

# EXPLORING PLEA NEGOTIATION PROCESSES AND OUTCOMES IN MILWAUKEE AND ST. LOUIS COUNTY

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## INTRODUCTION

Although guilty pleas are the modal method for criminal case resolution in the US, relatively little attention has been paid to the plea negotiation process.<sup>i</sup> Research suggests that prosecutors drive plea decision-making<sup>ii</sup>; however, the decision process is largely hidden and informal.

Consequently, little is known about the role that prosecutors and other criminal justice actors play across the process, and even less is known about how these mechanisms have changed over time, particularly during the COVID-19 pandemic.<sup>iii</sup> Unpacking these plea negotiation<sup>iv</sup> decisions are especially key to understanding racial and ethnic disparities in criminal case processing.

Funded as part of the John D. and Catherine T. MacArthur Foundation's Safety and Justice Challenge Research Consortium, the current study considers guilty plea negotiation processes and outcomes in Milwaukee County, Wisconsin, and St. Louis County, Missouri. Both offices are currently lead by reform-oriented attorneys, are medium-sized offices serving urban and suburban jurisdictions. Over the long tenure of elected District Attorney John Chisholm in Milwaukee, the office has implemented innovative prosecution models such as community prosecution units and diversion programs. In St. Louis, recently elected District Attorney Wesley Bell is the first Black person to hold the office, and he ran on a platform of ensuring equity in the system and reducing mass incarceration. The goal of the study is to explore how prosecutors and other court actors approach and make decisions surrounding the plea negotiation process, in addition to, investigating the factors that affect plea outcomes. The data used in this report include narratives from interviews with and surveys of local stakeholders including prosecutors, public defenders, judges, private attorneys, and system-involved persons. The report also centers on administrative data collected through agencies' case management systems for criminal cases filed in Milwaukee and St. Louis Counties through 2020.

## RESEARCH QUESTIONS

1. *What current policies govern the decision-making process?*
2. *How do attorneys approach the initial and subsequent plea offer and negotiation process?*
3. *What is the frequency of cases disposed by guilty plea?*
4. *How much do guilty plea outcomes differ from the initial filed charges?*
5. *How do attorneys evaluate and weigh the factors affecting a case?*
6. *What factors affect differences in guilty plea outcomes?*
7. *How do plea negotiations directly or indirectly influence outcomes by race?*

The study, conducted in 2021 and 2022, includes a discussion of how the ongoing COVID-19 pandemic and subsequent restrictions impacted plea negotiation processes. In addition, a central element of this work is identifying how the negotiation process could be improved, particularly as it relates to racial disparities in processes and outcomes.

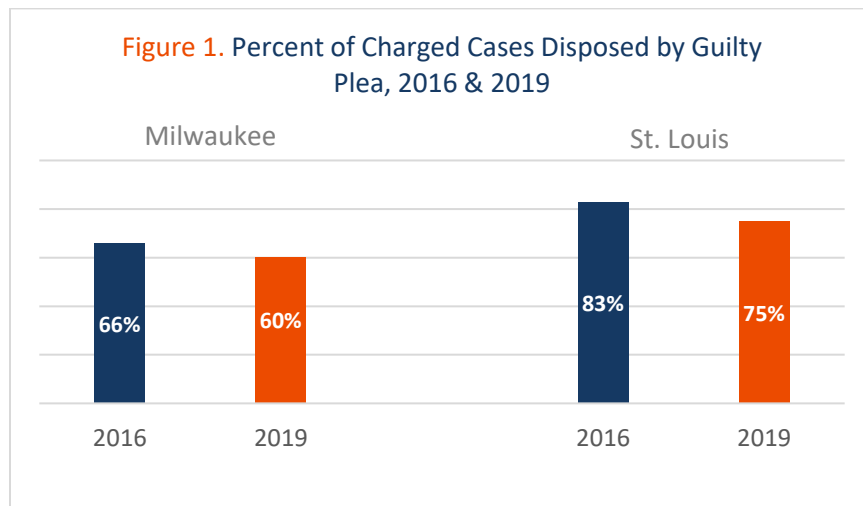
## WHAT DID WE FIND?

The plea negotiation process occurs in four general phases (case review, initial plea offer, negotiation, and judicial review and sentencing).



