Judicial Strategies for Evaluating the Validity of Guilty Pleas

Kelsey S. Henderson, Erika N. Fountain, Allison D. Redlich & Jason A. Cantone

In April 2022, the United States Court of Appeals for the Sixth Circuit in *In re United States* affirmed that federal judges' involvement in plea negotiations violated Rule 11 of the Federal Rules of Criminal Procedure.[1] In the case, the district court judge, after notification that both parties were negotiating a plea agreement, informed the parties that the court had a "longstanding 'practice' of rejecting plea agreements with certain plea-bargaining terms" such as waivers of the right to appeal. The court later rejected the agreed-upon bargain that included the disapproved waivers. On appeal, the U.S. Court of Appeals for the Sixth Circuit found that the "district court clearly overstepped its authority"[2] and "while the district court's conduct may have been motivated in good faith by its concern for defendants, there is 'no good motives exception' to Rule 11."[3]

While the federal courts prohibit the type of judicial involvement in the case above, our research identifies how state judges view their role in plea negotiations. U.S. states vary in their guidance. To date, 18 states prohibit judicial involvement and restrict the judge's involvement to confirming the constitutionality of the plea during the plea hearing (*i.e.*, is the defendant's decision knowing, intelligent, and voluntary—tenets established in *Boykin v. Alabama*.)[4] The remaining states either allow some form of enhanced involvement or make no mention of the practice in state statutes. For example, in Oregon, "any other judge [than the trial judge], at the request of both the prosecution and the defense . . . may participate in plea negotiations."[5] In Oregon, such involvement is quite customary in the form of judicial settlement conferences, which in some jurisdictions are a requisite of setting a trial date. Although involvement in plea *negotiations* may not take place in all jurisdictions, in both the federal courts and state courts, judges play an important role in the plea *agreement* process (*i.e.*, the plea hearing). However, restricting judicial involvement to the plea hearing comes with the assumption that this process gives judges adequate opportunity to carefully evaluate components of the plea such as the factual basis, voluntariness of the defendant's decision, and defendants' understanding of their rights waived.[6] This limited involvement raises two important questions: (1) Is the plea colloquy doing what it should, and (2) If it is not, what are the implications for defendants, the validity of pleas, and the fairness of plea bargaining?

As social scientists, these are the types of questions that we have explored over the years.[7] In our most recent work, we surveyed state court judges from 33 states regarding their expectations of the parties' responsibilities (*e.g.*, "whose responsibility is it to confirm the factual basis of the plea") and their practices with the plea colloquy (*e.g.*, indicators they rely on to determine if a plea is made knowingly, intelligently, and voluntarily).[8] In that study, we examined judges' use of different strategies associated with the evaluation of guilty pleas. Below, we expand from that study to highlight how psychological research can better inform state court judges' decisions.

PLEA COLLOQUY: PERCEIVED ROLES AND RESPONSIBILITIES

As this article focuses on the validity of pleading guilty and the substance of plea colloquies, we begin with a brief discussion of roles and responsibilities in this domain.[9] Specific to plea hearings, judges who responded to our survey overwhelmingly believed it is their role to ensure the validity of guilty pleas (See Graph 1). However, less than one-third of judges believed it was their responsibility alone to assess plea validity; the majority of judges believed they share this responsibility with defense attorneys and prosecutors. On average, judges perceived defense

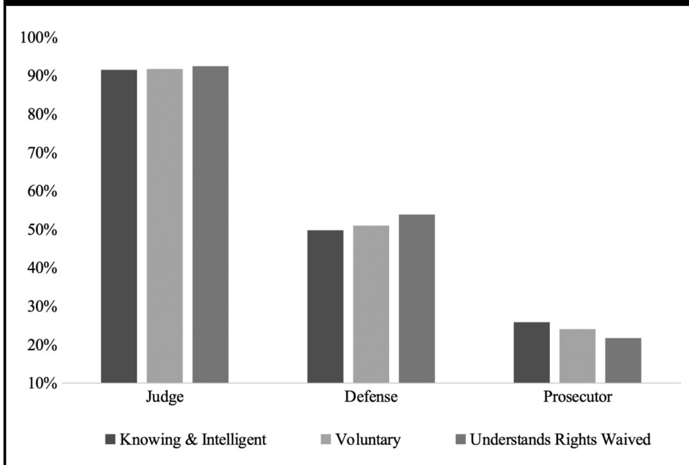
Authors Note: *We are extremely grateful to the judges who reviewed our survey materials and the judges who took the time to participate in our study. As researchers, we recognize the importance of hearing the perspectives and experiences of judges (and others in the legal system); gaining this insight helps psychological and criminological research to be more impactful and helpful. The results presented here are based on a survey of state court judges conducted in February and March 2020. Thank you to the American Judges Association for sharing this research opportunity. This work was completed outside of Dr. Jason Cantone's position at the Federal Judicial Center. The views expressed herein are those of the authors and are not the views of the Federal Judicial Center or its board.*

Footnotes

1. *In re* United States, 32 F.4th 584, 588 (6th Cir. 2022); *see also* FED. R. CRIM. P. 11(c)(1).
2. 32 F.4th at 588–590.
3. *Id.* at 594.
4. Boykin v. Alabama, 395 U.S. 238 (1969); *see* Tina M. Zottoli et al., *State of the States: A Survey of Statutory Law, Regulations and Court Rules Pertaining to Guilty Pleas Across the United States*, 37 BEHAV. SCI. & L. 388, 414–15 (2019).
5. OR. REV. STAT. § 135.432(1)(b) (2021).
6. For a greater discussion of expanding judicial involvement, see Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS (Nov. 20, 2014); Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMPAR. L. 199 (2006); and Jenia I. Turner, *Transparency in Plea Bargaining*, 96 NOTRE DAME L. REV. 973 (2021).
7. *See* Allison D. Redlich, *The Validity of Pleading Guilty, in* 2 ADVANCES IN PSYCHOLOGY AND LAW 1 (Brian H. Bornstein & Monica K. Miller eds., 2016).
8. Kelsey S. Henderson et al., *Judicial Involvement in Plea-Bargaining*, 28 PSYCH. PUB. POL'Y & L. 356, 358 (2022). Additionally, we asked a number of questions about judges' experiences and perceptions of expanded judicial involvement (*i.e.*, participation in plea negotiations). For example, judges were asked about their perception of the benefits and risks of such involvement. A discussion of those findings is outside the scope of this paper. However, interested readers can find more on those results by emailing the authors.
9. *Id.* The graphs and analyses below stem from the data in our survey of state judges.

attorneys as being 50% responsible for ensuring that defendants make a voluntary decision, a knowing and intelligent decision, and understand the rights they are waiving, with prosecutors bearing the least responsibility (about a quarter).

