I'LL GIVE YOU TWO MISDEMEANOURS FOR THAT FELONY: OVERPRICED, OLD BRUK OR JUST RIGHT. FAUSTIAN BARGAINS IN THE MALLS OF THE LAW.

A PROSECUTOR'S PERSPECTIVE ON THE ADEQUACY OF THE CRIMINAL JUSTICE (PLEA NEGOTIATIONS AND AGREEMENTS) ACT #34/2005 & REGULATIONS

SOURCE MATERIAL

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Criminal Justice (Plea Negotiations and Agreement) Act 2005

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PREAMBLE

We are familiar with the practice on American television shows such as ***Law and Order*** of the prosecutors and defence counsels negotiating pleas to a lesser offence or a reduced sentence very often in return for turning state's evidence.

The system of plea bargains in the United States has been described as

> …a mature process underpinned by legal principles and procedural rules that allow-in fact positively encourage- the prosecution and defence to negotiate openly. Pragmatism has become institutionalised and codified with few jurisprudential qualms[1]

The truth is, that notwithstanding the snobbery ingrained in those who practice in a common law system of jurisprudence influenced by British legal values and attitudes toward American legal practices, many Commonwealth jurisdictions have embraced and adopted a formalised structure to plea bargaining or plea negotiations. Canada, Pakistan in 1999, Trinidad and Tobago in 1999[2] , India (after some misgivings) in 2006, the Bahamas in 2008[3] and Jamaica in 2005[4] and 2010[5].

While it remains informal in some commonwealth countries guidelines have been promulgated to govern and regulate these activities. In Australia the Commonwealth Director of Public Prosecutions [6] has published considerations to be taken into account by prosecutors when considering charge negotiations[i].

The Attorney-General for England and Wales has also issued guidelines for the acceptance of pleas[7] which were revised in 2009[ii] and also guidelines were issued in relation to the acceptance of pleas in serious and complex fraud cases on March 18, 2009

Despite its origins within the common law, plea bargaining has proved surprisingly protean and adaptable and has been implemented in some limited form in civil law jurisdictions such as Estonia, Italy, Poland and France.

It is a testament to that unique American strength of devising pragmatic and practical solutions to knotty and thorny problems that plea bargaining has been implemented worldwide including Jamaica.

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[1] ***Please Don't Call It "Plea Bargaining"*** by Nick Vamos **[2009] Crim. LR** 617 at 619
[2] **The Criminal Procedure (Plea Discussions and Plea Agreement) Act**
[3] **The Criminal Procedure (Plea Discussions and Plea Agreement) Act**
[4] The legislation was passed by the Houses of Parliament in 2005 (Act 34/2005)
[5] The legislation was gazetted and brought into effect in 2010
[6] **Prosecution Policy of the Commonwealth**.
[7] [2001] Cr. App. R. 28

What is colloquially referred to as plea bargains and also plea agreements by the more refined and 'forensically inclined" did not originate in the United States of America though it has been perfected in that jurisdiction.

This feature of common law jurisdictions has its origins in England, though that country for many years turned up its nose at the practice – abjuring and disapprobating the exercise.

However, plea bargaining was given the judicial seal of approval by the House of Lords in ***McKinnon v The Government of the USA***[8] .

This was an extradition case where the USA was requesting the extradition of a computer hacker. The extradition request had been preceded by among other things plea-bargaining discussions between November 2002 and April 2003 during which the US prosecutors indicated to the appellant's legal representatives what attitude they would take depending upon whether he went to the US voluntarily and pleaded guilty or instead contested extradition and the charges against him. The discussion involved the particular charges he would face and the sentence he could expect and in addition his prospects of repatriation pursuant to the European Convention on the Transfer of Sentenced Persons 1983 (ETS 112 of 21 March 1983) to which the US is a party.

It was submitted by McKinnon that the plea bargaining by the Government of the USA was an attempt to interfere with the due process of the Court.

The House of Lords dismissed this ground holding (at para.34):-

> Before answering these questions, however, it is as well to recognise that the difference between the American system and our own is not perhaps so stark as the appellant's argument suggests. In this country too there is a clearly recognised discount for a plea of guilty: a basic discount of one-third for saving the cost of the trial, more if a guilty plea introduces other mitigating factors, and more still (usually one half to two thirds but exceptionally three-quarters or even beyond that) in the particular circumstances provided for by sections 71-75 of the Serious Organised Crime and Police Act 2005—see *R v P; R v Blackburn* [2007] EWCA Crim 2290. No less importantly, it is accepted practice in this country for the parties to hold off-the-record discussions whereby the prosecutor will accept pleas of guilty to lesser charges (or on a lesser factual basis) in return for a defendant's timely guilty plea. Indeed the entire premise of the principle established in *Goodyear* [2005] 1 WLR 2532 is that the parties will have reached an agreed basis of plea in private before the judge is approached. What, it must be appreciated, *Goodyear* forbids are *judicial*, not prosecutorial, indications of sentence. Indeed, *Goodyear* goes further than would be permitted in the United States by allowing the judge in certain circumstances to indicate what sentence he would pass[9].

[8] [2008] UKHL 59
[9] Per Lord Brown of Eaton –Under- Heywood

The case of ***Rex v Margaret Caroline Rudd***[10] was a matter where the Court of Kings Bench (per Lord Mansfield) was faced with an application from MCR that she was entitled to bail having given King's evidence in a case of forgery.

> It has been urged, that the prisoner in this case, is an accomplice who has been admitted to give evidence; that she has already given evidence, and is further ready to give evidence to convict her partners in the business; and therefore, that she is entitled by law to the King's pardon, and to a pardon which would operate in bar of her own crime.

The court held that while MCR did not fall within the categories that entitled her to a pardon

> There is besides a practice, which indeed does not give a legal right; and that is, where accomplices having made a full arid fair confession of the whole truth, are in consequence thereof admitted evidence for the Crown, and that evidence is afterwards made use *of* to convict the other offenders. If in that case they act fairly and openly, and discover the whole truth, though they are not entitled of right to a pardon, yet the wage, the lenity, and the practice of the Court is, to stop the prosecution against them, and they have an equitable title to a recommendation for the King's mercy.

This judgement is useful for it mentioned a certain class of persons called approvers.

> A person desiring to be an approver, must he one indicted of the offence, and in Custody on that indictment : he must confess himself guilty of the offence, and desire to accuse his accomplices : he must likewise upon oath discover, not only the particular offence for which he is accused but all treasons and felonies which he knows of ; and after all this, it is in the discretion of the Court, whether they will assign him a coroner, and admit him to be an approver or not : for if, on his confession it appears that he is a principal and tempted the others, the Court may refuse and reject him as an approver. When he is admitted as such, it must appear that what he has discovered is true; and that he has discovered the whole truth. For this purpose, the coroner puts his appeal into form; and when the prisoner returns into Court, he must repeat his appeal, without any help from the Court, or from any by-stander. And the law is so nice that if he vary in a single circumstance the whole falls to the ground, and he is condemned to be hanged; if he fail in the colour of a horse, or in circumstances of time, so rigorous is the law, that he is condemned to be hanged; much more, if he fail in essentials. The same Consequences follow if he does not discover the whole truth: and in all these cases the approver is convicted on his own confession,

Employing Queen's evidence to accomplish this end was distasteful to judges, lawyers and members of the public. Hale C.J., writing about 1650, used strong language of condemnation of the plea of approvement which was the precursor of the modern practice of granting immunity from prosecution, or further prosecution, to accomplices willing to give evidence for the Crown.

> "The truth is," he wrote, "that more mischief hath come to good men, by these kinds of approvements by false accusations, of desperate villains than benefit to the public by the discovery and convicting of real offenders."

[10] (1775) 98 ER 1114

It is perhaps due to legal practices such as these (which would also have been the law in colonial Jamaica) which have given rise to the *informa fe dead* culture in this our blessed kingdom.

This case shows that at least in the eighteenth century there was a method for recruiting cooperating witnesses to give evidence on behalf of the prosecution. Even then (especially in the case of approvers) the law had a mechanism of keeping these witnesses in line or at the end of one.

Blackstone in his **Commentaries** wrote that a witness was competent to give his evidence notwithstanding he had been induced to do so and that inducement was operating on his mind at the time he is giving his evidence in the witness box. Indeed, the accomplice could not expect to receive his pardon unless he gave his evidence without prevarication or fraud.

In 1976 W.T. Westling in his article entitled ***Plea Bargaining: A Forecast for the Future***[11] wrote:-

> There can be little doubt that some plea bargaining exists in Australian courts. It may not be very widespread, it may be done in subtle and unannounced ways, and it may lack official sanction, but it does exist in some degree. Furthermore, conditions exist which have the potential to increase the pressure on the criminal justice agencies to resort to plea bargaining to expedite the criminal processes.

Plea agreements especially where accomplice evidence is being utilised has been justified as necessary in the public interest notwithstanding the ethical issues that are thrown up and confront the Court.

In **Chan Wai-Keung v R**[12] the witness who gave evidence against the appellant on the charge of murder, was awaiting sentencing for an unrelated offence and he gave his evidence in expectation of receiving a reduced sentence.

The appellant's appeal to the Judicial Committee was dismissed by the Board on the ground that the trial judge had given a clear and firm direction to the jury warning them of the potential fallibility of the witness' evidence.

At pg. 200 Lord Mustill said:

> "It has been recognized for centuries that the practice of allowing one co-defendant to 'turn Queen's evidence' and obtain an immunity from further process by giving evidence against another was a powerful weapon for bringing criminals to justice, and although this practice 'has been distasteful for at least 300 years to judges, lawyers and members of the public', and although it brings with it an obvious risk that the defendant will give false evidence under this 'most powerful

[11] [1976] Sydney Law Review 424
[12] [1995] 2 Cr App Rep. 194

> inducement', the same very experienced court which so stigmatized this practice was willing to accept that it was in accordance with the law: Turner (Bryan) (1975) 61 Cr App. R 67, 79.
>
> The logic of this practice, which places the interests of the public in the detection and punishment of crime above the risk which must always exist where a witness gives evidence for the prosecution in the hope that he will obtain a benefit thereby, must also apply to situations where the 'powerful inducement' takes the shape not of a promised immunity from prosecution, but of the expectation that he will be granted the 'discount' from sentence which the courts accord to those who, not infrequently at physical risk, give evidence against their co-defendants. This logic is carried into effect. No authority is needed to illustrate the widespread practice of calling as a witness for the prosecution a co-defendant who has pleaded guilty."

Fast forward to the 21st century and Jamaica and plea bargaining is alive and well in our congested and sclerotic legal system. Plea bargaining exists in Jamaican courts and it is very widespread. Practitioners in the Resident Magistrates Court and the High Court –defence counsel and prosecutors- engage in this practice nearly every-day and judges are very often involved.

Very often it is only subtle and unannounced in cases where a cooperating witness is either being proffered or recruited.

PLEA BARGAINING/PLEA NEGOTIATIONS: DEFINITION AND CHARACTERISTICS

What exactly is a plea bargain or a plea agreement (to those who think that the word *'bargain'* sounds coarse and commercial).

Paul Gerber[13] described a plea bargain/plea agreement as thus:-

> There can hardly be a barrister practising in 'crime' who has not, at some time or other, been involved in some form of 'plea bargaining', that is, offering a plea of 'guilty' as a trade-off to a lesser charge. Sometimes the prosecutor approaches the defence, at other times the defence sounds out the Crown to see whether a 'deal' can arranged. The practice is well known and not uncommon. However, there is - or ought to be - 'consideration' for the bargain to the extent that the defence abandons a mitigating, or even potentially absolving factor which might otherwise be open to the accused, such as - in the case of crimes of violence - self-defence, provocation, or diminished responsibility. The list is by no means exhaustive. For maximum impact, if a plea bargain is contemplated, it should be explored after an accused has been committed to stand trial. Once it is known that the court is asked to deal with a plea rather than a full trial, this should expedite the hearing, thus shortening the period in remand centres if the accused is not bailed.

According to the learned authors of **Blackstone's Criminal Practice 2006**[14]

[13] "When is Plea Bargaining Justified?" **[2003] QUT. Law JJ 13 (Queensland University of Technology Law and Justice Journal)**

[14] Para. D11.62

> It is common practice for the prosecution and defence to agree through counsel prior to arraignment that in the event of the accused pleading guilty to parts of the indictment, the Crown will not seek to prove him guilty as charged. The precise nature of the arraignment will vary according to circumstances. It may take the form of accepting a plea of guilty to a lesser offence or of offering no evidence on counts to which the accused pleads not guilty , or of asking the judge to allow some counts to remain on the file marked not to be proceeded with.

