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### **Under the Gun: Plea Bargains and the Arbitrary Deadline**

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# UNDER THE GUN: PLEA BARGAINS AND THE ARBITRARY DEADLINE

*Michael D. Cicchini\**

## ABSTRACT

*Before a prosecutor and defendant may settle their criminal case by plea bargain, they must first obtain the trial judge's approval. The judge is allowed to reject a plea bargain if, in the exercise of sound discretion, the judge finds it is not in the public interest. However, some judges will reject plea bargains simply because the parties reached their agreement after the court's arbitrary plea deadline expired. At first glance, setting a plea deadline appears to be a routine administrative matter of little significance. However, plea deadlines can implicate important constitutional principles and often have a tremendous negative impact on the parties.*

*Courts justify their imposition of plea deadlines under the theory of judicial economy. But in reality, arbitrary deadlines are highly inefficient and create several additional problems: they often lead to rushed, unjust plea bargains; they obstruct the defendant from entering her plea knowingly and intelligently; they are the antithesis of the case-by-case discretion the judge is obligated to exercise before rejecting a plea; and they violate the separation of powers doctrine, infringing upon the prosecutor's discretion to resolve the State's cases when and how the prosecutor deems appropriate.*

*In light of these and other problems, this Article advocates for simple legal reform: the abolition of arbitrary plea deadlines or, in the alternative, severe constraints on the trial judge's power to impose them. The legal system, however, is often resistant to change. Therefore, this Article makes a more immediate and useful contribution: it provides a strategy for the parties to obtain the judge's approval of their plea deal, even when that plea deal is reached after the court's arbitrary deadline has expired.*

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### INTRODUCTION

Most criminal cases ultimately resolve by plea bargain instead of jury trial.<sup>1</sup> When the prosecutor and the defendant reach a plea deal, the trial judge must first approve their agreement before the parties are allowed to settle their case.<sup>2</sup> There are many reasons a trial judge might reject a plea bargain. If, for example, in the exercise of sound judicial discretion, the judge finds the agreement is not in the public interest, the judge may reject it and force the parties to trial instead.<sup>3</sup>

However, some judges will reject plea bargains *not* based on the exercise of their discretion, but merely because the parties were unable to reach an agreement until after an arbitrary, court-imposed plea deadline had expired.<sup>4</sup> Far from being a routine administrative matter or calendaring issue, setting such deadlines can have serious implications for the parties. For example, one defendant was forced to go to trial because, for reasons outside of his control, he missed the plea deadline by a mere forty minutes.<sup>5</sup> In another case, the judge rejected the defendant's plea because the parties reached their agreement too late; the defendant then lost his trial and his life—after conviction, he was sentenced to death.<sup>6</sup>

Courts often justify their imposition of plea deadlines under the theory of judicial economy or efficiency.<sup>7</sup> But efficiency must give way to other, more important interests.<sup>8</sup> Further, the imposition of an arbitrary plea deadline actually creates inefficiency by clogging up the court's trial calendar. This operates to the detriment of the parties, the taxpayer, and even the judge who imposed the deadline.<sup>9</sup>

Other courts justify plea deadlines under an incentive-based theory: if a defendant is not forced to resolve the case early, she will have an incentive to manipulate the system by negotiating a better plea deal late in the process.<sup>10</sup> This argument is baseless and, in

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1. *See infra* Section I.

2. *See infra* Section II.

3. *See infra* Section II.

4. *See infra* Section II.

5. *See infra* notes 41–43 and accompanying text.

6. *See infra* notes 55–57 and accompanying text.

7. *See infra* Part III.A.

8. *See infra* Part III.A.

9. *See infra* Part III.A.

10. *See infra* Part III.B.

fact, the opposite is true. It is the defendant who needs protection during plea negotiations, as the plea bargain machinery was designed to benefit prosecutors by giving them tremendous power and leverage over defendants.<sup>11</sup>

Not only are plea deadlines unjustified on efficiency and incentive grounds, but they also create several other problems. For example, in most cases the parties are able to reach a plea agreement *before* the court's arbitrary deadline.<sup>12</sup> However, their rushed, uninformed horse trading of charges often results in an equally arbitrary plea bargain that fails to accurately reflect the true facts of the case.<sup>13</sup> Similarly, when the parties rush to meet a deadline, the limited information available to the defendant so early in the case is often insufficient to permit a knowing and intelligent entry of the plea, as is theoretically required.<sup>14</sup>

In other cases, the parties will not be able to resolve their case until *after* the court's deadline has passed. In those cases, when the judge rejects their agreement and forces them to trial, different problems emerge. For example, a judge who rejects an agreement solely because of its timing abandons her obligation to exercise discretion, on a case-by-case basis, in deciding whether the plea deal is in the public interest.<sup>15</sup> Similarly, by terminating plea negotiations against the State's wishes, the judge violates the separation of powers doctrine by infringing upon the prosecutor's discretion to settle the State's cases.<sup>16</sup>

In light of these and other problems, this Article advocates for simple legal reform: abolishing, or at least greatly constraining, the trial court's ability to impose an arbitrary plea deadline.<sup>17</sup> But legal reform is often slow to materialize. Therefore, this Article makes a more useful and immediate contribution: it provides the parties with a strategy and a sample motion for obtaining a trial court's approval of their plea deal, even when they reach their agreement after the court's deadline has passed.<sup>18</sup>

This Article proceeds as follows. Section I explains some basics of plea bargains, including their widespread use in the criminal justice system. Section II discusses the judiciary's imposition of arbitrary plea deadlines—including several variations thereof—and demonstrates the real-life impact such deadlines can have on the parties. Section III debunks the justifications for the arbitrary plea deadline, and Section IV discusses the numerous problems that such deadlines actually create. Section V then recommends legal reform, and Section VI provides an interim strategy for the parties to obtain the trial court's approval of their plea bargain, even postdeadline.

## I. PLEA BARGAINING BASICS

Broadly defined, a plea bargain is “any agreement between the prosecutor and the defendant whereby a defendant agrees to perform some act or service [nearly always the

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11. *See infra* Part III.B.

12. *See infra* Part IV.A.

13. *See infra* Part IV.A.

14. *See infra* Part IV.B.

15. *See infra* Part IV.C.

16. *See infra* Part IV.D.

17. *See infra* Section V.

18. *See infra* Section VI.

entry of a plea] in exchange for more lenient treatment by the prosecutor.”<sup>19</sup> As this definition suggests, plea deals come in many shapes and forms,<sup>20</sup> and they often include both charge and sentence concessions.<sup>21</sup> The point for our purposes, however, is that when the defendant and the State reach a plea deal, the parties are agreeing to resolve their case without the need for a costly, time-consuming, and risky jury trial.

Plea bargains are indeed significant, as some estimates put the percentage of cases resolved by plea deal at more than ninety-five percent.<sup>22</sup> Given this, one does not have to agree that plea bargaining is “highly desirable for our criminal justice system”<sup>23</sup> in order to appreciate that, as a practical matter, plea bargaining “is not some adjunct to the criminal justice system; it *is* the criminal justice system.”<sup>24</sup> Although the debate will rage on about the desirability of plea bargaining,<sup>25</sup> it is undeniable that, in any given case, a plea bargain may offer tremendous benefits to both the State and the defendant.

From the State’s perspective, resolving cases by plea bargain instead of trial “can enhance judicial economy” and “protect the resources of the [s]tate,” which, in turn, allows a prosecutor to obtain far more convictions than if she was forced to try every case to a jury.<sup>26</sup> For a defendant, a plea bargain offers great certainty when compared with the alternative of a jury trial, which is analogous to “a plunge from an unknown height.”<sup>27</sup> A plea bargain allows a defendant to avoid conviction on one or more of the

19. *State v. Thompson*, 426 A.2d 14, 15 n.1 (Md. Ct. Spec. App. 1981).

20. See Michael D. Cicchini, *Broken Government Promises: A Contract-Based Approach to Enforcing Plea Bargains*, 38 N.M. L. REV. 159, 160–61 (2008) (providing several examples of plea bargains).

21. See, e.g., *People v. Killebrew*, 330 N.W.2d 834, 836 (Mich. 1982) (discussing “charge bargaining” and “sentence bargaining”).

22. See Darryl K. Brown, Response, *What’s the Matter with Kansas—and Utah?: Explaining Judicial Interventions in Plea Bargaining*, 95 TEX. L. REV. 47, 62 (2017) (“All this has allowed state and federal courts to reach guilty plea rates of 96 to 99 percent.”); John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 9 (1978) (“[A]s many as 99 percent of all felony convictions are by plea.”). For more statistics and sources, see Kiel Brennan-Marquez, Stephen E. Henderson & Darryl Brown, *The Trial Lottery*, 3 n.1 (Univ. Va. Sch. Law Pub. Law & Legal Theory Paper Ser. No. 2020-03, 2020), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3521342](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=3521342) [<https://perma.cc/PF8P-8ZZR>].

23. See *People v. Evans*, 673 N.E.2d 244, 247 (Ill. 1996).

24. Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992).

25. Compare Timothy Lynch, *The Case Against Plea Bargaining*, 26 REGULATION 24, 26 (2003) (“Plea bargaining rests on the constitutional fiction that our government does not retaliate against individuals who wish to exercise their right to trial by jury.”), with Timothy Sandefur, *In Defense of Plea Bargaining*, 26 REGULATION 28, 28 (2003) (“[T]he mere fact that a process can be abused does not necessarily make that process unconstitutional or immoral. Plea bargaining . . . needs reform. But the process itself is not unconstitutional, nor does it necessarily violate a defendant’s rights.”).

26. See *State v. Darelli*, 72 P.3d 1277, 1280 (Ariz. Ct. App. 2003) (quoting *Espinoza v. Martin*, 894 P.2d 688, 690 (Ariz. 1995)).

