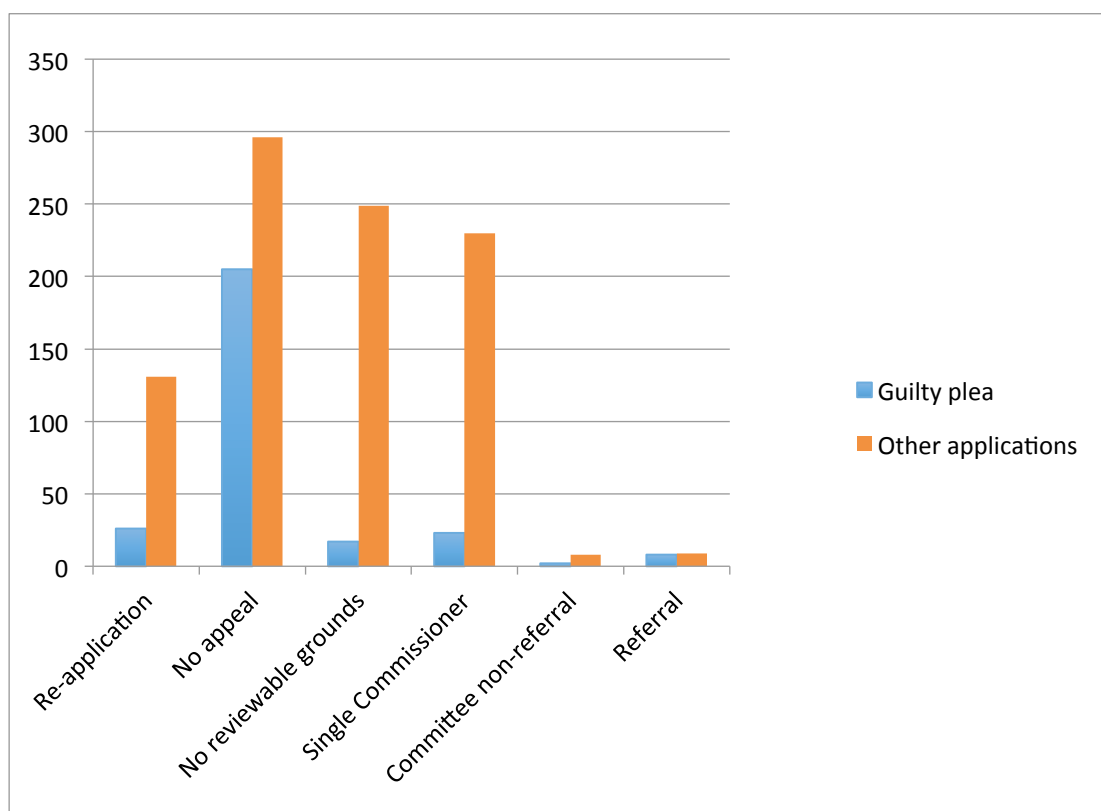
Analysis of the research data reveals that the CCRC has routinely used the lack of previous appeal to 'screen out' a high proportion of cases at the earliest stages of the CCRC process with the little oversight. Because guilty pleas are significantly more difficult to appeal than trial convictions, this screening inevitably affects guilty plea cases more than not guilty plea cases. The analysis of case closure statistics from the sample periods (having examined each case to determine which applications are guilty plea conviction applications) demonstrates this pattern of case closures.<sup>851</sup>

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<sup>850</sup> CRM4 said that the CCRC will find exceptional circumstances if they have found a real possibility. CRM1 said 'I don't think we should be massively worried about the statutory hurdles or guilty pleas' and took the view that he was just looking to see whether something has 'gone wrong'.

<sup>851</sup> See page 228 for an explanation of the CCRC's case stages.

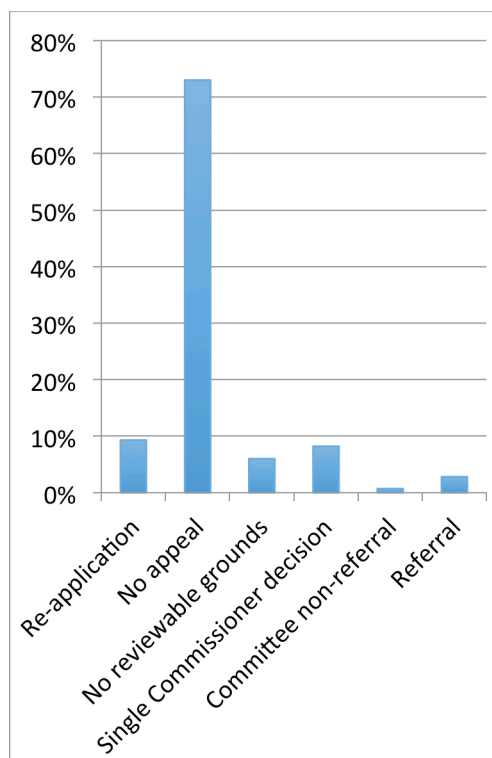
**Table 9: Stage at which applications are closed**



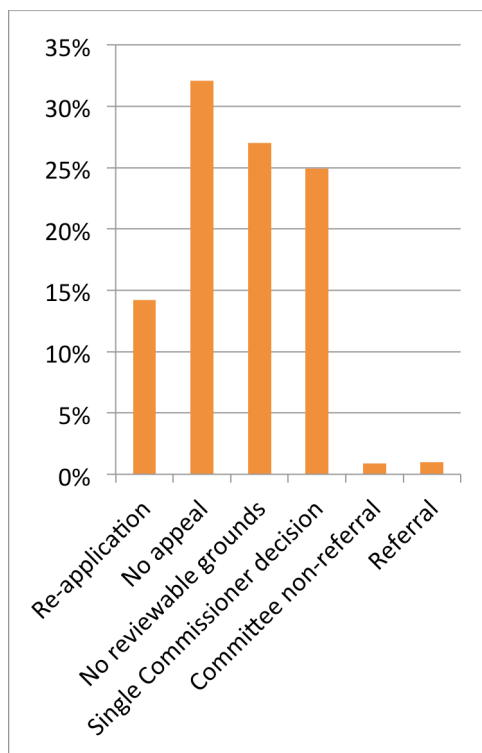
It can be seen that guilty plea conviction were overwhelmingly likely to be closed at the No Appeal stage whereas other applications, whilst vulnerable to closure as no appeals, were significantly more likely to reach the no reviewable grounds or single commissioner stage.

Another way to show the same information is to show case closures at each stage as a percentage of applications of that type. This is shown for guilty plea conviction applications and for other applications in the two tables below:

**Table 10: Stage at which guilty plea applications are closed**



**Table 11: Stage at which other applications are closed**



This data illustrates how critical the No Appeal screening stage is for applicants who have pleaded guilty. The No Appeal stage represents a particularly abbreviated form of review. If an application survives the screening process, a case review manager will consider the application before a decision is made either by a single Commissioner or by a committee of three Commissioners.<sup>852</sup> In contrast, cases closed at the No Appeal stage at this time will normally have been closed either by an administrator (under the pilot scheme discussed below) or by a single Commissioner acting alone. Guilty plea convictions are at very high risk of their application being rejected at this stage.

<sup>852</sup> Decisions are made by three Commissioners if the review has identified material which may give rise to a 'real possibility' (because the CAA 1995 provides that at least three Commissioners are required for a decision to refer a case).

Given that the CCRC guidance from this period is unclear about ‘exceptional circumstances’ with respect to the limitations on appeal against guilty plea conviction in the magistrates’ court,<sup>853</sup> it is interesting to note that 74% of magistrates’ court guilty plea cases (excluding those closed as ineligible or as re-applications revealing nothing new) were closed at the No Appeal stage as a result of there being no exceptional circumstances to overcome the lack of appeal.<sup>854</sup> Nine of these 26 cases fell within the random sampling and were examined in detail.<sup>855</sup> The case records for these nine cases do not reveal any indication that the decision-makers considered the relevance to exceptional circumstances of the limitations on appeal. Indeed, in six cases<sup>856</sup> it seems obvious that the decision-maker did not appreciate the issue at all, as in those cases the applicant was advised to seek leave to appeal himself and was sent a copy of the (Court of Appeal) Form NG, something which was of no use in mounting an appeal from the magistrates’ court. In Case 97 the Commissioner told the applicant that he had ‘all the information that you would need to launch your own application for leave to appeal out of time’ and suggested submitting an application on form NG. Three of these cases involved applicants who appeared to be strikingly vulnerable (one of whom had been upsetting administrative staff by spending long periods on the telephone to them crying and expressing suicidal thoughts,<sup>857</sup> another

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<sup>853</sup> See note 845 supra.

<sup>854</sup> In the three sample periods 26 magistrates’ court guilty plea conviction applications were closed as No Appeal, eight cases as ineligible or re-application, four as No Reviewable Grounds, one was rejected by a single Commissioner after a review, one by a committee after review and three magistrates’ court guilty plea convictions were referred.

<sup>855</sup> Cases 72, 76, 97, 106, 134, 140, 142, 154 and 164.

<sup>856</sup> Cases 97, 106, 134, 140, 142 and 164.

<sup>857</sup> Case 164.

claimed to have ‘acute mental health problems’<sup>858</sup> and the final applicant repeatedly asked in his letters ‘I have brain injury?’).<sup>859</sup>

These decisions are striking given that, when interviewed during the fieldwork period, most casework and management staff indicated that the fact of the case involving a magistrates’ court guilty plea would in itself be considered to give rise to exceptional circumstances to overcome the lack of appeal.<sup>860</sup> Some Commissioners, too, were adamant that there would be exceptional circumstances in this situation. One, who had considerable experience of the criminal courts, told me that it would be wrong to reject such a case and require the applicant to use ‘a slightly arcane appeal mechanism’ of which, he said, most lawyers would not be aware.<sup>861</sup>

Given the contradictory nature of the CCRC policies and guidance, decision-makers appear at this time to be left with the flexibility to take either the strict approach to No Appeal (i.e. rejecting any case which does not reveal ‘exceptional circumstances’ regardless of the potential for finding a ‘real possibility’) or a more generous approach. In the examination of cases closed during the sample periods by Commissioners acting alone at the No Appeal stage, Commissioners’ accounts in their decision letters purport to show that the decision-makers were looking beyond the lack of appeal to consider the wider merits of the application and whether a review might lead to a ‘real possibility’. However, during the sample periods, the overwhelming majority of cases were closed by a small number of Commissioners (around two thirds of the guilty plea cases closed as No Appeal were

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<sup>858</sup> Case 142.

<sup>859</sup> Case 134.

<sup>860</sup> This included MMT1 and MMT2 as well as a case review manager who provides training sessions for new staff and Commissioners (who said that this training addressed this point specifically).

<sup>861</sup> Although two Commissioners (CM4 and CM7) reflected the approach in the Formal Memorandum and stated that the fact of a magistrates’ court guilty plea would be one factor, but not enough on its own.

rejected by one of three Commissioners, with the remaining No Appeal cases being either closed administratively or by one of seven other Commissioners). The evidence discussed below suggests that many of these cases were subject to a more hostile approach to guilty plea cases than the letters purport to show. This raises the possibility that the accounts in these letters may be disguising the priorities which really lie behind these single member decisions.

In order to explain this issue, it is necessary to focus on the work of a single Commissioner, CM3, who was responsible for 32% of the sampled No Appeal closures in guilty plea cases. CM3 claimed that he was the single member decision-maker in an average of 240 cases per year. Given that the CCRC's annual rate of case closure during the three years before this fieldwork began varied from 878<sup>862</sup> to 1274<sup>863</sup> and there were, for most of this period, nine or ten Commissioners in post at a time,<sup>864</sup> it is possible to see the extent of CM3's possible influence. It is not suggested that this Commissioner's approach is representative of that taken by all Commissioners but it is important to discuss his approach because there were times when he was 'doing single-handedly about two thirds of the No Appeal cases that came into the Commission. So in practice that means that I am the policy maker and decision maker for the Commission'. In effect, as CM3 put it, 'what I do is the view of the Commission' (original emphasis). As he said later, when discussing the test for referring a guilty plea case, 'it doesn't really matter whether I'm right or wrong. If I'm doing two thirds of the cases then my answer is the right answer'.

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<sup>862</sup> 878 cases were completed in 2011/2012 and 947 in 2010/2011 (Criminal Cases Review Commission, *Annual Report and Accounts 2011/12*, HC 390, at p.21).

<sup>863</sup> In 2012/2013, the CCRC received 1625 applications and, according to the CCRC's Annual Report for that year, completed 351 fewer cases than it had received (Criminal Cases Review Commission, *Annual Report and Accounts 2012/13*, HC 482, at p11).

<sup>864</sup> CCRC Annual Report and Accounts for; 2010/2011 (Criminal Cases Review Commission, *Annual Report and Accounts 2010/11*, HC 1255); for 2011/2012 (op cit) and for 2012/2013 (ibid).



CM3's rejection letters in guilty plea cases at the screening stage purport to take a 'holistic' approach, considering the case as a whole in the light of the appeal courts' approach to guilty plea cases. The letters suggest that CM3 is taking into account the fact of the guilty plea and, if relevant, the absence of appeal, but not to the exclusion of the wider issues in the case. When asked about his approach at interview, however, CM3 gave an account of this work which suggests that his approach may be more narrow than the rejection letters would suggest.

CM3, who estimated that up to 40% of the convictions he dealt with at the CCRC were guilty plea cases, was adamant that there was not a 'substantial risk' of defendants being wrongfully convicted by guilty plea. He explained that his starting point with such cases was 'you're lying now or you were lying then' and said that, apart from some 'special categories' of guilty plea cases (and in this respect he mentioned immigration and asylum cases and cases involving false confessions resulting from police misconduct), he did not remember being worried by any guilty plea cases. He was also keen to stress that the problems of the criminal justice system that gave rise to these 'special categories' were in the past (saying that the immigration and asylum cases, were 'a major issue but it's addressed' and that the forced confession cases were 'a major historical area where you know the huge miscarriages have, thank God, been put right').