GRAPH 1. JUDGES' PERCEPTIONS OF LEGAL ACTORS' RESPONSIBILITIES DURING PLEA COLLOQUY

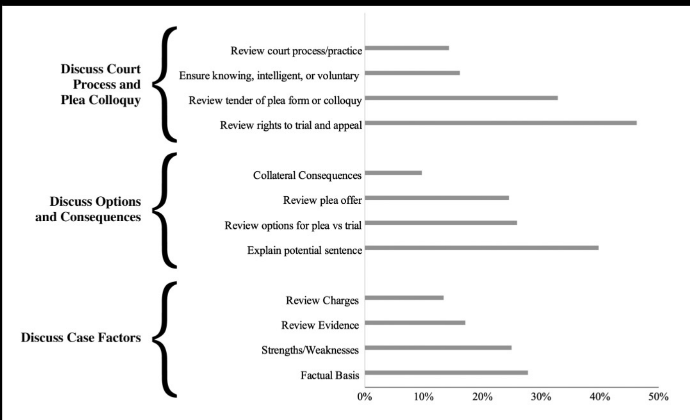


Note. Judges were provided with three slider scales (0-100%) for each question (judge, defense attorney, and prosecutor) and asked to indicate how responsible that legal actor is for that domain, using a percentage (*e.g.*, it is 100% the judge's responsibility to. . .). Accordingly, the percentages for each question do not necessarily add up to 100%.

Judges assumed that defense attorneys are doing much of this preparation work with their clients before the plea colloquy (See Graph 2). To that end, judges indicated attorneys should discuss the following aspects with their clients: court processes and the plea colloquy (*e.g.*, discussing what the judge will ask, reviewing the tender-of-plea form); the client's options and consequences associated with those choices (*e.g.*, reviewing the plea offer, discussing possible collateral consequences); and case factors (*e.g.*, evidence, strengths, and weaknesses of the case). Our survey also invited judges to provide additional detail about topics they expect defense attorneys to discuss in preparation for a plea hearing. Judges' comments varied from specific ("*Discussed the charges and range of sentence, the court process, defendant's rights, state's discovery, defendant's version of events, possible defenses and evidence, the details of the offer and effect of accepting or countering…"*) to more general ("*Explain everything to client…"*).

Much of the responses point to the work defense attorneys are expected to have conducted. In looking at judges' responses, the word "all" was referenced 54 times, for example: "*The defense attorney should review the written plea agreement and make sure he or she understands all the terms involved.*" The word "thorough" was referenced 18 times, for example: "*Thoroughly go over the questions that will be asked at the hearing. And confirm that the defendant is prepared to answer them.*" And finally, the words "fully" or "everything" were referenced 17 times, for example: "*Fully discuss the case, defendant's rights, all potential defenses, fully discuss the potential direct and collateral consequences of such a plea, fully discuss the plea petition and what the judge will likely discuss with him.*" Thus, some judges appear to rely heavily on defense attorneys to have either provided plea-relevant information to their clients in lieu of providing it themselves, or as a supplement to the information reiterated in court during the plea colloquy. But what is the likelihood that defense attorneys are having detailed, informative conversations before the plea hearing?

GRAPH 2. JUDGES' EXPECTATIONS ABOUT DEFENSE ATTORNEY PREPARATION WITH DEFENDANTS



Note. Responses corresponding to the question "Prior to the plea hearing, what do you expect the defense attorney to have done to prepare the client to make a voluntary, knowing, and intelligent decision?" Multiple codes could have applied to responses.

DEFENSE ATTORNEY INVOLVEMENT: ASSUMPTIONS AND REALITIES

Despite the courts' largely hands-off approach to the practice of plea bargaining at the end of the 20th century, more recent precedent has addressed counsel's role to provide effective assistance of counsel during plea discussions. Consider the following U.S. Supreme Court cases: in *Missouri v. Frye*, the Court established that defense attorneys have the duty to share all plea offers with their client;[10] in *Lafler v. Cooper* the Court found that deficient legal advice could constitute ineffective assistance of counsel under *Strickland*;[11] and in *Padilla v. Kentucky,* the Court found that defense attorneys have the responsibility to notify their clients they might be deported (if they are not a citizen) if they plead guilty.[12] Each case provided defendants with an additional layer of protection in the guilty-plea process. But there are myriad other issues that warrant additional attention, such as the specific needs of indigent defendants facing a complex legal system, and understaffed and under-resourced public defenders.[13] Over the years, the American Bar Association[14] and the U.S. Supreme Court have given defense attorneys the distinction of

10. Missouri v. Frye, 566 U.S. 134 (2012).
11. Lafler v. Cooper, 566 U.S. 156 (2012); Strickland v. Washington, 466 U.S. 668 (1984).
12. Padilla v. Kentucky, 559 U.S. 356 (2010).
13. In addition, in Shinn v. Ramirez, 142 S. Ct. 1718 (2022), the U.S. Supreme Court placed limitations on postconviction relief, including that "a federal habeas court may not conduct an evidentiary hearing or otherwise consider evidence beyond the state-court record based on the ineffective assistance of state postconviction counsel." *Id.* at 1734.
14. AM. BAR ASS'N, CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION (4th ed. 2017), https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/.

performing a "vital and imperative" role[15] as a "guiding hand"[16] and "protective device,"[17] a "diligent, conscientious" and "zealous advocate on behalf of a client."[18] However, defense attorneys' ability to act as a "protective device" is limited by constraints of the criminal legal system, such as the public defender caseload crisis, a lack of time with clients, and virtual hearings.