27. Albert W. Alschuler, *The Trial Judge’s Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1080–81 (1976) (quoting Oakland Public Defender John D. Nunes); see also Daniel S. McConkie, *Judges as Framers of Plea Bargaining*, 26 STAN. L. & POL’Y REV. 61, 63 (2015) (“Put simply, defendants decide to plead guilty out of fear . . .”).

charged crimes<sup>28</sup> and avoid the costly “trial penalty” on the crime or crimes to which the defendant does plead.<sup>29</sup>

Finally, it is important to reiterate that when the parties reach a plea agreement, the defendant and the State are, necessarily and by definition, in agreement. Both parties want to resolve the case for terms set forth in the plea deal. At that point, there “is not a battle between the [State] and the defendant since the [State has] agreed to the bargain.”<sup>30</sup> However, as the next Section demonstrates, when the parties attempt to resolve their case, there is sometimes a battle. That battle is waged between a unified prosecutor and defendant on one side and an obstinate trial judge on the other.

## II. THE ARBITRARY PLEA DEADLINE

Even when the parties agree to resolve their case, “[a] court may reject a plea in exercise of sound judicial discretion.”<sup>31</sup> In practice, “[t]here may be a number of reasons for courts to refuse to accept a plea bargain.”<sup>32</sup> These include, theoretically, protecting an innocent defendant from conviction<sup>33</sup>—or at least from conviction without sufficient factual allegations to support the charge<sup>34</sup>—and ensuring that *all* defendants enter their pleas knowingly, intelligently, and voluntarily.<sup>35</sup>

In addition to protecting the defendant, “a circuit court . . . may, if it appropriately exercises its discretion, reject any plea agreement that does not, in its view, serve the public interest.”<sup>36</sup> Considerations relevant to the “public interest” include “the general public’s perception that crimes should be prosecuted,” “the interests of the victim,” and

28. See Phil Locke, *Prosecutors, Charge Stacking, and Plea Deals*, WRONGFUL CONVICTIONS BLOG (June 12, 2015), <http://wrongfulconvictionsblog.org/2015/06/12/prosecutors-charge-stacking-and-plea-deals/> [<https://perma.cc/P5GK-C6G7>].

29. See NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, *THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT* 6 (2018) (describing the “trial penalty” as “the discrepancy between the sentence the prosecutor is willing to offer in exchange for a guilty plea and the sentence that would be imposed after trial”).

30. *People v. Wright*, No. C054979, 2008 WL 3846537, at \*7 (Cal. Ct. App. Aug. 19, 2008) (Robie, J., dissenting) (quoting *People v. Cobb*, 188 Cal. Rptr. 712, 720 (Cal. Ct. App. 1983)); see also *State v. Brimage*, 638 A.2d 904, 905 (N.J. Super. Ct. App. Div. 1994) (“[T]he defendant and the prosecutor join in urging that we reverse the Law Division orders obstructing the entry of the negotiated pleas.”).

31. *Santobello v. New York*, 404 U.S. 257, 262 (1971).

32. *State v. Hager*, 630 N.W.2d 828, 833 (Iowa 2001).

33. See *id.* (explaining that reasons for rejecting a plea bargain “have normally centered on doubts with the defendant’s guilt”).

34. See *State v. Sears*, 542 S.E.2d 863, 867 (W. Va. 2000) (requiring “that there is a factual basis for [the defendant’s] guilty plea.” (quoting *Myers v. Frazier*, 319 S.E.2d 782, 790 (W. Va. 1984))); Darryl Brown, *The Judicial Role in Criminal Charging and Plea Bargaining*, 46 HOFSTRA L. REV. 63, 67–68 (2017) (discussing the court’s authority to “[d]ismiss[] [c]harges [d]ue to [f]actual [i]nsufficiency”) [hereinafter Brown, *The Judicial Role*].

35. See *Brady v. United States*, 397 U.S. 742, 748 (1970) (“Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.”); *State v. Bangert*, 389 N.W.2d 12, 22 (Wis. 1986) (discussing that the court must affirmatively establish that a defendant understands the nature of the charge to which she is pleading as well as the constitutional rights being waived).

36. *State v. Conger*, 797 N.W.2d 341, 344 (Wis. 2010); see also Brown, *The Judicial Role*, *supra* note 34, at 70–73 (discussing the court’s authority to dismiss charges in the interest of justice).

“the seriousness of the criminal charges and the character and background of the defendant.”<sup>37</sup>

However, trial judges will sometimes reject plea agreements not because they have considered the above factors or otherwise exercised sound discretion, but merely because the parties did not reach their agreement until after an arbitrary, court-imposed plea deadline has passed. For example, one trial judge “adhered to a ‘local rule’ of his own making prohibiting plea agreements after pretrial hearings.”<sup>38</sup> Another judge adopted a policy “that no plea agreement would be considered after the readiness conference, which was to be held a week or so prior to trial.”<sup>39</sup> Similarly, another judge employed a slightly more accommodating policy, announcing “after the first trial date, no pleas will be accepted.”<sup>40</sup>

Judges will sometimes set these deadlines in stone. In an example that would be humorous if not for its real-life consequences, the trial judge in *United States v. Gamboa*<sup>41</sup> “instructed counsel for the parties that if the defendants were going to accept the Government’s offer, they had to tender their acceptances and guilty pleas by 9:00 a.m. the next day or the court would not consider them.”<sup>42</sup> Unfortunately, one of the codefendants did not speak English, and the following debacle unfolded:

When Martinez and his attorney arrived . . . the interpreter was not there; *he was stuck in traffic*. As a result, Martinez and his attorney were unable to confer. The interpreter eventually arrived, however, and, after consulting counsel, Martinez agreed to join his co-defendants and accept the Government’s plea offer. But he made his decision too late. By the time counsel were able to inform the court that the defendants were prepared to tender pleas of guilty, it was 9:40 a.m., *forty minutes past the court’s deadline*. Adhering strictly to the 9 a.m. deadline, the court refused to accept the proposed plea bargain.<sup>43</sup>

Some judges who set arbitrary deadlines, perhaps grasping the pure absurdity of situations like this, allow for limited exceptions. One judge, for example, adopted the following policy: “*Except where extraordinary circumstances exist, plea agreements of any kind will NOT be permitted after the pretrial conference.*”<sup>44</sup> Other courts include a good cause exception, such as permitting late deals “if new circumstances arose that were

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37. *Sears*, 542 S.E.2d at 867 (quoting *Myers*, 319 S.E.2d at 790–91).

38. *Id.*

39. *People v. Wright*, No. C054979, 2008 WL 3846537, at \*6 (Cal. Ct. App. Aug. 19, 2008) (Robie, J., dissenting) (quoting *People v. Cobb*, 188 Cal. Rptr. 712, 713 (Cal. Ct. App. 1983)) (internal quotation mark omitted).

40. *State v. Darelli*, 72 P.3d 1277, 1281 (Ariz. Ct. App. 2003) (quoting *Hare v. Superior Court*, 652 P.2d 1387, 1388 (Ariz. 1982)).

41. 166 F.3d 1327 (11th Cir. 1999).

42. *Gamboa*, 166 F.3d at 1330.

43. *Id.* (emphasis added).

44. Branch 3 Felony Scheduling Order (Wis. Cir. Ct., Kenosha Cty. May 15, 2020) (on file with the author). In reality, it is often the *routine*—such as reviewing discovery materials, finding and interviewing witnesses, obtaining scientific test results, and filing and deciding suppression motions—not the *extraordinary* that prevents the early resolution of cases.

unknown or unknowable as of the trial readiness [conference] and would otherwise warrant a different disposition or a continuance.”<sup>45</sup>

Of course, what constitutes “extraordinary circumstances” or justifies “a different disposition” must be decided by the very judge who set the arbitrary deadline in the first place, thus leaving the parties with little confidence that the decision will be any less arbitrary than the original deadline. What is clearer, however, is that these various exceptions typically do not allow for “a mere change of mind or a renegotiation of the plea bargain by the parties. Thus, the deadline is fixed for litigants . . . who simply change their mind after the plea deadline.”<sup>46</sup>

Some judges are also willing to adjourn their deadlines to a later point in the proceedings. This allows the parties to at least make an initial assessment of the admissible evidence before striking a plea deal.<sup>47</sup> However, other judges are so hostile to plea bargains, pretrial motions, and the testing of evidence that they will set and enforce arbitrary deadlines that occur *before* dispositive motions can be decided and crucial evidence can be tested.

In a drug possession case, *State v. Avitia-Wilson*,<sup>48</sup> even though the substance alleged to be a drug had not yet been tested, the judge set an arbitrary plea deadline and refused to modify it, regardless of “whether the drug(s) have been tested [by the deadline.]”<sup>49</sup> Similarly, *State v. Guzik*<sup>50</sup> involved a motion to suppress the State’s physical evidence for a violation of the Fourth Amendment, and the judge enforced a

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45. *People v. Wright*, No. C054979, 2008 WL 3846537, at \*8 (Cal. Ct. App. Aug. 19, 2008) (Robie, J. dissenting) (alteration in original) (citation omitted). If something is unknowable, it is necessarily unknown. This type of sloppy, or at least redundant, language in such an important policy is troubling.

46. *Cf. State v. Hager*, 630 N.W.2d 828, 836 (Iowa 2001) (holding that the district court abused its discretion in refusing to consider a plea bargain solely because the defendant had missed the deadline). Given what is at stake in a criminal case, particularly for the individual defendant, a change of mind, in itself, is a common and legitimate reason to settle a case later in process. *See infra* Part IV.F.

47. *See State v. Brimage*, 638 A.2d 904, 907 (N.J. Super. Ct. App. Div. 1994) (“Only after discovery has been exchanged, and necessary motions decided, a plea cut-off rule should be implemented . . . .” (quoting Criminal Division Operating Standard III, *Criminal Division White Paper*, 133 N.J.L.J. 1160, 1161 (1993))).