**The plea negotiation process is marked by a substantial amount of discretion.** Participants described the plea negotiation process as more of an art than a science. In recent years, the Prosecuting Attorney in St. Louis County has added some limits to discretion by expanding the sexual and domestic violence units, as well as instituting a supervisor over all homicide cases. Otherwise, most of the guidance that line prosecutors receive about how to charge cases and negotiate pleas is informal. In both counties, there is consensus that judges do not interfere with negotiated plea agreements; In Milwaukee, however, judges take a more active role in determining sentences since prosecutors and defense attorneys rarely present a joint recommendation.

**Most cases are disposed through a guilty plea.** Although guilty pleas are the most common method of case disposition in both counties, St. Louis County disposes of a higher percentage of cases by guilty plea than Milwaukee County. Even given these differences between counties, guilty plea rates in both counties decreased slightly over time: in St. Louis County the percent of cases disposed by guilty plea decreased from 83% in 2016 to 75% in 2019 whereas in Milwaukee County it decreased from 66% to 60%.



**Courtroom actors rely on several sources of data and case information when navigating the plea negotiation process.** The nature of the offense, the strength of the case, and the defendant’s criminal history are the most salient factors considered by all actors. Both counties are governed by state laws that dictate how victims can be involved in the process. Local stakeholders identified several extra-legal factors central to the eventual decision including the defendant’s cooperation with the prosecution, mental health, substance abuse, physical health, family support, education, employment history, remorse, and behavior while out of custody awaiting disposition. One St. Louis County public defender described the range of factors considered:

*Basically, the way you are going to value a case, and the state does the same thing – they look at what’s the crime charged, how bad is it, what’s the range of punishment, smallest and largest, what’s the defendant’s personal situation when they come to be charged. Do they have lots of priors or none? Do they have any mitigating mental health or any other kind of mitigating situation that cuts in the defendant’s favor that would justify maybe a downward departure from sort of what you would expect?*

**Several defendant and case factors are associated with guilty plea outcomes.** Most cases are resolved by way of a guilty plea, dismissal, or deferred prosecution. In St. Louis County, Black people (76%) are less likely than white people (88%) to have their case resolved by guilty plea. Very few racial differences were observed in Milwaukee where approximately 65% of all people plead guilty.

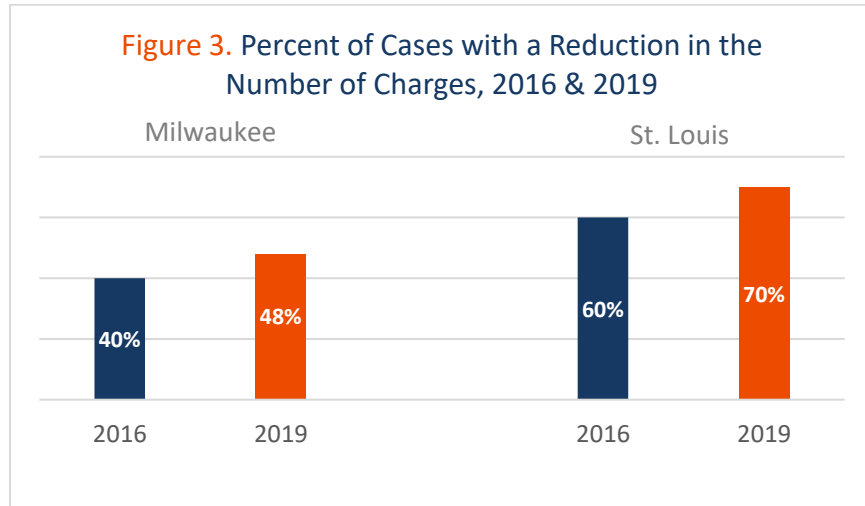
In both sites, cases with more charges and those with a violent or family violence charge (relative to a property charge) were less likely to be resolved by a guilty plea. There were also several jurisdictional differences. In Milwaukee, men are significantly more likely than women to have their case result in a guilty plea. In St Louis County, older people are more likely to have their cases result in a guilty plea but less likely in Milwaukee. Interestingly, relative to a property charge, cases involving a weapons charge were more likely to result in a guilty plea in Milwaukee but less likely to result in a guilty plea in St. Louis County.