To begin with, attorney caseloads have drastically increased over the years, with this increase exacerbated by the COVID-19 pandemic. For example, in Multnomah County, Oregon (Portland), in January 2019, the average felony caseload per prosecutor was 38 cases; in January 2022, the average caseload was 92 cases (a 141% increase).[19] Similar increases during that timeframe can be seen in open cases per unit: minor felonies, 319% increase (834 to 2,664 cases) and major felonies, 252% increase (386 to 975 cases). In this same jurisdiction, in February 2022, the firms representing indigent clients sent notice to the District Attorney's office that they no longer could take clients, resulting in a halt of services (an estimated 500 defendants in the state without representation), and ultimately a lawsuit against the state.[20] A recent American Bar Association report highlights that the state of Oregon has just 31% of the public defenders that it needs, stressing that issues of underfunding and lack of support for indigent defense work existed long before the COVID-19 pandemic.[21] This resource burden of overwhelming caseloads is especially felt in the state courts and by indigent defendants.[22]

Although judges in our survey said that defense attorneys share considerable responsibility for ensuring the validity of plea decisions, systemic issues in the criminal legal system result in less time spent per case consulting with a client on their case, the charges, and possible dispositions.[23] In one jurisdiction, adult defendants reported meeting with their attorney 4.7 times on average[24] and juvenile defendants an average of 2.7 times before pleading guilty.[25] The time spent in these meetings, though, is very limited. Defense attorneys have little time to assess clients' understanding of their rights, and typically only approach this topic after a client has decided to plead guilty.[26] In a different sample from Texas, roughly 70% of attorney-client conversations were less than 15 minutes.[27] A report to the Texas Indigent Defense Commission found that attorneys needed to double the amount of time of they spend with clients.[28]

In a recent survey, defense attorneys reported that the COVID-19 pandemic has further negatively impacted their ability to communicate with and advise their clients, especially those who were detained or without access to a reliable telephone or Wi-Fi.[29] Considering that many of these limited, short, attorney-client conversations took place in hallways immediately before court,[30] moving court appearances to virtual format gave defense attorneys even fewer confidential opportunities to interact with their clients.[31] Defense attorneys, more so than prosecutors and judges, believe that the online setting increases the risk that a defendant's guilty plea is unknowing or involuntary, and not factually based.[32] Quantifying the quality of conversations, or whether they met the needs of the defendant, is not possible.[33] However, judges should be made aware that defense attorneys of

15. Powell v. Alabama, 287 U.S. 45, 71 (1932).
16. *Id.* at 69.
17. Miranda v. Arizona, 384 U.S. 436, 466 (1966).
18. United States v. Decoster, 624 F.2d 196, 206 (D.C. Cir. 1976); Model Rules of Prof'l Conduct Preamble & Scope (Am. Bar Ass'n 2022).
19. *PPI Objective 1: Organizational and Staff Capacity*, Multnomah Cty. Dist. Att'y, www.mcda.us/index.php/ppi-objective-1-organizational-and-staff-capacity (last visited Apr. 15, 2023).
20. Gillian Flaccus, *Oregon Sued Over Failure to Provide Public Defenders*, U.S. News & World Report (May 16, 2022), https://www.usnews.com/news/politics/articles/2022-05-16/oregon-sued-over-failure-to-provide-public-defenders#:~:text=PORTLAND%2C%20Ore.,counsel%20and%20a%20speedy%20trial.
21. Am. Bar Ass'n Comm. on Legal Aid, The Oregon Project: An Analysis of the Oregon Public Defense System and Attorney Workload Standards, (2022), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls-sclaid-or-proj-rept.pdf.
22. *See* Thomas Giovanni & Roopal Patel, Brennan Cr. for Just., Gideon at 50: Three Reforms to Revive the Right to Counsel (2013), https://www.brennancenter.org/sites/default/files/publications/Gideon_Report_040913.pdf; *see also* Aaron Gottlieb & Kelsey Arnold, *The Effect of Public Defender and Support Staff Caseloads on Incarceration Outcomes for Felony Defendants*, 12 J. Soc'y Soc. Work & Res. 569 (2021).
23. Erika N. Fountain & Jennifer L. Woolard, *How Defense Attorneys Consult with Juvenile Clients About Plea Bargains*, 24 Psych. Pub. Pol'y & L. 192 (2018).
24. Tina M. Zottoli et al., *Plea Discounts, Time Pressures, and False-Guilty Pleas in Youth and Adults Who Pleaded Guilty to Felonies in New York City*, 22 Psych. Pub. Pol'y & L. 250 (2016).
25. Tarika Daftary-Kapur & Tina M. Zottoli, *A First Look at the Plea Deal Experiences of Juveniles Tried in Adult Court*, 13 Int'l J. Forensic Mental Health 323 (2014).
26. *See* Fountain & Woolard, *supra* note 23.
27. M. Elaine Nugent-Borakove et al., Justice Mgmt. Inst., The Power of Choice: The Implications of a System Where Indigent Defendants Choose Their Own Counsel (2017), http://www.tidc.texas.gov/media/8d87c73b45a851e/client-choice.pdf.
28. Dottie Carmichael et al., Pub. Pol'y Rsch. Inst., Guidelines for Indigent Defense Caseloads: A Report to the Texas Indigent Defense Commission (2015), http://www.tidc.texas.gov/media/8d85e69fd4fb841/guidelines-for-indigent-defense-caseloads-01222015.pdf.
29. *See* Tarika Daftary-Kapur et al., *COVID-19 Exacerbates Existing System Factors that Disadvantage Defendants: Findings from a National Survey of Defense Attorneys*, 45 L. & Hum. Behav. 81 (2021).
30. *See* Rakoff, *supra* note 6.
31. Daftary-Kapur et al., *supra* note 29; Jenia I. Turner, *Virtual Guilty Pleas,* 24 U. Pa. J. Const. L. 211 (2022).
32. Jenia I. Turner, *Remote Criminal Justice,* 53 Tex. Tech L. Rev. 197 (2021).
33. A discussion of client satisfaction and the attorney-client relationship is beyond the scope of this article. However, if readers are interested, we direct them to works by Marcus Boccoccini, Stan Brodsky, Andrew Davies, and Janet Moore (among many others). For example, see Marcus T. Boccaccini & Stanley L. Brodsky, *Attorney-Client Trust Among Convicted Criminal Defendants: Preliminary Examination of the Attorney-Client Trust Scale*, 20 Behav. Sci. & L. 69 (2002); and Janet Moore et al., *Attorney-Client Communication in Public Defense: A Qualitative Examination*, 31 Crim. Just. Pol'y Rev. 908 (2019).