48. *State v. Avitia-Wilson*, No. 2019CF001382, (Wis. Cir. Ct., Kenosha Cty. Feb. 5, 2020), <http://wcca.wicourts.gov/caseDetail.html?caseNo=2019CF001382&countyNo=30&index=0&isAdvanced=true&mode=details> [<https://perma.cc/4LZV-NDTY>] [hereinafter *State v. Avitia-Wilson*, No. 2019CF001382 (Feb. 5, 2020)].

49. *Id.* The court record of events also referenced a *Ludwig* hearing. This hearing is named after the case of *State v. Ludwig*, 369 N.W.2d 722 (Wis. 1985), and is designed to ensure that defense counsel communicated the State’s plea offer to the defendant and that it is the defendant’s decision, not defense counsel’s, to reject the offer. *See id.* at 727. *Ludwig* does not authorize a court to impose an arbitrary deadline; ironically, *Ludwig* involved an offer that was made on the morning of trial and would have been accepted by the defendant and approved by the court had counsel properly communicated it to the defendant. *Id.* at 723, 727. The trial judge in *State v. Avitia-Wilson*, however, combined the *Ludwig* hearing with the court’s early, arbitrary deadline, thus explaining the reference to the *Ludwig* hearing in the court record of events. *See State v. Avitia-Wilson*, No. 019CF001382 (Feb. 5, 2020), *supra* note 48.

50. *State v. Guzik*, No. 2019CF001164, (Wis. Cir. Ct., Kenosha Cty. Feb. 20, 2020), <http://wcca.wicourts.gov/caseDetail.html?caseNo=2019CF001164&countyNo=30&index=0&isAdvanced=true&mode=details> [<https://perma.cc/82MC-FMX6>] [hereinafter *State v. Guzik*, No. 2019CF001164 (Feb. 20, 2020)].



plea cutoff date before deciding the defendant's motion.<sup>51</sup> The defendant was thus forced to accept or reject a plea offer without knowing whether the State would be able to use its evidence at trial.<sup>52</sup> The court then stated that the "suppression [motion] will be heard on [the] day of trial; in the afternoon."<sup>53</sup> The midtrial timing of the hearing raises other concerns as well.<sup>54</sup>

The above examples demonstrate that establishing and enforcing a plea bargain deadline is more than a mere administrative task or routine calendaring event. Even aside from the logistical difficulties that arbitrary deadlines create, their real-life consequences can be staggering. In one case, the defendant attempted to accept the State's offer on the first day of trial, which was after the court's deadline had expired.<sup>55</sup> The prosecutor agreed to resolve the case; however, the judge would not permit the defendant to enter a plea.<sup>56</sup> After the defendant lost at trial, he "was ultimately sentenced to death."<sup>57</sup>

### III. DEBUNKING THE ARGUMENTS FOR THE ARBITRARY DEADLINE

Given the high stakes in criminal cases for both the defendant and the State—even when the death penalty is not involved and the charges are comparatively minor—one would assume a trial judge would have good reasons for imposing a deadline that dictates when, and for how long, the parties are able to negotiate a resolution. But that assumption would be incorrect. Instead, courts that impose arbitrary deadlines offer only two types of arguments in their favor, neither of which withstands even minimal scrutiny. This Section explores these arguments. Part III.A discusses the courts' efficiency-based arguments. Then, Part III.B describes the courts' incentive-based arguments.

#### A. Efficiency-Based Arguments

Most of the justifications for the arbitrary deadline are efficiency-based arguments flying under a variety of banners, such as judicial economy, docket control, efficient courtroom administration, or calendar management. For example:

[I]t is important for our legal system to be effectively and efficiently administered. Consequently, the efficient processing of a case has become an important element in the administration of our courts, and a plea deadline in

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51. See *id.* The court record of events also indicates that a *Ludwig* hearing was held. This particular trial judge set his arbitrary plea deadline to correspond to the *Ludwig* hearing. For an explanation and discussion of the *Ludwig* hearing, see *supra* note 49.

52. See *State v. Guzik*, No. 2019CF001164 (Feb. 20, 2020), *supra* note 50.

53. *Id.*

54. The judge likely did not realize it, but the timing of the motion hearing tips the judge's hand as to its outcome. Why bother selecting the jury or otherwise beginning the trial in the morning, before deciding the defendant's motion to suppress the drug evidence in the afternoon, unless the judge already decided he was going to deny the motion? Given the judge's concern for efficiency (which is the justification for the arbitrary deadline in the first place), if there was any chance he would grant the motion, he would have held the motion hearing before summoning the jurors and beginning the trial. This prejudgment of the defendant's motion, without hearing any testimony or arguments, could constitute judicial bias. See *State v. Jiles*, 663 N.W.2d 798, 801–02, 810 (Wis. 2003).

55. See *Wiggins v. State*, 193 So.3d 765, 778–79 (Ala. Crim. App. 2014).

56. See *id.* at 779.

57. *Id.* at 778.

criminal cases is one method commonly utilized by courts to help manage increasing demands on the criminal dockets. Deadlines are a way to help distinguish those cases that do not ultimately need a trial from those cases that require a trial, at a point in the process to help ensure that the time and resources involved in the preparation for trial are not devoted to those cases that will ultimately be resolved by a guilty plea. A plea deadline becomes a cutoff point for administrative purposes, and enables the court to direct its trial resources to those cases in which the parties do not reach a plea agreement by a certain date.<sup>58</sup>

There are several problems with this efficiency-based justification. First, even assuming for the moment that arbitrary plea deadlines *do* promote efficiency, “given the weighty interests of the defendant and the government at stake,” the trial judge must not elevate efficiency over other considerations.<sup>59</sup> Efficiency is but one consideration and is not even the primary one:

In our consideration of the competing interests at stake . . . efficiency must always be compatible with fairness, and fairness must consider the fundamental principles which drive our system of justice and the rights and liberties of each individual. There are many procedures courts could employ that would quickly eliminate backlogs and enable our legal system to run with the efficiency of an assembly line, but they are not implemented because they would offend the principles fundamental to our system of justice.

Plea deadlines not only adversely impact *prosecutorial discretion* and *individual interests*, but strict adherence to deadlines impedes the very *discretion of the court*.<sup>60</sup>

Second, the underlying assumption that arbitrary deadlines promote efficiency is a baffling one that fails to withstand even basic testing. For example, in one case the parties reached a plea agreement on Monday, the day before their Tuesday trial was scheduled to begin.<sup>61</sup> However, this was several days after the judge’s “local rule of his own making prohibiting plea agreements after pretrial hearings were concluded.”<sup>62</sup> The judge therefore rejected the parties’ agreement, claiming that the timing of such a plea deal “makes it harder for us to control our docket.”<sup>63</sup>

But in analyzing the record, the appellate court observed that if the plea agreement had been accepted, the anticipated witnesses and would-be jurors could easily have been called off without ever having to appear in court.<sup>64</sup> From the trial court’s perspective,

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58. *State v. Hager*, 630 N.W.2d 828, 835 (Iowa 2001).

59. *See United States v. Shepherd*, 102 F.3d 558, 562–64 (D.C. Cir. 1996) (reversing the defendant’s conviction because of the district court’s abuse of discretion in elevating its own interests over those of the defendant and the public).

60. *Hager*, 630 N.W.2d at 835–36 (emphasis added) (reversing the defendant’s conviction because of the trial court’s abuse of discretion in rejecting the parties’ plea agreement).

61. *State v. Sears*, 542 S.E.2d 863, 866 (W. Va. 2000).

62. *Id.* at 867 (internal quotation mark omitted).

63. *Id.* at 866.

64. *Id.* at 867–68. In many courts, there will be numerous other cases stacked for trial, and the jurors could be used for one of those cases instead, thus promoting efficiency. *See, e.g., Overview of a Trial*, CIV. L. SELF-HELP CTR., <http://www.civillawselfhelpcenter.org/self-help/lawsuits-for-money/trial-stage-your-day-in-court/249-overview-of-a-trial> [<https://perma.cc/JW5S-YRK2>] (last visited Nov. 1, 2020). In many counties, of

“the time and resources involved in the preparation for trial” are not implicated until very late in the process—usually not until the morning of the trial itself.<sup>65</sup> Given that, the appellate court reversed the trial judge: “We do not see,” it wrote, “how this particular local rule would help control the docket.”<sup>66</sup>

Even if the parties in the above case had not reached their plea deal until Tuesday morning—with the witnesses present in court and the jurors summoned, assembled, and ready to serve—the trial judge’s reasoning would still have been logically flawed, suffering from the sunk cost fallacy. “Individuals commit the sunk cost fallacy when they continue a behavior or endeavor”—here, a jury trial—“as a result of previously invested resources” such as “time, money or effort.”<sup>67</sup>

As of Tuesday morning, the time, money, and effort needed to get the witnesses and jurors to court has already been expended; those costs are “sunk.” And a sunk cost is not a relevant factor in deciding whether to proceed to trial. As another court explained, going to trial because of sunk costs does not recover those expended resources and, in fact, actually exacerbates the problem:

While deadlines are imposed as a means to eliminate the expense and time of assembling witnesses, jurors, and others for a trial that never occurs because the defendant pleads guilty on the morning of trial, the refusal to accept such a plea on the morning of trial only compounds the time and expense when the parties are forced to try the case. The trial may last several days or weeks, and the expense is actually increased exponentially.<sup>68</sup>

Worse yet, the major expenses often do not begin to pile up until *after* the trial ends. If the defendant is convicted, the case inevitably “continues to burden the court system with the expense of an appeal . . . or other postconviction proceedings. On the other hand, a plea of guilty results in the waiver of a variety of rights, and normally concludes the case without the expense of further proceedings.”<sup>69</sup>

These economic realities make it “all the more ironic that the justification for these kinds of plea deadlines is supposedly judicial efficiency.”<sup>70</sup> In fact, “the interest in judicial efficiency actually supports rejecting uniform deadlines.”<sup>71</sup> One need not employ economic-based reasoning, or even logical thinking, to realize this. As practicing lawyers know from experience, one need only appear in a given courtroom on Monday or

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course, there are multiple criminal court judges in the same courthouse, thus greatly increasing the chances that the jurors can be used elsewhere.