CM3 said the No Appeal screening work was not 'intellectually particularly challenging most of the time' but that he tended to write lengthy rejection letters because he sought to give the applicants 'closure.'<sup>865</sup> The work was depressing, he said, because it was usually clear from very early on that the case was hopeless and 'not going to go anywhere' but he still had to go through the 'slightly laborious' CCRC process.

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<sup>865</sup> In this context, CM3 expressed concern that, by giving 28 days to respond to a provisional decision not to refer, the CCRC was in some way giving false hope to applicants.

Although other interviewees had commented on the difficulty of deciding No Appeal cases given how little case material was available at that stage,<sup>866</sup> CM3 was confident that he had sufficient material to reach a view on the evidence. He explained that, for his 'own satisfaction', he liked to decide for himself 'do I think you did it or not'. In practice, he said, this amounted to saying 'have I seen enough evidence on the file to suggest that it was a reasonable decision on your part to plead guilty weighing the odds of what might happen.' When questioned as to whether it was possible to reach a conclusion about this, given that the available paperwork would inevitably primarily reflect the prosecution case, CM3 responded that many of the cases were magistrates' court cases and so he 'actually had the full file' and therefore felt that he got to see 'both sides'.<sup>867</sup> CM3 conceded that 'clearly there's potential for bias' but said that he was very interested to see 'what was said in the pre-sentence report and things like letters to the judge'. He said that 'very often you have got quite a lot of material left which contradicted' the applicant's account.

CM3 conceded that his was a 'confident' approach and contrasted with that of other Commissioners who would go to greater lengths to investigate a case. He expressed concern that other Commissioners 'weren't decisive enough' and would 'start again' with investigating a case. In his view he had a responsibility 'to be pretty decisive' because 'ultimately none of us was there at the time that the crime was or was not committed so the idea that by spending long enough you will get it right is I think a mistake'.

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<sup>866</sup> For example, CRM6, who had recently become involved in No Appeal screening, commented that the 'big difference' between that screening and the usual casework was the limited amount of material available to the decision-maker. He said that this meant that 'the "tool kit" that you normally have is not available to you.'

<sup>867</sup> These assertions appear to reflect a significant misunderstanding of the material which is available in magistrates' court cases. As discussed in chapter 4, in guilty plea cases the court will usually only have sight of the prosecution's advance information, the pre-sentence report and the other information given by both sides at the sentencing hearing (at which point, as discussed in chapter 4, the defence is not, in any event, permitted to mention any material which undermines the basis of plea).

### The bulk processing of applications

This Commissioner's interview reveals that this 'decisive' approach reflects a prioritisation of efficiency at the early stages of the CCRC process which contrasts with the way that cases are handled later in the CCRC process. This phenomenon is not unique to CM3 but has long been part of caseload management at the CCRC.<sup>868</sup> CM3 identified with former Commissioners, CM12 and CM13, who were known for closing large numbers of cases at the screening stage. He told me that he learned by 'sitting at the heels' of CM12 and that, 'I was the bulk man, I was the kind of the [CM12] replacement, then subsequently the [CM13] replacement.' After these Commissioners left, CM3 found that the screening cases were not being taken by other Commissioners so, he said, he took more cases on himself. In addition, at that stage casework staff could choose which Commissioner to take their cases to for decision and CM3 said that many were choosing to give their cases to him because, he said, they knew that he would 'process them quickly and get them out of the way'.

This sense that (in focusing on the processing of large quantities of cases) he was following in the steps of other Commissioners, fulfilling an important CCRC role, is reinforced by his later comment;

'I am the bulk man. This is what I do. You need a couple of people like me to have this approach'.

CM3 concluded that, with 'a falling budget' and 1600 applications a year,

'You've got to work out your priorities and sadly, or not sadly, the guilty pleas would in most cases not be priorities unless something screamed out at you.'

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<sup>868</sup> Concerns from CCRC staff about the impact of screening processes were raised during my previous research with Hodgson (Hodgson and Horne, see note 244 *supra*, at section 11 of the report) and concerns about the balance of efficiency and thoroughness at the screening stage were discussed regularly during my period of employment at the CCRC in the late 1990s.

Given the discussion in chapter 4 about the pressures facing defendants in making plea decisions and the limited amount of prosecution and defence evidence available at the point of plea in many cases, it will be apparent that CM3 was indeed taking a 'confident' approach in concluding that there is no substantial risk of wrongful conviction by guilty plea other than the (in his view, historic) categories of asylum documentation convictions and false confessions arising out of police misconduct. Even CM3 acknowledged that the current screening process would be unlikely to identify some wrongful conviction cases, saying when interviewed that a case like *R v F* was unlikely to be identified as meriting further investigation if it had been received during his time at the CCRC.

It is clear that other Commissioners and CCRC staff were aware of the type of approach described by CM3. The point is illustrated by the following exchange in interview when one Commissioner learned that the preliminary research data suggested that single commissioners rejected 74% of guilty plea cases as No Appeal:

CM7                    'Then you look at the Commissioners who do that work.'

Researcher        'Yes I know and it's a small number'

CM7                    'And that's really frightening'

CM7 appears to have been referring to screening decisions when he went on to describe concerns he had had for many years that,

'minds at the Commission are closing because of the pressures that are being brought to bear to meet targets and get cases out the door and hardliner approaches have been developed by people who are forceful personalities with hard line views and that view prevails'.

Clearly, therefore, CM7 did not see all of the ‘confident’ decisions being made in rejecting cases as necessarily the appropriate method for the CCRC to deal with its case backlog. Most Commissioners, however, were content simply to distinguish CM3’s approach from their own approach to their CCRC work. CM5 said that he specifically avoided screening work because it did not suit his ‘working practices’ and he ‘slowed everything down’ because single member decisions required the Commissioner to make ‘an educated judgment’ about whether or not a particular line of enquiry was likely to raise something. His professional background meant, he said, that he was aware that even the most unpromising line of enquiry could sometimes lead to valuable new evidence. He said that he was appointed due to his experience in serious cases and that there was not much point in getting him to look at ‘tiny things’.

CM4, on the other hand, did some screening work and said that he was conscious that ‘the biggest decision we make isn’t yes, it’s saying no to people’ so that he would always try to ‘look behind’ the case. He was clearly aware that other Commissioners took a different approach because he commented that different decisions will be made by different Commissioners, and observed that ‘that’s the health of this place. It is. Otherwise you’d be knocking everything out. Which I guess some people would do.’

#### **Commissioner independence in screening decisions**

Interviewees suggested that the CCRC’s tolerance of such a wide range of approaches to guilty plea cases is a consequence of Commissioners’ attachment to the notion that, as Crown appointees, they are appointed for their independence of mind. CM3, for example, said that Commissioners are ‘very, very independent’ and that when his approach conflicted with the approach of other Commissioners he just ‘carried on ploughing [his] own furrow’ (although he conceded that this is a ‘horrendous way to run a business’). He believed that, as a non-lawyer, he was supposed to take a different approach to other Commissioners,

‘I work on the basis that I was appointed by the Queen, as the representative of the Clapham omnibus man, to take a wider view so I am more interested than the average commissioner, rightly, in whether [the applicant] did it or not. And they are rightly there to focus on the legal side.’<sup>869</sup>

While the Commissioners’ varied approaches to their work may be valuable in the context of committee decision-making, it becomes problematic when Commissioners make decisions alone. At this time most of these screening decisions were given to a small number of Commissioners. The interviews with Commissioners and other staff showed an understanding that the focus on Commissioner independence was leading to a worrying level of inconsistency in single member decisions. CM5, for example, acknowledged this in interview and argued that, as a consequence, no case should be closed without a second mind being applied to it.<sup>870</sup> Similarly, CM3 accepted that there was a problem with the lack of consistency between commissioners.<sup>871</sup> CM7 suggested that the problem of inconsistency of approach extended to the case review staff, saying that the variety of experience amongst case review managers and ‘how savvy they are about what life is like

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<sup>869</sup> Although, interestingly, CM3 was less tolerant of the ‘independent’ approach taken by another Commissioner, which he criticised as amounting to saying ‘let’s start again and re-examine the case regardless of anything that’s happened beforehand.’

<sup>870</sup> It is clear that a second opinion can change the outcome of single member decisions. In Case 91, following a very strong response from an applicant’s experienced solicitor to a single member rejection letter, CM3 sought a second opinion from a Group Leader saying that, in the light of the solicitor’s ‘eloquent plea’ someone ‘less bloody-minded’ than him should look at it. The Group Leader recommended that the case be passed for further investigation, saying ‘We know from our [previous casework] experience that what appear unlikely conspiracy theories can turn out to be true’ and the case therefore survived the screening process. Without the intervention of the applicant’s solicitor, however, (and CM3’s response to its eloquence) this would not have happened. This case review had not been completed at the point that fieldwork was conducted so the outcome of the further work is not known.

<sup>871</sup> The CCRC does operate a quality assurance system whereby Commissioners double-check some of their fellow-Commissioners’ decisions however CM4 said in interview that these checks only look at ‘the process and not the decision’ (although, reassuringly, the same Commissioner did observe that if he considered the decision to be ‘fundamentally flawed’ then he would go and tell the decision-maker).

at the doors of the court' is strength of the CCRC but 'it is also one of its greatest weaknesses'.

Management staff accepted the importance of Commissioner independence<sup>872</sup> while acknowledging that it could be problematic and sometimes 'stretched beyond the bounds of what is reasonable.'<sup>873</sup> The CCRC Chair, Richard Foster, however, rejected 'misguided' accusations of inconsistency when he responded<sup>874</sup> to criticisms by INUK<sup>875</sup> saying that 'as every lawyer knows, each criminal case is different in terms of the issues, the evidence and the legal argument presented. Necessarily then, each CCRC review is different and tailored to deal with the issues in the case. No doctor provides the same treatment to all patients - where some need sticking plasters, others need scans or major surgery. To complain that each patient is treated differently is absurd.'

One way to balance the respect for Commissioner independence with the need for some degree of consistency would be to provide a policy framework for decision-making. This view was put forward in interview by CM7 who said that he had sought to introduce such a policy framework because he felt that 'it is inherently unfair to have this chance that you might just land on the desk of the right person'. He said that this had a particular impact on guilty plea cases because 'some very forceful personalities' drove policy at the Commission and 'there has been very little sympathy for people who plead guilty' and lots 'don't think we should be looking at guilty pleas'.

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<sup>872</sup> MMT1 saying that 'the commissioners here are recruited on the basis of their independence of mind.'

<sup>873</sup> MMT2.

<sup>874</sup> Foster, R. (2012) Law Society Gazette. 26 April.

<sup>875</sup> INUK was an umbrella organization for Innocence campaign groups in the UK.

Even CM3, who was particularly protective of his independence as a Commissioner, recognised the need for clear policy, observing that the confusion as to the status of magistrates' court guilty pleas as exceptional circumstances was 'absolute nonsense'. However, in contrast, some Commissioners were far more dismissive of policy. CM10 said in interview that his approach to guilty plea cases had 'nothing to do with policy'. He talked about his approach coming from his 'commitment to the work', 'the richness of experience' of the criminal justice system and the Commission's work but 'definitely not policy! Scrap the policy!'

Unsurprisingly then, the Commissioners have had difficulty reaching agreement on policy and guidance on guilty plea cases and this is why the casework guidance on guilty pleas had been 'under reconstruction' for over a year.<sup>876</sup> CM7 explained that that the CCRC did not have a 'coherent' policy or guidance note 'because so many people had a go at it over the years only to be shot down in flames in discussions'. The issue was 'endlessly debated' for many years and 'it's just one of those difficult issues that we couldn't get any agreement on. Which is why I think 17 years down the line we still don't have a party line on this.'

Clearly, despite the CCRC's awareness that lack of consistency can be problematic, the focus on Commissioner independence is blamed for making it very difficult for the CCRC to reach agreement on matters of policy, especially in relation to issues on which opinions are strong and divergent. The treatment of guilty plea cases is one of those issues. As a member of the management team told me in conversation, the divergent treatment of these cases appears to arise from 'the fundamental issue of different Commissioners' understanding of what the CCRC is here for', which becomes crystallised in the No Appeal decisions.

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<sup>876</sup> CM7



Despite these accounts, I will argue in the next sections that inconsistent decision-making in guilty plea cases cannot be explained by Commissioner independence and, in fact, is primarily a result of the CCRC's decision to permit the prioritisation of efficiency at the earliest stages of the CCRC process. This makes it very difficult for those who are wrongfully convicted by guilty plea to get their cases investigated by the CCRC. Recent developments in the treatment of No Appeal cases have in some ways highlighted these issues.

### **Prioritising efficiency and consistency over Commissioner independence**

The difficult discussions amongst Commissioners described above took place against the background of a large increase in applications and reduction in resources. They led to the CCRC searching for a way efficiently to screen out 'no appeal' cases. In November 2012 the CCRC implemented a pilot scheme which was running during the final sample period.<sup>877</sup> During the pilot, administrative staff were tasked to look at No Appeal applications to see whether the applicant mentioned any exceptional circumstances to justify referral in the absence of an appeal. If not, the applicant was sent a letter giving her 28 days to notify the CCRC of any exceptional circumstances in the case. The case would only be seen by a Commissioner if the applicant sent a substantive response. Otherwise it would be closed by the administrator. This was the first time that CCRC processes permitted case closure without a Commissioner decision (in contrast, in order for a case to have any prospect of getting through to Stage 2 under the pilot, additional trained oversight was required).<sup>878</sup>

The sampling reveals that there were significant problems with the pilot scheme. Some applications were closed administratively because the applicant had not specifically

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<sup>877</sup> Sample period 1 Jan 2013 – 30 April 2013.