A plea bargain or a plea agreement is a form of negotiation between a person charged with an offence and a crown prosecutor. The accused person usually negotiates through his counsel. Plea bargaining can take several forms. For example, an accused charged with several offences may agree to plead guilty to some of these offences while the Crown agrees to withdraw the remaining charges. It may also take the form of an accused pleading guilty in exchange for the Crown recommending to the court a lesser sentence than the accused might otherwise risk receiving. As well, the Crown and the accused often negotiate over the facts upon which a guilty plea will be entered[15].

From this definition it can be determined that there are usually three (3) areas of negotiations in a plea bargain/plea agreement. These are:-

[i] **Charge Bargaining**: This is a common and widely known form of plea bargaining and the most common area of plea negotiations in Jamaica. It involves a negotiation of the specific charges (counts) or crimes that the accused will face at trial. Usually, in return for a plea of "guilty" to a lesser charge, a prosecutor will dismiss the higher or other charge(s) or counts. For example, in return for dismissing charges for **murder**, a prosecutor may accept a "guilty" plea for **manslaughter** (subject to court approval).

[ii] **Sentence Bargaining**: Sentence bargaining involves the agreement to a plea of guilty (for the stated charge rather than a reduced charge) in return for a lighter sentence. It saves the prosecution the necessity of going through trial and proving its case. It provides the defendant with an opportunity for a lighter sentence.

[iii] **Fact Bargaining**: The least used negotiation involves an admission to certain facts ("stipulating "to the truth and existence of provable facts, thereby eliminating the need for the prosecutor to have to prove them) in return for an agreement not to introduce certain other facts into evidence.

The validity of a plea bargain is dependent upon three essential components:

[a] a knowing waiver of rights

[15] See also **Osborn's Concise Law Dictionary 8th ed (Sheila Bone (ed)) SWEET & MAXWELL 2001** which defines a plea bargain as an arrangement by which a defendant in criminal proceedings may agree to plead guilty to one or more charges in return for the prosecution extending some advantage to him e.g. dropping another charge. Such a bargain will be closely scrutinised by the court and a judge should never indicate what sentence he has in mind to induce a defendant to change his plea.

[b] a voluntary waiver

In relation to [a] and [b] A voluntary plea has two elements: the defendant must understand to what he is pleading; and he must make the plea of his own free will. He must not be pressured by anyone to plead guilty[16]. If at the time he pleaded, the defendant was subject to such pressure that he did not genuinely have a free choice between 'guilty' and 'not guilty' then his plea is a nullity[17] [***Regina v Turner***[18]].

The plea must be unambiguous. If a defendant says he is *'guilty with an explanation'* this indicates that the plea is qualified. If on listening to the explanation the court forms the opinion that the defendant may have a valid defence, the court should record a not guilty plea and set the matter for trial[19] (***Lewis v Commissioner of Police***[20]).

[c] a factual basis to support the charges to which the defendant is pleading guilty

THE PROS AND CONS OF PLEA AGREEMENTS

The case law and research material on plea bargaining all touch And concern ethics –whether professional or moral or both.

Plea Bargaining should be Abolished

Opponents of plea bargaining argue that it should be abolished for the following reasons.

[I] Plea bargaining is unfair because defendants forfeit some of their rights, including the right to trial by jury.

Nick Vamos[21] argues that :

> *Plea bargaining is coercive*
> If the penalty for going to trial is too high, if it is simply too risky to claim innocence, then defendants may be coerced into pleading guilty. A defendant faced with a choice between life imprisonment and five years would be acting rationally in accepting such a deal even when faced with a weak case.

Richard Lippke[22] argues that defendants (in the USA) are subject to what he calls trial penalties and that a defendant who exercises his right to a trial if he is convicted is subject to a higher sentence than if he had undergone a plea agreement. Though trial penalties are hard to detect in Jamaica since the prosecutor is basically a spectator in

[16] **Commonwealth Caribbean Criminal Practice and Procedure** (3rd Ed) by Dana Seetahal
[17] Para D11.34 **Blackstone's Criminal Practice** 2006
[18] [1970] 2 QB 321]
[19] **Commonwealth Caribbean Criminal Practice and Procedure** (3rd Ed) by Dana Seetahal
[20] (1969) 13 WIR 186
[21] ***Please Don't Call It "Plea Bargaining"*** by Nick Vamos **[2009] Crim. LR** 617
[22] **The Ethics of Plea Bargaining**. Oxford University Press 2011.

the whole sentencing process and only defence counsel is allowed to recommend sentencing options to the Judge.

Lippke goes on to argue quite persuasively that a criminal trial produces a wide range of public and private goods. The acquittal of innocent persons does not only benefit the accused person and those that love and depend on him but the public benefits in that the system works in weeding out the guilty from the innocent.

Critics of plea bargaining argue that in the absence of criminal trials, the government's case against the defendant is not tested or not tested vigorously. So police or prosecutorial incompetence, corruption or malfeasance are not exposed, often to the considerable detriment not only of the defendants but also the general public[23].

[II] Plea bargaining allows criminals to defeat justice, thus diminishing the public's respect for the criminal justice process.

[III] The practice of giving criminals who plea bargain lighter sentences results in unjust sentences in which the punishment is too lenient given the severity of the crime.

[IV] Plea bargaining raises the possibility that innocent people will plead guilty to crimes they didn't commit. Again according to Nick Vamos[24]

> *The innocence problem*
> A second problem follows naturally from this conclusion namely the unrestricted plea bargaining encourages the innocent to plead guilty not because they believe the trial process to be unfair but simply because it becomes rational to do so when faced with an outlandish plea/trial differential.

[V] Plea bargaining undermines consistency of outcomes.

> If plea/trial differentials are too high then similar defendants charged with identical crimes may receive vastly different sentences depending on the weight of the evidence against them. This undermines both public confidence and very basic notions of justice. Sentencing should be anchored to the seriousness of the offence and any relevant personal mitigation not the probability that a defendant is guilty[25].

[VI] That plea bargaining leads to prosecutorial overcharging in two contexts:-

[a] overcharging for strategic reasons – what Lippke calls "strategic overcharging" either charging a more serious offence than what the evidence warrants or multiple counts of an offence where a single count

[23] **The Ethics of Plea Bargaining** by Richard Lippke. Oxford University Press 2011
[24] ***Please Don't Call It "Plea Bargaining"*** by Nick Vamos **[2009] Crim. LR** 617
[25] ***Please Don't Call It "Plea Bargaining"*** by Nick Vamos **[2009] Crim. LR** 617

would suffice or numerous ancillary offences with a view to pressuring the defendant to plead guilty[26]:

and

[b] charging additional offences when plea negotiations with the defendant has failed. With a view to the defendant being assessed at a high trial penalty in the event he is found guilty by the court.

It would seem however that the effect of the **CJPNA** is twofold. Firstly it attempts to change the prosecutorial culture in Jamaica which adheres to the legality principle of prosecution. That is prosecutors are to charge all prosecutable offenses. This of course is incompatible with the practice of charge-bargaining which the **CJPNA** in the policy it represents would encourage.

Secondly, it encourages the prosecutorial culture it hopes to change as prosecutors will charge all prosecutable offences (over-charging) strategically in the hope of getting an advantage in plea agreements. Thus charge bargaining with a strong hand of dominoes.

Plea Bargaining should not be Abolished

Defenders of plea bargaining stress its practical benefits.

[I] Plea bargaining allows criminal justice personnel to individualize punishments and make them less severe.

[II] Plea bargaining is an administrative necessity—without it, courts would be flooded and the justice process would get bogged down.

[III] Plea bargaining saves the prosecution, the courts, and the defendant the costs of going to trial.

PLEA BARGAINING: JAMAICA: THE LEGISLATION

In Jamaica there has always been some form of informal plea negotiation and it is usually to take a plea to a lesser offence. This was formalised in 2005 with the passage of the **Criminal Justice (Plea Negotiations and Agreements) Act**.

The contents of a plea bargain agreement are set out in the schedule to the act.
(see appendix)

The **Criminal Justice (Plea Negotiations and Agreements) Act (CJPNA)** received the Royal Assent on the 29th day of December, 2005.

[26] **The Ethics of Plea Bargaining** by Richard Lippke. Oxford University Press 2011

The then Honourable Minister of Justice, Dorothy Lightbourne, CD QC, by appointed day notice brought the **CJPNA** into effect on November 1, 2010.

According to s.7 of the **CJPNA** every plea agreement must contain the information set out in the schedule to the **Principal Act**.

To that end in the regulations (**Criminal Justice (Plea Negotiations and Agreements) Regulations 2010 (CJPNAR)** the required standard forms have been created to capture all the information required by the Court.

This legislation culminates years of lobbying by the Jamaica Constabulary Force who see it as an essential tool for crime fighting especially in the struggle against organised crime.

It remains to be seen how well it will work. One senior member of the Jamaican bar was heard to dismiss the legislation derisively as "the informer law" at the time of its passage in 2005.

This is the fundamental flaw of the legislation. The legislation is basically a precursor to the proposed Anti-Gang Act or to give it its proper title – **The Criminal Justice (Suppression of Criminal Gangs and Organised Criminal Groups) Act**.

The legislation was not designed and is unable to deal with the number of matters on our court lists. The main role of the **CJPNA** is to recruit cooperating witnesses. This is ironic because everywhere modern plea bargaining is mushrooming and finding fertile soil was due to the fact that there was due to the pervasive existence of a backlog or logjam in the court system which institutionalises delay.

DISPOSAL OF CASES IN THE HOME CIRCUIT COURT APRIL 1, 2004 – JULY 30, 2012[27]

PERIOD	TOTAL NUMBER OF CASES	TOTAL NUMBER DISPOSED OF	CONVICTIONS	ACQUITTALS
APRIL 1 2004 – MARCH 31, 2005	495	131	55	52
APRIL 19, 2006 – MARCH 31, 2007	786	169	80	61
APRIL 11, 2007 – MARCH 14, 2008	881	151	75	40
MARCH 26, 2008 – APRIL 3, 2009	1052	187	88	41
APRIL 15, 2009 – MARCH 31, 2010	1316	207	123	55
APRIL 7, 2010 – APRIL 15, 2011	1481	209	66	87
APRIL 11 2012 – JULY 30,2012	649	103[28]	58	22

It is here that we now proceed to look at the role of the principal actors in the drama of the **CJPNA**. The supporting actors are the prosecutors and the defence counsel and the ***star boy***- the person with top billing – is the judge.

It is the adequacy of the legislation that this paper seeks to evaluate.

THE DIRECTOR OF PUBLIC PROSECUTIONS' (DPP) ROLE

Section 2 of the Act is an interpretation section and defines the following terms-

> "Director of Public Prosecutions" – includes any attorney-at-law authorised in writing by the Director of Public Prosecutions to conduct plea negotiations and conclude plea agreements.

What is clear from section 2 is that before any prosecutor can enter into and conclude plea negotiation and agreements he/she must first have the written *imprimatur* of the DPP.

Prosecutor here means Crown Counsel (of any rank), Clerk of Court or those with the DPP's *fiat*.

Comparatively, the corresponding section in the Trinidadian equivalent legislation is worded with greater precision and also separates the DPP from prosecutor.

> "prosecutor" means the Director of Public Prosecutions, an Attorney-at-law in the office of the Director of Public Prosecutions, a police officer or an Attorney-at-law to whom the Director of Public Prosecutions has granted a *fiat*[29];

[27] Figures culled from annual reports of the DPP to Parliament and last day of circuit report. I have omitted disposals by other means concentrating only on convictions and acquittals

[28] The others were disposed of in the following manner:- 16 *nolle prosequis* entered, 5 absconded bail and 2 died.

"Director of Public Prosecutions" means the Public Officer appointed under section 90 of the Constitution to undertake to execute the responsibilities assigned to him under that section[30];

Furthermore, nothing in this Act affects the powers conferred upon the DPP by virtue of section 94 [31]of the **Jamaica (Constitution) Order in Council 1962** (hereafter the **Constitution**)

The DPP may at any time in any case – where she considers it desirable – before judgment is rendered by a Court enter into plea negotiations with the accused person for the purpose of concluding a plea agreement[32].

The entry into plea negotiations and plea agreements by the DPP is an exercise of prosecutorial discretion which defined is the use of those powers that constitute the core of the DPP's office and which are protected from the influence of improper political and other vitiating factors by the principle of independence[33].

The core elements of that prosecutorial discretion encompass the following:

[a] the discretion whether to bring the prosecution of a charge laid by police;

[b] the discretion to enter a stay of proceedings in either a private or public prosecution

[c] the discretion to accept a guilty plea to a lesser charge;

[d] the discretion to withdraw from criminal proceedings altogether;

and

[e] the discretion to take control of a private prosecution[34]

Significantly, what is common to the various elements of prosecutorial discretion is that they involve the ultimate decisions as to whether a prosecution should be brought, continued or ceased, and what the prosecution ought to be for. Put differently, prosecutorial discretion refers to decisions regarding the nature and extent of the prosecution and the DPP's participation in it[35].