late have even less time to meet with their clients and discuss these essential issues. This places more importance on the courts and judges ensuring the constitutionality of plea decisions. As the following sections discuss, current plea colloquy practices are likely inadequate safeguards.

METHODS OF EVALUATING THE CONSTITUTIONALITY OF THE PLEA

At plea hearings, judges are tasked with determining the validity of guilty plea decisions, which is done by asking the defendant a series of questions (*i.e.*, the colloquy). For example, the *U.S. Benchbook for U.S. District Court Judges* provides more than 40 questions that can be used to measure plea validity.[34] The overwhelming majority are yes/no questions gauged at determining whether the plea decision was voluntary (*e.g.*, "Are you pleading guilty of your own free will because you are guilty?"); knowing (*e.g.*, "Do you understand the terms of the plea agreement?"); and intelligent (*e.g.*, "Have you been treated recently for any mental illness or addiction to narcotic drugs of any kind?").[35]

There is some research that has sought to systematically describe how judges go about determining the validity of plea decisions.[36] One method has been to observe plea hearings and code the content and goings on. Although quite dated, in 1978, Miller and colleagues observed 720 plea hearings in six U.S. cities.[37] They found plea hearings to be quite brief, at an average of eight minutes. They also discovered that although the plea validity elements were inquired about in the majority of cases, certain questions were asked less frequently. For example, whether any promises other than the plea were made was asked in only 32% of cases. Further, a plea colloquy did not occur at all in 11% of the cases, and in 9% of cases, defendants were only asked to sign a written form rather than engage in an oral exchange.

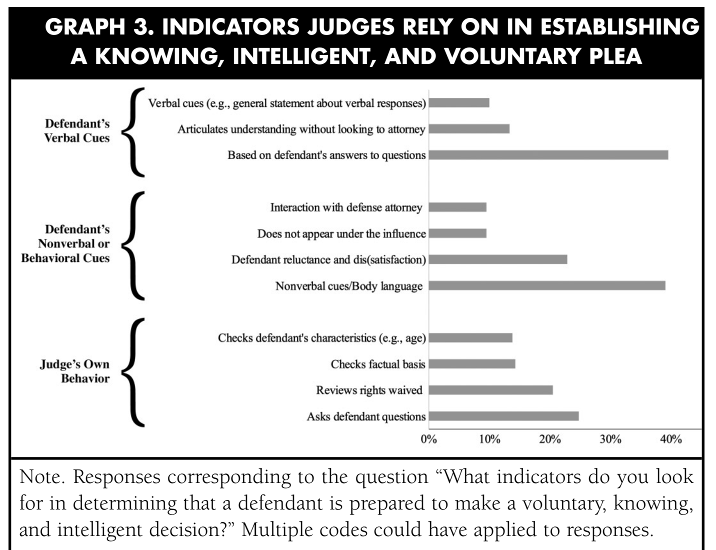
More recently, Redlich and colleagues conducted similar systematic observations of plea hearings in two juvenile delinquency courts and one criminal (circuit) court.[38] They found juvenile and criminal court plea hearings to last about seven and thirteen minutes, respectively, and that the length (and the extent of the plea validity assessment) depended on the severity of the pled-to charges, whether the defendant was in custody before the plea hearing, and whether the defendant would receive a carceral sentence post-plea. For example, the plea hearings of defendants in circuit court who pled guilty to at least one felony lasted about 14 minutes in contrast to the plea hearings of defendants in the same court who pled guilty to misdemeanor-only charges, which lasted nearly 8 minutes. In our survey, when judges estimated the length of their plea colloquy, we found general convergence with Dezember and colleagues.[39] Judges estimated felony plea colloquies to last an average of about 12 minutes and misdemeanor plea hearings to last about 8 minutes.[40] Recent research on remote plea hearings suggests similar lengths of time and that current standards make it difficult for judges to accurately identify uninformed and involuntary guilty pleas at virtual proceedings.[41]

Another method has been to ask judges about their plea validity determination methods. In our survey, we asked judges an open-ended question about the indicators they use to determine whether guilty plea decisions are voluntary, knowing, and intelligent (See Graph 3).[42] Below we highlight a few of these methods and draw observations to broader psychological research.

USING VERBAL CUES TO GAUGE ACCURACY

In the over 200 responses, the most frequent answer was that judges determine the validity of the plea decision through defendants' verbal cues. In 39% of responses, judges noted they rely on the defendants' answers to the colloquy questions and an additional 10% of responses were more general that they relied on verbal cues (*e.g.*, general statement about verbal responses), which could also indicate defendants' answers. Nearly 15% of responses indicated that judges determine the validity of the plea by whether or not the defendant could answer questions on their own without looking to their attorney. For example, one judge stated, "*Independent answers to the questions asked while the attorney remains quiet.*" Thus, perhaps unsurprisingly, judges claimed to assess plea validity through the oral exchange with the defendants.[43]

GRAPH 3. INDICATORS JUDGES RELY ON IN ESTABLISHING A KNOWING, INTELLIGENT, AND VOLUNTARY PLEA



Note. Responses corresponding to the question "What indicators do you look for in determining that a defendant is prepared to make a voluntary, knowing, and intelligent decision?" Multiple codes could have applied to responses.