<sup>878</sup> This process is reflected in the Formal Memorandum on Exceptional Circumstances (note 839 supra) which sets out what was, in essence, the pilot scheme. In contrast, the Casework Guidance Note (also note 839 supra) does not deal with administrative closures but suggests that all No Appeal cases will be seen by a Commissioner.

directed the CCRC's attention to any 'exceptional circumstances' despite there being features of the case that merited further attention.<sup>879</sup> For example, Case 128 involved an applicant who was 16 when she pleaded guilty in the youth court to seriously assaulting a child. The case involved a potentially vulnerable applicant<sup>880</sup> who pleaded guilty as a vulnerable teenager in circumstances which, if verified, would be troubling.<sup>881</sup> Her application pointed to a potential defence and potential grounds to undermine her guilty plea. Having pleaded guilty in the youth court, the applicant had no right of appeal against conviction. Despite this, the application was closed by an administrator as part of the No Appeal pilot, without being seen by a Commissioner or even a case review manager.<sup>882</sup>

After this pilot had been running for a few months, it was decided that it was inappropriate for administrative staff to be reaching these decisions. The No Appeal process then went through a number of formulations and was under review during the fieldwork period. As a consequence, management staff expressed interest in my preliminary findings in relation to the No Appeal process and, as discussed in chapter 2,<sup>883</sup> I shared some of these findings with the CCRC in December 2013, when the fieldwork had been completed.

Since the fieldwork ended, the CCRC has developed a new approach to No Appeal cases. Applications made before the time limit for appeal has expired will be rejected

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<sup>879</sup> Although there were other cases in which the administrator noticed details in the application and passed the case to a Group Leader for further assessment (Case 130, Case 135, Case 143 and 150).

<sup>880</sup> The applicant was being treated for serious psychiatric problems.

<sup>881</sup> Her account pointed to a number of factual conflicts of interest on the part of the solicitor, her family members and the alleged victim.

<sup>882</sup> This was one of the cases which I discussed with a Group Leader as it appeared to raise matters of concern (p.68 *supra*). A senior member of staff later said that it was recognised that the case illustrated the reasons why the procedure that was piloted was 'not a good idea'.

<sup>883</sup> P.93 *supra*.

administratively.<sup>884</sup> Other cases should be considered by case review managers before being handed to Commissioners for final decisions. The new policy confirms that exceptional circumstances should be found to exist in applications concerning convictions by way of guilty plea in the magistrates' court<sup>885</sup> but in other respects a far tighter interpretation of exceptional circumstances has been adopted.<sup>886</sup> Exceptional circumstances will only be found if there is 'a good reason why you did not appeal and cannot appeal now without the CCRC's help'<sup>887</sup> and usually this will mean that applicant needs the CCRC powers to investigate.<sup>888</sup> Exceptional circumstances may also be present if the applicant has considerable communication difficulties which could prevent him from mounting an appeal but the CCRC will first try to arrange for such an applicant to access legal representation for an appeal, rather than taking the case on themselves.<sup>889</sup> The paperwork accompanying No Appeal decisions has also been shortened, with a new pro forma 'decision notice' being developed and applicants are not invited to respond to the

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<sup>884</sup> CCRC Formal Memorandum on Exceptional Circumstances updated July 2015 and reviewed January 2016 at paragraph 18.

<sup>885</sup> The Formal Memorandum (ibid) now stipulates in paragraph 15(iv) that the 'statutory bar to appeal in such cases gives rise to exceptional circumstances' and the CCRC claims these convictions 'will almost without exception go through for review' (email from the CCRC dated 13/6/16). In the recent decision of the Court of Appeal in YY and Nori [2016] EWCA Crim. 18, the Court of Appeal indicated (at paragraph 43) that the CCRC should decline to review Crown Court guilty plea convictions in asylum cases which had not been appealed but, significantly, suggested that the CCRC should continue to investigate magistrates' court cases which had not been appealed. The court noted (at paragraph 42) that, in such cases, 'the intervention of the CCRC is essential.' The CCRC suggested, however, (by email dated 23/6/16) that this comment is simply a re-statement of the law and should not be taken as a suggestion that CCRC should 'continue to review mags [magistrates'] court guilty pleas'.

<sup>886</sup> The CCRC's board made this decision in August 2014 on the basis of counsel's advice on the legality of the approach (this information provided by the CCRC by email dated 27/7/15).

<sup>887</sup> Text from the CCRC draft decision notice provided by email dated 25/8/15. The CCRC has determined that three particular circumstances will not be judged to be exceptional, namely being 'out of time' for appeal, having received legal advice that there are no grounds for appeal and having been unable to get legal representation appeal (email 27/7/15, ibid).

<sup>888</sup> Email 27/7/15, ibid.

<sup>889</sup> Ibid

decision notice with further representations,<sup>890</sup> unless the notice included disclosure by the CCRC of new information.<sup>891</sup>

According to the CCRC, these changes were intended to increase efficiency<sup>892</sup> and consistency in No Appeal decision-making.<sup>893</sup> It has led to the CCRC closing many more No Appeal cases than previously.<sup>894</sup> This is unsurprising given how narrow the new account of exceptional circumstances is compared to the practice of the CCRC outlined in this chapter. The exception to this is the new clarification of the approach to exceptional circumstances in magistrates' court guilty plea cases which is a potentially significant change<sup>895</sup> and if, as the CCRC claims, it is being applied in practice will overcome one of the difficulties identified during the research period. These summary guilty plea cases are, however, still at high risk of being rejected at the 'no reviewable grounds' stage for all the reasons discussed in this chapter.

By involving both case review managers and Commissioners in most No Appeal decisions, the CCRC has to some extent sought to address concerns about single Commissioner decision-making. Case review managers, with less status and working within a team structure, may be less likely than some Commissioners to develop 'hardliner

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<sup>890</sup> Previously applicants were invited to respond and given a fixed period in which to do so.

<sup>891</sup> The decision-maker is able to indicate on the form if the CCRC used its powers to investigate the complainant's credibility but those enquiries did not lead to any material that assists the applicant. If the form gives this indication then the applicant will be invited to respond to the decision.

<sup>892</sup> Ibid.

<sup>893</sup> Email 25/8/15 (note 887 supra).

<sup>894</sup> Ibid

<sup>895</sup> The previous guidance stipulated that Commissioners should consider the question of 'real possibility' in such cases but it was not clear that this alone was sufficient to amount to exceptional circumstances (see note 839 supra)) and 74% of magistrates' court guilty plea convictions in the sample periods were closed on the basis of no appeal and no exceptional circumstances (see note 854 supra).

approaches'.<sup>896</sup> At the same time, however, by formally adopting the very narrow understanding of 'exceptional circumstances' in the new policy, the CCRC has significantly restricted staff and Commissioners' ability to pass No Appeal applications on for further investigation. In reality, therefore, the 'hardliner approach' has to some extent simply been adopted as policy.

Apart from the welcome clarification regarding exceptional circumstances in magistrates' court guilty plea cases, this new approach to No Appeal represents a deliberate choice to prioritise efficiency and consistency over consideration of the merits of individual cases. As already discussed, there are legitimate reasons for the CCRC to insist that convicted persons go through the appeal process before enlisting the assistance of the CCRC. It is, however, inevitable that some applicants who are rejected under the new No Appeal process will find it impossible to access the appeal courts as a consequence of the barriers to appeal discussed already. Particular problems here will be the lack of legal representation,<sup>897</sup> the difficulties in accessing case papers<sup>898</sup> and the near-impossibility of unrepresented applicants conducting any enquiries into their own case from prison.

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<sup>896</sup> CM7

<sup>897</sup> For example, in Case 142 the applicant claimed to have acute mental health difficulties, which he said had contributed to his guilty plea and his inability to appeal. He claimed to have written to at least ten solicitors' firms asking for help with his appeal. He said that he had written to the Court of Appeal for help but they had simply sent him a form NG which he did not understand. It is not clear whether a case like this would survive the new screening process (further research will be required to establish how decision-makers are applying the provision that exceptional circumstances may exist if the applicant has sufficient communication difficulties) but it was rejected under the old approach.

<sup>898</sup> For example, in Case 137 the applicant claimed simply that he did not understand how to appeal, he had no case papers and he could not find a solicitor who was willing to help. This application would almost certainly be rejected under the new policy, as it was under the administrative pilot

CCRC staff have acknowledged this problem in recent months and there is clearly concern at the CCRC about the impact of these decisions on individual applicants.<sup>899</sup> This was expressed in the research interviews by Commissioners and casework staff alike, CM3 observing that he did not ‘hold out much hope’ of applicants appealing on their own and personally he ‘wouldn’t even dream of’ trying to fill in the ‘appalling bad’ Form NG (Court of Appeal form).<sup>900</sup> It is certainly very rare for an applicant whose case is rejected as a No Appeal case to re-apply to the CCRC following a subsequent attempt to appeal.<sup>901</sup> Further research is needed to consider the impact of the new policy but there are certainly grounds for concern.

### The risk of ‘screening out’ wrongful guilty pleas

The material discussed in this chapter about the rejection of guilty plea cases at the screening stages of the CCRC process suggest that there is a risk that the CCRC may be overlooking some wrongful convictions by guilty plea. Despite this risk, the CCRC has, as discussed, referred guilty plea cases to the appeal courts. These cases were not ‘screened

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<sup>899</sup> The CCRC attempted to examine this issue in September 2013 by way of a management project which found that, of 38 randomly selected Crown Court No Appeal rejections (not specifically guilty plea cases) prior to 1 November 2012, only seven later applied to the Court of Appeal. Of 46 similarly randomly selected rejections after November 2012, none had subsequently applied to the Court of Appeal. The CCRC is seeking to establish a further academic research project to consider the impact of the new process, particularly whether these rejected applicants ever subsequently manage to appeal their convictions.

<sup>900</sup> This issue is discussed at p.275 *supra*.

<sup>901</sup> In sampling, I checked to see whether applicants rejected at the No Appeal stage had made re-applications to the CCRC following a subsequent attempt to appeal but only one such re-application was found (out of 72 No Appeal rejections which were examined). This research cannot determine why the re-application rate is so low. It is possible that some convicted persons, although willing to ‘have a go’ at a CCRC application, did not feel strongly enough about their case to try to mount an appeal. It is also possible that some of these rejected applicants might have successfully appealed their conviction following rejection at the No Appeal stage (and therefore have no need to re-apply to the CCRC) but it is very unlikely that this is a significant factor in the tiny re-application rate (particularly in the light of the CCRC data discussed at note 899 *supra*). However there is clearly room for concern that some of these cases could involve applicants who have legitimate concerns about their conviction but who have been unable to mount an appeal themselves.

out' despite inevitably being unpromising to some extent by virtue of the guilty plea and (in 39 of the 49 cases) the absence of previous appeal proceedings. I looked at the early stages of these case reviews to try to establish why these cases had survived the screening process. Most of these referral cases involved a strong application that clearly displayed the potential point for referral.<sup>902</sup> This does not mean that the CCRC did not do valuable work on all these cases (whether checking the truth of the allegations made, extending the evidential basis for the appeal or developing the legal arguments). The point here, rather, is that when the case went through the early screening stages at the CCRC, there was a clear and compelling issue for review and therefore these cases say little about whether the screening stage would detect wrongful convictions raised in applications which were less well-argued.<sup>903</sup>

There were, however, six cases in which the CCRC identified the issue for referral despite the applicant not having articulated the point in the application.<sup>904</sup> There were also three

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<sup>902</sup> Of the 49 guilty plea referrals, 25 cases had the referral issue and some of the legal basis for that referral set out plainly in the application either by solicitors, counsel or an outside body. In a further 12 cases the application contained factual information that made the potential referral issue plain (i.e. the information provided, if verified, raised a *prima facie* ground for referral to anyone familiar with the relevant law). I was assisted in making this assessment by my previous experience as a case review manager but the assessment is inevitably subjective (and I was likely to find the referral issue more 'obvious' in the application, having seen the statement of reasons for the referral) so I tried to be generous to the CCRC in assessing how plainly the potential referral issue was set out in the application.

<sup>903</sup> This data is consistent with previous research which found a similar proportion of CCRC referral cases had the issue for referral set out clearly in the application. That research examined two sample periods and considered which referred cases had included 'successful' submissions from the applicant or his lawyer (i.e. submissions which identified issues relied upon for the later referral). In the 2005/2006 sample period 67.5% of referred cases (27 out of 40) were founded in applications which had contained 'successful' submissions. In the 2006/2007 sample period, the percentage was lower, at 50% (17 out of 34 referred cases). (Hodgson, J. and Horne, J. *The Extent and Impact of Legal Representation on Applications to the Criminal Cases Review Commission* (October 6, 2009). Tables 4A- 4D At SSRN: <http://ssrn.com/abstract=1483721>, on 16/3/16.)

<sup>904</sup> Two of these referrals related to a change of law (Case 32 and Case 63), two were abuse of process cases arising out of a large enquiry into police misconduct (Case 28 and Case 34), one was a

cases in which the applicant set out the relevant information in the application but in a form that looked very unpromising and yet the CCRC identified the case as one of concern and the case was passed for review.<sup>905</sup> This means that in nine cases out of the 49 referrals, the CCRC's screening process has successfully identified a case as meriting further investigation despite that not being made obvious in the application itself. This provides some support for the perspicacity of the screening process.

A closer examination of the history of some of the referral cases may, however, temper the confidence engendered by these nine cases. There are examples of cases later referred in which the CCRC had rejected a prior application at the screening stage, despite the potential referral issue being apparent in the application. Case 5, for example, involved an applicant whose conviction was subsequently quashed due to his status as an asylum seeker. The application in Case 5 had twice previously been rejected by a single Commissioner on grounds which were later acknowledged by a member of CCRC staff to be seriously flawed.<sup>906</sup> Many years later the CCRC conducted a 'trawl' through its case records to see whether any asylum cases had been overlooked.<sup>907</sup> This led to Case 5 being re-

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'no offence in law' case (Case 31) and the final one was a breach of the Turner guidelines on sentence indications (Case 25).

<sup>905</sup> Cases 22, 23 and 55. The three remaining cases were identified as potential referrals because the CCRC was engaged in significant work on a co-defendant's case.

<sup>906</sup> The application arrived at the CCRC during the period when the CCRC was already reviewing some of the first applications involving asylum documentation offences. Despite the ongoing work on these issues, and despite the application being a magistrates' court guilty plea, the application was rejected as a No Appeal case. Some years later (by which time the Commission's referrals had led to six similar guilty plea convictions being set aside) this applicant re-applied. This application was again rejected by a single Commissioner.