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[29] Section 2 **The Criminal Procedure (Plea Discussions and Plea Agreement) Act**
[30] Section 2 **The Criminal Procedure (Plea Discussions and Plea Agreement) Act**
[31] S.3(2)
[32] S.4 (1)
[33] An adaptation of the dictum of Charron J in ***R. v. Olga Nixon*** 2011 SCC 34, [2011] 2 SCR. 566 Supreme Court of Canada
[34] An adaptation of the dictum of Charron J in ***R. v. Olga Nixon*** 2011 SCC 34, [2011] 2 SCR. 566 Supreme Court of Canada
[35] An adaptation of the dictum of Charron J in ***R. v. Olga Nixon*** 2011 SCC 34, [2011] 2 SCR. 566 Supreme Court of Canada

Within the context of a plea bargain the prosecutor performs three[36] important functions:-

[1] to act as an administrator and dispose of cases in the fastest, most efficient manner;

[2] to act as an advocate for the state to maximize convictions and severity (severity in the context meaning appropriateness) of sentences;

[3] to ensure fairness,

Thus in the exercise of her discretion and pursuant to her functions, the DPP may at any time in any case – where she considers it desirable – before judgment is rendered by a Court enter into plea negotiations with the accused person for the purpose of concluding a plea agreement[37].

However, before commencing the plea negotiations the DPP is required to inform the accused person of his/her right to representation by a lawyer and of his right to apply for legal aid in respect of such negotiations. [38]

Thereafter plea negotiations shall be held by the DPP with the accused only through his lawyer[39].

The **CJPNA** I believe is also inflexible in this regard in requiring that all accused persons entering a plea agreement must be represented.

Accused persons do have the right to represent themselves in legal proceedings and not have formal legal representation. Why fetter that right. In the corresponding legislation from Trinidad and Tobago the law acknowledges that right and in the schedule to the legislation at Form 1 the accused person signs a declaration of his desire to represent himself in the High Court/Magistrate's Court[40]. Then there is also a special plea agreement form at form 3 which is utilised where the accused person is representing himself.

The Bahamian version[41] also recognises the right of the accused person to enter into plea agreements with the prosecution even though it does not use such direct language as the Trinidadian legislation.

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[36] An adaptation of dicta laid down by Gibbons J in ***Government of Virgin Islands v Scotland and Springette*** [1980] USCA3 103; 614 F.2d 360 (6 February 1980) United States Court of Appeals, Third Circuit
[37] S.4 (1)
[38] S.6 (1)
[39] S.6(2)
[40] **The Criminal Procedure (Plea Discussions and Plea Agreement) Act**
[41] **The Criminal Procedure (Plea Discussions and Plea Agreement) Act**

In section 4(1) of the Bahamian legislation a prosecutor and an accused person or where the accused person is represented by an attorney, a prosecutor and the attorney for the accused person may engage in plea discussions. It, like its Trinidadian counterpart, in Form 3 of the schedule contains a form signed by the accused person where he is representing himself.

It is recommended that these provisions be included in the Jamaican **CJPNA**.

A plea agreement shall require that the accused person undertakes to:-

[i] Enter a guilty plea to an offence which is disclosed on the facts on which the charge against the accused is based:-

and

[ii] Fulfil his other obligations specified in the agreement.

The DPP is then required[42] to either withdraw or discontinue the original charge against the accused persons[43];

And to accept the plea of the accused to a lesser offence than that charged (whether originally included or not)[44] and fulfil the other obligations of the Crown specified in the agreement[45].

The First schedule to the **CJPNAR** Form 1 at paragraphs 8 and 9 requires the DPP to set out the obligations that they undertake to perform in furtherance of the plea agreement.

However, there are certain obligations which the prosecution in Jamaica could not enter into and those touch and concern sentence. It is submitted that an accused person is somewhat disadvantaged at the sentencing process because the Crown who would have a vested interest in seeing him have a reduced sentence is precluded from making sentence recommendations to the Court and under the **CJPNA** neither the Crown and the defence can approach the judge in Chambers to give advance notice of the position of each of the parties.

In the Bahamas[46] and Trinidad and Tobago their legislation allows the prosecution to take a "particular course of action". A "particular course of action" under those Acts is where the prosecution may make the following recommendations:-

[a] a recommendation to the Court to dismiss other charges;

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[42] S.4(2)(b) (i)
[43] S.5(a)
[44] S.5(b)
[45] S.4 (2)(b)(ii)
[46] Section 2 of **The Criminal Procedure (Plea Discussions and Plea Agreement) Act** of the Bahamas and Trinidad and Tobago

[b] a recommendation to the Court as to a particular sentence;

[c] an agreement not to oppose a request by the accused person, or his attorney, for a particular sentence;

[d] an agreement that a specific sentence is appropriate for the disposition of the case;

The only recommendation that the Jamaican prosecutor could make is a recommendation to the Court to dismiss other charges. In relation to the others the Crown would maintain its silence unless so invited by the Court to make these submissions.

Conclusion of the Plea Agreement

When the plea agreement is concluded the DPP shall in open Court or in Chambers (but DPP has to show good cause for the matter to be heard in Chambers) inform the Judge / the Resident Magistrate (RM) of the existence of the plea agreement.

The Judge/RM is to be informed by the DPP of the plea agreement either:-

[a] before the accused person is pleaded; or

[b] at any time after arraignment[47].

Section 10 of the **CJPNAR** names the DPP as the custodian of the written records of the plea negotiations.

In addition the prosecutor is required to include on the plea agreement the following contact information:-

[i] name

[ii] position

[iii] business address

[iv] business telephone numbers

[v] facsimile number

The Plea Agreement becomes effective upon signature by the accused, his attorney-at-law and the Director, before a Justice of the Peace[48].

[47] S.9(1)(a)(b)
[48] First Schedule. Form 1. Para. 18 **CJPNAR**

As an aside one can't help but note how bureaucratic and cumbersome the plea agreement form is in the 1st schedule form 1 of the CJPNA Regulations (CJPNAR). In legal size paper the document is about six (6) pages long. In letter size some nine to ten (9-10) pages long. In contrast the Trinidadian plea agreement is only one (1) page. Furthermore, no provision has been made in the plea agreement for the inclusion of a declaration and signature by a parent/guardian where the accused person is a child.

Withdrawal from Plea Agreement by the DPP

A prosecutor must know the applicable law and its implications for the case before him, and must present a recommendation to both the defendant and court which is lawful, clear and consistent both internally and with respect to the underlying promise[49].

Thus the jurisprudence has developed in binding prosecutors to the agreements that have been acted upon because of the serious implications and harm to due process guarantees. Therefore when a defendant pleads guilty in reliance on an agreement with the prosecutor, that promise must be fulfilled [50].

The Federal Court of Appeals in the United States has held:-

> It is the defendant's rights which are being violated when the plea agreement is broken or meaningless. It is his waiver which must be voluntary and knowing. He offers that waiver not in exchange for the actual sentence or impact on the judge, but for the prosecutor's statements in court. If they are not adequate, the waiver is ineffective[51].
> ....
>
> Prosecuting attorneys, however, traditionally have had broad authority to institute criminal charges and to evaluate the charges in terms of society's interest in individual cases. When the prosecutor and the accused enter into an agreement their conflicting interests merge. And, with the aid of both counsel and judge, and accused is protected from improvident or involuntary agreements[52].

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[49] ***Anthony Correale v. United States of America*** 479 F.2d 944 United States Court of Appeals, First Circuit per Coffin CJ

[50] ***Government of Virgin Islands v Scotland and Springette*** [1980] USCA3 103; 614 F.2d 360 (6 February 1980) United States Court of Appeals, Third Circuit per Gibbons J

[51] ***Anthony Correale v. United States of America*** 479 F.2d 944 United States Court of Appeals, First Circuit per Coffin CJ

[52] ***Brown v J Beto*** [1967] USCA5 411; 377 F.2d 950 (12 May 1967) United States Court of Appeals, Fifth Circuit per Wisdom J. See also ***United States of America v. Leonel Aquilera,*** 654 F.2d 352 United States Court of Appeals, Fifth Circuit *"Certainly, when the prosecution makes an agreement within its authority and the defendant relies on it in good faith, the court will not let the defendant be prejudiced as a result of that reliance"* [*per curiam*] ; ***Vincent Scott v United States*** [1968] USCADC 357; 419 F.2d 264 (9 September 1968) United States Court of Appeals, DC Circuit *"When a defendant pleads guilty in exchange for the promise of the prosecutor or court, a subsequent challenge to the voluntariness of his plea raises a recognized constitutional issue. When the accused refuses to plead guilty and subsequently receives a heavier sentence, the invisibility with which the system operates in individual cases too often conceals the constitutional issue. But the problem is the same in both contexts. Whether the defendant surrenders his right to a trial because of a bargain with court or prosecutor, or exercises his right at the cost of a stiffer sentence, a price has been put on the right"* per Bazelon CJ

…

The Supreme Court of Canada pronounced upon the repudiation of plea agreements by the Crown[53]:-

> However, the vital importance of upholding such agreements means that, in those instances where there is disagreement, the Crown may simply have to live with the initial decision that has been made. To hold otherwise would mean that defence lawyers would no longer have confidence in the finality of negotiated agreements reached with front-line Crown counsel, with whom they work on a daily basis. Further, if agreements arrived at over the course of resolution discussions cannot be relied upon by the accused, the benefits that resolutions produce for *both* the accused and the administration of justice cannot be achieved. As a result, I reiterate that the situations in which the Crown can properly repudiate a resolution agreement are, and must remain, very rare.
> ….
> However, the repudiation of a plea agreement is not just a bare allegation. It is evidence that the Crown has gone back on its word. As everyone agrees, it is of crucial importance to the proper and fair administration of criminal justice that plea agreements be honoured. The repudiation of a plea agreement is a rare and exceptional event. In my view, evidence that a plea agreement was entered into with the Crown, and subsequently reneged by the Crown, provides the requisite evidentiary threshold to embark on a review of the decision for abuse of process.

The Court of Appeal of the Bahamas had to consider the terms and obligations of the Crown in a plea agreement in the matter of ***Sherman Rodriguez v Regina***[54].

The issue concerned some provisions of their **Criminal Procedure (Plea Discussion and Plea Agreement) Act.**

The Appellant had been charged for the offence of murder and when the case came up for trial both Crown and defence announced that a plea agreement had been reached and the appellant pleaded guilty to murder. Consequently, he was sentenced to a term of imprisonment of sixty years.

The Appellant naturally appealed and in his grounds he argued that pursuant to the provisions of the plea agreement the Crown was to recommend a particular sentence (20 years) to the trial judge – which they failed to do.

"First, the prosecutor clearly cannot have carte blanche to apply whatever tactics he wishes to induce a guilty plea. A policy of deliberately overcharging defendants with no intention of prosecuting on all counts simply in order to have chips at the bargaining table would, for example, constitute improper harassment of the defendant.

Second, there may be circumstances under which the prosecutor may bargain with the defendant without raising the constitutional question of whether the exercise of the right to trial can be made costly. When there is substantial uncertainty concerning the likely outcome of a trial, "each side is interested in limiting these inherent litigation risks."The prosecutor may be willing to accept a plea of guilty on a lesser charge rather than chance an acquittal on the more serious. The accused may be similarly willing to acknowledge his guilt of the lesser charge rather than risk conviction on the more serious, or to accept the promise of a lighter sentence to escape the possibility of conviction after trial and a heavier sentence" per Bazelon CJ

[53] ***R. v. Olga Nixon,*** 2011 SCC 34, [2011] 2 SCR. 566 Supreme Court of Canada per Charron J paras.48 & 49

[54] SCCr. App. 77/2011. June 6, 2012

The Crown contended that they never agreed to recommend a sentence of a particular length to the Court but in any event the agreement was honoured since they had agreed to forego the capital sentence.

John JA who delivered the judgment of the Court came to the view that the plea agreement required the Crown to perform a positive duty – that is recommend a particular sentence. This they failed to do and were in breach of the plea agreement. John JA went on to hold that the taking off of the death penalty cannot be construed as the recommendation of a particular sentence.

Fairness is central to the administration of justice and the accuracy of what is being recommended plays a vital role in ensuring fairness to the accused person who has entered into a plea agreement[55]. The Court of Appeal went on to quash the sentence and conviction and ordered that the appellant be retried for the offence of murder.

Nevertheless, the legislation acknowledges that it is not in every case the Crown must remain stuck and tied to a bad bargain.