There is good reason, however, to expect that asking a series of yes/no questions does not gauge true understanding, but rather the defendants' willingness to plead guilty and ensure that the plea is accepted. On the one hand, we know that the overwhelming majority of guilty pleas are accepted. Both the aforementioned systematic observation studies, by Miller et al. and by Dezember et al., found that only 2% of pleas were not accepted at the plea hearing—and these often for logistical reasons (*e.g.*,

34. *See* Fed. Jud. Ctr., Benchbook for U.S. District Court Judges § 2.01, at 63–73 (6th ed. 2013).
35. *See id.*
36. *See, e.g.*, Redlich, *supra* note 7.
37. *See* Herbert S. Miller et al., Nat'l Inst. L. Enf't & Crim. Just., Plea Bargaining in the United States (1978).
38. Amy Dezember et al., *Plea Validity in Circuit Court: Judicial Colloquies in Misdemeanor vs. Felony Charges,* 28 Psych. Crime & L. 268 (2022); Allison D. Redlich et al., *Describing and Comparing Plea Hearings in Juvenile and Criminal Court*, 46 L. & Hum. Behav. 337 (2022).
39. *Cf.* Dezember et al., *supra* note 38.
40. *See* Henderson et al., *supra* note 8.
41. Turner, *supra* note 32, at 262.
42. *See* Henderson et al., *supra* note 8.
43. *See id.*

incorrect paperwork was completed) rather than substantive ones.[44] On the other hand, defendants, many of whom are undereducated, have been found to have less than adequate understanding of the plea process, consequences, and terminology.[45] And tender-of-plea forms provide little protection; one study found that fewer than 5% of juvenile and adult court tender-of-plea forms were written to be comprehensible to individuals who read at the 6th-grade level, which is typical of most defendants.[46]

Defendants who answer "yes" to the question "do you understand your rights?" asked at plea hearings, for example, may be unable to articulate rights if asked more in-depth questions. Moreover, judges appear to recognize that some defendants lack understanding. In our sample, nearly all judges (97.3%) acknowledged that at least some of the time defendants do not fully understand the rights they waive.[47] Thus, although the majority of judges in our sample rely on defendants' answers during the colloquy to assess plea validity, it is unclear whether such questions are effective or adequate assessments.

USING NONVERBAL CUES TO DETECT VERACITY

In 39% of responses, judges noted they rely on the defendants' nonverbal or behavioral cues to help them assess plea validity.[48] This subset of judges consistently used terms such as "demeanor," "facial expressions," or "body language" as indicators they relied on, often in combination with verbal utterances. Reliance on nonverbal cues can also be problematic, especially in the absence of other verbal indicators. There is a robust body of research indicating that humans are poor judges of behavior,[49] even among those in careers tasked with making such determinations.[50] Although this body of research focuses on the ability to distinguish lies from the truth (*e.g.*, among suspects), in a sense, judges are attempting to determine whether defendants are lying or unsure about their understanding, voluntariness of their decision, etc. To a large degree, persons tend to rely on stereotypical nonverbal or paralinguistic cues, such as eye contact or hesitation words (*e.g.*, "er", "um") to determine veracity, but such cues are also signs of nervousness. Understandably some defendants will be nervous during the plea hearing, and thus judges who look to demeanor and body language may be picking up on behaviors that have little to do with understanding and plea validity and more to do with the stress associated with the situation.

Given that a large portion of judges responding to our survey spontaneously mentioned relying on nonverbal indicators, more research is needed into whether this reliance results in valid determinations. It may be that perceived looks of confusion are indeed defendants' lack of understanding, and judges should inquire further under such circumstances. But what does it mean if a defendant does not make eye contact with the judge when answering questions? Defendants who avert their gaze or appear overly tense or anxious may be perceived as disrespectful, unprepared, rambling, or as having difficulty answering questions. This can especially lead to bias against certain defendants, such as those with autism spectrum disorder (ASD).[51] However, there are other possibilities that warrant additional research including deceit, lack of comprehension, or defendants' experiencing emotions appropriate for the situation (*e.g.*, unhappiness, stress, or shame).

Relying on nonverbal cues also opens the door to misinterpreting behaviors resulting from stereotype threat.[52] Research has found that people of color are more likely to anticipate being perceived by legal actors as deviant or criminal, which results in increased anxiety and attempts to monitor their own behavior. One study found that Black men believed police would unfairly judge them as criminal, which resulted in them anticipating being anxious in police encounters and behaving in ways that are typically interpreted by police as deceptive or suspicious.[53] For example, defendants feeling concerned about how they are perceived or anticipating a negative appraisal may be more likely to avert their gaze and avoid eye contact or appear overly nervous and anxious. While most defendants may appear nervous before the court, those of color may be more likely to experience this anxiety as a result of stereotype threat. According to Najdowski and colleagues, this particular type of stereotype threat may provoke inequities unrelated to the intentions of legal actors.[54] Specifically, because stereotype threat evokes behavior that is commonly perceived as suspicious or problematized in assessments, it can unintentionally elicit evaluations by legal actors that lead to decisions to arrest or adjudicate. In short, behavioral cues are an imperfect metric for determining the state of an individual as the same cues can be indicative of other underlying states.