<sup>907</sup> These cases involved asylum seekers being prosecuted for documentation offences and pleading guilty despite giving accounts which revealed the existence of a statutory defence. Many of these defendants pleaded guilty following erroneous advice from their lawyers. For cases demonstrating the appeal courts' approach to such cases see note 134 (in relation to summary convictions) and note 151 (in relation to Crown Court convictions) above. Although some of the early immigration and asylum applications had included legal argument which set out the principal issues on which the convictions were later quashed (albeit that the CCRC did important work in developing these



opened and then referred. The delays in this case resulting from the earlier rejections by the CCRC dramatically extended the time during which the applicant suffered serious personal and financial consequences of his conviction.

Another example is provided by Case 38, one of the referral cases involving the detention and interview of young defendants in Northern Ireland in the late 1970s during the Troubles.<sup>908</sup> The application in this case, which was prepared by solicitors, was initially rejected as a No Appeal case<sup>909</sup> and was only re-opened at the instigation of the RUC (the applicant's solicitors having raised the case with the RUC, who were sufficiently concerned to review the case voluntarily and contact the CCRC).<sup>910</sup>

One of the three cases in which the CCRC successfully identified the case as potentially problematic, despite a highly unpromising application, was *R v F*.<sup>911</sup> This case involved a 16 year old boy who was wrongly convicted of a sexual assault on a very young relative. The conviction was quashed after the CCRC identified material which cast doubt on his confession to the police and guilty plea. The case, which was only received by the CCRC nineteen years after conviction, is rightly a source of considerable pride for CCRC staff and

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arguments further), the CCRC's response to these applications was uneven for some time. CM3 commented in interview that when the CCRC first began to see immigration and asylum cases the CCRC 'almost always got it all wrong', although he suggested that by 2006 they were 'mostly getting it right'.

<sup>908</sup> There were five of these cases in this study, all of which were subsequently quashed by the Northern Ireland Court of Appeal (Cases 38,39,40,41 and 43). For further discussion of the CCRC's work in cases arising out of the Troubles, see Quirk, H. 'Don't mention the war: The Court of Appeal, the CCRC and dealing with the past in Northern Ireland.' (2013) 76 *MLR* 949-980.

<sup>909</sup> Unfortunately the electronic records for this first application have been routinely destroyed under the CCRC's records retention policy so it was not possible to examine the records behind this decision.

<sup>910</sup> On being contacted by the RUC, the CCRC appointed the RUC investigating officer to further investigate the case on behalf of the CCRC and this led to the subsequent referral decision.

<sup>911</sup> Note 415 *supra*.

Commissioners.<sup>912</sup> In the context of these research findings, however, it is impossible to be confident that this case would have survived the screening processes and Commissioner decision-making in operation during my sample periods. This was recognised explicitly by two Commissioners in interview,<sup>913</sup> CM7 commenting that, while this case was the result of the tenacity of the Commissioner and case review manager involved, many more applicants have had rejection letters from ‘the one or two of the Commissioners who’ve churned through that sort of work very quickly’. He asked,

‘how many more people are there in the [F] category of being bullied into pleading guilty to something they didn’t do and are still reaping the rewards of doing so?’<sup>914</sup>

There are two key issues in the treatment of *R v F* which contrast with the sampled cases in this research. Firstly, there is no indication in the case records for F’s application that the guilty plea was seen as a problem for the applicant at the screening stage. The focus throughout is on the evidence in the case<sup>915</sup> and little attention is paid to the plea itself until the drafting of the statement of reasons for the referral. This is in stark contrast to the ‘strict’ approach of CM1 (who closed 15% of the cases closed on the basis of No Appeal in the sample periods) as discussed at page 260 above.

Secondly, despite this being a 1982 magistrates’ court application, the lack of documentation was not seen as a bar to review. Instead, the CCRC conducted lengthy

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<sup>912</sup> CM3 described the case in interview as a ‘huge achievement’ for the CCRC and indicated that he always referred to it in lectures and talks. A number of staff mentioned *R v F* in conversation and paid tribute to the case review manager and Commissioner involved.

<sup>913</sup> CM3 and CM7.

<sup>914</sup> CM5.

<sup>915</sup> The committee that made the referral was clearly interested in the state of the evidence, noting that ‘the guilty plea resulted in there being no trial. Consequently the evidence was never tested. However, the following issues may serve to support the possibility that, had there been a trial, then a conviction was by no means certain...’

enquiries (including enquiries of the police, social services, the health authority, the probation service, the CPS, the magistrates' court and interviews with the applicant, his mother, grandmother and uncle, two police officers, a district judge, the probation officer, solicitor, cousin and a family friend) to gather the necessary evidence. This contrasts with other cases in the sample which were rejected at the screening stage on the basis that there would be insufficient records available.<sup>916</sup>

This analysis of the referral cases leads to the conclusion that an application which shows obvious potential to fall into one of the narrow categories of cases known to give rise to successful guilty plea appeals may well survive the screening process and be investigated (regardless of the lack of previous appeal) although such an outcome cannot necessarily be relied upon. It is doubtful, however, that less-obvious wrongful convictions by guilty pleas will survive the screening stage.

It is a fact that instances of defendants pleading guilty when they are not guilty are likely to be 'non-obvious' wrongful convictions in CCRC terms. As guilty plea convictions they inevitably look unlikely to give rise to a real possibility (due to the appeal courts' hostility to such cases), they are probably No Appeal cases and they are likely to be unrepresented (owing to the lack of funding and lack of attraction of guilty plea appeals to lawyers) and so may be poorly prepared. If the applicant also suffers from a vulnerability (e.g. a mental illness, severe drug addiction or learning disability)<sup>917</sup> then his ability to frame his

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<sup>916</sup> e.g. Case 72, which was a 2006 guilty plea in the magistrates' court which was rejected on the basis that there no appeal/no Ecs. The applicant, who had a mental disorder, was convicted of the benefits offence of failure to notify of a change of circumstances. She sets out an account of events which could amount to a defence to the charge. The Commissioner only accessed the court extract in this case and rejected the application on the basis that due to the destruction of case files there was no realistic prospect of the CCRC being able to gather enough material to produce a basis for referral.

<sup>917</sup> Risk factors which might make someone 'vulnerable' include, childhood, lack of fluency in English language, illiteracy, learning disabilities, hearing impairments, speech or language problems and

application and alert the CCRC to its unsafety is likely to be very limited. Given that such applicants are, logically, at high risk of wrongful conviction in the first place,<sup>918</sup> it is particularly important that the CCRC's processes are able to identify and assist vulnerable applicants. The research exposed a number of concerns about the treatment of potentially vulnerable applicants by the CCRC.

The CCRC has taken steps to assist vulnerable applicants<sup>919</sup> and examination of case files reveals that on occasion the CCRC demonstrates the highest standards of care for vulnerable applicants<sup>920</sup> but the treatment is inconsistent. Commissioners raised concerns that they might have difficulty identifying vulnerable applicants from the application form. As CM7 observed, 'another consequence of the Commission being so removed from its clientele is that they become a piece of paper and unless they declare a vulnerability you can't identify it'. CM4 also expressed this difficulty in interview: 'How do we assess their capabilities when we know that the vast majority in particular are vulnerable and they've got real vulnerabilities here and they may not even be open to the court?' Although there

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mental health conditions or impairments. (Cooper, P. Identifying Vulnerability in witnesses and defendants. (2014) The Advocates Gateway Toolkit 10. Paragraph 1.3. At <http://www.theadvocatesgateway.org/toolkits>, on 28/4/16.)

<sup>918</sup> Two interviewees who were formerly defence lawyers raised this issue. A Commissioner with considerable experience of defence work suggested that the risk was particularly acute in cases involving people with mental health or learning difficulties or personality disorders, particularly if they lacked specialist legal representatives. A case review manager spoke of vulnerable defendants being 'rushed through the [criminal justice] system'.

<sup>919</sup> The successful introduction of the 'easy read' form in 2012 was intended to make it easier for applicants with communication difficulties to apply to the CCRC and the CCRC is now examining why it receives so few applications relating to youth court convictions, as these are likely to be a particularly vulnerable group (see Oral evidence of the Chair of the CCRC to the House of Commons Justice Committee: HC 850 Friday 6 February 2015.)

<sup>920</sup> e.g. Case 88, in which the Commissioner was sufficiently concerned about the impact of a rejection on a vulnerable applicant that he arranged to deliver the letter to the applicant by hand and Case 68, in which the Commissioner was sufficiently concerned about the applicant's ability to respond to a rejection letter that he arranged a meeting to discuss the case with him. When the applicant subsequently re-applied the Commissioner chose to meet the applicant again.

is a risk that some vulnerabilities will not be apparent from the application form (staff suggested that applicants will often ask a fellow prisoner to fill in the application form for them, which would mask their difficulties), the cases examined for this research suggest that there are a large number of cases in which potential vulnerabilities are obvious on the face of the application and yet the CCRC still appears to have done little to respond to those signs.

The applications examined revealed that applicants whose cases were rejected during the screening process had mentioned in their applications a wide range of potential vulnerabilities. These could have rendered the applicant vulnerable to pressure at the time of their plea and/or limited their ability to access legal advice, make their own application to the appeal courts or communicate with the CCRC about their case. Examples include an applicant who had mental health difficulties, a 'seriously low' IQ and a learning difficulty and claimed that his plea was the result of pressure from co-defendants;<sup>921</sup> another who pleaded guilty soon after her child's death and claimed to be 'bad with depression' at the time;<sup>922</sup> one who had serious learning difficulties and, according to the case review manager 'it is difficult to make any sense of what he writes'<sup>923</sup> and another applicant who had a head injury, communication difficulties and was, according to the Commissioner involved in the case, very 'difficult to follow'.<sup>924</sup> All of these applicants were rejected at the screening stage.

Eighteen of the 72 applications which were examined for this research having been rejected by a single Commissioner at the No Appeal stage contained material in the

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<sup>921</sup> Case 165.

<sup>922</sup> Case 101.

<sup>923</sup> Case 105.

<sup>924</sup> Case 134.

application or accompanying letter which indicated a potential vulnerability on the part of the applicant. These rejections happened despite the Formal Memorandum on Exceptional Circumstances,<sup>925</sup> which applied during the sample periods, stating that vulnerability on the part of an applicant can give rise to exceptional circumstances. All but one of these applicants were unrepresented in their application. Case 76, for example, involved an unrepresented, mentally ill applicant whose conviction resulted in him being subjected to a hospital order. The applicant had sought to explain his guilty plea to the CCRC in his application saying that he had intended to plead not guilty but that his guilty plea resulted from 'misinformation' and 'from the sheer amount of pressure of the situation I was under'. His application was rejected at the No Appeal stage and he was told (despite this being a magistrates' court guilty plea) that 'it remains open to you to consider the possibility of submitting an application for leave to appeal out of time.'

Given this history, there is reason to doubt that the new approach to exceptional circumstances in No Appeal cases, despite its provision for exceptional circumstances where there are communication difficulties, will in fact protect vulnerable applicants. If rejected, vulnerable applicants will be unable to appeal if they were convicted in the youth court or magistrates' court and are unlikely to get leave to appeal by themselves if they were convicted in the Crown Court. It is unlikely that they will be able to access new advice on appeal unless they have private means and they are unlikely to be able to investigate their own case due to their vulnerabilities, their incarceration (in prison or in hospital) and because it is likely that there has never been full disclosure in their case in any event, as a result of their plea.

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<sup>925</sup> Note 839 supra.

This is a matter of particular concern because these vulnerable defendants are likely to be the ones most vulnerable to the systemic and other pressures to plead guilty. The sampled applications reveal that many applicants, including those with possible vulnerabilities, claim that they were ‘forced’,<sup>926</sup> ‘pushed’,<sup>927</sup> ‘bullied’,<sup>928</sup> ‘blackmailed’<sup>929</sup> or otherwise manipulated<sup>930</sup> by their lawyer to plead guilty. It is impossible to know whether there is any foundation to the claims made in these applications<sup>931</sup> but the material discussed in chapter 4 demonstrates that there are reasons to be concerned about the impact on vulnerable defendants of the pressures to plead guilty. However enlightened the CCRC approach may have been in the case of *R v F*, it does not appear that decision-makers at the CCRC are consistently open to the possibility that systemic pressures could lead to a vulnerable person being wrongfully convicted.

This research suggests that, if a guilty plea case is to survive the CCRC’s screening processes, it will usually be important that the applicant clearly sets out the potential referral issue and any exceptional circumstances in their application. Unfortunately, most unrepresented applicants do not know what classes of cases are likely to be referred and will struggle to identify and articulate exceptional circumstances. All these applicants know

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<sup>926</sup> Cases 78, 104, 136, 164 and 78.

<sup>927</sup> Cases 81 and 116.

<sup>928</sup> Case 95.

<sup>929</sup> Case 88.

<sup>930</sup> Cases 136, 142 and 148.

<sup>931</sup> The claims in these cases were not investigated by the CCRC (apart from in Case 88 where the defence files were examined but the CCRC was unable to identify any material to support the claim). All of these cases, apart from Case 88, were closed at the NA stage. The claims do, however, echo the claims made by defendants in the 1970s in Baldwin and McConville’s study that their barristers ‘instructed’, ‘ordered’, ‘forced’ or even ‘terrorised’ them into pleading guilty. (Baldwin, J. and McConville, M. ‘Plea Bargaining and Plea Negotiation in England’ (1979) 13 Law and Society Review. 287 at p.296.)

is what happened to them, and this is frequently expressed in the words, 'I was forced by my lawyer to plead guilty.'

### Tragic Choices at the CCRC

Despite the concerns raised in this chapter about the CCRC's treatment of guilty plea cases, it is important to stress that I did not encounter in the CCRC an organisation that has lost its concern for victims of wrongful conviction. In interviews, in case records and, crucially, in the everyday conversation observed in the CCRC offices, Commissioners and other staff demonstrated their concern for individual applicants and their commitment to the CCRC's role as a 'body of last resort'. Early in the fieldwork, a number of case review managers approached me to talk about cases they were reviewing in which they harboured instinctive doubts about the reliability of the guilty plea but had not been able to identify any legal grounds for appeal. In each case, these case review managers hoped to mine my understanding of the appeal courts' approach to guilty pleas to help with their review. When I talked to staff about cases in which it appeared that a mistake might have been made and when I related my preliminary findings to a member of the management staff, my comments were met positively and without defensiveness.