The DPP shall be entitled to withdraw from a plea agreement before sentence where she is satisfied that she was:-

[a] in the course of plea negotiations, misled by the accused or by his attorney-at-law in some material respect; or

[b] induced to conclude the plea agreement by conduct amounting to an obstruction of justice[56].

In withdrawing from the Plea Agreement the DPP would file a **Notice of Breach of Plea Agreement**[57]**.**

The Notice would contain the following:-

[a] the nature of the breach

[b] the consequences of the breach

[c] effective date of the notice

The title of the form is interesting as the Principal Act does not grant to the DPP an option of withdrawal from a plea agreement where the accused person has breached same.

[55] Per John JA at 11
[56] S.16(2)(a)(b) and First Schedule **CJPNAR** Form 1 para.11
[57] First Schedule **CJPNAR** Form 2

This begs the query as to why is there no provision to allow the DPP to withdraw from the plea agreement where the accused person has breached the terms of the agreement?

One recalls the Learned Director pointing this out to the CPC[58] and MOJ officials but the **CJPNA** remains un-amended and the **CJPNAR** has been enacted with this startling omission.

In addition Form 1 in the First schedule paragraph 11 repeats the provisions of s.16 (2) (a) (b) of the principal act and thus contradicts form 2.

The fact that the **CJPNAR** seems to incorporate such a provision is not helpful as the **CJPNAR** being subsidiary legislation cannot alter an Act of Parliament[59] despite the wording in the Regulations.

These repudiation provisions are limited and unhelpful to the Crown. In mature and evolved legal systems the prosecution has a voice at sentence and has a right of appeal. In this respect and context – that of plea negotiations – the Jamaican legal system is still in the era of the Neanderthal and Australopithecus.

The Crown can only repudiate the bargain before sentence but not after sentence. However, the formal plea agreements that have been negotiated all require the accused person to perform his reciprocal obligations after he has been sentenced.

There is no enforcement mechanism under this legislation to penalise the accused person who reneges on an agreement.

Again one would wish to commend the Trinidadian legislation and one would urge the Government and policy makers to look at the provisions contained there.

In Trinidad and Tobago the prosecution can appeal in the following circumstances:-

[i] the prosecutor, in the course of a plea discussion, was wilfully misled by the accused person or his attorney at law in some material respect[60];

[ii] the Court, in passing sentence, was wilfully misled in some material respect[61].

[iii] was induced to conclude the plea agreement by conduct amounting to an obstruction of justice[62].

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[58] Chief Parliamentary Counsel
[59] ***Phillip Stephens v The DPP*** HCV 05020/2006 (23/1/2007) per Sykes J at para.28.
[60] **S.14(1)(a) & s.15(1)(a) Criminal Procedure (Plea Discussion and Plea Agreement Act)**
[61] **S.14(1)(b) Criminal Procedure (Plea Discussion and Plea Agreement Act)**
[62] **S.15(1)(b) Criminal Procedure (Plea Discussion and Plea Agreement) Act**

In appealing the prosecution can ask the Court of Appeal to quash the agreement, conviction or sentence.

In the Bahamas the prosecution can appeal[63] in the following circumstances:-

[a] where in the course of a plea discussion, he was wilfully misled by the accused person in some material respect; or

[b] the Court, in passing sentence, was wilfully misled in some material respect.

The prosecution is precluded from appealing in the Bahamas where an accused person pleads guilty to an offence and, upon his conviction, receives a sentence that accords with, or is within the range anticipated by, the plea agreement[64].

It is submitted that the **CJPNA** will never resonate with prosecutors in Jamaica unless powers similar to his Bahamian and Trinidadian counterparts are conferred upon them.

Again it is worth repeating that within the context of a plea bargain the prosecutor performs three[65] important functions:-

[1] to act as an administrator and dispose of cases in the fastest, most efficient manner;

[2] to act as an advocate for the state to maximize convictions and severity (severity in the context meaning appropriateness) of sentences;

[3] to ensure fairness.

It is the prosecutor more than anyone in the legal system of Jamaica who will be responsible for the effective administration of the legislation. The legislation while commendable in its efforts in securing fairness and justice for the accused man has not seen it fit to equip the prosecution with the proper tools to uphold its side of the bargain. It is submitted that the present legislative provisions of the **CJPNA** does not engender any affection, fondness or even regard towards the law that will beget its success.

DPP Free to prosecute the accused person otherwise

In the First Schedule to the **CJPNAR** Form 1 para.10 (1) (2), the standard form indicates the following:-

[63] S.14(1)(a)(b) **Criminal Procedure (Plea Discussion and Plea Agreement) Act**
[64] S.14(1) **Criminal Procedure (Plea Discussion and Plea Agreement) Act**
[65] An adaptation of dicta laid down by Gibbons J in ***Government of Virgin Islands v Scotland and Springette*** [1980] USCA3 103; 614 F.2d 360 (6 February 1980) United States Court of Appeals, Third Circuit

The Director is free to prosecute the accused for any other unlawful past conduct that does not relate to this Agreement or any unlawful conduct that occurs after the date of this Agreement.

The Director may in any case where he considers it desirable so to do, discontinue at any stage before judgment is delivered, any criminal proceedings instituted or undertaken by himself or any other person or authority.

IMMUNITY FROM PROSECUTION

It is interesting that the **CJPNA** leaves unsaid what exactly are the obligations to be fulfilled by the prosecution even within the remit of their powers laid down by the Constitution. In particular whether or not the prosecution in the exercise of their powers and fulfilling their obligations required by statute -grant immunity from prosecution to an accused person under the Act.

The Jamaica (Constitution) Order in Council 1962 in section 94 established the office of the Director of Public Prosecutions and his jurisdiction.

Section 94 (3) (a-c) prescribes the powers of the Director of Public Prosecution, which are as follows: -

[1] To institute and undertake criminal proceedings against any person before any court other than a court –martial in respect of any offence against the law of Jamaica;

[2] To take over and continue any such criminal proceedings that may have been instituted by any other person or authority;

[3] To discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or any other person or authority.

Section 4(1) of the **Criminal Justice (Administration) Act** expressly states that:-

It shall be lawful for the Director of Public Prosecutions or for the Deputy Director of Public Prosecutions by his direction in writing, in any criminal proceedings whatever before Justices, or before any Court having criminal jurisdiction at any time, and whether the person accused has been committed or bound over for trial or not, to enter a *nolle prosequi* to such proceeding, by stating in open Court to such Justice or Court where the proceedings are pending, or by whom the accused has been committed or bound over for trial, or by informing in writing the Clerk or other proper officer of such Justice or Court that the Crown intends not to continue such proceedings, and thereupon the proceedings shall be at an end. It shall be the duty of such Justices or Court, if the accused has been committed for trial to cause notice in writing, in the Form A of the Schedule, or to the like effect of such *nolle prosequi*, to be forthwith given to the Superintendent or other head officer of the prison in which the accused is detained, and on receipt of such notice the accused person shall at once be discharged in respect of the charge for which the *nolle prosequi* is entered; and such notice shall be a sufficient authority to the Superintendent or head officer of the prison so to discharge such accused person:

> Provided, that such discharge shall not affect the liability to detention on any other charge for which such accused person may be under commitment. After an indictment has been preferred against any person a *nolle prosequi* may be entered in the manner aforesaid, or in the manner heretofore in use:
>
> Provided, that if the accused person is in Court when the *nolle prosequi* is entered, the Court or Justice may direct the release of the accused forthwith.

It has been argued elsewhere that nowhere in these statutory enactments is there an express power in the DPP to grant immunity from prosecution. That if Parliament had intended for the DPP to have those powers it would have done so in clear and express terms.

The issue has never been canvassed in the Courts in Jamaica but has been litigated in Trinidad and Tobago – a country which has similar constitutional provisions to that of Jamaica.

The High Court had occasion to consider section 90(3) of the **Constitution** of Trinidad and Tobago which is *ipsissima verba* with that of section 94 of the **Constitution** of Jamaica.

> The Director of Public Prosecutions shall have power in any case in which he considers it proper to do so -
>
> [a] to institute and undertake criminal proceedings against any person before any court in respect of any offence against the law of Trinidad and Tobago;
>
> [b] to take over and continue any such criminal proceedings that may have been instituted by any other person or authority;
>
> [c] to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or any other person or authority.

This they did in the matter of ***Dhanraj Singh v The Attorney General of Trinidad and Tobago and The Director of Public Prosecutions***[66].

The Applicant, DS, a former Minister of Local Government was charged with twenty-seven offences under the Prevention of Corruption Act. A little over one month later, DS was charged with murdering one Hansraj Sumairsingh who was shot and killed on December 31, 1999.

In both cases the charges were laid at the direction of, the Director of Public Prosecutions after he reviewed, *inter alia,* statements from accomplices to the crimes. In case of the corruption charges, the Director had considered a statutory declaration made by Karamchand Rampersad.

[66] HCA No. S-395 of 2001 and No. S-475 of 2001(December 4, 2001)

With respect to the murder charge, the Director considered a statement from one Elliott Hypolite which had been recorded under caution.

Mr Hypolite also had been charged for the murder of Mr Sumairsingh. That charge was formally discontinued by the Director who also granted to Mr Hypolite, immunity from prosecution subject to four conditions. In granting the immunity from prosecution the Director purported to act pursuant to his powers under section 90 of the Constitution of the Republic of Trinidad and Tobago *"and all the powers in that behalf enabling."*

The formal grant expressly provides that the immunity may be withdrawn in the event of a deliberate breach of any of the four conditions.

DS filed motions in the High Court seeking declarations on the ground that in relation to the Corruption and Murder charges that :-

> That upon a proper interpretation of section 90 of the Constitution, the Director of Public Prosecutions does not have the power to grant a witness immunity from prosecution (whether conditional or otherwise). At any stage prior to judgment he may discontinue criminal proceedings against any person, but such discontinuance does not operate as a bar to future prosecution.

Bereaux J (as he then was) in a judgement that traced the origin of the Office of the Director of Public Prosecutions and examined the relevant case law in England and Trinidad and Tobago.

He found that he was in agreement with Ibrahim J who had stated in ***Burroughs v Attorney General and Director of Public Prosecutions***[67] that the Director of Public Prosecutions had the power to grant immunity from prosecution. Ibrahim J had held:-

> "In England, the office of Director of Public Prosecutions was created by the Prosecution of Offences Act 1879. That Act also sets out his duties which included, inter alia, the power 'to institute, undertake and carry on criminal proceedings'. In the United Kingdom there is no expressed statutory power in the Director of Public Prosecutions to grant immunities. But he, nevertheless, exercises that power. It is a power there exercised under the Common Law and it is also inherent in the power to institute, undertake and carry on prosecutions. The power to institute also carries with it the implied power not to institute which can be effected in many ways.[68]"

Bereaux J found that the immunity power is vested in the office of the Director of Public Prosecutions under section 90(3) and that it is inherent in the power to institute, undertake and carry on prosecutions that the Director may choose not to. Bereaux J went on to hold that It is a power to be exercised in the public interest. Indeed the grant of immunity was no more than an undertaking or promise by the Director not to exercise his power to institute or undertake

[67] (1990) 1TTLR 135
[68] (1990) 1TTLR 135 at 143

criminal proceedings. Where it has been granted subject to conditions which are accepted by the grantee, it may be described as an "agreement".

Bereaux J also stated that the fact that such an agreement may be forged between the holder of an office created to uphold and enforce the criminal law and a confessed law breaker may be distasteful but has come to be recognized by the courts as being sometimes necessary in the public interest. The existence of such a power in the Director of Public Prosecutions under section 90(3) and a pardon power in the President under section 87(1) are entirely consistent with their respective constitutional functions.

Bereaux J went on to hold that he has found no authority to the effect that the grant of a conditional immunity from prosecution is unconstitutional or otherwise unfair.

The conclusion that can be drawn is that the DPP of Jamaica pursuant to section 94(3) of the Constitution may provide immunity from prosecution to an accused person in fulfilment of a plea agreement under **CJPNA**. However, it should be sparingly exercised not only because of public interest considerations but also due to the fact that there are no opportunities under the Act for the DPP repudiate a bad bargain and to seek sanctions against those who mislead the Crown for a better deal.

Public Interest Considerations.

The public interest considerations are of vital importance and prosecutors are warned not to enter into plea agreements or give grants of immunity in plea agreements that inadequately reflect the gravity of the provable conduct of the accused person.

A recent decision out of Belize reflects the trap that prosecutors can fall into with grants of immunity.