65. See *State v. Hager*, 630 N.W.2d 828, 835–36 (Iowa 2001).

66. *Sears*, 542 S.E.2d at 868 (internal quotation marks omitted).

67. *Sunk Cost Fallacy*, BEHAVIORALECONOMICS.COM, <http://www.behavioraleconomics.com/resources/mini-encyclopedia-of-be/sunk-cost-fallacy/> [<https://perma.cc/468R-48EV>] (last visited Nov. 1, 2020).

68. *Hager*, 630 N.W.2d at 836. In addition, this assumes that there is only one case that could possibly be tried on a given day. In most courts, there will be multiple other cases waiting in the wings to go to trial. Therefore, the cost of bringing in jurors, for example, will not be wasted in any imaginable sense of the word.

69. *Id.*

70. *People v. Wright*, No. C054979, 2008 WL 3846537, at \*9 (Cal. Ct. App. Aug. 19, 2008) (Robie, J., dissenting).

71. *Id.* (emphasis omitted).

Tuesday morning to witness the backlog of cases vying to go to trial that week—many of them simply because the parties are no longer permitted to enter into plea bargains.<sup>72</sup>

### B. Incentive-Based Arguments

While most arguments in favor of the arbitrary plea deadline are efficiency based, a second category of argument is that the failure to set and enforce such a deadline “encourages people to just plead later and later.”<sup>73</sup> Similarly, another judge asserted “the importance of trying to discourage defendants from rejecting early plea offers in the hope of getting a better one later.”<sup>74</sup>

This raises the obvious question: What, exactly, is wrong with that? It is hard to imagine such a criticism being lodged against civil litigants, who routinely hold out for the best possible offer and then resolve their cases on the morning of trial, as the saying goes, on the courthouse steps. A criminal defendant who is negotiating with her liberty—rather than mere money—should be afforded the same opportunity.

This criticism of defendants is badly misplaced for another reason. If criticism is warranted at all, it should be directed at the State—or at least at the system that was designed for the State’s benefit. Prosecutors typically do not make reasonable offers early in the case.<sup>75</sup> Rather, they will “stack” criminal charges in their complaints,<sup>76</sup> hoping that in-custody defendants will accept early offers in order to be released from custody sooner.<sup>77</sup> Further, prosecutors do not want to make early, reasonable offers to

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72. See, for example, *State v. Brimage*, 638 A.2d 904, 904–05 (N.J. Super. Ct. App. Div. 1994), where the defendant rejected a plea bargain in favor of trial only to find himself, on the morning of trial, ranked low on the court’s “trial list” relative to competing cases. Defense lawyers and prosecutors often refer to this Monday or Tuesday morning cattle call as “the trial lottery.” Although the vast majority of cases resolve by plea bargain, even the relatively few that are set for trial are still too many for the judge’s calendar to accommodate. See, e.g., Jerold H. Israel, *Excessive Criminal Justice Caseloads: Challenging the Conventional Wisdom*, 48 FLA. L. REV. 761, 778 (1996) (discussing how overloaded dockets prohibit judges from spending more than a few minutes on any one case). This trial lottery is not to be confused with the article titled *The Trial Lottery*, which advocates for trying even some of the cases that actually resolve by plea bargain. See Brennan-Marquez et al., *supra* note 22, at 5–6. This experiment would obviously be difficult to implement given that so many cases that have not resolved are competing for limited trial slots on the court’s calendar.

73. *State v. Sears*, 542 S.E.2d 863, 866 (W. Va. 2000).

74. *Wright*, 2008 WL 3846537, at \*9 (Robie, J., dissenting).

75. In my experience, the prosecutor’s initial plea offer is often *so bad* that it offers virtually no inducement to plead, even assuming the alternative is going to trial and *losing*. One of the reasons for this is that prosecutors know next to nothing about their case until they begin to read police reports and talk to their witnesses on the weekend before, or even morning of, trial. This “charge first, ask questions later” approach to criminal cases has been exacerbated by the demise of the preliminary hearing, which was intended, but is no longer used, to evaluate the merits of a case before the defendant is bound over for trial. See Michael D. Cicchini, *Improvident Prosecutions*, 12 DREXEL L. REV. 465 (2020) [hereinafter Cicchini, *Improvident Prosecutions*] (discussing several abuses of the preliminary hearing that prevent it from serving its original purpose). See also *infra* Part IV.A for a discussion on the adequate time needed to produce an accurate plea agreement.

76. Locke, *supra* note 28 (“This has become absolutely standard practice. The prosecutor will ‘stack’ charges to build such a scary potential sentence, that even actually innocent people will be intimidated into pleading guilty.”).

77. See John Raphling, Opinion, *Plead Guilty, Go Home. Plead Not Guilty, Stay in Jail*, L.A. TIMES (May 17, 2017, 4:00 AM), <http://www.latimes.com/opinion/op-ed/la-oe-raphling-bail-20170517-story.html> [<https://perma.cc/89W3-GSMB>] (“Prosecutors know that defendants in custody will plead guilty more quickly than those who are out. So they request bail and enjoy the leverage custody gives them.”).

out-of-custody defendants; instead, prosecutors will wait it out, hoping that those defendants commit technical, noncriminal bond violations.<sup>78</sup> This allows prosecutors to file bail jumping charges and then coerce defendants into pleading to the original complaint in exchange for dismissal of the bail jumping complaint.<sup>79</sup>

A defendant who can, at least temporarily, resist these forms of government extortion and negotiate a better plea deal should not be condemned or discouraged from doing so. The fear that the defendant will somehow cheat justice unless the parties are cutoff from plea bargaining early in the case is not only unfounded but nonsensical. The reason is that “the [State] will not make late offers if they are not in the interest of justice, and if defendants are attempting to work the system the [prosecutor] can stop the process in its tracks simply by refusing to accept any late conditional pleas.”<sup>80</sup>

Of course, prosecutors will not stop negotiating late plea bargains. Their strategies—stacking charges and filing subsequent bail jumping charges—are specifically designed to induce pleas rather than foreclose them. Given this, one can rest assured that justice will not be subverted if defendants are permitted to negotiate settlements beyond some early, arbitrary deadline.

#### IV. THE CASE FOR FLEXIBILITY

In debunking the justifications for arbitrary deadlines, the previous Section revealed two arguments against them: (a) they actually create inefficiency and (b) given the modern prosecutorial practices of stacking charges in the original complaint and filing subsequent bail jumping charges, defendants should not be discouraged from temporarily resisting the State’s coercive powers in order to negotiate a reasonable plea bargain later in the case.

In addition to these two points, there are several other arguments against trial courts imposing arbitrary plea deadlines. As explained below, allowing the parties to negotiate over a broader timeframe (a) increases plea bargain “accuracy,”<sup>81</sup> (b) promotes knowing and intelligent pleas,<sup>82</sup> (c) refocuses judicial discretion,<sup>83</sup> (d) respects the separation of powers,<sup>84</sup> (e) reduces unnecessary litigation,<sup>85</sup> and (f) acknowledges built-in incentives.<sup>86</sup>

78. The violation of a bond condition, even when the defendant’s act is otherwise noncriminal, is criminal. For example, courts may set a bond condition that a defendant have no contact with her spouse, relative, or friend because that person saw or heard something and is a potential witness. The purported reason for doing so is to prevent the intimidation of witnesses. *See, e.g.*, WIS. STAT. ANN. § 969.01(4) (West 2020). The effect, whether or not intended by the court, is that defendants often have such contact, thus allowing the State to file new charges for bail jumping. *See, e.g., id.* § 969.49.

79. *See* Amy Johnson, Comment, *The Use of Wisconsin’s Bail Jumping Statute: A Legal and Quantitative Analysis*, 2018 WIS. L. REV. 619, 619 (“The data also suggests that an underlying purpose for filing bail jumping charges may be to create leverage against defendants to induce them to plead to their original charge rather than to punish them for violating their bond conditions.”).

80. *People v. Wright*, No. C054979, 2008 WL 3846537, at \*10 (Cal. Ct. App. Aug. 19, 2008) (Robie, J., dissenting).

81. *See infra* Part IV.A.

82. *See infra* Part IV.B.

83. *See infra* Part IV.C.

84. *See infra* Part IV.D.

85. *See infra* Part IV.E.

86. *See infra* Part IV.F.

### A. Plea Bargain “Accuracy”

Most cases ultimately resolve by plea bargain regardless of whether a trial judge imposed a plea deadline.<sup>87</sup> Some estimates indicate that ninety-five percent or more of all cases settle; therefore, only about five percent go to trial.<sup>88</sup> Only a percentage of that percentage is attributable to a judge forcing the parties into a trial because they missed a deadline. Consequently, it could be argued that the arbitrary deadline is a small problem.

This is certainly true on a comparative, percentage basis. However, given the great volume of criminal cases filed each year, such reasoning is less persuasive on a raw number basis. Five percent can, depending upon the state, equate to a very large number of jury trials.<sup>89</sup> In addition, the use of arbitrary deadlines is widespread and may force more cases to trial, against the parties’ wishes, than is commonly thought. By way of example, “[t]he ‘plea agreement cut-off date’ is . . . utilized as an administrative component of the criminal justice system in *fourteen of the twenty-one counties* in New Jersey.”<sup>90</sup>

But the cases that are forced to trial due to a missed deadline constitute only one aspect of the larger problem. The other aspect is when the parties actually comply with the arbitrary deadline and settle their cases sooner than they would like.