This is not an organisation operating under a general culture of hostility towards its applicants in the way that Newman<sup>932</sup> and *Standing Accused*<sup>933</sup> describe defence firms' attitudes to clients. The referred guilty plea cases discussed above reveal the lengths to which Commissioners and casework staff will go to investigate cases which have been identified as meriting further work. Many interviewees, particularly those with a background in criminal defence, displayed a nuanced understanding of the pressures facing defendants in reaching a plea decision and the impact this might have on the criminal

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<sup>932</sup> Note 163 supra.

<sup>933</sup> Note 129 supra.



process.<sup>934</sup> They had also seen in CCRC referral cases that things can go badly wrong in guilty plea cases and they mentioned a range of risk factors in interview.<sup>935</sup> Despite all this, however, the organisation allowed a system to develop in which large volumes of guilty plea cases were screened out with little attention by a small number of Commissioners who take a narrow approach to the work.

The explanation for the organisation's tolerance of bulk processing does not (despite the Commissioners' rhetoric) lie in a respect for Commissioners' independence but instead is founded on the need to prioritise efficiency at the early stages of the review process. Complexity is the enemy of speedy determination and so efficiency would normally require that the CCRC adopt a clear policy on the treatment of guilty pleas. Such a clear policy has, however, eluded the CCRC because of the Court of Appeal's inconsistent approach to guilty pleas as it seeks to disguise the system's earlier prioritisation of efficiency over fairness and accuracy. In the absence of clear guidance, individual Commissioners were left to devise their own approach and that approach will depend, to some extent, on the aim of the decision-maker. If the aim is to close cases swiftly in a bulk processing system, the Commissioner will need to adopt a clear and simple account of what could give rise to a wrongful conviction by guilty plea. This was often achieved by Commissioners adopting their own idiosyncratic and restrictive interpretation of the law on guilty pleas, making it easier to dismiss the application.

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<sup>934</sup> e.g. MMT1, CRM4, CRM1.

<sup>935</sup> MMT2 said that the number of false confession cases identified by the CCRC made it likely that there were cases of defendants pleading guilty 'either to get some attention or just to make an immediate problem go away'. One CRM, who has been at the CCRC since its founding years, said that initially it was thought that applicants would largely claim to have been subject to oppression but that the CCRC later realised it was usually 'the more subtle pressures of the system' that resulted in guilty pleas. CRM7 said that 'time and time again' applicants say that they were bullied into making guilty pleas. CM7 said that defendants, particularly in the magistrates' court are under 'huge pressure to take calculated risks and whether they are guilty or not is not necessarily the issue.'

If the aim is to assess all possible avenues in order to be satisfied that the application is without merit,<sup>936</sup> a much more nuanced approach to the law will be taken, acknowledging that, in rare cases, the appeal courts will overturn even ‘voluntary’ and unequivocal guilty pleas. This required the Commissioner in every case to consider the possibility that a fuller review of a guilty plea case might lead to the identification of significant new evidence. This is the time-consuming approach which was supported by most of the non-Commissioner interviewees.

These different approaches cause refraction, leading to different outcomes in different cases. This refraction, however, brings organisational benefits. While the ‘confident’ decisions made by the ‘bulk men’ address the casework backlog at the screening stage, the more cautious and idealistic Commissioners and case review managers are able to devote more extensive resources to reviewing the remaining cases. They can continue with their ‘gold standard’ review work, using the time and resources preserved by the efforts of the bulk men at the expense of those rejected in the early stages of the application process. The discomfort engendered by the co-existing approaches is addressed by talk of Commissioner independence, enabling the more thorough Commissioners and case review managers to distance themselves from the uncomfortable choices made by their colleagues.

The new policy on No Appeals which, with the exception of the clarification on magistrates’ court guilty pleas, represents the transparent prioritisation of consistency and efficiency, has disrupted the Commissioner independence account and has, therefore, now exposed the CCRC’s own tragic choices. This exposure is conscious: the policy is a public acknowledgement of the consequences of the current resource constraints. It represents a

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<sup>936</sup> As with CM5, discussed at p.292 supra.

deliberate decision to direct resources at some cases, with certain difficulties in accessing appeal, at the expense of other cases which may also, in fact, be excluded from the appeal process by legal or practical factors.

The CCRC's decision to be open about its approach to No Appeals and the impact on casework decisions of its resource constraints is to be welcomed but it is important that the extent of the risks to meritorious cases, and particularly to the most vulnerable applicants, are understood.<sup>937</sup> Despite the potential (and, no doubt, intended) benefits of involving case review managers in the No Appeal work, the narrowness of the test being applied reveals that the consistency aimed for here is consistent *efficiency*. A generous or flexible approach to No Appeal cases (recognising the practical barriers to appeal) would have prevented the swift closure of cases at the screening stage. The CCRC's new policy aims to avoid this problem.

## Conclusion

The CCRC aspires 'to give hope and bring justice to those wrongfully convicted, to enhance confidence in the criminal justice system and use our experience to contribute to reform of an improvements in the law.'<sup>938</sup> It is ironic that the organisation that was created to be a body of last resort and to bring hope for the wrongly convicted should have been co-opted into the business of making and disguising tragic choices. Crucially, however, the foregoing chapters have demonstrated that this prioritisation of efficiency by the CCRC is not a choice made as a consequence of a disregard for the interests of individual defendants or a lack of concern about injustice but is the rational and, to a degree, inevitable consequence of the system's prioritisation of efficiency at the plea and appeal stages. The system puts considerable pressure on defendants to plead guilty and yet, in the appeals system, the

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<sup>937</sup> It is commendable, therefore, that the CCRC is taking steps to facilitate research into the impact of the policy (see note 899 *supra*).

<sup>938</sup> CCRC Annual Report and Accounts 2013/14 (note 863 *supra*).

impact of these pressures is obscured or denied, it erects legal and practical barriers to appeal and, fundamentally, it fails to offer a coherent account of what makes a guilty plea conviction 'safe'. In the circumstances, the CCRC is presented with a herculean task.

The criminal justice system must be seen to reflect the values of fairness and accuracy. The CCRC, with its flexible powers to investigate almost any criminal case, is presented as the ultimate demonstration of these concerns. The criminal justice system also, however, needs efficiency and finality. Because it must mirror the Court of Appeal and yet must give an account of its concern for these values, the CCRC will also mirror the Court of Appeal in disguising the compromises inherent in the acceptance of bargained guilty pleas. As MM2 put it, the CCRC must accept 'to some extent' that the guilty plea is 'evidence of an indication of guilt', because otherwise,

'it throws open all sorts of questions that certainly are beyond the role of the Commission and beyond what we would be able to cope with in our current resourcing at the Commission. That doesn't mean for a moment that there are not problems out there with the way that the guilty plea system works.'

The CCRC has a unique role in the criminal justice system where finality is of lesser significance. The very nature of the CCRC is that it should prioritise the investigation of potentially wrongful convictions over the requirements of finality.<sup>939</sup> There is no limit on the number of times an applicant can apply to the CCRC. There is no limit to how long the CCRC can spend reviewing a case or how many times it can refer that case to the appeal courts. In practice, however, the CCRC (in common with the courts of first instance) cannot

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<sup>939</sup> 'In the criminal context the principle of finality has less drastic consequences because there exists a safety net outside the courts. That safety net is the CCRC.' (Hungerford-Welch, P. 'Case Comment on R v Smith (Paul James)' (2014) Crim. L. Rev. 612 at p.613)

endow every case with the degree of attention and resources that it gives the most complex application. As MM1 said,

‘Wouldn’t it be great if every one of the 1500 cases that come through our door could be subjected to painstaking analysis of every aspect of the case? If you were in the queue you’d soon become pretty fed up with that, because 95% of the time that painstaking analysis would lead you nowhere but you’d have used a vast amount of Commission resource to do it.’

The CCRC continues to do some excellent work through its staff and the Commissioners who are committed to the organisation’s stated values but the uncomfortable truth is that this work is enabled by the bulk processing of cases at the early stages of the CCRC process. This account demonstrates that the CCRC is unlikely to do more than remedy the most glaring injustices in guilty plea cases. In the circumstances, the CCRC cannot be presented as the criminal justice system’s answer to the problem of wrongful conviction by guilty plea.

## Chapter 6: The search for justified guilty plea convictions

At its heart, this thesis is about justifications for founding convictions on guilty pleas. The history of guilty pleas and the existing literature reveals that the courts' traditional account of the guilty plea as a confession (and, therefore, reliable evidence of guilt) has been undermined by the increasing reliance on bargained pleas. These bargained pleas are a mechanism for avoiding trials, thus avoiding the cost, delay and disruption to victims and witnesses that is seen as the inevitable consequence of the trial process.

With the criminal justice system currently under severe resource constraints, it may seem an inauspicious time to cast a critical eye over the mechanism that is overwhelmingly relied upon to deal with caseload pressures. However the current pressures actually bring the matters discussed in this thesis into sharp relief. Recent policy developments, including the Criminal Courts Charge and the new crime contract (both now abandoned), have led to unprecedented public discussion of and media attention to the impact on defendants of pressures to plead guilty. It is possible that these policy responses to the current resourcing crisis have begun to test the limits of society's willingness to prioritise efficiency over fairness and accuracy.<sup>940</sup> It will be interesting to see whether this is reflected in

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<sup>940</sup> Although it should be noted that some of the concerns expressed about the Criminal Courts Charge by campaigners and the House of Commons Justice Committee (note 970 *supra*, at paras. 17-25) also relied on efficiency arguments (because in many cases the convicted person was patently unable to pay the CCC and so the charge was not recoverable) so it cannot be assumed that the government's decision to abandon the CCC was wholly motivated by a concern for the innocent.

responses to the Sentencing Council's current consultation on sentencing in guilty plea cases.<sup>941</sup>

While all parts of the criminal justice system are being asked to identify new ways to reduce costs, it is crucial that we understand the implications of these policy initiatives (which will almost inevitably point towards an increased reliance on guilty pleas). The issues discussed in this thesis strike at the integrity of the criminal justice system. If it is impossible to identify coherent justifications for over 90% of criminal convictions (the proportion of criminal convictions which are reached by guilty plea),<sup>942</sup> the criminal justice system must be structurally unsound.

For these reasons, in this thesis I set out to consider the meaning and significance of the guilty plea in England and Wales. The starting point was to consider what possible theoretical accounts of the guilty plea could be offered which could provide a justification for the system's reliance on the guilty plea as a foundation for conviction. Three such accounts were identified and discussed: the guilty plea as confession; as negotiated settlement and as a defendant-assessed verdict. Each of these accounts offers different justifications for conviction, makes different requirements of the plea process and has different implications for appeal provision.

With those theoretical accounts in mind, I examined the guilty plea within three stages of the criminal process (plea, appeal and case review) and considered the following questions:

- 1 How does the criminal justice system in England & Wales treat convictions reached through guilty pleas differently at the appeal stage from convictions through contested trials and what does this reveal about the meaning and significance of the guilty plea?

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<sup>941</sup> Note 971 below.

<sup>942</sup> See note 2 *supra*.

2 To the extent that the differential treatment of guilty plea convictions at the appellate stage is based on assumptions about:

- defendants' reasons for pleading guilty,
- the meaning of the guilty plea or,
- the fairness of the process that produces the plea,

are these assumptions supported by empirical evidence regarding the plea process and plea decision?

3 To what extent does the CCRC provide a safety net for defendants who are wrongfully convicted by guilty plea and who are unable to find a remedy in the appeal process?

4 Is it possible to identify an account of the guilty plea which could provide a justification for founding criminal convictions on guilty pleas within a system that includes plea incentives and what changes to the current system might be required in order to satisfy that account?

### **Treatment of guilty pleas at the appeal stage**

The discussion of the law on guilty plea appeal in chapter 3 confirms that guilty plea convictions are treated as being a safer foundation for conviction than a trial but reveals that the appeal system offers no coherent justification for this approach. Instead, the account of the guilty plea which underpins the appeal court judgments shifts and changes to suit the prevailing aim of the criminal process, whilst retaining a heavy rhetorical reliance on guilty plea as a confession or acknowledgment of the 'truth' of the prosecution case.

My analysis differs from previous accounts of the courts' approach to guilty pleas. Applying tragic choices theory to an analysis of the system's treatment of guilty pleas illuminates the



purpose of the guilty plea system. It is widely recognised that plea incentives create a risk that innocent defendants will plead guilty but this risk is said to be outweighed by the 'benefits to the system' of incentivising guilty pleas. In tragic choices terms, this represents the deliberate prioritisation of efficiency over the fundamental values of fairness and accuracy.<sup>943</sup> The tragic compromise of these fundamental values is painful and damaging to our conceptions of the criminal justice system.

Having recognised this, the problems of the appeal courts (and, for that matter, the Criminal Cases Review Commission) come into focus. On this basis, it is inevitable that the courts (and, in respect of magistrates' court convictions, Parliament) would seek to limit access to the appeal courts for those who have pleaded guilty. If it were easy to appeal against guilty plea convictions, this would destroy the 'system benefits' which had been achieved. The appellate system's treatment of guilty pleas is, therefore, a consequence of the prioritisation of efficiency in the guilty plea process.