**Figure 2. Factors Associated with the Likelihood of a Guilty Plea**

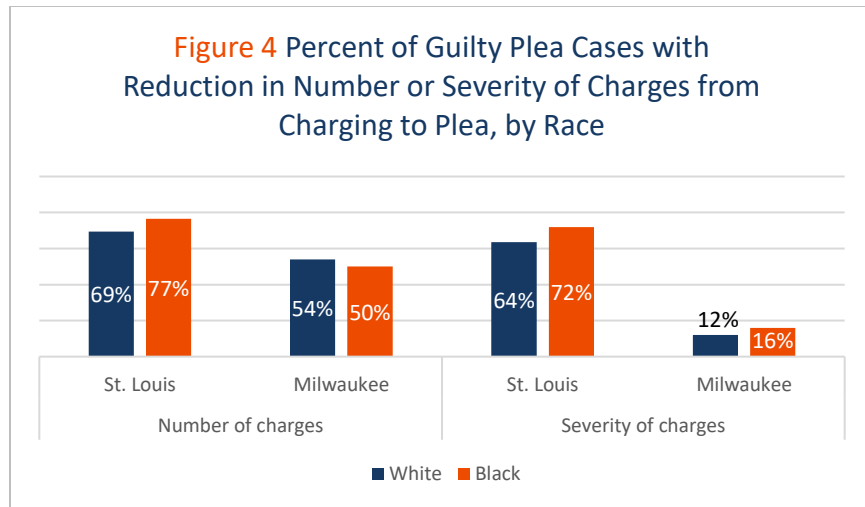
	St. Louis	Milwaukee
Black (relative to white)	-	
Latinx/Hispanic (relative to white)		+
Male		+
Age	+	-
Number of charges at screening	+	+
More serious felonies	+	+/-
Misdemeanors	+	-
Longer criminal history	+	
Violent (relative to property)	-	-
Family violence (relative to property)	-	-
Weapons (relative to property)	-	+
Drugs (relative to property)		-

**Guilty pleas involving a reduction in the number or severity of charges have increased over time.** In St. Louis County, the percent of cases with a reduction in the number of charges from filing a guilty plea increased from roughly 60% in 2016 to 70% after 2019; the percent of cases with a reduction in the severity of charges followed a similar trend. In Milwaukee County, there was a slight increase in the percent of cases

with a reduction in the number of charges, from 40% in 2015 to 48% after 2020; however, there was a marked increase in cases with a reduction in the severity of charges starting in March 2018, from roughly 8% to over 20% by 2020.



There were both similarities and differences in racial disparities in charge reductions between the sites. In St. Louis County, Black people were charged with more charges and more severe charges on average relative to white people; accordingly, white people were less likely than Black people to have the number and severity of charges reduced. While there were greater charge reductions in the number of charges for white people relative to Black people in Milwaukee, white people were less likely to have the severity of charges reduced.



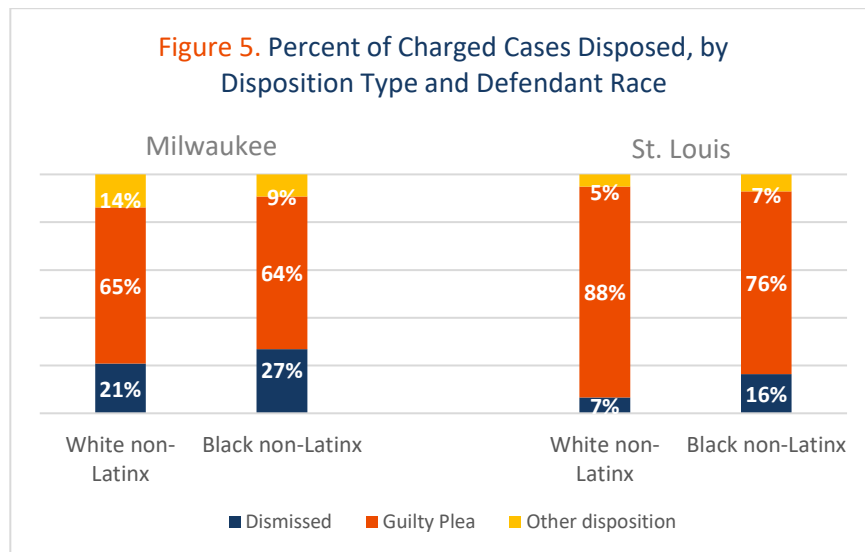
**Court actors and system-involved persons acknowledge broad disparities in the criminal legal system.**

However, there was disagreement over if and how race influences the plea negotiation process and outcomes. While some felt that court actors had implicit biases, others thought that bias was embedded in the criminal legal system. Several participants denoted the role of over-policing and the ways that decisions at other phases of the system influenced the types of cases that came to the court. One Milwaukee County judge explained:

*Black and Brown young men and women are having far more contact with law enforcement, which is not surprisingly resulting in police contacts and more convictions in certain populations. So, for me, if you have a deferred prosecution or early intervention program that excludes anyone who has a prior criminal conviction, you are automatically creating a program that is going to be less forgiving in certain communities, and less acceptable to people in certain communities.*

Others indicated that the lack of racial and ethnic diversity in the court, overall, leads to a lack of empathy and dehumanization of the civilians who move through the criminal legal system. Several court actors and system-involved persons recounted acts of racism that they had observed in court. Some felt that Black men charged with gun crimes were particularly likely to be punished more harshly than their white counterparts. Overall, disparities were attributed to biased actors or to external factors, like income, that influenced representation and furthered a cycle of involvement in the system.

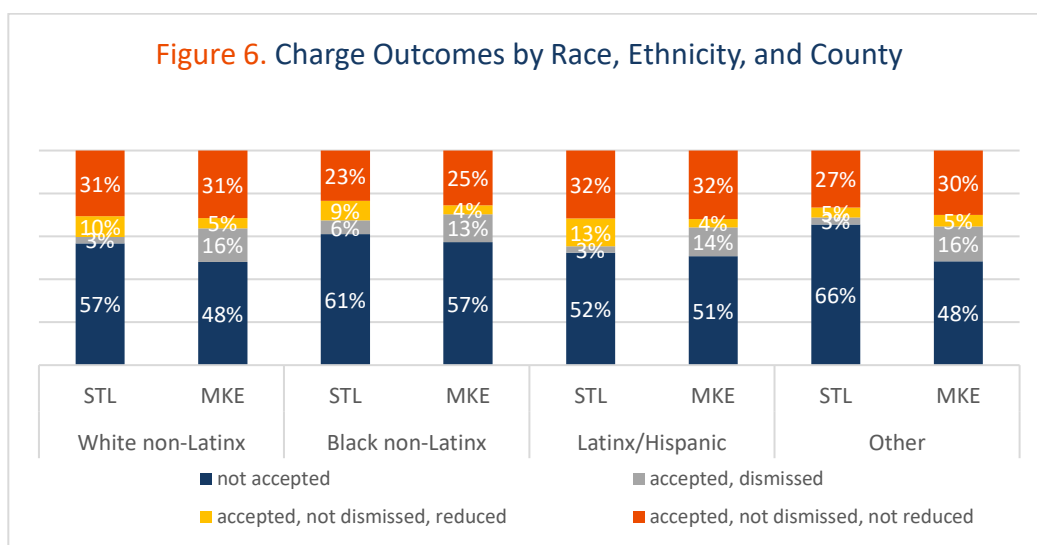
**Milwaukee and St. Louis Counties have reduced some of the racial disparities in prosecution but do so at different stages.** In St. Louis County, the prosecutor's office charges a similar proportion of cases for Black and white people. Out of the cases screened, roughly 39% of cases involving Black people are charged and roughly 43% of cases involving white people are charged. However, guilty pleas account for a relatively lower percentage of cases for Black people (76%) relative to white people (88%), especially in more recent years. In contrast, in Milwaukee, the prosecutor's office charges a lower percentage of cases for Black people (43%) relative to white people (52%); however, Milwaukee guilty plea rates are relatively similar for Black people (64%) and white people (65%).



There are also some similarities and differences in racial disparities for some crime types. In Milwaukee, a higher percentage of drug cases result in guilty pleas for Black people (71%) relative to white people (43%). In St. Louis County, guilty plea rates in drug cases are similar for Black (86%) and white people (89%). On the other hand, in family violence/domestic violence cases, guilty pleas occur more often for white people

compared to Black people – in Milwaukee, 51% of domestic violence cases result in guilty pleas for Black people compared to 67% of cases involving white people, and in St. Louis, 65% of family violence cases result in guilty pleas for Black people compared to 74% of cases involving white people.

**There are still large-scale racial disparities throughout the criminal legal system process, but there is little evidence that these disadvantages compound in case outcomes in Milwaukee and St. Louis Counties.** In both sites, white people are more likely than Black people to have their cases accepted and to result in a guilty plea without a charge reduction. Black people are the most likely to have a case not accepted and the least likely to receive a guilty plea without a charge reduction. This may be a reflection of the cases that are coming into the system, where Black people are more likely to be arrested and also to have more charges and more severe charges at screening. As such, they are more likely to have their charges not accepted in the first place, or, if the prosecutor initially files charges, they are more likely to have these charges reduced during the prosecutorial process. As important, several participants denoted that people of color had longer lengths of pre-trial detention, suggesting that disparities may be even greater on the front end of the system.