IMPACT OF THE FACTUAL BASIS ON PLEA VALIDITY

Lastly, 15% of responses by judges spontaneously mentioned another element of plea validity—establishing a factual basis of

44. *See* MILLER ET AL., *supra* note 37; Dezember et al., *supra* note 38.
45. *See* Allison D Redlich & Alicia Summers, *Voluntary, Knowing, and Intelligent Pleas: Understanding the Plea Inquiry*, 18 PSYCH. PUB. POL'Y & L. 626 (2012).
46. Allison D. Redlich & Catherine L. Bonventre, *Content and Comprehensibility of Juvenile and Adult Tender-of-Plea Forms: Implications for Knowing, Intelligent, and Voluntary Guilty Pleas*, 39 L. & HUM. BEHAV. 162, 164, 171 (2015).
47. *See* Henderson et al., *supra* note 8, at 362; *see also* Joseph B. Sanborn Jr., *Pleading Guilty in Juvenile Court: Minimal Ado About Something Very Important to Young Defendants*, 9 JUST. Q. 127 (1992); Skye A. Woestehoff et al., *Legal Professionals' Perceptions of Juvenile Engagement in the Plea Process,* 5 TRANSLATIONAL ISSUES PSYCH. SCI. 121 (2019).
48. Henderson et al., *supra* note 8, at 365.
49. *See* Charles F. Bond, Jr. & Bella M. DePaulo, *Accuracy of Deception Judgments*, 10 PERSONALITY & SOC. PSYCH. REV. 214 (2006); Aldert Vrij et al., *Reading Lies: Nonverbal Communication and Deception*, 70 ANN. REVS. PSYCH. 295 (2019).
50. Kathy Pezdek & Daniel Reisberg, *Psychological Myths About Evidence in the Legal System: How Should Researchers Respond?*, 11 J. APPLIED RES. MEMORY & COGNITION 143 (2022).
51. Colleen M. Berryessa, *Defendants with Autism Spectrum Disorder in Criminal Court: A Judges' Toolkit,* 13 DREXEL L. REV. 841 (2021).
52. For more on stereotype threat, see Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCH. 613 (1997).
53. Cynthia J Najdowski et al., *Stereotype Threat and Racial Differences in Citizens' Experiences of Police Encounters*, 39 L. & HUM. BEHAV. 463 (2015).
54. *Id.* at 474.

guilt.[55] In our survey, establishing the factual basis of the plea was perceived as largely the judges' role, much more so than prosecutors and defense attorneys.[56] However, scholars opine that this element may be less attended to than the traditional elements of a knowing, intelligent, and voluntary plea decision.[57] Some states do not allow for baseless pleas, indicating that there may not be a need to inquire (as all pleas should be presumed to have a factual basis present).[58] Dezember and colleagues observed that the question "Are you pleading guilty because you are in fact guilty" was asked of almost all defendants pleading guilty to at least one felony charge, but only asked of 55% of those pleading to misdemeanor-only charges.[59] However, the Dezember et al. study represented only one jurisdiction (though a total of 17 judges) and thus may or may not reflect the traditions of other courts.[60] Indeed, the Miller et al. study of six jurisdictions revealed how differently courts handled the factual basis inquiry.[61]

Another issue is whether the question (or similar variations of) "Are you pleading guilty because you are in fact guilty" adequately assesses this plea-validity element. In our survey, we pointedly asked judges in our sample how they establish a factual basis of guilt.[62] Slightly more than half of judges who responded answered by stating they rely on the defendants' words. Thus, it is likely that these judges asked defendants similar questions to that observed by Dezember et al. Indeed, several judges stated that they ask defendants to simply confirm the factual basis, though several others stated they ask the defendant to explain what they (the defendant) did in their own words. [63] For example, "*I ask the defendant what he did that he thinks makes him guilty. Then I let him explain it to me.*"

The remainder half of judges claimed to establish a factual basis of guilt by either looking to prosecutors and/or defense attorneys, or relying on the complaint and case materials (*i.e.*, the facts of the case).[64] For example, one judge stated, "*I rely on the prosecutor recitation and any clarification from the defendant*." A portion of judges relied on all of these factors. One judge stated, "*I ask the state to recite the facts; I ask the defense if they agree that the facts are sufficient to support a plea; I ask defendant to acknowledge that the facts announced did occur; I also acknowledge that the crime to which defendant if entering a plea is supported by a factual basis*." Looking to the prosecutor and/or defense attorney to help establish a factual basis comes with some of the risks identified above (regarding attorney time and resources).

In addition, we asked judges what legal standard they used to establish a factual basis of guilt. Judges generally fell into two different groups; half used the "beyond a reasonable doubt" standard (40%), whereas the other half rely on the factual elements of the crime/evidence (51%).[65] By virtue of their guilty plea, defendants waive their right to have their case proven beyond a reasonable doubt, and thus that four in ten judges adhere to this high standard is noteworthy. However, the manner in which this high standard was achieved was not always clear. The judges who rely on the proof beyond a reasonable doubt standard were often those who confirmed or acknowledged either the defendants' or prosecutors' version of events to establish a factual basis of guilt (roughly 65% overlap). Whereas a trial, which typically includes days of testimony and presentations of evidence, aims to establish proof beyond a reasonable doubt, a minutes-long synopsis of a one-sided perspective arguably cannot do the same.

ESTABLISHING PLEA VALIDITY WITH JUVENILES

To better understand how judicial practices may vary across defendants, we specifically asked judges to indicate how their evaluations of guilty pleas varied, if at all, with juveniles (See Graph 4). Some judges noted varying their approach by slowing down the process or using simpler language (*e.g.*, *"more explanation using teen language"*), but the most common response by a third of respondents indicated they evaluated pleas similarly regardless of age.[66] For example, one judge noted their strategy "*does not vary much given that all juveniles in my jurisdiction are represented by defense counsel."* Once again, in this example, the judge stressed the reliance on, and importance of, defense counsel. The plea colloquy is arguably a more important stopgap measure with youth, as they are more likely than adults to lack the capacities necessary to make competent legal decisions.[67] Youth are also more likely to make decisions that reflect immediate gratification and acquiescence to authority figures. Recent studies show that (innocent) youth are at greater risk of falsely pleading guilty than (innocent) adults, which may imply they require additional protections at this stage.[68]