In Belize section 95 of their **Evidence Act** (cap 95) prescribes that:-

> A judge of the Supreme Court, with the written consent of the Director of Public Prosecutions, may order that a pardon be granted to any person accused or suspected of, or committed for trial for, any crime on condition of his giving full and true evidence upon any preliminary inquiry or trial, and such order shall have effect as a pardon by the Governor-General, but may be withdrawn by a judge of the Supreme Court upon proof satisfying him that the person has withheld evidence or given false evidence.

It is appropriate to mention that the inappropriate application of section 95 caused not both injustice to the accused persons and embarrassment to the Crown who employed the provisions in the case of ***Francis Eiley, Ernest Savery and Lenton Polonio v Regina***[69] - a decision of their Lordships' Board.

The prosecution relied on the evidence of one Frank Vazquez who had been arrested and

[69] [2009] UKPC 40

charged along with the 3 appellants for the offence of murder.

After four days in custody, Frank Vasquez signed an immunity agreement with the Director of Public Prosecutions.

Frank Vazquez then gave statements and the murder case against him was withdrawn by the DPP.

During the trial, the other witnesses for the Crown spoke to Vazquez's involvement in the events of the murder while in relation to the 3 appellants the only evidence implicating them came from Vazquez.

In addition there was forensic evidence showing the blood of the deceased on the clothes and shoes of Vazquez. The Crown did not put these items into evidence but even more surprising the defence did not. In addition shoe laces had been used to tie the hands of the deceased and Vazquez when held by the police had no laces in his shoes.

Their Lordships opined:-

> These matters added to the importance of the summing up, which was not an easy task in any event having regard to the unusual nature of the case. Mr Vasquez had been caught literally red-handed at the scene of the crime. The initial story that he told the police was simply not credible. His account of lending his tennis shoes was patently absurd and he had no acceptable explanation for the blood on his clothes. He was a prime suspect. In these circumstances the decision of the prosecution to offer him immunity if he gave truthful evidence was, on the face of it, surprising. It was capable of providing a cogent motive for ensuring that the jury convicted the three men whom he had accused of being implicated in the murder. The jury needed a careful direction to that effect[70].

Their Lordships' Board quashed the convictions and sentences – pronouncing them unsafe.

> Mr Vasquez had been promised immunity from prosecution if he told the truth. Despite this, his evidence had features that were unsatisfactory and suggested that his primary concern was to distance himself from involvement in the murder. The Board has not been able to dismiss the possibility that on the morning after the murder Mr Vasquez simply pointed to the first group of men that he saw after indicating to the police that he would take them to those who were involved in the crime.

EXCLUSIONARY RULE

Re Admissions

> Where the accused person pleaded guilty or made any statement regarding the plea of guilty and later withdrew (i) that plea and (ii) from the plea agreement or made any statement in the course of plea negotiations with the DPP which does not result in a

[70] Para. 36 per Lord Phillips

plea of guilty or which results in a plea of guilty that is later withdrawn or rejected, the evidence of these facts is inadmissible against the accused person in any civil or criminal matter brought against the said accused person[71].

Accomplice Evidence

The issue is whether or not evidence of accomplices which has been procured by way of a plea agreement falls into the category of fruits of the poisoned tree and should be excluded by the Court as a matter of course.

Such evidence is not *pro tanto* inadmissible and it is left up to the discretion of the trial judge to determine whether or not the evidence has been obtained in circumstances in which are contrary to the interests of justice[72].

> One circumstance where it may be appropriate to do so is where the witness has received an inducement to give evidence for the prosecution that will render the evidence suspect – see *R v Turner* (1975) 61 Cr. App. R. 67 at p. 78. The discretion is one that should be used sparingly. Such promises, when made to an accomplice to a crime, have been described as distasteful – see *Turner* at p. 80. They are nonetheless capable of being justified in the public interest. While the Board has reservations as to whether it was appropriate for the Director of Public Prosecutions to enter into the immunity agreement that was concluded with Mr Vasquez, their Lordships do not consider that the trial judge should have refused to receive the evidence of Mr Vasquez of his own motion.
>
> None of the defence counsel applied to have the trial stopped at the end of the prosecution case under the principle in *R v Galbraith* [1981] 1 WLR 1039. Had such an application been made the Board considers that it would have had merit. It would, however, have been an unusual and extreme step for the judge to have ruled that there was no case upon which the jury could safely convict in the absence of any submission to this effect from any defendant. The critical question is whether having regard to the nature of the evidence given by Mr Vasquez, the circumstances in which it was given and the terms in which the judge summed up the evidence to the jury, the appellants' convictions are safe. The Board has concluded that they are not. For these reasons their Lordships will humbly advise Her Majesty that the three appeals should be allowed and the convictions of the appellants quashed[73].

IMPROPER INDUCEMENTS

It bears repeating that a plea of guilty must be made voluntarily and with no inducement, promise or threat to influence same. This is done in the event that some of us may get over-zealous in the exercise of our discretion. The Crown may not produce a plea by actual or threatened physical harm or by mental coercion overbearing the will of the defendant[74]

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[71] S.17(a)(b)

[72] ***R v Turner*** (1975) 61 Cr. App. R. 67; ***Julia Ramdeen a/c J-Lo and David Abraham v The State*** CR.APP.Nos.42 & 43 of 2008 (26 February 2010) per Weekes JA; ***Francis Eiley, Ernest Savery and Lenton Polonio v Regina***[2009] UKPC 40 per Lord Phillips

[73] Paras. 48-50 per Lord Phillips

[74] ***Brady v. United States*** 397 U.S. 742 (1970) United States Supreme Court per White J

The use of threats or promises calculated to deprive a defendant of his freedom of choice is a denial of procedural fairness guaranteed by the **Constitution** and vitiates a plea of guilty which is so induced. Likewise, a defendant is deprived of his constitutional rights if he is deceived or coerced by a prosecutor into entering a guilty plea[75].

While the **CJPNA** uses the term inducement it does not define same – thus leaving intact the ordinary meaning of the word which is a thing that influences or persuades a person to do a certain action – an incentive. Recognising that not all inducements are illegal or improper.

There is no specific offence under the **CJPNA** of improperly inducing someone to enter a plea agreement or plead guilty.

The High Court of Australia[76] had to consider whether or not at common law there was an offence of inducing someone to plead guilty to an offence for which he has been charged.

> 21. There appears to be no reported authority in the British Commonwealth to the effect that a person who improperly influences an accused to plead guilty to an offence is guilty of attempting to pervert the course of justice. But two cases in the United States (4) accept that it is an attempt to pervert the course of justice to use improper means to secure a plea of guilty. Principle and the nature of the criminal prosecution under the common law system make this conclusion inevitable.
>
> 22. The two elements of the offence of attempting to pervert the course of justice are conduct which has the proscribed tendency and an intent that the course of justice be perverted. Clearly enough, it is not sufficient for the prosecution to prove merely that the conduct of an accused had a tendency to induce a person charged with an offence to plead guilty to that offence. A person charged with an offence is at liberty to plead guilty or not guilty to the charge, whether or not that person is in truth guilty or not guilty. An inducement to plead guilty does not necessarily have a tendency to pervert the course of justice, for the inducement may be offered simply to assist the person charged to make a free choice in that person's own interests. A court will act on a plea of guilty (5) when it is entered in open court by a person who is of full age and apparently of sound mind and understanding, provided the plea is entered in exercise of a free choice in the interests of the person entering the plea. There is no miscarriage of justice if a court does act on such a plea, even if the person entering it is not in truth guilty of the offence. The principle is stated by Lawton LJ in Inns (6):
>
> > "The whole basis of a plea on arraignment is that in open court an accused freely says what he is going to do; and the law attaches so much importance to a plea of guilty in open court that no further proof is required of the accused's guilt. When the accused is making a plea of guilty under pressure and threats, he does not make a free

[75] ***Barber v. Gladden*** 220 F. Supp. 308 (1963) United States District Court, Oregon per Solomon CJ
[76] ***Meissner v R [1995] HCA 41; (1995) 130 ALR 547 (1995); 69 ALJR 693; (1005) 184 CLR 132 (16 August 1995) per Brennan, Toohey and McHugh JJ***

> plea and the trial starts without there being a proper plea at all. All that follows thereafter is, in our judgment, a nullity."
>
> It may not be strictly accurate to describe what follows as a nullity, but it is certainly liable to be set aside and a new trial ordered. If a plea of guilty is entered by the person charged in purported exercise of a free choice to serve that person's own interests, but the plea is in fact procured by pressure and threats, there is a miscarriage of justice. In such a case, the court is falsely led to dispense with a trial on the faith of a defective plea. The course of justice is thus perverted.
> ….
>
> 25. Any conduct designed to intimidate an accused person to plead guilty is improper conduct and necessarily constitutes an attempt to pervert the course of justice even if the intimidator believes that the accused is guilty of the offence with which he or she is charged. A plea made as the result of intimidation has not been made freely and voluntarily, and the court that acts on the plea has been misled and its proceedings have been rendered abortive, whether or not it ever becomes aware of the impropriety.

Therefore in Jamaica for an incentive to be improper in relation to the aforementioned context it must be charged either under the **Corruption Prevention Act** or under common law as an attempt to pervert the course of justice.

Any conduct designed to intimidate an accused person to plead guilty is improper conduct and necessarily constitutes an attempt to pervert the course of justice even if the intimidator believes that the accused is guilty of the offence with which he or she is charged. A plea made as the result of intimidation has not been made freely and voluntarily, and the court that acts on the plea has been misled and its proceedings have been rendered abortive, whether or not it ever becomes aware of the impropriety. For similar reasons, improper conduct of any kind that has the tendency to interfere with an accused person's right to make a free and voluntary decision to plead not guilty to a charge must be regarded as having a tendency to pervert the course of justice. If that conduct is accompanied by an intention to pervert the course of justice, the person engaging in the conduct will be guilty of attempting to pervert the course of justice[77].

Under the Bahamian and Trinidadian legislation there is such an offence. Both Acts define an improper inducement in the following terms:-

> "improper inducement" includes—
>
> *(a)* the coercion of an accused person to enter into a plea discussion; and
>
> *(b)* the fraudulent misrepresentation of a material fact by the prosecutor either before a plea discussion is entered into or during the course of such discussion;

[77] ***Meissner v R*** [1995] HCA 41; (1995) 130 ALR 547 (1995); 69 ALJR 693; (1005) 184 CLR 132 (16 August 1995) per Brennan, Toohey and McHugh JJ at para. 25

One would advise the Jamaican Government to exercise caution before adopting this definition uncritically – as it is too restrictive. As under the Bahamian and Trinidadian legislation only a prosecutor may be charged as a principal in the first degree for improper inducement while a police officer or defence counsel may only be charged either as a conspirator (with the prosecutor) or as a procurer, counsellor or aider and abettor – principals in the second degree.

Although the Bahamian legislation equalises the punishments while the Trinidadian legislation penalises the prosecutor with a greater punishment.

One would propose the definition be amended to also include the attorney-at-law. The Bahamian and Trinidadian legislation do not contemplate that attorneys at law can and do improperly induce their clients to enter plea agreements without any reference at all to the prosecutor.

This was the case in ***USA v Harvey Silverman***[78] . The facts were that HS an attorney-at- law in Florida was hired by Carlos Angel Munoz [CAM] to represent him, his wife and his two brothers on several federal criminal charges stemming from their participation in the "Mariel boatlift." On the combined offenses, CAM faced a possible maximum prison sentence of thirteen years, six months, plus a fine of $515,500; his wife and two brothers each faced a possible maximum prison sentence of five years, six months, plus a $10,500 fine. Silverman had previously represented CAM in civil actions connected with the boatlift.

HS entered into plea negotiations with the prosecutor, Assistant U.S. Attorney William Norris [AUS]. The AUS told HS that if CAM would plead guilty to one of the major offences charged, his two brothers and his wife would be allowed to plead guilty to a lesser offence, and the remaining charges against all four defendants would be dismissed. The AUS stated that he did not know what type of sentence Munoz could expect but that the others would likely receive six months probation. The AUS also stated that he would make no sentencing recommendation and that the final decision would be strictly up to the judge.

After this conversation with the prosecutor, HS attempted to extort money from CAM by telling him that he could "fix" the case for $25,000. HS told CAM that the money would be paid to "some very powerful people" with connections in the Department of Justice, who would ensure that if he and his brothers pled guilty they would receive sentences of probation rather than imprisonment, and the case against his wife would be dismissed.

HS then went to CAM's home accompanied by two unidentified men and introduced them as the recipients of the $25,000. The men told CAM that they had already fixed the case and if he failed to pay the money he and his wife would go to jail and his brothers would be deported. These threats frightened Munoz. In an effort to protect himself, he purchased a tape recorder and recorded his subsequent telephone conversations with HS. These taped conversations confirmed HS scheme. CAM took the recordings to the district judge presiding over his case

[78] [1984] USCA11 1566; 745 F.2d 1386

who, in turn, referred Munoz to the F.B.I. Munoz thereafter recorded additional conversations with Silverman, all under the supervision of the F.B.I.