**COVID-19 has influenced all aspects of the plea negotiation process.** Court actors reported less frequent communication during COVID-19. Before the pandemic, most plea negotiations were conducted in person. The typical face-to-face process transitioned to email or other forms of communication during the pandemic, which minimized informal discussions. It is unclear how changes in communication affected case outcomes. Some defense attorneys felt that the lack of communication hindered their clients as stakeholders were not able to argue the nuances of the case, but others appreciated the efficiency of the focused discussions. According to one St. Louis County judge: “The pandemic has made it hard for people to meet and talk, you know...they send emails or they get on the phone, but they don’t cut deals like they used to in the back hallways...and that’s really how it happens.”

**Guilty plea rates decreased significantly during the COVID-19 pandemic.** Case processing slowed during this time. In St. Louis County, the number of disposed cases dropped from roughly 300 cases per month in 2019 to just 30 cases in April and May 2020; while 90 cases per month were disposed for the remainder of 2020. In Milwaukee County, the number of disposed cases dropped from roughly 830 cases per month in 2019 to 114 in April and May 2020; throughout the rest of 2020, 266 cases per month were disposed. In both sites, the percent of cases disposed by guilty plea dropped markedly in April and May 2020 before recovering to pre-COVID-19 levels. Court actors in both counties reported strong pressure to work on some of the backlogs that were amassed as part of court closures.

## AVENUES FOR REFORM

### Increase the consistency of plea offers and outcomes

Many court actors agreed that the plea negotiation process was essential given the current caseload size and resources available to the court. Many participants acknowledged the need for greater consistency or uniformity in plea offers for similarly situated defendants. Some participants noted the lack of experience of new prosecutors or defense attorneys, which created a lack of awareness of the “right” or “normal” plea offer in a typical case and, in turn, inconsistencies in outcomes. In both communities, there has been high staff turnover and some felt that this led to substantial variation in outcomes, particularly when training is sparse. That noted, there was a great deal of emphasis placed on the import of discretion in the process as consistent pleas may not be inherently fair.

### Create Guidelines for Initial Plea Offers

Most actors also felt that the onus for reform rested with the prosecutor, as the actor who initiated the negotiation process in most cases. Many participants felt that ensuring consistency in plea offers and outcomes had to start with prosecutors, with one prosecutor in Milwaukee County commenting “*that's something that's all on us.*” One solution, discussed by some participants, involved the creation of formal guidelines or lists of “going rates” for initial plea offers that would ensure plea negotiations started from a similar place. The basic idea was that prosecutors would be provided a list of specific crimes with an initial plea offer to present to defense attorneys as a starting point for negotiations. As one prosecutor in Milwaukee County described it:

*If you're going to provide them more guidance with, “all right, if you have this case, this background, this age, this chart, you should be looking in this range, except for maybe if X, Y, and Z are present.” I think that could be potentially helpful.*

A public defender in St. Louis County similarly noted that:

*If you knew for this type of charge, if it's a first offense, then typically the recommendation will be SIS probation. Even if we knew those kind of things that would at least give some kind of help from the get-go on how negotiations are going to go.*

By starting from a similar point, participants felt the final plea outcome would be more consistent. However, participants also emphasized the need for individualization in plea offers. They cautioned that plea guidelines should not fully determine the outcome and should instead be responsive to “the person and their situation and their circumstances.”

### Improve the Exchange of Information

Court actors in both communities expressed a desire to improve the exchange of information about cases and defendants, particularly in light of the COVID-19 pandemic. The pandemic has further highlighted the need to expedite the negotiation of pleas. For example, judges in Milwaukee County suggested the need for prosecutors and defense attorneys to meet in person to negotiate pleas, criticizing attorneys for not presenting and discussing information before coming to court. This was specific to Milwaukee County, with one judge noting:

*Many times, the day of the hearing, the parties come in front of me, and I could tell that they just haven't talked, and they seem so far away. And I think it's so important for them to just communicate beforehand. And I think it's important for the defense to provide information to the prosecutor. So they get a picture of who this person is that's coming before them.*



These were described as “plea conferences,” in which information would be exchanged and initial plea offers and counteroffers would be made. As one Milwaukee County judge described it, “they are ordered to be in conference with each other before the first pretrial hearing and make sure discovery has been exchanged, make sure an offer has been conveyed, and then actually have a meaningful discussion.”