This problem requires elaboration. One of the criticisms of plea bargaining is that the horse trading of charges leads to an inaccurate resolution of the case: a deal that might reflect the parties’ wishes at the time, but not necessarily what the defendant did or did not do.<sup>91</sup> But if negotiations are to have any chance of producing an “accurate”—and therefore just—agreement with regard to the charge(s) to which the defendant will plead, defense counsel needs time to investigate and analyze the case. This is one way to demonstrate for the prosecutor that the State’s case is weak or even improperly charged and should be settled on different terms than those offered in the initial plea. Achieving this important objective typically requires the defense lawyer to do some or all of the following:

[O]btain and review all discovery materials, including but not limited to police reports, all written or recorded statements of the defendant, names of witnesses to any written or recorded statements, a copy of the client’s criminal record, if any, and statements of witnesses, a copy of the criminal record of prosecution witnesses; and examine physical evidence and/or reports of physical evidence. . . . [A]rrange for the client to review discovery materials in so far as it is necessary for the client to make informed decisions about his/her case. . . . [C]ause an investigation of the facts including attempting to

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87. See *supra* note 22 and accompanying text.

88. See *supra* note 22 and accompanying text.

89. See *CSP Data Viewer*, COURT STATS. PROJECT (N. Waters, K. Genthon, S. Gibson & D. Robinson, eds.), [http://popup.ncsc.org/CSP/CSP\\_Intro.aspx](http://popup.ncsc.org/CSP/CSP_Intro.aspx) [<https://perma.cc/9ZXM-BW8F?type=image>] (last updated Nov. 20, 2019) (compiling statistics of trials broken down by felony, misdemeanor, and jury for each state, the District of Columbia, Puerto Rico, and Guam).

90. *State v. Brimage*, 638 A.2d 904, 906 (N.J. Super. Ct. App. Div. 1994) (emphasis added) (quoting *State v. Bowen*, 634 A.2d 1371, 1373 (N.J. Super. Ct. App. Div. 1993)).

91. See, e.g., Ralph Adam Fine, *Plea Bargaining: An Unnecessary Evil*, 70 MARQ. L. REV. 615, 616 (1987) (distinguishing between “leniency” as “payment to a defendant to induce him or her not to go to trial” and “those situations where the facts of a particular case may justify a . . . dismissal, or reduction”).

interview appropriate defense or prosecution witnesses. . . . [A]nalyze all legal issues presented in the case. . . . [D]ecide which issues have merit and make strategic decisions about issues to be pursued. . . . [U]tilize experts, investigators, interpreters and other professional support where appropriate. . . . [p]repare the case for trial or hearing, as appropriate, and advise the client of the procedures to be followed and his/her rights.<sup>92</sup>

Given the modern prosecutor's assembly-line approach to producing criminal cases—that is, charge first and investigate (if at all) later—the above defense work takes on even greater significance. Consider, for example, the preliminary hearing, which prosecutors once used as “a means for testing the complaints of prosecuting witnesses, determining their motives and eliminating accusations based upon misinformation or prejudice.”<sup>93</sup> Today, the hearing has been all but eliminated in both form and substance, and prosecutors no longer use it to evaluate the strength of their cases; rather, they may meet their witnesses and inspect their evidence, for the first time, on the weekend before, or even the morning of, trial.<sup>94</sup> Unless defense lawyers educate prosecutors about the case during the plea bargaining process, the parties' eventual plea bargain will have little chance of accurately reflecting the true underlying facts of the case.

The defense lawyer's investigation and analysis, described above, takes a great deal of time. In many cases, it cannot be accomplished before the pretrial hearing, the readiness conference, or some other pretrial event. While the alternative—the parties' rushed horse trading of charges while “under the gun” to resolve the case—may satisfy the trial court's arbitrary pretrial deadline, such an approach is destined to produce an equally arbitrary plea agreement.

#### B. *Knowing and Intelligent Plea*

When a defendant enters a plea under the pressure of a deadline, even more important than the “accuracy” of the plea bargain is this requirement: before accepting the plea, the court must ensure the defendant is entering it knowingly and intelligently.<sup>95</sup> Arbitrary deadlines, particularly when they are set in stone and occur early in the case, effectively prohibit the trial judge from making this required finding.

Consider *Guzik*, where the judge enforced a plea cutoff date before deciding the defendant's motion to suppress physical evidence.<sup>96</sup> It is inconceivable that the defendant in that case could make a knowing and intelligent decision about whether to plead

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92. MINIMUM ATTORNEY PERFORMANCE STANDARDS FOR APPOINTED PRIVATE BAR COUNSEL (WIS. STATE PUB. DEF. 2018); see also McConkie, *supra* note 27, at 63 (stating that without a proper investigation of the case, defendants essentially “plead guilty based on . . . guesses”).

93. Justin Miller, *The Preliminary Hearing*, 15 A.B.A. J. 414, 414 (1929).

94. See Cicchini, *Improvident Prosecutions*, *supra* note 75, at 485–511 (discussing multiple ways that prosecutors and judges have eroded, and even obliterated, the important aspects of the preliminary hearing).

95. See *Brady v. United States*, 397 U.S. 742, 748 (1970) (“Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.”); *State v. Bangert*, 389 N.W.2d 12, 22 (Wis. 1986) (discussing that a plea may be involuntary if a defendant does not have a complete understanding of the nature of the charge or of the constitutional rights she is waiving).

96. See *supra* notes 50–54 and accompany text.

without first knowing what evidence the State would be allowed to introduce at trial.<sup>97</sup> That is why some jurisdictions impose a constraint on the judge's ability to set such deadlines: "Only after discovery has been exchanged, *and necessary motions decided*, a plea cut-off rule should be implemented."<sup>98</sup>

Determining whether a defendant's plea is knowingly and intelligently entered also requires that, before accepting the plea, the court "ascertain whether a factual basis exists to support the plea."<sup>99</sup> But an early plea deadline often prevents the judge from fulfilling this mandate as well.

In this regard, consider *Avitia-Wilson*, where the plea cutoff date in a drug case occurred before the substance alleged to be an illegal drug could be tested.<sup>100</sup> Under those circumstances, the court would often be unable to determine whether there is a factual basis for the defendant's rushed plea. If the substance ultimately tests negative, as substances sometimes do, then there would be no factual basis.<sup>101</sup> If the substance ultimately tests positive for a different drug than the one alleged, which could result in a less serious charge, there could be a factual basis for a different crime but not the charged crime.<sup>102</sup>

In short, when the defendant is rushed into a plea deal under the threat of an arbitrary deadline, the judge may be disregarding important safeguards in violation of statutory and even constitutional mandates designed to protect the defendant. As a more practical matter, the judge could also be laying the groundwork for the defendant's subsequent (and highly inefficient and costly) motion to withdraw her guilty plea.<sup>103</sup> After all, one of the factors that courts have recognized when deciding whether to grant

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97. Some case law seems to indicate that this knowledge and intelligence requirement is strictly construed, referring narrowly to a defendant's understanding of the nature of the charge and the possible sentence that it carries. *See Brady*, 397 U.S. at 756. However, other cases indicate the importance of a defendant understanding any "defenses or mitigating circumstances" to the charge as well. *See Bangert*, 389 N.W.2d at 21; *see also Farley v. Glanton*, 280 N.W.2d 411, 415 (Iowa 1979) (finding the trial court did not abuse its discretion in rejecting the plea due to the availability of an entrapment defense).

98. *State v. Brimage*, 638 A.2d 904, 907 (N.J. Super. Ct. App. Div. 1994) (emphasis added) (quoting Criminal Division Operating Standard III, *Criminal Division White Paper*, 133 N.J.L.J. 1160, 1161 (1993)).

99. *Bangert*, 389 N.W.2d at 20–21.

100. *See supra* notes 48–49 and accompanying text.

101. Initially, the police use field tests to obtain a positive result on the substance, establish probable cause that a crime was committed, arrest the defendant, and drag her into the criminal system. However, such preliminary tests have turned out to be inaccurate. *See Ryan Gabrielson, Unreliable and Unchallenged*, PROPUBLICA (Oct. 28, 2016, 11:00 AM), <http://www.propublica.org/article/unreliable-and-unchallenged> [<https://perma.cc/36HV-EYZ7>]. Further testing may therefore be required before a defendant may be convicted, because there are a lot of fake drugs that are pushed for profit. *See id.*

102. The crime of possession of a controlled substance can have a wide range of penalties depending upon, among other things, the weight and the precise chemical nature of the substance. *See, e.g.*, WIS. STAT. ANN. § 961.41(1)–(3) (West 2020). Defendants, when caught for purchasing substances on the street, often do not know what they are buying. *See Gabrielson, supra* note 101. The nature of the substance must therefore be determined by testing at a state crime lab. *See id.*

103. With regard to the two examples used in this Section, if the defendant enters a plea, the judge will no longer hold the suppression hearing and the state will no longer test the substance. However, even in these two narrow factual scenarios, a defendant's buyer's remorse after rushing into a plea deal could result in the relitigation of these matters by appellate counsel in the form of highly inefficient and costly post-conviction motions and appeals.



such motions is the defendant's "[h]asty entry of the plea[]." <sup>104</sup> This is yet another reason to allow the parties' negotiations to unfold over the entire timeline of the case, rather than artificially restricting them to a shorter period.

### C. *Judicial Discretion*

The two previous Parts addressed the situation where the parties were under the gun of a deadline and did, in fact, meet that deadline and resolve the case. This Part and the following Parts will now address the other aspect of the problem: cases where the parties do not reach their agreement until *after* the court's deadline, causing the court to reject the plea deal and force the parties into a trial that neither wants.