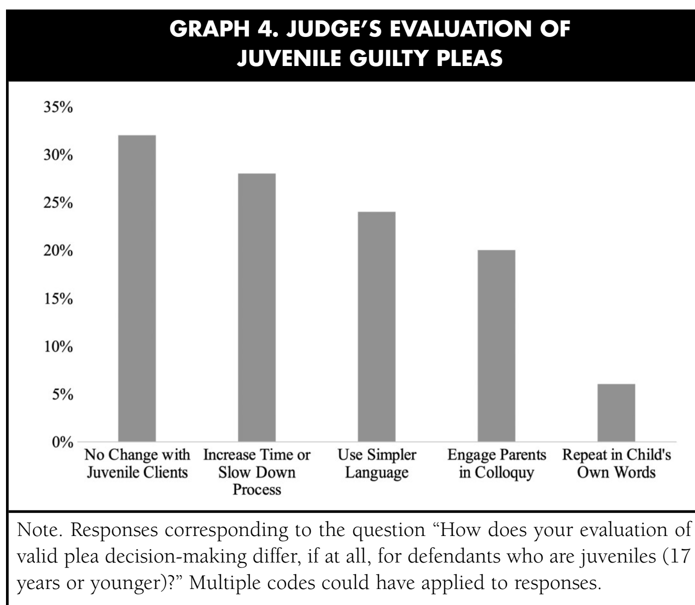
While a subset of judges took measures to protect youth, some strategies are not as effective as others. Relying on parents, for example, to assess their child's understanding is an intuitive approach that lacks empirical support. About one in five responses from judges indicated they would engage parents in the child's colloquy. Some judges wanted to ensure the parent understood the child's plea (*e.g.*, *"Juvenile pleas require an adult parent or guardian to also fully understand, not agree, but understand same information as an adult defendant"*). However, others wanted parental input or consent before their child could accept the plea (*e.g.*, *"For juveniles I require parental consent and consultation with a lawyer before accepting plea"*). While judges may involve parents as a protective measure to ensure the child understands their plea, it is important to recognize that parents' understanding is no substitute for the youth's. Furthermore, parents often misunderstand the plea process and

55. Henderson et al., *supra* note 8, at 365.
56. *Id.* at 362.
57. *See* Rakoff, *supra* note 6.
58. *See* Zottoli et al., *supra* note 4.
59. *See* Dezember et al., *supra* note 38, at 277.
60. *Id.* at 273, 284–85.
61. *See* Miller et al., *supra* note 37, at 281.
62. *See* Henderson et al., *supra* note 8, at 363.
63. *Id.*
64. *Id.*
65. *Id.*
66. This section contains material derived from our state judge survey, but was not reported in Henderson et al., *supra* note 8.
67. *See* Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 L. & Hum. Behav. 333 (2003).
68. *See* Lindsay C. Malloy et al., *Interrogations, Confessions, and Guilty Pleas Among Serious Adolescent Offenders,* 38 L. & Hum. Behav. 181 (2014); Allison D. Redlich & Reveka V. Shteynberg, *To Plead or Not to Plead: A Comparison of Juvenile and Adult True and False Plea Decisions,* 40 L. & Hum. Behav. 611 (2016).

many of the rights youth are asked to waive. In fact, one study showed that parents of justice-involved youth were most often misinformed about issues related to pleading guilty.[69] While parental involvement could have various benefits, such as emotional support for the juvenile during a difficult time, parents are likely unprepared to evaluate the validity of their child's plea. Instead, having youth describe terms, processes, and outcomes in their own words is a better way to discern their level of understanding. However, in a systematic observation study of juvenile court plea hearings in two jurisdictions, one court paid virtually no attention to plea validity elements (knowingness, intelligence, and voluntariness) and in neither court were juvenile defendants asked to expound on their one-word (yes/no) answers.[70]

Finally, it is important to note that while youth are at increased risk of making uninformed and involuntary pleas, youth of color are doubly vulnerable. Several studies show that people of color are more likely to receive less advantageous plea offers. [71] For instance, Kutateladze and colleagues found that Black defendants were more likely to receive custodial offers than White defendants for similar offenses.[72] While racial disparities are seen in offers made by the state, one study also found that defense attorneys are more likely to recommend Black defendants take harsher pleas—even when they perceive their White clients as guiltier.[73] Together, Black youth may be at an even greater disadvantage when pleading guilty, given the combined implications of developmental incompetence and racial bias. Judges can increase the chance that defendants make voluntary, intelligent, and knowing decisions by asking open-ended questions and using simpler language during the plea colloquy; this is especially true for youthful, more vulnerable clients.

GRAPH 4. JUDGE'S EVALUATION OF JUVENILE GUILTY PLEAS



Note. Responses corresponding to the question "How does your evaluation of valid plea decision-making differ, if at all, for defendants who are juveniles (17 years or younger)?" Multiple codes could have applied to responses.

CONCLUSION

We have situated results from our survey of state court judges in the context of current challenges facing the courts (*e.g.*, attorney caseloads) and psychological research on behavior and decision-making (*e.g.*, stress and responsiveness). We conclude by offering evidence-based suggestions that judges can apply to help assess knowing, intelligent, and voluntary plea decisions. Our hope is that these simple, low-stakes changes will balance time and efficiency with getting a more reliable measure of plea validity.

1. **Avoid closed-ended questions.** When possible, avoid closed-ended questions and include more open-ended questions during the plea colloquy. As one judge in our survey noted when asked how they ensure the defendant is prepared to make a knowing, intelligent, and voluntary plea decision, "*[I] ask the defendant questions where he must answer with something other than 'yes' or 'no'*". When open-ended questions are asked, defendants are likely to give more detail-laded responses that can allow judges to quickly identify areas of misunderstanding or concern. For example, instead of asking if the defendant understands the consequences associated with the guilty plea "yes" versus "no", ask them to explain the consequences and what those mean from their point of view. It is even possible that judges might be able to omit certain areas of the colloquy if defendants' responses to earlier questions provide evidence of understanding.
2. **Be strategic with questions.** Consider rewriting or rewording questions in a manner that may elicit more thoughtful responses from defendants. As one judge in our survey noted, "*I frequently ask, 'Would you recommend your lawyer to a friend?' rather than or in addition to 'Are you satisfied with the representation?'*" If the goal is to understand if the attorney provided meaningful representation, asking if the defendant would recommend them to a friend might be a better gauge of that than simply "satisfaction." Asking unanticipated questions has long been suggested as an evidence-based practice for accurately detecting deception.[74] Although, *misunderstanding* is more likely than *deceit* in the context of plea colloquies, phrasing questions in a manner that is not expected imposes cognitive load, and can increase the likelihood individuals will provide a more honest and thoughtful response. Considering the goals of each question, and crafting the writing with those goals in mind, might allow judges to delete some questions that serve little purpose or are unlikely to elicit a meaningful response.
3. **Avoid evaluations based on nonverbal behavior.** Refrain from relying on nonverbal behavior exhibited by the defendant as a cue to accuracy. As discussed above, nonverbal