### **Expedite the Negotiation Process**

While improving the exchange of information was seen as crucial to the plea process, participants also suggested ways to expedite the process to make it more efficient. Many of these suggestions derive from changes made to the process in response to the COVID-19 pandemic, while others are a response to long-standing practices.

Several participants felt that better scheduling was necessary. One change that occurred in Milwaukee County during the pandemic involved better scheduling of plea hearings; these allowed for more efficient use of time by prosecutors and defense attorneys and could potentially lead to more meaningful exchanges. As one prosecutor in Milwaukee County noted:

*I like that now courts are now scheduling more specific times for people, not as much of a cattle call...I do, I really like that change and it's made it so I can, as attorneys, we can get more accomplished.*

Other reforms for expediting cases centered on improving the initial review of cases. Several participants argued that both prosecutors and defense attorneys had limited knowledge of cases at crucial early stages when initial charging decisions were made, and initial plea offers set. As a result, cases that could be diverted out of the system were often charged and reasonable plea offers were often overlooked. One public defender suggested reform focused on prosecutors spending more time screening cases – specifically to get through discovery before they charge a case – to better understand the circumstances of the case and, in turn, to better inform an initial plea offer. Others suggested creating committees within the public defender’s office to identify cases that could be diverted and bringing those to the prosecutors’ attention; this would alleviate the burden on public defenders by getting more cases out of the system early. As one judge in St. Louis County described it:

*Just the ability to be able to fast-track some cases, having someone that could do a quick analysis of whether or not someone should go into treatment court, or consider other options...It just isn't happening, because for the most part you've got a group of really earnest folks that are just reacting to putting out fires all of the time because they don't have the luxury of really preparing a case in a way that they should.*

### **Enhance the Transparency of the System.**

Participants who had been involved with the court system felt that the court process moved very slowly and was opaque, yet, their involvement and ability to have a voice were very brief. They indicated that there was substantial pressure to enter into the plea negotiation process. Several participants felt that they did not have a choice but to plead guilty, and others indicated that they plead guilty because they were in jail or the process dragged out. Participants described the entire process as arduous and indicated that the process itself was part of the punishment.

## **CONCLUSIONS**

Much remains to be learned about the role that prosecutors and other system actors play in the plea negotiation process, and even less is known about how this process has changed over time, particularly during the COVID-19 pandemic. The goal of the current study was to unpack the plea negotiation decisions

which is especially key to understanding racial and ethnic disparities in criminal case processing. In Milwaukee and St. Louis Counties, more similarities arose than differences. The report details the predominance of plea negotiation in the study communities. We find few racial differences in the likelihood of a guilty plea or in the likelihood of charge reductions across the two sites. These findings should be interpreted against the backdrop of the specific study sites, where elected prosecutors have expressed a commitment to reducing mass incarceration and racial disparities.

Emerging from our interviews with stakeholders and system-involved people is the tension between consistency and individualization in plea processes and outcomes. This is evident in the calls for greater communication between prosecutors and defense attorneys and for the timely exchange of detailed information specific to the defendant's circumstances. COVID-19 also has upended much of the plea negotiation process, by limiting in-person engagement among system actors and delaying outcomes for defendants. In the effort to expedite the resolution of cases backlogged due to the pandemic, much of the "human element" of the process has been absent.

Overall, these tensions in the plea negotiation process may lead to positive outcomes for court actors and justice-involved persons. Justice demands both equality and equity in treatment - both consistency and individualization. And the reforms articulated by court actors and system-involved individuals recognize these dual demands – seeking greater communication, collaboration, and consideration in reaching guilty plea outcomes.

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<sup>i</sup> Edkins, V. A., & Redlich, A. D. (Eds.). (2019). *A System of Pleas: Social Sciences Contributions to the Real Legal System*. Oxford University Press.

<sup>ii</sup> Stemen, D., & Escobar, G. (2018). Whither the prosecutor? Prosecutor and county effects on guilty plea outcomes in Wisconsin. *Justice Quarterly*, 35(7), 1166-1194.

<sup>iii</sup> Johnson, B., King, R., & Spohn, C. (2016). Sociolegal approaches to the study of guilty pleas and prosecution. *Annual Review of Law and Social Science*, 12, 479–495.

<sup>iv</sup> Throughout this report, we use the term preferred by study participants "plea negotiation" as opposed to "plea bargaining."