Overtly supporting such a prioritisation of efficiency presents problems for the authority of the criminal courts because the deliberate neglect of the values of accuracy and fairness is likely to damage public confidence in the criminal justice system. The courts' shifting accounts of the meaning of the guilty plea and their rhetorical focus on the appellant's

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<sup>943</sup> Although, when explaining the sentence discount, criminal justice agencies frequently focus on the benefits of guilty pleas to victims and witnesses, rather than the financial benefits to the system, this simply reflects the fact that this explanation is more palatable than the financial account. Research conducted for the Sentencing Council indicated that, whilst most of the victims, witnesses and defendants involved in the study assumed that sentence reductions for guilty pleas were aimed at saving time and money, 'they preferred the idea that the purpose of reductions for guilty pleas should be to save victims from the emotional trauma of giving evidence'. (Sentencing Council. *Attitudes to Guilty Plea Sentence Reductions*. (2011) Sentencing Council Research Series 02/11 At [http://www.sentencingcouncil.org.uk/wp-content/uploads/Attitudes to Guilty Plea Sentence Reductions\\_web1.pdf](http://www.sentencingcouncil.org.uk/wp-content/uploads/Attitudes_to_Guilty_Plea_Sentence_Reductions_web1.pdf), on 9/3/16.) In its recent consultation on the sentence discount (note 455 supra), the Sentencing Council is careful, when explaining the benefits of guilty pleas, to highlight the benefits to victims and witnesses ahead of references to the efficiency benefits.

‘voluntary’ confession and the ‘truth’ of the allegations at the heart of the conviction reflect judges’ attempts to disguise these tragic choices. Faced with the problem of explaining how ‘confessions’ extracted under systemic pressures can be reliable, the courts have constructed a new account of voluntariness. This account of voluntariness relies<sup>944</sup> on the criminal defence lawyer sheltering defendants within the plea process from systemic and other pressures, despite the existing literature on the criminal defence profession which suggests that lawyers are unlikely to protect defendants from wrongful conviction.<sup>945</sup> Because almost all defendants convicted in the Crown Court are represented, this account enables the Court of Appeal to deem the overwhelming majority of guilty pleas passing through their hands as ‘voluntary’.

The limited availability of appeal ‘underscores the importance of ensuring that defendants who plead guilty do so with full knowledge and understanding of the strength of their innocence claims before it becomes too late to assert them.’<sup>946</sup> Given the Court’s focus on voluntariness and the impact of defence advice, it was important to examine the plea process itself, the pressures that are experienced by defendants and the extent to which defence lawyers may be able to live up to the role allocated to them by the appeal courts.

## The plea process and the plea decision

In chapter 4 I considered the guilty plea process itself and the ways in which the criminal process ensures that defence lawyers, even those acting professionally and with care for their client, are likely to become a lens through which systemic and other pressures are focused on the defendant. The lawyer/client observations and lawyer interviews all

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<sup>944</sup> As McConville and Marsh (note 4 *supra*) suggest.

<sup>945</sup> Whether as a consequence of the lawyers’ attitudes to defendants and their work or as a consequence of the courts’ deliberate disempowerment of criminal defence lawyers (see the discussion starting at p.22 *supra*).

<sup>946</sup> Hughes, E. *Innocence Unmodified*. (2010) Washington University Legal Studies Research Paper 10-10-04 at p.26.

demonstrate how the sentence discount, the management of the court process, the funding situation and the professional obligations on defence lawyers can lead to the lawyer's advice creating substantial pressure on the defendant to plead guilty. These pressures have no necessary connection to the balance of evidence in the case. Because the pressure of the sentence discount begins early in the process, when defendants and their lawyers are poorly placed to make the necessary assessment of the risk and consequences of conviction at trial, even that pressure does not depend on the strength of the prosecution case.

The court observations reveal the ways in which the court process has increasingly undermined the voluntariness of the plea (through pressure from judges, and other court actors) and the reliability of the guilty plea as a confession. The reality that the Court of Appeal seeks to obscure is that the rules, laws and practices of the guilty plea process promote the swift resolution of cases by guilty plea over a concern for accuracy or fairness. The guilty plea process fail to reflect any of the proposed theoretical accounts of the guilty plea and contains elements which present significant difficulties for all three accounts.

The empirical evidence discussed in this chapter moves the discussion of defence advice on plea beyond the previous accounts of defendants being put under pressure to plead guilty by defence lawyers acting improperly. It reveals that even a defence lawyer who acts properly and with concern for her client can be a source of pressure to plead guilty because she is used by the criminal justice system to focus systemic pressures and incentives on her client. This demonstrates that the appeal courts' reliance on defendant's 'freedom' of choice on plea and the ability of defence lawyers to protect defendants from systemic and personal pressures is entirely hollow.

## The role of the CCRC in guilty plea cases

These first chapters reveal that there is a real risk that some defendants will plead guilty as a consequence of systemic and other pressures, despite not accepting their guilt and that these people are unlikely to be able to challenge their convictions in the appeal courts. An unknowable number of these defendants will be factually innocent. With little prospect of the Court of Appeal addressing the problem of wrongful guilty pleas resulting from systemic or personal pressures, this focuses attention on the CCRC as an important safety net. If it could be shown that the CCRC was in a position to identify and refer to the appeal courts those cases in which defendants had pleaded guilty despite being innocent, this might provide a balance to the earlier prioritisation of system benefits at the plea and appeal stages.

This research represents the first empirical assessment of the CCRC's role in relation to guilty pleas and the first time the CCRC's role has been considered in the context of justifications for guilty plea convictions. My research has demonstrated that, despite the CCRC's important work in a small number of wrongful guilty plea cases, the CCRC is not in a position to provide such a safety net.

My discussion of the CCRC has revealed the extent to which the CCRC's attitude to guilty plea cases, like that of the courts, has been influenced by resourcing pressures. With broad powers and discretion, a heavy caseload and reduced funding, the CCRC has to make difficult decisions about which cases to reject with little work and which cases merit the expenditure of time and money. The statutory test requires the CCRC to mirror the approach of the Court of Appeal. The shifting accounts of the guilty plea reflected in appeal court judgments make it difficult, however, for the CCRC to provide reasoned justifications for their decisions in guilty plea cases. As a consequence, different decision-makers at the CCRC have relied on different interpretations of the appeal courts' approach.

My research demonstrates that a small number of Commissioners, who were focused on efficiency, adopted a narrow account of the law on guilty plea appeals as a means to reject large numbers of cases at the screening stage. They were assisted in this by the fact that few applications in guilty plea cases had been the subject of previous appeal proceedings which, as a consequence of the CCRC's statutory framework, enabled the CCRC to reject the overwhelming majority of guilty plea convictions at the No Appeal screening stage. The CCRC's approach to selecting which no appeal cases merit further investigation is revealed to be characterised by confusion and inconsistency and, in a large proportion of cases, a focus on efficiency.

More recent policy developments appear to have led the CCRC to reduce confusion and inconsistency in its treatment of No Appeal decisions. This has, however, been resolved in favour of a clear and strong prioritisation of efficiency through the rejection of the vast majority of cases which have not previously been appealed, without consideration of the merits of the application. While the CCRC tells these applicants that they can appeal against their conviction, the practical barriers to appeal against guilty plea conviction mean that this is unlikely to be a realistic option for many defendants, including those who are most vulnerable.

The 'bulk processing' of the majority of cases at the early stages of the CCRC process leaves other staff and Commissioners free to adopt a more generous account of the law and CCRC policy in the remaining cases. The approach taken in this more extensive review work may be open-minded, thorough and careful, reflecting the CCRC's foundational values. My research demonstrates, however, that it is impossible to be confident that innocent defendants who have pleaded guilty as a result of personal or systemic pressures will survive the screening process and benefit from the 'gold-standard' CCRC review.

## The defendant's voice

Many of the concerns discussed in this thesis relate to the risk that innocent defendants might plead guilty as a consequence of sentencing incentives. As well as being a problem for the individual defendant, this is a legitimacy problem for the system more generally. If the guilty plea process cannot sufficiently be relied upon to distinguish between the factually innocent and the factually guilty, this would clearly damage the legitimacy of the process. As a former Commissioner and experienced criminal lawyer put it,

‘if you can’t look at somebody who pleaded guilty and say they’re guilty then you know the criminal justice system is in trouble and the courts are in trouble.’

The problems of the guilty plea system extend beyond the treatment of the factually innocent defendant, however. It may be tempting to suggest that, provided the defendant is factually guilty, it matters little whether his guilty plea results from systemic pressures or from genuine repentance and remorse.<sup>947</sup> The work of social psychologists<sup>948</sup> suggests, however, that defendants who feel coerced into pleading guilty or who feel that a distorted account of events has been presented to the court may be damaged by that process, regardless of their factual guilt. Meyerson, in particular, argues that a system which permits the defendant to be silenced (and, she argues, damaged) in this way lacks legitimacy.<sup>949</sup>

A defendant who pleads guilty, unless that plea is a genuine and voluntary confession of guilt according to the account in the prosecution papers, does not have his voice heard. Whatever the complexity of the defendant's reasons for entering a guilty plea, whatever

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<sup>947</sup> As discussed already in this thesis, this attitude appears to underpin the courts' current case management processes, despite the inevitable conflict with the right to put the prosecution to proof, which is an element of the presumption of innocence.

<sup>948</sup> Discussed at p.57 *supra*.

<sup>949</sup> Meyerson (note 218 *supra*).

tactical or emotional discussions have taken place between a defendant and his lawyer or between the defence and prosecution, the defendant is required to speak with the single word, 'guilty'. Even that word is surrounded by complexity and uncertainty of meaning. The case law reveals that the courts reserve to themselves the right to give meaning to the word, speaking over the defendant in the process. Usually, as discussed in chapter 3, it is deemed to mean 'I acknowledge that the prosecution case is true.' If there is a basis of plea then the word will be deemed to mean 'I acknowledge that the basis of plea is true'. This is despite the fact that the basis of plea will often be a deliberate construction, a compromise between conflicting accounts which is honed through negotiation between prosecution and defence lawyers and through the defence lawyer's 'strong' advice.

Some defendants will have used the word 'guilty' as a genuine acknowledgement of guilt. Others may use it with a subtle (but crucially different) meaning 'I acknowledge that I will be deemed to acknowledge that the prosecution case is true'. Some defendants, having understood the system's use of sentence discounts to prioritise efficiency, may mean 'I waive my right to trial in return for a lesser sentence'. Others may not even understand it in those terms, and may simply mean 'I give in', 'I can't cope' or 'I don't care'.

When defendants are given the opportunity to speak in their own voice (when they discuss plea with their lawyers; when unrepresented defendants enter equivocal pleas and when they apply to the CCRC claiming to have been wrongfully convicted by guilty plea) they challenge the meaning attributed by the courts to their words and they reveal their sense of injustice.<sup>950</sup> As one CCRC applicant put it (responding unsuccessfully to a rejection by a

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<sup>950</sup> Baldwin and McConville (note 931 supra) at p.300 observed this in the 1970s, saying 'It seemed to us that, for these defendants, the guilty plea reflected bitterness and cynicism far more than genuine remorse'. Much more recently, Newman (note 163 supra) at p.126 reports spontaneous remarks from defendants, made when their lawyers left the room to finalise a plea deal, which demonstrate this, for example, 'The thing is, they're lying. And I have to plead guilty to something that's a lie. It's not fair.'

single Commissioner who had commented that the applicant had made a 'sensible decision' to plead guilty), 'I made no decision at all'.<sup>951</sup> Some of these defendants may be innocent. Some, although having committed a crime, may have pleaded guilty on an exaggerated factual basis or to a more serious crime. Others may be guilty but simply feel that they have been denied their opportunity for a trial. The plea incentives skewer them and then the system denies they have been skewered. Their words are twisted and reality is distorted as courts rely on the fact of conviction to justify their assumption that 'the defendant knows what he has done'.

It is not only the defendant's words that are subverted through the guilty plea process. The criminal justice system's attempts to manage the prioritisation of efficiency without losing the appearance of justice rely, throughout, on empty assertions that are simultaneously undermined by the deliberate routine workings of the system. This is a form of doubletalk.<sup>952</sup> Defendants who receive a postal requisition,<sup>953</sup> are given information about the sentence discount and how they can plead guilty before being told 'Nothing stated here is intended to persuade you to plead guilty'. Defendants who claim to be innocent will be told by their lawyers that they should only plead guilty if they are guilty, but, if the prosecution file appears strong, will also receive 'strong' advice about the benefits of doing so. If they decide to enter an 'inconsistent plea' as a consequence of this advice, their lawyer will either carefully suggest to them that they give a new (guilty) account of their plea or they will be required to sign a statement (in their lawyer's words) which contradicts what they have said to their lawyer.

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<sup>951</sup> Case 151. This applicant had serious medical and special educational needs.

<sup>952</sup> Sanders, Young and Burton (note 98 supra) at p.490.

<sup>953</sup> Form MG4D



On the rare occasions when defendants seek to appeal these convictions, the twisting of ordinary language continues as the courts deny the reality of the plea process. Coercion becomes ‘advice’; pleas produced through fear and pressure become ‘voluntary’ and an acquiescence to the perceived inevitability of conviction in the face of systemic pressures becomes an ‘acceptance of the truth of the prosecution case’. Even at the CCRC, complex reality can be conveniently disguised through bare assertions of ‘fact’, like the following account by a Commissioner (in a rejection letter) of how the applicant ‘would’ have been treated by his defence lawyer,

“A lawyer’s job is to advise and represent his client, so that the client does not need to have legal knowledge himself. Your lawyer would have talked to you, and he would have advised you in relation to pleading guilty or not guilty on the basis of the information available to him, including what you told him. Your lawyer would also have told you that it was for you to decide how to plead and that you did not have to take his advice. You would have had the opportunity to explain any fears you had. If you had any concerns about the consequences if you chose to plead not guilty and went to trial you could have discussed those concerns with your lawyer.’<sup>954</sup>

At the heart of these tactics lie a subversion of the defendant’s voice in order to achieve the required aim of holding the defendant responsible for his plea and, therefore, for any injustice resulting from that plea.

One way to restore the defendant’s voice in the guilty plea process is to permit Alford-style ‘guilty but innocent’ pleas.<sup>955</sup> Alschuler<sup>956</sup> argues that Alford pleas permit innocent

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<sup>954</sup> Case 161.