HS was convicted of the crime of corruptly endeavouring to influence, obstruct or impede the due administration of justice.

THE ACCUSED PERSON'S ROLE

During the plea negotiations leading to the conclusion of a plea agreement the following must be set out:-

[i] The offence (s) charged[79]

[ii] The maximum penalty for the offence[80]; and

[iii] The substantial facts relevant to any admissions made by the accused[81].

The **CJPNA** does not affect the accused person's right to plead guilty to a charge without entering into plea negotiations or a plea agreement[82].
Where the accused person enters into a plea agreement he/she will be required to undertake to[83]:-

[a] enter a guilty plea to an offence which is disclosed on the facts on which the charge is based; and

[b] fulfil his other obligations specified in the agreement.

Under the terms of the Plea Agreement according to the schedule of the **CJPNA** and the first schedule form 1 of the **CJPNAR** the accused person is required to do the following:-

[1] withdraw any previously entered plea of not guilty and enter a plea or pleas of guilty to the offence(s) he/she has agreed to plead guilty to. It is a requirement that a draft information or indictment has to be attached to the plea agreement[84].

[2] that if the Court accepts his guilty plea he waives the following rights[85]:-

[i] not to be compelled to give self-incriminating evidence

[79] Schedule line. 7 **CJPNA** and First schedule. Form 1. Para 1 **CJPNAR.**
[80] Schedule line. 8 **CJPNA** and First schedule. Form 1. Para 1 **CJPNAR**
[81] Schedule line. 9 **CJPNA** and First schedule. Form 1. Para 2 **CJPNAR**
[82] S.3(1)
[83] S.4(2)(a)(i)(ii)
[84] Form 1 para.3 **CJPNAR**
[85] Form 1 para.4 **CJPNAR**

[ii] to persist in a plea of not guilty

[iii] to confront and cross-examine witnesses against him/her

[iv] to pursue pre-trial motions and appeal preliminary points.

He however retains the right to be represented by an Attorney-at –Law at all stages of the proceedings and he does not waive the rights reserved to him by the plea agreement.

As per s.4 (2) (a) (ii) the plea agreement requires that the accused person fulfil certain obligations which usually means that he/she will turn "Queen's evidence".

In the **CJPNAR** the obligations of the accused person under the plea agreement have to be expressly stated and recorded in the agreement[86].

The caveat to the provisions which create obligations for both the accused person and the DPP are that:-

> The provisions of this Agreement are not binding on the Court or any of the following agencies or entities of the Government –
> *(Set out any other agencies or entities, as applicable)*
> …
> In this regard the accused understands that the Resident Magistrate/ Judge is not bound to accept any recommendations and may impose a greater or lesser sentence[87].

The Accused person who enters into a plea agreement shall be entitled to withdraw from that agreement before sentence or to appeal against a conviction based on the agreement under the following circumstances[88]:-

[a] it was entered into as a result of an improper inducement[89];

[b] the Court determines that the Director of Public Prosecutions has breached the terms of the plea agreement;

or

[c] it was entered into as a result of a misrepresentation or misapprehension as to the substance or consequences of the plea agreement[90].

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[86] Form 1 para.7 **CJPNAR**
[87] Form 1 para.6 and 9 **CJPNAR**
[88] S.16 (1) (a) (b) (c) **CJPNA** and First schedule. Form 1. Para. 12 **CJPNAR**
[89] ***Government of Virgin Islands v Scotland and Springette*** [1980] USCA3 103; 614 F.2d 360 (6 February 1980) United States Court of Appeals, Third Circuit

Where the accused person is a person whose first language is not English or suffers from some kind of impairment that affects hearing or speech(requiring sign language) or sight (needing agreement to be brailled) then the plea agreement requires that it be noted that the accused person has communicated with the DPP through an interpreter/translator[91].

The interpreter/translator is also required to attest to a certificate before a Justice of the Peace certifying the accuracy of the interpretation/translation during the negotiations. This certificate shall also be appended to the plea agreement.

The Certificate is worded thus:-

If she has not required those services that also needs to be declared in the plea agreement.

> ***Declaration[92] by Interpreter/Translator as to The Accuracy of the Interpretation/Translation during the Negotiations and in respect of the Contents of the Plea Agreement***
>
> I, ***A.B.,*** _____, do
> (***Insert name of person translating and interpreting***)
>
> solemnly and sincerely declare that -
>
> 1. I am certified/ registered to interpret and translate from the _____language to the _____ language.
>
>   My Certification/Registration Number(s) is/are: _____.
>
> 2. I have translated (*describe document or portion thereof, e.g. a transcript of the negotiations/the Plea Agreement/attached document*) from the _____language
>   (*insert name of language*)
>   to the ENGLISH language.
>
> 3. To the best of my abilities and belief, the interpretation during the negotiations is accurate and the contents of the Agreement are a true and accurate translation thereof.
>
> **AND I MAKE THIS SOLEMN DECLARATION** conscientiously believing the same to be true, and by virtue of the Voluntary Declarations Act.

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[90] ***Government of Virgin Islands v Scotland and Springette*** [1980] USCA3 103; 614 F.2d 360 (6 February 1980) United States Court of Appeals, Third Circuit "The defendant is entitled to withdraw his plea any time before he has officially entered it, and any time afterwards if it was not entered voluntarily and knowingly."per Gibbons J

[91] Schedule line 24 **CJPNA** and First Schedule. Form 1 para. 14(1) **CJPNAR**

[92] First schedule. Form 1. **CJPNAR**

In addition the accused person is required to state his/her highest education level and/or training.

For example it has to be declared whether or not the accused person is functionally/ not functionally literate, pre-primary, primary, secondary Grade 9, secondary Grade 11, Secondary Grade 13, tertiary, postgraduate, skills/vocational training[93].

The accused person shall initial or make his mark on each page of each form set out in the First Schedule before signing the last page[94].

Upon conclusion of the Plea Agreement and before signature, the accused person is required to attest to the following statement:-

> **STATEMENT BY THE ACCUSED**
>
> I _____ have read this Agreement and
> (*Name of accused)*
> carefully discussed each paragraph with my attorney(s)-at-law,
>
> _____
> *(name of attorney(s)-at-law)*
>
> I understand the terms of this Agreement and voluntarily, and of my free will, agree to them without reservation. I am pleading guilty to the charge(s) as indicated in this Agreement. My attorney-at-law has advised me of my rights, of possible defences, of the penalties and of the consequences of entering into this Agreement. No promises, agreements, understanding or inducements have been made to me other than those contained in this Agreement. No one has threatened or forced me in any way to enter into this Agreement. I have had sufficient time to confer with my attorney(s)-at-law concerning this Agreement. I am satisfied with the representation of my attorney(s)-at-law in this matter.

Accused must be represented

The law contemplates that the accused person before commencing plea negotiations and concluding plea agreements must have legal representation.

Indeed, before commencing any kind of plea negotiations with the accused person the DPP is required and mandated to inform the accused person of his/her right to representation by an attorney-at-law and of his right to apply for legal aid in respect of such negotiations[95].

Furthermore, all plea negotiations between the accused person and the DPP shall only be held through the accused person's attorney-at-law[96].

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[93] First schedule. Form 1. Para. 14(2). **CJPNAR**
[94] Article 9 **CJPNAR**
[95] S.6(1)
[96] S.6(2)

Articles 2 and 3 of the **CJPNAR** outline the duties of an attorney-at –law to an accused person during plea negotiations:-

> 2. The attorney-at-law for the accused shall inform the accused of any offer made by the prosecution to enter into plea discussions and keep the accused fully informed of any plea discussions.
>
> 3. The attorney-at-law for the accused shall *fully* explain to the accused the contents of any plea agreement reached with the prosecution and the advantages, disadvantages and potential consequences of the agreement.

Where the Accused person or his/her Attorney-at-Law for the accused person misleads the DPP in a material particular during the course of the plea negotiations, that is a ground for the DPP to seek withdrawal from the plea agreement[97].

In addition the accused person's attorney-at-law is required to include on the plea agreement the following contact information[98]:-

[i] Name

[ii] Position

[iii] Business address

[iv] Business telephone numbers

[v] facsimile number

As stated before the agreement becomes effective upon signature by the accused, his attorney-at-law and the DPP before a Justice of the Peace[99].

Upon conclusion of the Plea agreement and before signature, the accused person's attorney-at-law is required to attest to a certificate which states:-

[97] S.16(2)(a) **CJPNA** and First schedule Form.1 para.11(a) of **CJPNAR**
[98] First schedule.Form 1. Para. 16 **CJPNAR**
[99] First schedule.Form 1. Para. 18 **CJPNAR**

CERTIFICATE OF ACCUSED'S ATTORNEY(S)-AT-LAW

I am/We are the attorney(s)-at-law for _____.
(name of accused)

I/We have read this Agreement and carefully discussed each paragraph of this Agreement with the accused. Further, I/We have fully advised the accused of his rights, of possible defences, of the penalties, and of the consequences of entering into this Agreement. To the best of my/our knowledge and belief, the accused's decision to enter into this Agreement is an informed and voluntary one.

....
Name(s) of Attorney(s)-at-law representing the accused — Date

Accused must be represented: Legal Aid

In relation to legal aid the legal aid provisions are invoked in the following way[100]:-

[i] The DPP informs the accused person of his right to legal representation and if he cannot afford a lawyer of his right to apply for legal aid.

[ii] The Executive Director of the Legal Aid Council is informed by the accused person or someone on his/her behalf that he is unable to afford the services of an attorney-at-law.

[iii] An application to the Executive Director for legal aid in relation to plea negotiations is submitted by the accused person or someone acting on his/her behalf.

[iv] Where the Executive Director grants legal aid in respect of plea negotiations, he shall issue a legal aid certificate to the applicant (in the form set out as Form D in the First Schedule of the **Legal Aid Regulations 2000**.

The Legal Aid (Amendment) Regulations (LAAR) 2010 also preserve the right of the accused person to apply for legal aid at any stage during the proceedings of the matter for which the plea negotiations are being held.

> 15C. The grant of legal aid to any person for the conduct of plea negotiations in any matter shall not affect any provision that entitles that person to apply for legal aid in respect of any other stage of the proceedings in relation to that matter.

In addition the law makes provision for legal aid to be granted to an accused person to be granted legal aid in relation to excepted offences once plea negotiations have commenced.

An excepted offence under the **Legal Aid Act (LAA)[101]** is defined as:-

[100] Pt IVA. Article 15A(1)(2) **LAAR**

… an offence prescribed under this Act, whether in specific terms or with reference to a particular description, in relation to which legal aid shall
not be granted under this Act;

The same legislation formerly proscribed legal aid for excepted offences but that was amended in 2005[102]:-

Legal aid may be granted to-

[a] any person who is detained **at** a police station or in a lock-up, correctional institution or other similar place; or.
[b] an accused in respect of the conduct of plea negotiations under section 4 of the Criminal Justice (Plea Negotiations and Agreements) Act, 2005[103].

The **Legal Aid (Excepted Offences) Regulations 2000** lists the following offences as excepted offences[104]:-

Subject to paragraph (2), legal aid shall not be granted under the Legal Aid Act in respect of the following excepted offences-

[a] an offence under section 3, 5 or 9 (1) and (2) of the Money Laundering Act[105];
[b] offences under the Dangerous Drugs Act as follows:

[i] manufacturing, importing, exporting, taking steps preparatory to exporting, selling or otherwise dealing in, any dangerous drug;

[ii] being in possession of any dangerous drug in excess of the amounts specified in section 22 (7);

[c] any offence which is not punishable with imprisonment.

In 2010 the Honourable Minister of Justice promulgated the **Legal Aid Act (Excepted Offences) (Amendment) Regulations[106]** which now provided legal aid services for excepted offences[107] solely for the purpose of plea negotiations and agreements.

Legal aid may be granted to a person –

[a] who is charged with an excepted offence; and

---

[101] S.2 **LAA**
[102] S.15(1)**LAA** and s.23 of the **CJPNA**
[103] These provisions in the **LAA** did not take effect until November 1, 2010
[104] Art. 2(1)(a-c)
[105] Repealed. Replaced by **Proceeds of Crime Act (POCA) 2007**
[106] Art. 2
[107] However, it left intact the reference to the **Money Laundering Act**

[b] with whom the Director of Public Prosecutions proposes to enter into plea negotiations pursuant to section 4 of the Criminal Justice Administration (Plea Negotiations and Agreements) Act.