In this situation, the court's enforcement of the arbitrary deadline conflicts with its obligation to exercise judicial discretion, on a case-by-case basis, in deciding whether to reject a plea bargain. Recall that "a circuit court . . . may, if it appropriately exercises its discretion, reject any plea agreement that does not, in its view, serve the public interest."<sup>105</sup> However, setting "a fixed plea deadline is the very antithesis of discretionary decision-making."<sup>106</sup>

In other words, "a trial court abuses, or abdicates, its discretion when it refuses to consider a negotiated plea agreement presented by the parties beyond a deadline set by the court."<sup>107</sup> Rejecting a plea bargain "solely because of the timing of the presentation of the agreement to the court" is not the proper exercise of discretion.<sup>108</sup> Simply put, "[d]iscretion without a criterion for its exercise is . . . arbitrariness."<sup>109</sup>

Importantly, there are two potential objects, or subjects, of the court's discretion: whether the plea agreement is in the public interest and whether the parties were justified in missing the court's deadline.<sup>110</sup> These two things should not be confused. It is the public interest—not the parties' reasons for missing the deadline—on which the judge's discretion must be focused when deciding whether to accept a plea agreement.<sup>111</sup>

There may, however, be rare cases where the court imposes an individualized deadline for a legitimate reason—such as to combat the defendant's history of bad faith

104. *State v. Shanks*, 448 N.W.2d 264, 266 (Wis. Ct. App. 1989).

105. *State v. Conger*, 797 N.W.2d 341, 344 (Wis. 2010).

106. *State v. Hager*, 630 N.W.2d 828, 836 (Iowa 2001).

107. *People v. Allen*, 815 N.E.2d 426, 433 (Ill. App. Ct. 2004) (Cook, J., concurring) (citing but disagreeing with *People v. Henderson*, 777 N.E.2d 1048, 1052 (Ill. App. Ct. 2002), *rev'd on other grounds*, 809 N.E.2d 1224 (Ill. 2004)).

108. *State v. Sears*, 542 S.E.2d 863, 868 (W. Va. 2000).

109. *Brown v. Allen*, 344 U.S. 443, 496 (1953); *see also People v. Allen*, 815 N.E.2d at 430 ("A court abuses its discretion . . . if the decision has no basis in 'facts, logic, or reason but is arbitrary.'" (quoting *People v. Peterson*, 725 N.E.2d 1, 7 (Ill. App. Ct. 1999))).

110. *See United States v. Shepherd*, 102 F.3d 558, 562 (D.C. Cir. 1996) (considering the defendant's reasoning for the late plea in vacating and remanding the trial court's verdict and rejection of a plea agreement); *Sears*, 542 S.E.2d at 867 (discussing factors relevant to whether a plea aligns with public interest).

111. *Sears*, 542 S.E.2d, at 867 ("[A] court's ultimate discretion in accepting or rejecting a plea agreement is whether it is consistent with the public interest in the fair administration of justice." (quoting *Myers v. Frazier*, 319 S.E.2d 782, 788 (1984))).

plea bargaining, repeated renegeing on deals, or other intentional abuse of the system.<sup>112</sup> Only in those rare cases should the court turn its discretion to deciding whether there was good cause for the parties' late settlement.

Consider *Gamboa* where the interpreter was stuck in traffic and was needed for the defendant and his counsel to discuss the State's plea offer.<sup>113</sup> Even if there was good reason for the court to impose the 9:00 a.m. deadline in the first place,<sup>114</sup> sound judicial discretion should permit entry of the plea forty minutes late, given that the delay fell outside of the defendant's control. Similarly, when a defendant was afraid to accept a plea deal because she was intimidated by her codefendants "who were incarcerated in the same detention facility," sound judicial discretion should have, once again, permitted the late entry of the plea—even if the deadline had been instituted for a good reason and was tailored to the facts of the case known to the judge at the time.<sup>115</sup>

#### D. Separation of Powers

A serious constitutional argument against the arbitrary deadline is that it effectively terminates negotiations and prohibits the prosecutor from resolving the State's case as she deems appropriate, which violates the separation of powers doctrine.<sup>116</sup>

Most state justice systems follow the federal constitutional model, under which "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case." . . . [M]uch the same is said about the judicial role in plea bargaining. Plea agreements are closely bound up with charging decisions . . . . The parties negotiate terms for a criminal judgment that they then present to the judge, whose role is confined to confirming a factual basis for the plea [and] the knowing voluntariness of the defendant's plea.<sup>117</sup>

By analogy, "a judge may not tender a plea offer" to the defendant as "such action improperly assumes the executive or prosecutorial power and, therefore, violates the doctrine of separation of powers."<sup>118</sup> Just as the judge is not permitted to settle the prosecutor's case, neither should the judge be permitted to prevent the prosecutor from doing so by imposing an arbitrary plea deadline. One prosecutor's office explained it this way:

[U]nder the separation of powers doctrine, the Judiciary may not, for mere administrative convenience, interfere with the prosecutor's discretion by refusing to entertain a plea the prosecutor has negotiated.

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112. See, e.g., *Hager*, 630 N.W.2d at 837 (providing instances where trial courts would be properly exercising their discretion in refusing to accept a plea agreement when it was presented after the deadline).

113. *United States v. Gamboa*, 166 F.3d 1327, 1330 (11th Cir. 1999).

114. See *id.*

115. See *Shepherd*, 102 F.3d at 562.

116. See Brown, *The Judicial Role*, *supra* note 34, at 63–64.

117. *Id.* (quoting *Greenlaw v. United States*, 554 U.S. 237, 246 (2008)). Brown also identifies the judiciary's other powers, including determining whether the plea is in the interests of justice or the public interest. *Id.* at 70–73, 77.

118. *State v. Williams*, 648 A.2d 1148, 1151–52 (N.J. Super. Ct. App. Div. 1994).

. . . [T]he Judiciary must give deference to the Executive when exercising judicial discretion and may only reject a plea bargain if it does not serve the interests of justice or there is an abuse of prosecutorial discretion.

. . . [A]lthough the court has the power to control its calendar, that power should not include an ability to require the taxpayers to fund a multiple-court-day trial when a result satisfactory to the Executive can be reached in a few minutes.<sup>119</sup>

Our legal system grants prosecutors broad discretion, especially with regard to plea negotiations.<sup>120</sup> The court's rejection of a plea deal for failing to comply with an arbitrary deadline is "an intrusion into the prosecutor's role to determine whether or not to make a plea offer."<sup>121</sup> In fact, "[t]he decision to terminate plea bargaining lies with the prosecutor's office, *not the trial judge*."<sup>122</sup>

In response to these arguments, courts in favor of the arbitrary deadline offer little, if anything, of substance. One court even replied that the prosecutor's separation of powers argument was "unfounded" because "[s]entencing is a judicial function."<sup>123</sup> This may be true, which is why some states give judges limited power to "jump" the parties' negotiated *sentence* concession but not their negotiated *charge* concession after a plea deal is accepted.<sup>124</sup> This argument, however, confuses a trial judge's sentencing powers with the judge's power to reject a plea bargain. Such rejection is permitted only if—in the exercise of sound judicial discretion rather than arbitrariness—the judge finds the agreement is not in the public interest or the defendant is not entering the plea knowingly, intelligently, and voluntarily.<sup>125</sup>

#### E. *Good Cause*

As discussed earlier, plea deadlines sometimes come with exceptions for extraordinary circumstances or good cause.<sup>126</sup> But in most cases where the parties are unable to reach a plea bargain before the deadline, their reasons probably would not be considered extraordinary, but routine. With regard to the good-cause exception, this, too, is in the eye of the beholder: the judge who arbitrarily set the deadline to begin with must now determine whether there is good cause for violating it.

119. *State v. Brimage*, 638 A.2d 904, 905–06 (N.J. Super. Ct. App. Div. 1994) (internal quotation marks omitted).

120. *State v. Darelli*, 72 P.3d 1277, 1281 (Ariz. Ct. App. 2003) (citing *Hare v. Superior Court*, 652 P.2d 1387, 1390 (Ariz. 1982)).

121. *Id.* at 1279.

122. *Id.* at 1281 (emphasis added) (citing *State v. Morse*, 617 P.2d 1141, 1148 (Ariz. 1980)).

123. *Brimage*, 638 A.2d at 909.

124. However, most of those states then give the defendant the right to withdraw her plea if the judge decides to "jump" the plea deal and impose a harsher sentence. *See, e.g.*, N.C. GEN. STAT. ANN. § 15A-1024 (West 2020) ("If at the time of sentencing, the judge for any reason determines to impose a sentence other than provided for in a plea arrangement between the parties, the judge must inform the defendant of that fact and inform the defendant *that he may withdraw his plea*." (emphasis added)). This demonstrates that even the judge's sentencing powers are constrained. The legislature also constrains judicial sentencing powers in numerous other ways, such as imposing mandatory minimum penalties. *See, e.g.*, WIS. STAT. ANN. § 939.617 (West 2020) (requiring a mandatory prison term for possessing an image of child pornography).

125. *See supra* notes 31–37 and accompanying text for an analysis of these exceptions.

126. *See supra* Section II.

This conundrum is yet another strike against the imposition of arbitrary deadlines. Such folly was on full display in a consolidated case in which two defense lawyers joined with their respective prosecutors to file interlocutory appeals.<sup>127</sup> All four lawyers asked the appellate court to reverse the trial courts' rejection of their plea bargains that they submitted after the court-imposed deadline.<sup>128</sup>

In one of the cases, the defendant rejected a plea bargain on the cutoff date, opting instead for trial.<sup>129</sup> About two and a half months later, on the day the trial was scheduled to begin, the judge had multiple cases clogging up his calendar and selected a different case for trial, adjourning the defendant's case.<sup>130</sup> Given this new development, the parties agreed to resolve the case for the previously contemplated plea deal rather than waiting for the next available trial date—or any number of possible later dates due to competing cases in the court's scheduling.<sup>131</sup>

However, the trial judge ruled that because the defendant did not accept the offer before the deadline, he was locked into his earlier decision—even though the court could not give him his trial for many months or perhaps even many years.<sup>132</sup> Similarly, the prosecutor was forced to pay the price for his inability to induce the defendant to plead earlier in the case: the prosecutor was required to go through a trial that would last “ten to fifteen trial days,” at taxpayers' expense, even though both parties wanted to resolve the matter with a short plea and sentencing hearing instead.<sup>133</sup>

In the other case, after the parties passed the cutoff date without reaching a plea bargain, the State filed new charges against the defendant.<sup>134</sup> Unsurprisingly, and as the prosecutor had probably hoped, the “defendant's attorney informed the trial judge that because of the new charges, he desired to negotiate and resolve all of the matters.”<sup>135</sup> The trial court, however, would not permit further plea negotiations after the deadline, which had already expired.<sup>136</sup> Consequently, against their wishes, the prosecutor and the defendant were forced to proceed to trial.<sup>137</sup>

In the parties' interlocutory appeal, the appellate court recognized, particularly in the case where the prosecutor filed new charges, that “the situation had been substantially

127. *See Brimage*, 638 A.2d at 904–05.