<sup>955</sup> Note 733 supra.

defendants to have a voice in the guilty plea process while exposing 'the coercion and injustice' of that process. The criminal justice system in England and Wales has not yet reached the same level of reliance on guilty pleas as the USA but similar arguments apply to the use of Alford pleas here. It is disreputable that the discussions which take place here between lawyers and clients who deny guilt are then, when the guilty plea is entered, suppressed and dressed up as 'acceptance of the truth of the prosecution case'. The suppression is possible because the court declines to enquire into the circumstances of the plea (and, the new empirical evidence discussed in chapter 4 reveals, in some instances closes its eyes to overt equivocality in the defendant's plea) and therefore sees no evil in it. On the other hand, Alford pleas in the USA can be seen to undermine the important connection between guilty plea and factual guilt. Bibas<sup>957</sup> argues that such pleas encourage innocent defendants to plead guilty and that abolishing Alford pleas in the USA would be a 'good first step towards honestly protecting the innocent' by 'embrac[ing] a consistent message: innocent defendants should persevere to trial to win acquittals'.<sup>958</sup> He also argues that the existence of Alford pleas damages public perceptions of the legitimacy of the criminal justice system.<sup>959</sup>

Convicting without trial those who openly assert their innocence is undoubtedly damaging to public perceptions of justice and yet (as Alschuler argued in response to Bibas)<sup>960</sup> it is not Alford pleas themselves that bring the criminal justice system into disrepute but the system of plea-bargaining that creates the need for such pleas. The underlying problem is the

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<sup>956</sup> Note 734 supra.

<sup>957</sup> Bibas (note 734 supra).

<sup>958</sup> Ibid at p.1429.

<sup>959</sup> Ibid at p.1387.

<sup>960</sup> Alschuler (note 734 supra).

same (coerced guilty pleas) but in an Alford plea the problem is exposed and in the current system in England & Wales it is disguised:

‘Defendants may not package their guilty pleas in disingenuous ways to save face. Rather the government may package their guilty pleas in disingenuous ways to save face. Defendants who plead guilty may not imply that they have been coerced (even when they might have been) or that they are innocent (even when they might be). The government, however, may promote the appearance of justice (even where this appearance may be false).’<sup>961</sup>

These arguments reveal that, although Alford pleas give defendants a clearer voice in the guilty plea process, they do not in themselves resolve the problems discussed in this thesis.

### **Justifying the guilty plea system**

While it is easy to criticise (as I have done) the approach of the appeal courts and the CCRC to guilty plea cases, it is also important to recognise that these institutions face irreconcilable aims. Unless they are willing to challenge the legitimacy of 90% of criminal convictions, they must find justifications for upholding convictions which are achieved by guilty plea in the face of systemic coercion. Yet, if they are not to damage public confidence in the criminal process, they must respond adequately to incontestable examples of wrongful conviction by guilty plea. At the heart of the problem is the prioritisation of system benefits in the lower courts. The appeal courts and the CCRC are simply dealing with the inevitable consequences of that decision.<sup>962</sup> The criminal justice system needs to be workable and affordable. This leads to the compromise of justice in the interests of

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<sup>961</sup> Ibid at p.1419.

<sup>962</sup> Whether that original prioritisation is itself inevitable (as a consequence of the volume of criminal cases and the complexity of the trial process) or whether it is a deliberate (and ‘voluntary’) choice made by judges who have an instinctive distrust of the trial process and disdain for defendants (McConville and Marsh, note 4 supra and discussed at p.61) is not something that this thesis has sought to answer. This is, however, an important question, meriting further analysis.

efficiency. Such compromises must be disguised to avoid challenging the authority of the system.

This thesis demonstrates the need to adapt the guilty plea system so that it reflects an account of the guilty plea that can offer a justification for it forming the basis of a conviction. This requires an adjusted account of the guilty plea which leaves room for the defendant's voice but which sustains the connection between guilty plea and evidence of guilt. Proposals for reform of the system (particularly those with a U.S. perspective) often focus on strengthening the courts' oversight of charging and pleas.<sup>963</sup> While increased court oversight has potential benefits, these approaches risk establishing the guilty plea process as a 'trial-lite' which could indirectly undermine the institution of the trial and which does not necessarily give voice to the defendant or address the meaning of the plea itself. For the reasons discussed in chapter 3 (and assuming that it will be necessary to continue to offer plea incentives)<sup>964</sup> the solution appears to lie in the defendant-assessed verdict account of the guilty plea, within which the guilty plea represents an acceptance by the defendant that a trial would be likely to lead to conviction. My observation of plea discussions, and lawyers' answers when interviewed, suggest that this account most accurately reflects defendants' reasons for pleading guilty.

Provided that the decision to enter a defendant-assessed verdict could not be undermined (e.g. because some crucial evidence was withheld which would have changed the assessment of the balance of the case or because the defendant was wrongly advised on the law), this could, in theory, provide a safe basis for conviction.<sup>965</sup> The defendant-

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<sup>963</sup> See for example Lippke *The Ethics of Plea Bargaining*. (2011) Oxford: OUP, especially at p.217.

<sup>964</sup> The question of whether sufficient numbers of defendants would continue to plead guilty such that the system could cope with case volumes if plea incentives were removed forms part of the question outlined at note 962 *supra* and falls outside the scope of this thesis.

<sup>965</sup> For the reasons discussed *supra*, starting at p.115.

assessed verdict would permit the court to rely upon the defendant having acknowledged the apparent strength of the evidence against him and the likelihood that a trial court would convict but it would not permit the court to conclude that the defendant has 'confessed' or 'acknowledged the truth of the prosecution case' any more than an appellant who was convicted at trial is presumed to have done so. By providing an account of what makes a guilty plea a safe foundation for conviction, this approach would also give a framework for the appeal courts and the CCRC in assessing challenges to those convictions.

The connection between guilty plea conviction and factual guilt could only be sustained if it was possible to argue that those who plead guilty do so because they were highly likely to be convicted at trial. Consequently, the defendant-assessed verdict will not provide a sound justification for guilty plea convictions unless adjustments are made to the guilty plea process to enable defendants and their lawyers to assess the prosecution case and to investigate and assess the defence case.<sup>966</sup> This means removing the pressure to plead guilty at the earliest stages, ensuring adequate prosecution disclosure is made and providing sufficient funding for adequate defence investigation and analysis. The analysis of the plea process (and particularly the limitations on early disclosure) in chapter 4 demonstrates that this would require substantial changes to the procedure and culture of the courts. In addition, care must be taken that the sentencing incentives and offers of charge and fact bargains are not magnified such that the pressures result in defendants pleading guilty based on a low risk of conviction at trial.

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<sup>966</sup> Because, 'where an accused has insufficient information or expertise to make a wise decision, his or her participation in their own defence is a cruel illusion'. (McEwan (note 454 supra) at p.525.)

## Austerity and the defendant-assessed verdict

Given the current environment of austerity, the defendant-assessed verdict will be unappealing to those who fund and manage the criminal courts. Permitting the defendant to delay plea without loss of credit, requiring the prosecution to prepare a full file in guilty plea case, funding the defence lawyer to investigate the defence case and reducing plea incentives such that fewer defendants might plead guilty all have considerable and complex cost implications.

It could be argued that policy developments and proposals in recent years have been directly opposed to the requirements of the defendant-assessed verdict. The Criminal Courts Charge (CCC), for example, was widely criticised on the basis that it could create pressure on innocent defendants to plead guilty. Introduced in order to ensure that 'convicted adult offenders who use our criminal courts should pay towards the cost of running them,'<sup>967</sup> the amount of the CCC was set according to 'factors that drive cost' (such as offence type, court and plea)<sup>968</sup> As discussed in chapter 4, the defendant could be charged up to 5½ times more for a trial than for a guilty plea.

The government considered during the legislative process whether the CCC presented a risk to the innocent but their response at that time was simple: '[t]he policy will not impose a charge on anyone who is found not guilty.'<sup>969</sup> This dismissal of the risk that factually innocent defendants would plead guilty in order to avoid the higher CCC was predicated on

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<sup>967</sup> Paragraph 1 of Ministry of Justice publication, *Criminal Justice and Courts Bill Fact Sheet: Criminal Courts Charge*. At

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/336085/fact-sheet-criminal-courts-charge.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/336085/fact-sheet-criminal-courts-charge.pdf), on 19 November 2015.

<sup>968</sup> The government claimed that the bands were set 'so that offenders do not pay more than the costs reasonably attributable to their type of case.' (ibid, paragraph 6).

<sup>969</sup> Para 55 of IA MOJ223 Criminal Courts Charge Impact Assessment 24/2/2014. At <https://www.gov.uk/government/publications/criminal-justice-and-courts-bill-impact-assessments>, on 19 November 2015.

the assumption that only those who are factually guilty need fear being convicted at trial. In this reasoning, the guilty plea proves factual guilt and provides ex post facto justification for the application of pressures at the plea stage. It is the same reasoning that is applied to justify the sentence discount and so is subject to all the same criticisms as already discussed in this thesis.

Whether or not the risk of a higher CCC was sufficient alone to cause an innocent defendant to plead guilty, it was certainly a factor which could add to the cumulative pressures. By November 2015, the House of Commons Justice Committee reported a range of concerns about the CCC, including that it was ‘inimical to the interests of justice’ and may create ‘perverse incentives’ affecting defendants.<sup>970</sup> By December 2015, the new Justice Secretary had decided to abandon the CCC, (albeit without conceding that it had created a risk of wrongful conviction by guilty plea) and to develop plans for a replacement scheme.

Any confidence that the abandonment of the CCC might reveal a new desire within the criminal justice system to reduce plea pressures is tempered by the proposed new sentencing guideline on guilty pleas.<sup>971</sup> Despite specifically aiming to increase the pressure on defendants to plead guilty at the earliest hearings, the Sentencing Council offers nothing by way of protection for defendants and instead relies on optimistic and unsupported assertions about the lack of risk to the innocent,

‘While an early guilty plea is desirable it is important to note that nothing in the draft guideline should be taken to suggest that an accused who is not guilty should

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<sup>970</sup> House of Commons Justice Committee. ‘Criminal Courts Charge’ *Second Report of Session 2015/16*. Para. 37.

<sup>971</sup> Sentencing Council. *Reduction in Sentence for a Guilty Plea Consultation*. (2016) At <https://www.sentencingcouncil.org.uk/publications/item/reduction-in-sentence-for-a-guilty-plea-guideline-consultation/>, on 9/3/16. Discussed further at note 539 supra.

be pressured to plead guilty. The draft guideline explicitly states that it is for the prosecution to prove its case; the guideline does not undermine the presumption of innocence.<sup>972</sup>

Although (as discussed in chapter 4) my research does not permit any firm conclusion on whether specific legal aid funding arrangements are directly influencing plea advice,<sup>973</sup> many defence lawyers have argued that the government is, through funding provisions, deliberately seeking to use defence lawyers as agents in the procurement of guilty pleas. This view was expressed by an experienced defence lawyer in a diatribe that went viral shortly before the Ministry of Justice announced the outcome of the (now abandoned) tender process for duty contracts.<sup>974</sup> The lawyer claimed that under the proposed new contracts,

‘[t]he only way to stay in business will be deal with a large number of cases and pressure all your clients into pleading guilty. If you think that is a result which the government has achieved by accident, then you’re a [\*\*\*\*\*] idiot.’

Solicitors and barristers are under a clear professional duty to give advice to clients that represents the client’s best interests and not to allow their own financial position to influence that advice. In the circumstances, it might seem unduly cynical to suggest that any government would deliberately seek to use legal aid funding arrangements to incentivise lawyers to advise their clients in a particular way. However, many of the

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<sup>972</sup> Ibid at p.13.

<sup>973</sup> Although there were suggestions in the interviews that lawyers from smaller firms were more likely to feel pressurised to tailor their plea advice to the firm’s financial advantage, it should be noted that the lawyers interviewed were from large firms and so were not necessarily best placed to judge the pressures on other types of firms.

<sup>974</sup> And was reported on the Legal Cheek website on 25/9/15. At <http://www.legalcheek.com/2015/09/legal-aid-lawyers-facebook-status-about-feeding-clients-cat-goes-viral/>, on 10/3/16.



lawyers interviewed for this research argued that the government has indeed sought to use legal aid funding structures to procure defendant decisions which reduce the cost of the criminal justice system. The lawyers cite in evidence arrangements for funding in cases in which defendants have elected Crown Court trial in either-way cases.<sup>975</sup> Although this issue does not relate to advice on plea (the issue for consideration is whether the lawyer advises the defendant to seek trial in the Crown Court or trial in the magistrates' court, rather than on guilty or not guilty plea), several lawyers<sup>976</sup> drew parallels between what they saw as deliberate incentives to encourage clients to plead guilty and the imposition of financial incentives to discourage clients from electing Crown Court trial over summary trial (described by one lawyer as 'extremely cynical and plain wrong').

As discussed in chapter 4, the evidence from one firm suggested that this provision is capable of changing the behaviour of defence lawyers (albeit that the lawyers interviewed claimed to be resisting the pressure from their firm's management to tailor their advice on trial election). Lawyers perceive the jury trial election penalty to be a deliberate attempt by the funding authorities to use fee structures to encourage lawyers to influence their clients' choices in ways that enhance the efficiency of the criminal justice system. Indeed, it is difficult to understand this provision in any other way.

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<sup>975</sup> This pressure related to a funding provision which determines litigators' fixed fees in cases where the defendant has elected trial in the Crown Court (see note 640 *supra*).

<sup>976</sup> The most senior lawyer interviewed in each firm raised this issue in interview, the Firm B lawyer observing 'I think it's been a deliberate ploy by the way the cases are funded and the cuts, election for crown court trial has been disincentivised for the lawyers even though you may get a fairer trial with the judge and jury than before magistrates. [...] So there's certainly pressure against advising on election for trial by jury which is just wrong. [...] They [the funding authorities] think we're a right bunch of charlatans who would just advise our clients just to get the best outcome for us'. The Firm P lawyer was concerned that the attempt to influence lawyers' advice might be successful, observing that 'If you put lawyers in that position whereby the alternative is that they go bankrupt and will go out of practice then there are lawyers who will make that decision.' Four other lawyers also discussed these concerns in interview.