Defence Counsel

While there is hardly anything in the jurisprudence on the role and obligations of the accused person much has been said about the ethics and obligations of defence counsel. Indeed, the **CJPNA** in an attempt to protect the rights of accused persons has denied the autonomy of the accused person to represent himself by enacting mandatory provisions that he must have legal representation.

The **Charter of Fundamental Rights and Freedoms** in section 16(6) in the constitutional guarantee to the citizen of his due process rights stipulates that a person accused of a criminal offence shall have the right to [a] defend himself [b] defend himself with legal representation of his own choosing; or [c] where the citizen cannot afford legal representation to be given such assistance (legal aid) as is required in the interests of justice.

As mentioned before the **Legal Aid Act and Regulations** have been amended to increase the protection of the citizen within the stipulated constitutional guarantees.

The **CJPNA** does not expressly prescribe any additional duties or obligations beyond those delineated in the Canons of the legal profession.
The legal profession has become increasingly scrutinised by the citizenry who have come to rely on the services offered and it is only because Jamaica does not have activist consumer groups that many attorneys-at-law have managed to get away with increasingly slip shod service to their clients.

The legal profession is also actively policed by the General Legal Council (GLC) even with its resource constraints.

Anecdotally, the Court of Appeal is beginning to hear appeals from aggrieved convicted appellants who in their grounds filed now actively begin to question the competence of their counsel or to put it more forensically that their lawyer did not render effective assistance to them during their trial. Such grounds used to be a rarity at the appellate level once. While not commonplace they are no longer unusual and even when not pleaded directly, negative oblique references to trial counsel's duty at trial will be canvassed before the Court.

Thus it behoves the criminal law practitioner at the defence bar to exercise care and due diligence on behalf of his client within the highest standards of the profession at all times and even more so when pursuing plea negotiations.

In the 21st century constitutional climate of Jamaica the lack of effective assistance by counsel can be construed as a denial of the accused person's fundamental due process rights.

> We do not mean to imply that only the government attorney has obligations of knowledge and clarity. Defence counsel too must know or learn about the relevant law and evaluate its application to his or her client. Clearly, in certain cases, such failure will amount to constitutionally ineffective assistance of counsel and undermine the validity of the plea.
> …
> Particularly when a plea bargain is discussed, and hence sentencing becomes the client's pre-eminent concern, it is incumbent on counsel to acquaint himself or herself with all the available alternatives and their consequences for the defendant's liberty and rehabilitation[108].

On March 21, 2012 the United States Supreme Court handed down their decision in two[109] matters where they ruled that the right to counsel under the Sixth Amendment of the Constitution extends to the plea bargaining process.

In ***Lafler v Cooper*** Cooper was charged under Michigan law with assault with intent to murder and three other offences. The prosecution offered to dismiss two of the charges and to recommend a 51-to-85-month sentence on the other two, in exchange for a guilty plea. In a communication with the court, respondent admitted his guilt and expressed a willingness to accept the offer. But he rejected the offer, allegedly after his attorney convinced him that the prosecution would be unable to establish intent to murder because the victim had been shot below the waist. At trial, respondent was convicted on all counts and received a mandatory minimum 185-to-360-month sentence.

The United States Supreme Court quashed the convictions and sentence returned the matter to the trial court and ordered the prosecution to re-offer the plea bargain. Should Cooper accept the offer, the state trial court can exercise its discretion in determining whether to vacate respondent's convictions and re-sentence pursuant to the plea agreement, to vacate only some of the convictions and re-sentence accordingly, or to leave the conviction and sentence resulting from the trial undisturbed.

Kennedy J who delivered the judgement for the majority[110] held that defendants have a Sixth Amendment right to counsel, a right that extends to the plea-bargaining process.

> The Sixth Amendment requires effective assistance of counsel at critical stages of a criminal proceeding. Its protections are not designed simply to protect the trial, even though "counsel's absence [in these stages] may derogate from the accused's right to a fair trial." …. The constitutional guarantee applies to pre-trial critical stages that are part of the whole course of a criminal proceeding, a proceeding in which defendants cannot be presumed to make critical decisions without counsel's advice. This is consistent, too, with the rule that defendants have a right to effective assistance of counsel on appeal, even though that cannot in any way be characterized as part of the trial.

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[108] ***Anthony Correale v. United States of America*** 479 F.2d 944 United States Court of Appeals, First Circuit per Coffin CJ
[109] ***Lafler v Cooper*** 566 US (March 21, 2012) and ***Missouri v Frye*** 566 US (March 21, 2012)
[110] Breyer, Ginsburg, Kagan and Sotomayor JJ concurring.

> If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it. If that right is denied, prejudice can be shown if loss of the plea opportunity led to a trial resulting in a conviction on more serious charges or the imposition of a more severe sentence

While the lack of effective assistance of counsel can lead to a breach of a defendant's constitutional right to due process, the finding of a constitutional right to a plea bargain in the reasoning of Kennedy J is suspect.

The Appellant received a trial in which there was no question or issue as to its fairness with its innumerable constitutional and statutory limitations upon the evidence that the prosecution can bring forward, and the requirement of a unanimous guilty verdict by impartial jurors. However, the Supreme Court per Kennedy J holds that the conviction is invalid because Cooper was deprived of his constitutional entitlement to a plea-bargain.

This was not a case in which the counsel did not bring to the attention of the accused of the prosecution's offer of a plea bargain. Defence counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused but even a breach of this fiduciary duty to the client does not elevate it to an abrogation of his constitutional right to due process.

One is compelled to agree with Scalia J in his dissent[111] that the remedy ordered by the Court that the State re-offer the plea bargain to be patently absurd (even more absurd is the binding of the prosecution to a plea offer which had been rejected by an accused person who had the benefit of legal counsel).

> The Court today embraces the sporting chance theory of criminal law, in which the State functions like a conscientious casino-operator, giving each player a fair chance to beat the house, that is, to serve less time than the law says he deserves. And when a player is excluded from the tables, his *constitutional rights* have been violated. I do not subscribe to that theory. No one should, least of all the Justices of the Supreme Court.
>
> Today's decision upends decades of our cases, violates a federal statute, and opens a whole new boutique of constitutional jurisprudence ("plea-bargaining law") without even specifying the remedies the boutique offers. The result in the present case is the undoing of an adjudicatory process that worked *exactly* as it is supposed to[112].

In ***Missouri v Frye*** Frye was charged with driving with a revoked license. Because he had been convicted of the same offense three times before, he was charged, under Missouri law, with a felony carrying a maximum 4-year prison term. The prosecutor sent Frye's counsel a letter, offering two possible plea bargains, including an offer to reduce the charge to a misdemeanour

[111] Roberts CJ, Alito and Thomas JJ concurring
[112] Scalia J in ***Lafler v Cooper***

and to recommend, with a guilty plea, a 90 day sentence. Counsel did not convey the offers to Frye, and they expired. Less than a week before Frye's preliminary hearing, he was again arrested for driving with a revoked license. He subsequently pleaded guilty with no underlying plea agreement and was sentenced to three years in prison. Seeking post-conviction relief in state court, he alleged his counsel's failure to inform him of the earlier plea offers denied him the effective assistance of counsel, and he testified that he would have pleaded guilty to the misdemeanour had he known of the offer.

Kennedy J who delivered the judgement of the majority held that it is well settled that the right to the effective assistance of counsel applies to certain steps before trial. The Sixth Amendment guarantees a defendant the right to have counsel present at all 'critical' stages of the criminal proceedings. Critical stages include arraignments, post-indictment interrogations, post-indictment line-ups, and the entry of a guilty plea.

The Court went on to pronounce on the question as to whether defence counsel has the duty to communicate the terms of a formal offer to accept a plea on terms and conditions that may result in a lesser sentence, a conviction on lesser charges, or both. The Court went on to hold that, as a general rule, defence counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favourable to the accused. Any exceptions to that rule need not be explored here, for the offer was a formal one with a fixed expiration date. When defence counsel allowed the offer to expire without advising the defendant or allowing him to consider it, defence counsel did not render the effective assistance the Constitution requires.

While one acknowledges that counsel was deficient in his duty to his client one again finds it hard to conclude that the deficiency rose to the heights of a constitutional abrogation.

One can only hope even in this era of expanded constitutional rights that the Court of Appeal of Jamaica will be measured before it pronounces new rights and certainly before it creates a right to a plea bargain.

> The Constitution is not an all purpose tool for judicial construction of a perfect world; and when we ignore its text in order to make it that, we often find ourselves swinging a sledge where a tack hammer is needed.[113]

The examples cited here from the United States Supreme Court may be somewhat extreme but at the very least they underscore the importance of the work done by defence counsel and the need to approach their duties –especially in relation to plea negotiations – with diligence and seriousness and not nonchalance and flippancy.

[113] per Scalia J in ***Padilla v Kentucky*** (2010) 559 US

THE ROLE OF THE JUDGE

Every plea agreement has to be brought before a Judge /RM after it has been concluded and shall[114]:-

[a] be in writing

[b] contain the information set out in the schedule of the **CJPNA**

[c] the signature of the accused, his attorney-at-law and the DPP before a Justice of the Peace.

It is the duty of the DPP to inform the Judge/RM of the existence of a plea agreement.
When the plea agreement is concluded the DPP shall in open Court or in Chambers (but DPP has to show good cause for the matter to be heard in Chambers) inform the Judge /RM of the existence of the plea agreement.

If the matter is in Chambers then the accused and his/her attorney-at-law shall be entitled to attend[115].

The Judge/RM is to be informed by the DPP of the plea agreement either:-

[a] before the accused person is pleaded; or
[b] at any time after arraignment[116].

There is discretion in the Judge/RM to question the accused person in order to confirm his knowledge of the existence of the agreement. This is only done if in the opinion of the Judge/RM the circumstances so require[117].
The Judge/RM is not bound to accept the plea agreement[118]

Enquiries by the Court.

The Judge/RM has a mandatory duty before any plea agreement is accepted to make a determination in open court that[119] :-

[a] no improper inducement was offered to the accused person to encourage him/her to enter into any plea agreement;

[b] the accused person understands the nature, substance and consequence of the plea agreement

[114] S.7(a)(b)(c) **CJPNA**
[115] S.9(3) **CJPNA**
[116] S.9(1)(a)(b)
[117] S.9(2) **CJPNA**
[118] S.10 **CJPNA** and First schedule. Form 1. Para.6 & 9 **CJPNAR**
[119] S.11(1) (a-d) **CJPNA**

[c] there is a factual basis upon which the plea agreement has been made;

and

[d] acceptance of the plea agreement would not be contrary to the interests of justice.

In relation to [d] this is to avoid ***Lloydell Richards*** type situations from ever occurring.

Such a situation happened in 1983 where one Lloydell Richards[120], a mini-bus driver, had been charged for the murder in furtherance of a rape of one of his passengers, Sharon Lewis, who was at the time a student of West Indies College (now Northern Caribbean University). He pleaded guilty to manslaughter. This was a case of an informal plea agreement.

The nature of that plea agreement was obviously so contrary to the interests of justice and morally reprehensible and repugnant that the DPP on the day of sentence entered a *nolle prosequi* discontinuing the matter and preferring a new indictment for murder. Lloydell Richards was convicted for murder and sentenced to death[121].

If so satisfied with the plea agreement at the close of the case for the defence and the Court has determined that a person has an interest in the outcome of the case- the Judge/RM shall warn herself/the jury (where relevant) of the need for corroboration and that it is dangerous to convict on the uncorroborated evidence of that person.

Furthermore, the Judge/RM has to go on to identify to herself/the jury what independent evidence in the matter is capable of providing corroboration[122] .

This is a codification of a required mandatory direction that the Judge has to give when relying on accomplice evidence.

The **CJPNA** is therefore requiring that the Judge/RM deliver a direction on the evidence of accomplices and how to treat with it.

It bears reminding of the following principles of law:-

[i] an accomplice is always a competent witness

[ii] an accessory is always a competent witness against his principal and *vice versa* the principal against his accessory

[120] 41 WIR 262 PC
[121] Sentence commuted to life imprisonment.
[122] S.11(2)(a-b) **CJPNA**

[iii] Where an accomplice gives evidence on behalf of the prosecution the judge is required to expressly warn himself or the jury that although they can convict on the evidence of an accomplice it is dangerous to do so unless it has been corroborated.

Therefore at both common law and under the **CJPNA** - a failure to give this warning will lead to the conviction being quashed when appealed.

It is surprising that in the common law world where mandatory corroboration warnings are on their way out and courts are striking them down Parliament has seen it fit to encode this principle.

One could see the Court giving directions on witnesses with an interest to serve and the benefit of the bargain but why should the need for corroboration be mandatory and not discretionary.