128. *See id.* at 905 (“In both appeals, the defendant and the prosecutor join in urging that we reverse the Law Division orders obstructing the entry of the negotiated pleas.”).

129. *Id.* at 904.

130. *See id.* (“[T]he trial was adjourned because the judge assigned to the case was on trial in another matter.”).

131. *See id.* at 904–05.

132. *See id.* The term “speedy trial” is a misnomer, at least in the context of the constitutional right to a speedy trial; delays of several years are often tolerated without finding a violation of the defendant's Sixth Amendment rights. *See, e.g., United States v. Serna-Villarreal*, 352 F.3d 225, 232–33 (5th Cir. 2003) (deciding that a three-year and nine-month delay, even when attributable to the government, was insufficient to establish a constitutional violation); *United States v. Tchibassa*, 452 F.3d 918, 923–27 (D.C. Cir. 2006) (deciding that an eleven-year delay was insufficient to establish a constitutional violation).

133. *Brimage*, 638 A.2d at 904.

134. *Id.* at 905.

135. *Id.*

136. *Id.*

137. *Id.* (stating that the trial judge “would not entertain any plea bargaining regardless of whether there was any outstanding new charges”).

altered.”<sup>138</sup> It further conceded that “[w]e do not disagree that [fairness] should be a guiding principle . . . for a comprehensive scheme of plea cut-off procedures in particular.”<sup>139</sup>

Despite these concessions, the appellate court ignored the “substantially altered” situation the parties faced after their deadline had passed and held that it was powerless to review the trial courts’ decisions absent “a showing of . . . abuse of discretion constituting a miscarriage of justice.”<sup>140</sup> The appellate court added, when the parties have a “mandated trial” in lieu of a plea bargain, there could rarely be a “miscarriage of justice sufficient to warrant [the appellate court’s] intervention.”<sup>141</sup> And just like that, with a few strokes of an appellate judge’s (or her law clerk’s) keyboard, arbitrariness prevailed over even the pretense of engaging in a good-cause analysis.

#### F. Ripeness

Finally, judges that impose arbitrary plea deadlines also ignore or perhaps are unaware of the reality of the practice of law. In many situations, a case is simply not ripe for settlement *until trial*. Sometimes, in order for a case to resolve, negotiations must play out over the course of the entire process.

From the State’s perspective, the prosecutor has no incentive to make an early plea offer; rather, there are many advantages to letting the case unfold over time.<sup>142</sup> On the other hand, in some cases, on the morning of trial when meeting the complaining witness for the first time, the prosecutor may discover the witness is a walking disaster—for example, aggressive, intoxicated, incoherent, loudmouthed, or even uncooperative. Only then does the prosecutor have an incentive to make a reasonable plea offer or sometimes even dismiss the case outright.<sup>143</sup>

From the defendant’s perspective, she may simply not be ready to enter a plea early in the case and should not be rushed to do so. If for no other reason, rushed plea deals often come with buyer’s remorse and can result in costly, time-consuming motions or even appeals to withdraw the guilty plea.<sup>144</sup>

In many cases, therefore, the process needs to play out over a longer period of time. In those circumstances, “the function of a jury and the other components of a trial can at

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138. *Id.*

139. *Id.* at 908.

140. *Id.* at 905, 908.

141. *Id.* at 908–09.

142. See *supra* Part III.B for a discussion of prosecutors’ incentives to negotiate plea bargains.

143. This is how the watering down, or in some instances the decimation, of the preliminary hearing harms the public and especially the defendant. See Cicchini, *Improvident Prosecutions*, *supra* note 75, at 472–73 (explaining how preliminary hearings were designed to test accusations early in the criminal process and eliminate weak cases before they progress too far). The prosecutor, however, suffers little if any harm. Even without the early testing of the evidence at the preliminary hearing, the prosecutor still gets to keep the defendant in custody or under restrictive bond conditions. The prosecutor therefore has little incentive to investigate the strength of the case until she is forced to do so right before trial.

144. See, e.g., *State v. Shanks*, 448 N.W.2d 264, 266 (Wis. Ct. App. 1989) (explaining that the defendant’s “[h]asty entry of the plea[]” is one reason to permit the defendant to later withdraw that plea).

times extend beyond” their formal purposes of evaluating evidence and reaching a verdict.<sup>145</sup> One court explained it this way:

At times, the very presence of a jury on the morning of trial can engender a desire from the defendant to plead guilty [or from the prosecutor to make a better plea offer] that cannot be replicated at any prior time in the process. Thus, the jury’s function to help resolve cases can be performed at times by its mere presence on the morning of trial. If the process results in a conclusion to a case on the morning of trial which was not possible the day before, the time and resources devoted to the case were not wasted.<sup>146</sup>

Even the individual jurors will not mind playing this important role on the morning of the trial, especially considering the time-consuming alternative that awaits them. “Potential jurors, faced with the alternative prospect of attending a [lengthy] trial, would no doubt consider it time well spent.”<sup>147</sup>

#### V. LEGAL REFORM: DITCHING THE DEADLINE

Legal reform of the arbitrary deadline in plea bargaining is incredibly simple. The parties to a criminal action are the State (or the People or the Commonwealth) and the defendant. When the parties agree to settle their case, the judge should not obstruct their resolution by invoking a previously imposed bureaucratic hurdle that fails even to advance the second-tier objectives of judicial economy or courtroom efficiency.

Instead, when presented with a plea bargain, the court must focus on its legal obligation to ensure that the agreement is in the public interest, not that it was struck before an arbitrarily imposed deadline. Before a court is tempted to “back door” its deadline by disingenuously finding that an untimely plea agreement is not in the public interest, the court must remember and respect “the district attorney’s great discretion in [the] decision to charge . . . [and the] negotiation of plea bargains.”<sup>148</sup>

Better yet, deadlines should be expressly prohibited to begin with. As this Article has demonstrated, “the underlying rationale supporting the deadlines is flawed.”<sup>149</sup> Therefore, whether through a state supreme court rule,<sup>150</sup> an appellate court decision,<sup>151</sup> local practice rules,<sup>152</sup> or a legislative mandate,<sup>153</sup> courts should be prohibited from

145. *People v. Wright*, No. C054979, 2008 WL 3846537, at \*9 (Cal. Ct. App. Aug. 19, 2008) (Robie, J., dissenting).

146. *Id.*

147. *People v. Allen*, 815 N.E.2d 426, 431 (Ill. App. Ct. 2004). Two to three day trials are common, a week is typical for complex cases or cases involving scientific evidence, and some trials last several weeks or even months—although such length is rarely justified.

148. *State v. Conger*, 797 N.W.2d 341, 350 (Wis. 2010) (omission in original) (alterations in original) (quoting *State ex rel. White v. Gray*, 203 N.W.2d 638, 644 (Wis. 1973)) (internal quotation marks omitted).

149. *State v. Hager*, 630 N.W.2d 828, 836 (Iowa 2001).

150. *See, e.g., In re Amendment of Rules of Civil & Criminal Procedure*, 383 N.W.2d 496, 496 (Wis. 1986) (discussing the Wisconsin Supreme Court’s authority to implement a “proposed plea agreement rule”).

151. *See, e.g., Hager*, 630 N.W.2d at 837 (“In exercising discretion to accept or reject the plea, the court may not refuse the plea for the sole reason that it was tendered after the plea deadline.”).

152. *See, e.g., Espinoza v. Martin*, 894 P.2d 688, 690–93 (Ariz. 1995) (discussing a local practice rule and explaining that it may not infringe upon a judge’s duty to exercise discretion on a case-by-case basis).

153. *See, e.g., MASS. R. CRIM. P. 12* (setting forth the trial judge’s statutory powers and obligations in cases that resolve by plea bargain).

imposing plea deadlines in the first place, thus completely avoiding the problems that would otherwise inevitably ensue.

Put another way, “[t]he decision to terminate plea bargaining lies with the prosecutor’s office, *not the trial judge*.”<sup>154</sup> If the prosecutor and the defendant agree to resolve a case—whether the resolution is reached two weeks before trial, on the morning of trial, or even after the presentation of evidence during trial—they must be allowed to do so.

Alternatively, it would be an improvement, but certainly less than optimal, if legal reform merely constrained the trial court’s imposition of plea deadlines. Deadlines should only be set and enforced after (1) all anticipated pretrial motions have been filed and decided, (2) all known discovery has been exchanged, and (3) all known evidence has been tested or otherwise evaluated. Of course, as the words “known” and “anticipated” imply, this alternative legal reform must also allow for a good-cause exception to the deadline. This point illustrates why this alternative reform would be less than optimal: we must necessarily rely on the judge who imposed the arbitrary deadline in the first place to decide what constitutes good cause.

But legal reform, if it occurs at all, usually unfolds at a pace “somewhat faster than a tree grows but a lot slower than ketchup coming out of a bottle.”<sup>155</sup> Therefore, because many states currently permit—or at least do not prohibit—a trial court’s imposition of arbitrary deadlines,<sup>156</sup> the next Section provides a practical strategy for defense counsel and the prosecutor to resolve their case, via plea bargain, even after a court-imposed deadline has passed.

## VI. A PRACTICAL INTERIM STRATEGY

Even without legal reform, the prosecutor and defense lawyer who wish to resolve a case postdeadline may still have options—depending, of course, on the facts of the case, the particular judge, the flexibility of the judge’s deadline, and the law applicable in the jurisdiction and perhaps even locality.