Clearly, if the government was concerned that the right to trial by jury was too expensive to sustain then it could have changed the legislation to further restrict the cases in which it is available. However the right to jury trial is rhetorically important so the government has instead sought to preserve the right in theory but to restrict it in practice. The apparent use of the criminal defence lawyer in this way reveals that the government itself knows that the court's rhetorical accounts of defence lawyers sheltering defendants from systemic pressures are entirely hollow. The Ministry of Justice appears to recognise (and capitalise on) defence lawyers' willingness to prioritise their own financial interest over defendants' rights.

There were fears that a similar calculation by the Ministry of Justice was behind the government proposal<sup>977</sup> (subsequently abandoned) to introduce fixed fees in criminal cases which would be the same regardless of plea.<sup>978</sup> Lawyers and other campaigners argued the provision would incentivise lawyers to advise their clients to plead guilty.<sup>979</sup> One lawyer interviewed made reference to what he saw as the deceit in this proposal, saying 'I mean, either grow some testicles and say we are going to reverse the burden and you are [...] guilty until proven innocent; put your cards on the table, instead of, you know, purporting that we've got this amazing criminal justice system and then stripping it away bit by bit.'

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<sup>977</sup> Ministry of Justice. *Transforming Legal Aid Consultation Paper* CP14/2013. At [https://consult.justice.gov.uk/digital-communications/transforming-legal-aid/supporting\\_documents/transforminglegalaid.pdf](https://consult.justice.gov.uk/digital-communications/transforming-legal-aid/supporting_documents/transforminglegalaid.pdf), on 10/3/16.

<sup>978</sup> See, for example, the Law Society Press Release (11 December 2013). At <https://www.lawsociety.org.uk/news/press-releases/law-society-council-commits-to-ongoing-lobbying-on-legal-aid-proposals/>, on 10/3/16 and the response of the Bar Standards Board to the Ministry of Justice consultation. At [https://www.barstandardsboard.org.uk/media/1510291/bar\\_standards\\_board\\_response\\_-\\_annex\\_1.pdf](https://www.barstandardsboard.org.uk/media/1510291/bar_standards_board_response_-_annex_1.pdf), on 10/3/16.

<sup>979</sup> See Baksi, C. 'Cuts forcing guilty pleas, leading lawyer warns' (2014) *Law Society Gazette* 10 February 2014 and Smith, T. 'Trust, choice and money: why the legal aid reform 'u-turn' is essential for effective criminal defence. (2013) *Crim. L.R.* 906.

As well as these specific provisions, it is important not to overlook the potential impact of the broader funding issues facing defence solicitors as they also create pressures which could indirectly influence advice on plea. The two most senior lawyers interviewed for this research both raised the broader issue of the state of the criminal defence profession and its impact on the quality of legal representation. The supervising partner for Firm B in Middleton said that funding pressures were causing standards of advocacy in the magistrates' court to deteriorate. He expressed concern about the quality of junior lawyers in other local firms, saying that only a tiny proportion could be described as 'passionate' about their work,

'No one is passionate any more, the passionate ones can't afford to be criminal lawyers because it's not worth it. You can be passionate but you also want to live.'

With the (now abandoned) new crime contract looming when this fieldwork was conducted, lawyers were pre-occupied with the impact of the contract on their work. In chapter 4 I discussed defence lawyers' views that, working for large firms, they were sheltered from some of the financial pressures relating to plea advice to which their colleagues in smaller firms were exposed. The government might be tempted to draw comfort from these findings as providing support for their efforts to rationalise criminal defence work into the hands of larger firms. However, the lawyers that I met during this research, despite being from leading national firms, were deeply troubled about the impact of the planned reforms. They certainly did not expect that their firms would continue to feel 'sheltered' from financial pressures under the planned crime contract. The most senior lawyer in the Centreville office of Firm P said that he and other lawyers had warned politicians about the likely impact of the funding reforms, saying

'You are storing up trouble for the future. These are the appeals of the future, these are the overturned judgments, these will undermine public confidence and

trust in the criminal justice system in this country. You'll erode it at one end and then you'll erode it at the other end. We've told them this and they do not want to know. Cross-party, they do not want to know.'

The government's recent abandonment of the new Crime Contract and suspension of the most recent funding cut,<sup>980</sup> leaves the future organisation of the criminal defence profession unclear. When examining any proposals made for its replacement, it will be crucial to bear in mind the potential for funding structures to influence advice to defendants on plea. In this context, the assessment in this thesis of the consequences for justice of the current guilty plea system is particularly timely.

### Faith in the system

In their concluding paragraphs to *Understanding Miscarriages of Justice*, Nobles and Schiff acknowledge that 'what they see' in terms of the inevitability of tragic choices in the criminal justice system is 'neither particularly optimistic nor, in an objective sense, ethical'.<sup>981</sup> They explain that, despite this, they consider it important to give the account in order to promote better understanding of criminal justice.

The observation that the criminal justice system is willing to prioritise efficiency over accuracy and fairness in the guilty plea system is apparently obvious but at the same time deeply uncomfortable. As Blume and Helm put it (quoting a traditional saying from the USA<sup>982</sup>), 'People like sausage and justice, but no one likes to see how either one is really

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<sup>980</sup> Written Ministerial Statement made by the Lord Chancellor and Secretary of State for Justice. 28 January 2016. At <https://www.gov.uk/government/speeches/changes-to-criminal-legal-aid-contracting>, on 10/3/16.

<sup>981</sup> Nobles and Schiff (note 229 supra) at p.261.

<sup>982</sup> This aphorism was originally attributed to Bismarck although its source is somewhat unclear (see Waldron, J. *Law and Disagreement*. (1999) OUP at p.88).

made.<sup>983</sup> But exposing ‘how justice is made’ serves a valuable purpose. When the tragic choices made in the criminal process are exposed, society is at last forced to own or disown those choices,

‘for it is in the choosing that enduring societies preserve or destroy those values that suffering and necessity expose. In this way societies are defined, for it is by the values that are forgone no less than by those that are preserved at tremendous cost that we know a society’s character.’<sup>984</sup>

This thesis has argued that the criminal justice system in England and Wales relies upon confusion and inconsistency regarding the significance and meaning of the guilty plea to mask the reality of pressures within the guilty plea process resulting from a deliberate prioritisation of efficiency. The confusion and discomfort engendered by this obfuscation was perfectly illustrated by an experienced member of staff at the CCRC when he attempted to describe why the guilty plea was a safe foundation for conviction,

CRM            ‘If you plead guilty to something then it means “I did it”. Unless you’re going to make a tactical decision to plead guilty when you in fact hadn’t done it, but you know, in my experience people don’t do that.

And indeed, there’s a responsibility on the defendant. If the defendant chooses (and it is a proper and informed choice) to plead guilty, then... that’s it!

It might not make it safe, I hasten to add, and indeed you know if the Commission suddenly turns up loads of stuff which was never disclosed to

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<sup>983</sup> Blume and Helm (note 715 supra) at p.181.

<sup>984</sup> Calabresi, G. and Bobbitt, P. *Tragic Choices*. (1978) New York: Norton. p.17.

the defence or to the court or indeed to anyone else or in terms of new evidence then you know then anything's up for grabs.'

Researcher 'So, in other words, "it's *not* it"!' [laughter]

CRM 'Well, it's not it. I mean, it's a circular argument isn't it, you can say there's nothing wrong with it but the more you talk about there being nothing wrong with it the more you get round to the fact that it's all wrong. It's all absolutely terrible!

The case review manager continued,

'I don't know what the answer is to it. I honestly believe that one should have, let me say, faith in the system. If the system works, one should have faith in the system. And of course experience has shown us over time that the system very often doesn't work.'

In offering an alternative account of the guilty plea, I recognise that the defendant-assessed verdict account of the guilty plea could, like the confession account, simply become a rhetorical justification for guilty plea convictions which is then systematically undermined by the operation of the criminal justice system. Tragic choices theory and historical precedent<sup>985</sup> would suggest this is likely, if not inevitable.

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<sup>985</sup> See for example Langbein's comparison of the efforts in the US to improve the defendant's protection in the system of plea bargaining through 'pathetic safeguards of voluntariness and factual basis' with the 'illusory safeguards' which were aimed at improving the same in the medieval European system of judicial torture (Langbein, J. Torture and Plea Bargaining. (1978-79) 46 *Univ. Chicago L. Rev.* 3 at pp.14-17).

Nobles and Schiff conclude their book with the story of the rabbis of Auschwitz,<sup>986</sup> illustrating the view that recognising the inevitability of injustice does not and should not prevent individuals from searching for justice and expecting others to do the same. The case review manager quoted above clearly recognised the inevitability of injustice in the guilty plea process and yet strove to maintain his 'faith in the system'. It is in the same spirit that I present this account of the meaning and significance of the guilty plea, and offer the defendant-assessed verdict as a starting point for future efforts to render the criminal justice system's choices somewhat less tragic.

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<sup>986</sup> 'The rabbis meet to discuss, in the light of their current experiences, evidence for the existence of God. In assessing their current experiences they are forced to agree that the evidence points clearly to the conclusion that there is no God. It is the Sabbath. Having ended their discussion, they go to pray.' (Nobles and Schiff, op cit, at p.261).

## Annex A: Interview Schedule for CCRC interviews.





## Interview Schedule

### HOUSEKEEPING

- As an academic researcher, I need to comply with the terms of the university's ethical approval for this research. That means that I need to get you to read this information sheet and then sign a form to show that you are happy to continue with the interview.

*[while s/he reads the form, offer to get coffee/water]*

*[complete forms and obtain signature – interviewee keeps information sheet, I keep signed form]*

- So I'll start the recording in a minute. Just to confirm that I will transcribe this recording but I will anonymise it so that your name is not attached to the transcript and I will also remove any other names (of applicants, other staff etc). These will be my research materials so they will be stored securely by me off-site and will not go on the Commission's system.
- Are you happy to continue – do you have any questions before we begin.

*[start audio recorder and the back-up iphone recording]*

### WARM UP AND BACKGROUND

**Thank you for agreeing to take part in this interview. Just to get started.....**

1. Remind me how long you've been at the Commission?
2. And before that, what did you do?
3. EITHER

*[If CRM] How many cases are you handling? Stage 2 review? Screen?*

OR

*[if CM or other non-CRM ] And which parts of the Commission's work are you mostly involved with – committees, no appeal screening, single commissioner decisions?*

## GENERAL QUESTIONS RE GUILTY PLEAS

4. Do you see a lot of guilty plea convictions in your work here? What sort of proportion of applications do you think involve guilty plea convictions?
5. So, based on your work here and any previous experience, do you think that there is a significant risk of guilty pleas leading to wrongful convictions?
  - a. IF NO – so what is it about convictions through guilty pleas that makes them likely to be safe?
  - b. What factors *could* cause a risk of wrongful conviction by guilty plea?

## NO APPEAL IN GUILTY PLEA CASES

6. In reading cases here I've seen that most guilty plea conviction applications are No Appeal cases. Why do you think that so few applicants who plead guilty have been to appeal?
7. What do you think could amount to ECs for no appeal in a guilty plea case?
8. Does it make any difference to No Appeal ECs if the applicant has no right of appeal (eg if they pleaded guilty in the mags)?

[questions 9 and 10 only for CMs or those involved in NA decisions or policy]

9. Each CM who sends NA letters in GP cases gives their own formulation of the significance of a GP and what is needed to get past a GP – there don't seem to be standard paragraphs for this. Why is that? Where would I find guidance for CMs and CRMs on the requirements for a successful appeal against a guilty plea?
10. One of my sample periods was for the first three months of this year. In that period I saw a number of cases which were closed administratively (by which I mean without involvement of a CM) after the applicant was sent a pro forma letter referring to the lack of appeal. Can you explain how this process came about?

## SCREENING AND REVIEWING GP CONVICTIONS

11. When an application lands on your desk, what difference does it make if it is a guilty plea conviction?
12. What are you looking for then in a guilty plea application, that would justify further work?
13. Where does this approach to guilty plea cases come from?

#### OTHER CASEWORK ISSUES IN GUILTY PLEA CASES

14. Were you involved in either the Immigration and Asylum trawl? How did this come about?

#### GP CONVICTIONS FROM THE MAGISTRATES COURT

15. Going back to GP convictions in the magistrates court, given that there is no right of appeal against GP in mags court, why do you think the CCRC has been given the power to review these cases?
16. Do these cases present any particular difficulties for the Commission
17. What is the test for referral in these cases? (i.e. a real possibility of what?)

**Thank you. We've covered all of my questions but is there anything else you wanted to add?**

**I'll turn off the recording now.**



## Annex B: Interview Schedule for Lawyer interviews.



## Interview Schedule

### HOUSEKEEPING

- As a PhD researcher, I need to comply with the terms of the university's ethical approval for this research. That means that I need to get you to read this information sheet and then sign a form to show that you are happy to continue with the interview.

*[while s/he reads the form, offer to get coffee/water]*

*[complete forms and obtain signature – interviewee keeps information sheet, I keep signed form]*

- Just to confirm that I will transcribe this recording but I will anonymise it so that your name is not attached to the transcript and I will also remove any other names (of clients, other staff etc). These will be my research materials so they will be stored securely by me off-site.

- do you have any questions before we begin.

*[start audio recorder and the back-up iphone recording]*

### BACKGROUND

1. How long have you been at the firm and what does your role involve.
2. What did you do before you did this job?
3. Why did you choose to go into criminal defence work?

### ADVICE ON PLEA

4. When you advise a client on plea, what are the factors that you take into account?
5. What factors do you think clients take into account?
6. Do you ever have clients who enter guilty pleas despite your advice that they have a defence? How do you handle this situation?
7. Do you think clients are ever placed under undue pressure to plead guilty?



## FUNDING ARRANGEMENTS AND FEES

8. Do you think individual defence lawyers can be under pressure to prioritise fees over the interests of their clients when it comes to plea advice?
9. What factors (apart from better funding) enable defence lawyers to withstand pressure to allow funding to influence advice to clients?

## APPEAL AGAINST GUILTY PLEA CONVICTIONS

10. Have you had clients who have asked you to help them appeal a guilty plea conviction?
11. When advising clients about plea, do you talk about the impact of a guilty plea on appeal rights?
12. Do you think it should be possible to appeal against a conviction by way of guilty plea (mags court/CC)?

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