69. Caitlin Cavanagh & Elizabeth Cauffman, *What They Don't Know* Can *Hurt Them: Mothers' Legal Knowledge and Youth Re-Offending*, 23 PSYCH. PUB. POL'Y & L.141 (2017).
70. Redlich et al., *supra* note 38.
71. *See, e.g.*, Besiki Luka Kutateladze et al., *Opening Pandora's Box: How Does Defendant Race Influence Plea Bargaining?*, 33 JUST. Q. 398 (2016); Christi Metcalfe & Ted Chiricos, *Race, Plea, and Charge Reduction: An Assessment of Racial Disparities in the Plea Process*, 35 JUST. Q. 223 (2018).
72. *See* Kutateladze et al., *supra* note 71.
73. Vanessa A. Edkins, *Defense Attorney Plea Recommendations and Client Race: Does Zealous Representation Apply Equally to All?*, 35 L. & HUM. BEHAV. 413 (2011).
74. *See* Aldert Vrij & Pär Anders Granhag, *Eliciting Cues to Deception and Truth: What Matters Are the Questions Asked*, 1 J. APPLIED. RES. MEMORY & COGNITION 110 (2012).

behaviors to detect veracity are unreliable, and easily misjudged; verbal cues are more diagnostic.[75] Although judges in our study reportedly used nonverbal cues, relying on the defendants' answers to questions was more common. Many judges highlighted specific verbal cues that serve as a "red flag", such as the *"[Defendant] saying 'I guess...' when asked if they are pleading guilty."* One judge noted a strong reliance on verbal cues, "*How the defendant answers all questions, if the defendant's responses reflect lack of understanding or free choice ('My attorney says I have to take this deal.')."* Strategies suggested for juveniles, such as asking the defendant to repeat advisements in their own words/based on their own understanding, may be helpful for adult defendants as well. Especially when coupled with open-ended and unanticipated questions, relying on defendants' responses can yield more diagnostic and reliable results, which can make the plea colloquy more efficient.

4. **Rethink vocabulary and language.** As highlighted above, research suggests that the language used in tender of plea forms and oral plea colloquies is likely beyond the understanding of most adults, let alone juveniles. Consider language used in court (or "legalese"): words such as "counsel," "admit to sufficient facts," "compel," "voluntary," and "beyond a reasonable doubt." Kaban and Quinlan identified words common in juvenile tender-of-plea forms and plea colloquies, and found that only 7% of juveniles accurately defined "counsel" (one 14-year-old defined counsel as a "Person who sits in front of the computer"), and none were able to accurately define "waiver."[76] Again, the same strategies considered for juveniles such as using simpler language is likely to benefit all defendants. We echo Redlich and Bonventre's suggestion that "simplified and clarified" language for tender-of-plea forms and oral plea colloquies be adopted.[77] Avoiding legalese or confusing words in the first place may save judges from having to explain concepts multiple times.

Given that about 95% or more of defendants are convicted by guilty plea, it is imperative that assessments of the validity of the plea decision are effective. Although some of our above recommendations may lengthen the plea colloquy, a comprehensive and accurate determination of whether pleas are knowing, intelligent, voluntary, and made with a factual basis of guilt is fundamental to the integrity of our criminal legal system.

Kelsey Henderson is an associate professor of Criminology and Criminal Justice at Portland State University. Henderson received her Ph.D. in Criminology, Law and Society from the University of Florida in 2016. Her research examines the courts, specifically focusing on decision-making by jurors, and plea-bargaining decision-making.

Erika Fountain is a developmental and community psychologist whose work lies at the intersection of research, policy, and practice in juvenile and criminal justice. She received her Ph.D. in Psychology with a concentration in Human Development and Public Policy from Georgetown University and is currently an Assistant Professor at the University of Maryland, Baltimore County. In addition to her research examining court processes and evidence-based justice policy, Erika has provided scientific testimony to Maryland legislators and has co-authored op-eds advocating for developmentally informed reforms to youth justice.

Allison Redlich, Ph.D., is a University Professor in the Department of Criminology, Law and Society at George Mason University. Her research focuses on confessions and interrogations, guilty pleas, and wrongful convictions. She is a Fellow of the American Psychological Association and the American Psychology-Law Society, and the recipient of two national mentoring awards.

Jason A. Cantone is a Senior Researcher at the Federal Judicial Center. His research focuses on enhancing federal-state court cooperation, access to justice, civil procedure, and discrimination in legal and employment contexts. He received his J.D. in 2008 and Ph.D. in 2011. This work was completed outside of Dr. Jason Cantone's position at the Federal Judicial Center. The views expressed herein are those of the authors and are not the views of the Federal Judicial Center or its board.

75. *See id.*
76. Barbara Kaban & Judith C. Quinlan, *Rethinking a "Knowing, Intelligent and Voluntary Waiver" in Massachusetts' Juvenile Courts*, 5 J. Ctr. Fam. Child. & Cts 35 (2004).
77. *See* Redlich & Bonventre, *supra* note 46, at 172; *see also* Richard Rogers et al., *The Comprehensibility and Content of Juvenile Miranda Warnings*, 14 Psych. Pub. Pol'y & L. 63 (2008).