Regardless of those variables, defense counsel must make a clear record of the parties’ request to resolve the case, and this record should include the precise terms of the plea bargain. Without this, if the trial judge rejects the agreement and the defendant appeals, the appellate court may similarly reject the defendant’s appeal due to a lack of evidence that the parties reached a plea agreement in the first place. If there was never a plea agreement, the appellate court must, of course, rule that the trial judge did not err in trying the case.<sup>157</sup>

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154. *State v. Darelli*, 72 P.3d 1277, 1281 (Ariz. Ct. App. 2003) (emphasis added).

155. MATTHEW STEWART, *THE MANAGEMENT MYTH: WHY THE EXPERTS KEEP GETTING IT WRONG* 241 (2009) (describing the author’s personal experience in the legal system).

156. Several cases that have specifically permitted arbitrary deadlines. *See, e.g.*, *United States v. Gamboa*, 166 F.3d 1327, 1331 (11th Cir. 1999); *United States v. Ellis*, 547 F.2d 863, 868 (5th Cir. 1977); *Wiggins v. State*, 193 So. 3d 765, 782 (Ala. Crim. App. 2014); *People v. Cobb*, 188 Cal. Rptr. 712, 717 (Cal. Ct. App. 1983); *People v. Jasper*, 17 P.3d 807, 817 (Colo. 2001); *People v. Grove*, 566 N.W.2d 547, 561 (Mich. 1997). Many other states have no case law on point, leaving trial judges to set arbitrary deadlines as they wish.

157. *See Darelli*, 72 P.3d at 1284 (“If no plea is reached, or a plea is rejected, then this matter will proceed to trial.”).

For example, in *People v. Allen*,<sup>158</sup> when the defendant appealed the trial judge's rejection of the parties' plea agreement because it was untimely, the dissenting appellate court judge raised a fair point: "I question whether the trial court even concluded the parties had reached a negotiated plea agreement. The existence of such an agreement is not as clear-cut as the majority suggests."<sup>159</sup>

If such ambiguity arises in a post-conviction motion or appeal, the defense will no longer be able to rely on the prosecutor as an ally. Despite the prosecutor and the defendant being aligned before trial, during a post-conviction appeal, the prosecutor will not have any interest in undoing the outcome of the trial. In fact, at this later juncture, the prosecutor will have an incentive to preserve the jury's guilty verdict.

Given this, it may be preferable for defense counsel to move the trial court in writing to resolve the case, thus laying a better foundation for a post-conviction motion or appeal—whether interlocutory appeal (possibly with the prosecutor) or post-conviction appeal (without the prosecutor)—if the trial court denies the motion. The following sample motion may provide a framework or starting point for asking the trial court to accept a postdeadline plea deal.

This sample presumes the law of the relevant jurisdiction has not directly addressed the issue. It is written from the perspective of defense counsel but indicates that the prosecutor joins in the motion. Once again, at this pretrial stage, the prosecutor and defense counsel are necessarily, and by definition, in agreement, or there would be nothing to present to the trial court. Alternatively, a joint motion of the parties could be submitted, which may be more persuasive.

*[State] and [County]*  
*[State or People or Commonwealth] v. [Defendant]*  
*[Case No.]*

#### Defendant's Motion for Change of Plea

The Defendant, appearing specially by her attorney and reserving the right to challenge the Court's jurisdiction, moves the Court to permit her change of plea pursuant to the plea agreement and for the reasons set forth below. Defense counsel is authorized to represent that the *[State or People or Commonwealth]* join[s] in this motion, as the parties have reached the following plea agreement:

*[Set forth the terms of the plea agreement with specificity, including charge and sentence concessions.]*

It is well-settled law that the trial court "may, if it appropriately exercises its discretion, reject any plea agreement that does not, in its view, serve the public interest." *State v. Conger*, 797 N.W.2d 341, 344 (Wis. 2010).

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158. 815 N.E.2d 426 (Ill. App. Ct. 2004).

159. *People v. Allen*, 815 N.E.2d at 434 (Turner, J., dissenting).



However, “[w]hen a criminal defendant and the prosecution reach a plea agreement, it is an abuse of discretion for the circuit court to summarily refuse to consider the substantive terms of the agreement solely because of the timing of the presentation of the agreement to the court.” *State v. Sears*, 542 S.E.2d 863, 868 (W. Va. 2000).

In other words, “a fixed plea deadline is the very antithesis of discretionary decision-making.” *State v. Hager*, 630 N.W.2d 828, 836 (Iowa 2001).

Further, rejecting an agreement solely because of its timing would infringe upon the prosecutor’s discretion. Prosecutors are afforded wide latitude in plea bargaining. *Conger*, 797 N.W.2d at 350. This is true not only with regard to the terms but also the timing of their agreements. “The decision to terminate plea bargaining lies with the prosecutor’s office, not the trial judge.” *State v. Darelli*, 72 P.3d 1277, 1281 (Ariz. Ct. App. 2003) (citing *State v. Morse*, 617 P.2d 1141, 1148 (Ariz. 1980)).

Rejecting an agreement solely because of its timing would also violate the defendant’s important interests. A criminal case “involves interests as fundamental as freedom and imprisonment”; therefore, “we demand independent consideration by the sentencing court . . . [A] fixed policy should not be followed in rejecting plea agreements.” *Hager*, 630 N.W.2d at 834 (citations omitted).

When appellate courts have upheld a trial court’s decision to impose a deadline on plea negotiations, they have often done so because the trial court permitted “an exception to the deadline for good cause.” *See e.g., People v. Jasper*, 17 P.3d 807, 809–10 (Colo. 2001). In our case, the parties were unable to reach an agreement before the Court’s deadline because

*[Set forth the reasons for the timing of the plea agreement, including delays in obtaining test results or other items of evidence, obstacles faced in contacting and interviewing witnesses, the subsequent filing of bail jumping charges, etc.]*

*[In cases involving evidence-related issues, include citation to relevant authorities about the importance of such evidence for the defendant’s entry of a knowing and intelligent plea.]*

*[In the case of the parties’ mere change of mind regarding the resolution of the case, set forth the real-life implications of the decision for the defendant and the defendant’s family, or in the case of the State, for the complaining witness who would otherwise be forced to testify in order for the State to win a conviction.]*

Therefore, based on the foregoing, the parties move the Court to accept their plea agreement in lieu of conducting a time- and resource-consuming jury trial. “While deadlines are imposed as a means to eliminate the expense and

time of assembling witnesses, jurors, and others . . . the refusal to accept such a plea on the morning of trial only compounds the time and expense when the parties are forced to try the case. The trial may last several days or weeks, and the expense is actually increased exponentially.” *Hager*, 630 N.W.2d at 836.

[Date]

[Defense Counsel’s Signature Block]

Any such motion should include, to the extent possible, jurisdiction-specific law including any applicable statutes, along with policies and procedures specific to the relevant county and even the individual judge.

#### CONCLUSION

Trial courts often set arbitrary deadlines for when parties to a criminal case are required to reach a plea agreement; if an agreement is not reached, the court may force them to go to trial instead.<sup>160</sup> Courts often justify this practice because they claim it promotes judicial economy or efficiency,<sup>161</sup> and it provides proper incentives for defendants to settle their cases sooner rather than later.<sup>162</sup> But in reality, the practice of setting arbitrary deadlines actually creates great inefficiency<sup>163</sup> and fails to provide laudable incentives of any kind.<sup>164</sup>

In addition to creating inefficiencies and failing to offer proper incentives for either of the parties, the imposition of an arbitrary deadline actually creates several other serious problems. In cases where the parties are able to comply with the court’s arbitrary deadline, their rushed, uninformed horse trading of charges will produce an equally arbitrary, inaccurate plea agreement that fails to reflect the true facts underlying the case.<sup>165</sup> Similarly, racing to meet a deadline without sufficient information leads to pleas that are not knowingly and intelligently entered but rather are based on the defendant’s guesswork about the strength of the State’s case.<sup>166</sup>

In other cases, the parties will not be able to reach a plea agreement until after the deadline, and the court will force them to go to trial instead. In these cases, judges are abandoning their obligation to evaluate plea bargains on a case-by-case basis to determine whether they are in the public interest, rather than reached by an arbitrarily selected date.<sup>167</sup> Further, by terminating plea bargaining against the prosecutor’s wishes, courts are violating the separation of powers doctrine and infringing upon prosecutorial discretion to settle the State’s cases when and how the prosecutor deems appropriate.<sup>168</sup> Finally, in enforcing plea deadlines, courts often fail not only to recognize good-cause

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160. *See supra* Section II.

161. *See supra* Part III.A.

162. *See supra* Part III.B.

163. *See supra* Part III.A.

164. *See supra* Part III.B.

165. *See supra* Part IV.A.

166. *See supra* Part IV.B.

167. *See supra* Part IV.C.

168. *See supra* Part IV.D.

exceptions for late settlements<sup>169</sup> but also to appreciate the practical, real-world aspects of litigation.<sup>170</sup>

The legal reform necessary to cure these ills is incredibly simple. Whether by state supreme court order, appellate court decision, local court rule, or legislative mandate, trial courts must not be permitted to impose deadlines on the parties' plea negotiations and settlement of their case.<sup>171</sup> In the alternative, trial judges should be greatly constrained in their use of such deadlines and should be allowed to impose them only after the parties have exchanged discovery, the evidence has been evaluated or tested, and all motions have been filed and decided.<sup>172</sup>

Because legal reform usually occurs at a snail's pace, if at all, the parties, particularly the defendant, should consider alternative measures. To that end, this Article provides a practical solution: a sample motion that can be used as a starting point for obtaining the trial court's approval of a plea bargain, even after the court's arbitrary deadline has passed.<sup>173</sup>

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169. *See supra* Part IV.E.

170. *See supra* Part IV.F.

171. *See supra* Section V.

172. *See supra* Section V.

173. *See supra* Section VI.