In Trinidad and Tobago section (11) of The **Administration of Justice (Miscellaneous Provision) Act 1996**, provides that a corroboration warning is no longer a requirement, a judge in his discretion may give a direction tailored to suit the particular summing up of a specific case.

It is proposed that the mandatory corroboration requirement in the Act be repealed and Parliament enact a similar provision in CJPNA failing that the section be amended leaving it up to the Court to act on its own discretion to apply the principles laid down by Lord Taylor of Gosforth LCJ[123] which are:-

[i] It is a matter for the judge's discretion what, if any warning, he considers appropriate in respect of such a witness as indeed in respect of any other witness in whatever type of case. Whether he chooses to give a warning and in what terms will depend on the circumstances of the case, the issues raised and the content and quality of the witness's evidence.

[ii] In some cases, it may be appropriate for the judge to warn the jury to exercise caution before acting upon the unsupported evidence of a witness. This will not be so simply because the witness is a complainant of a sexual offence nor will it necessarily be so because a witness is alleged to be an accomplice. There will need to be an evidential basis for suggesting that the evidence of the witness may be unreliable. An evidential basis does not include mere suggestion by cross-examining counsel.

[iii] If any question arises as to whether the judge should give a special warning in respect of a witness, it is desirable that the question be resolved by discussion with counsel in the absence of the jury before final speeches.

[123] ***R v Makanjuola*** [1995] 1 WLR 1348 at 1351-1352

[iv] Where the judge does decide to give some warning in respect of a witness, it will be appropriate to do so as part of the judge's review of the evidence and his comments as to how the jury should evaluate it rather than as a set-piece legal direction.

[v] Where some warning is required, it will be for the judge to decide the strength and terms of the warning. It does not have to be invested with the whole florid regime of the old corroboration rules.

Acceptance of a Plea Agreement

Where the Court accepts the plea agreement the accused shall be asked to plead to the charge[124].

The plea agreement shall then be entered into the record of the Court and any written representation made by the victim/victim's relatives[125].

Upon acceptance of a plea agreement the Judge/RM is required to add her certificate to the plea agreement:-

CERTIFICATE OF JUDGE/RESIDENT MAGISTRATE[126]

JAMAICA

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CRIMINAL DIVISION/HOME CIRCUIT DIVISION

Or

IN THE RESIDENT MAGISTRATE'S COURT FOR THE PARISH OF

HOLDEN AT

Suit No.

File No.

A plea of guilty is entered by the accused herein and accepted by this Honourable Court. I hereby certify that no improper inducement was offered to the accused by the Court to encourage him to enter into this plea agreement. I believe that the accused understands the nature, substance and consequence of the plea agreement. There is a factual basis upon which the plea agreement has been made and acceptance of the plea agreement would not be contrary to the interests of justice.

_____

JUDGE/RESIDENT MAGISTRATE

[124] S.13 **CJPNA**
[125] S.14 **CJPNA**
[126] First schedule. Form 1 **CJPNAR.** Done in compliance with s.11 of the **CJPNA**

Where the plea is accepted the Court grants an order in conformity with the terms set out in the Second schedule to the **CJPNAR:-**

ORDER ACCEPTING PLEA[127]

(Suit No./Information No./Indictment No.) IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE GUN COURT
or
IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE HoME CIRCUIT COURT
or
IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE CIRCUIT COURT FOR THE PARISH OF (*name of parish*)
Holden at
or
IN THE RESIDENT MAGISTRATE'S COURT
FOR THE PARISH OF *(name of parish)*
HOLDEN AT
R. v *(Name of Accused)*
The day of…. , 20 .

UPON THE APPLICATION of _____ coming on this *(Name of accused)*
day for hearing and upon hearing _____ the Court finds *(name(s) of attorney(s)-at-law)*
that the accused has presented a Plea Agreement, and entered a plea of guilty to the charges brought by the Crown. Having examined the agreement, the Court inquires of the accused and his attorney-at-law in open court. The Court informs the accused of the maximum penalty which may be imposed if the plea is accepted, and that he is waiving certain constitutional rights by entering his plea. The Court informs the accused that he is admitting to the truth of each and all of the essential elements of the charges. Having heard the statements of the accused and counsel, reviewed the file, and being duly advised in the premises, the Court finds:
Examples of findings:

1. *The accused enters his plea voluntarily and not under any threat or promise.*
2. *The accused understands the charges, and the plea that he is entering to those charges.*
3. *The accused understands the consequences of the plea that he is entering.*
4. *There is a factual basis for the charges to which the accused is entering his plea.*

IT IS HEREBY ORDERED that the accused's plea of guilty be accepted, and it is hereby accepted, by this Court, in accordance with his request.

BY THE COURT

_____
Judge/Resident Magistrate

[127] Done in compliance with s.13 of the **CJPNA**

Acceptance of a Plea Agreement: Sentence

Where a Judge/RM accepts a plea agreement she shall (where the situation requires it) impose sentence which can be either[128]:-

[a] 2/3 of the prescribed maximum penalty by which the offence would otherwise be punishable notwithstanding any provision to the contrary;

Or

[b] a fifteen year (15) maximum sentence in relation to any offence where it is punishable by life imprisonment.

Section 15 of the **CJPNA** was amended by including a subsection 4 which states that where the offence is punishable by a prescribed minimum penalty the Judge/RM may impose sentence without regard to the prescribed minimum penalty[129].

Based on these provisions there is now an incentive for any person charged under the relevant sections of the **Firearms Act** (2010 amendment) and **Offences Against the Person Act** (2010 amendment) to enter into plea agreements with the Crown and to plead guilty and provide testimony.

This so because although offences such as wounding with intent with the use of a firearm or shooting with intent carry maximum sentences of life imprisonment those laws also prescribe a mandatory minimum of fifteen (15) years imprisonment.

Furthermore, the amendment in 2010 to the **Parole Act** prescribes that the convict would have to serve a minimum of ten (10) years before becoming eligible for parole.

The need for strict compliance with the requirements of the CJPNA by the Judge not only preserves the validity of the agreement but it prevents an accused persons who has developed post-conviction regrets about entering the plea agreement from raising it as a valid ground of appeal.

This was the issue that confronted the High Court of South Africa Cape of Good Hope Provincial Division in the matter of ***Paul Taylor v The State***[130] . In ***Paul Taylor*** the Applicant pleaded guilty pursuant to a plea and sentence agreement. He convicted of 14 counts of theft of a total amount of R 499,079.21 allegedly stolen from Spier Properties (Pty) Ltd to whom he was employed as an accountant.

PT applied to the Court to set aside the plea agreement on the following grounds:-

[128] S.15(1)(2)(3) **CJPNA**
[129] **Criminal Justice (Plea Negotiations and Agreement) Amendment** Bill 2010
[130] 27/172/2003 (October 24, 2005)

[1] The learned magistrate erred or misdirected himself and/or failed to ensure and protect the constitutional and legal rights of the applicant and failed to ensure due and proper process and procedure "*inter alia*" in that:

[2] He failed to ensure that the procedure at the trial was just, fair, reasonable and that it complied with all the accepted principles of justice and equity. In particular, he failed to ensure that the applicant was fully informed of all his rights and the consequences of the section 105A agreement he had entered into prior to the conviction and sentence in terms thereof.

He also accused his counsel of giving him misleading advice. The Court wrote to the magistrate concerned and the prosecution and received replies and an affidavit from defence counsel.

Yekiso J who delivered the opinion of the Court held in paras. 18-20 held:-

> The accused's right to a fair trial in the instance of this matter would also include those rights contemplated in section 105A(6)(a) of the Act, which enjoins the judicial officer to follow the procedure set out in that section once there has been a disclosure of the existence of a plea and sentence agreement. The duty contemplated in subsection (6) (a) involves confirmation by the judicial officer if the accused is indeed a party to the plea and sentence agreement; admission by the accused that he admits the allegations in the charge sheet; that he has agreed to plead guilty and that the agreement was concluded freely and voluntarily in his sound and sober senses and without having been unduly influenced. All that has been said in this paragraph is exactly what the magistrate did as the portions of the record cited in paragraph [13] of this judgment indicate.
>
> I would, however, add that the judicial officer, in enquiring into the conclusion of the agreement, need not limit himself/herself to the provisions of sub-section 6(a) of section 105A of the Act. One could go further to confirm with the accused the latter's signature on the agreement and that of his legal representative, if the accused is legally represented, and also confirm with the accused the sentence proposed and any condition attached thereto.
>
> As regards the procedure at trial, I cannot see how the proceedings and the procedure followed could be said not to have been just, fair, reasonable and how it failed to comply with the accepted principles of justice as the accused seeks to contend. The accused was represented by an attorney who had negotiated a plea and sentence agreement on his behalf. The signature of the agreement by the accused signifies consent on his part that he was satisfied with the terms and conditions of the agreement. Moreover the accused confirmed that he was aware of the contents of the agreement. Once the magistrate was satisfied that the sentence proposed in the agreement was just, she proceeded to impose the sentence in accordance with the agreement. The accused cannot now, once the shoe starts pinching, begin to complain about the procedure followed at trial and the performance of his attorney. I cannot, on basis of what appears on record, conclude that the proceedings were irregular or in any way impeachable as the accused seeks to contend

Sealing of Plea Agreement

It would seem that Plea agreements are public documents to which members of the public could have access or available pursuant to the provisions of the **Access to Information Act**. However, the Judge/RM may upon application (by either DPP or accused person) or on her own motion order that the records of plea negotiations or a plea agreement be sealed, where the Judge/RM is satisfied that the sealing of such records is in the interests of the effective administration of justice[131].

Effect of Refusal of a Plea Agreement

The Judge/RM can only refuse the plea agreement on one of two factors[132]. These are:-

[a] the offence for which the accused person has been charged is not disclosed on the facts;

or

[b] there is no confirmation by the accused person of the agreement or the admissions contained therein.

Upon refusing the plea agreement the Judge/RM shall then inform the DPP of her refusal of the agreement and the reasons therefor[133]. It does not seem that there is any requirement that these reasons ought to be put into writing.

However, the rejection of a plea agreement by the Court shall not operate as a bar to the conduct of subsequent plea negotiations and the conclusion of a subsequent plea agreement in respect of the same case[134].

Can the Judge give advance notice of sentence?

It is the sentence bargaining aspect of plea bargains that has given rise to most of the judicial comment as to the role of the judge in the plea bargaining process.

Prior to the coming into effect of the **CJPNA**, plea agreements were conducted on an informal basis between prosecutor and counsel without any reference to the Court.

It was not and is not unusual in this jurisdiction for counsel (Crown and defence) to be seen by the trial judge in his chambers, and for the judge to tell counsel his view of the sentence which would follow an immediate guilty plea.

For years this practice continued happily. It was our guilty secret because between 1970—2005 this practice was disapproved. This rule was laid down in ***R v Turner*** [1970] 2 QB 321.

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[131] Section 18 of the **CJPNA** and Article 10 of the **CJPNAR**
[132] S.12(1)(a-b) **CJPNA**
[133] S.12(2)(a-b) **CJPNA**
[134] S.12(3) **CJPNA**

The Facts in ***Turner*** are the defendant, a man with many previous convictions, pleaded not guilty to theft. During an adjournment in the trial, counsel indicated that he wished to have a discussion with the judge, and went and did so. After he had spoken to the judge, and following that discussion, he advised Turner that in his (counsel's) opinion, if he pleaded guilty, the outcome might well be a non-custodial sentence, but that if the case proceeded and he was convicted by the jury, he ran the risk of going to prison.

The defendant received the impression that the views expressed to him by counsel represented the views the judge had communicated to counsel.

The Court of Appeal of England decided that this represented improper pressure on the defendant to plead guilty, and that in the circumstances, the appropriate course would be to treat the guilty plea as a nullity.

Lord Parker LCJ delivering the judgment of English Court of Appeal held that whereas counsel may give advice, which includes advice about the likely sentence on a guilty plea, such information coming from the court itself was impermissible.

> The judge should, subject to the one exception referred to hereafter, never indicate the sentence which he is minded to impose. A statement that on a plea of guilty he would impose one sentence but that on a conviction following a plea of not guilty he would impose a severer sentence is one which should never be made. This could be taken to be undue pressure on the accused, thus depriving him of that complete freedom of choice which is essential[135].

Lord Parker LCJ referred to occasions when the judge would tell counsel that on the basis of the information before him; the sentence which would follow a guilty plea would be non-custodial, without saying anything about what would happen if the case proceeded to trial and conviction.

> Even so, the accused may well get the impression that the judge is intimating that in that event a severer sentence, maybe a custodial sentence would result, so that again he may feel under pressure. This accordingly must also not be done[136].

The only exception to the rule that an indication of sentence should not be given is:

> … that it should be permissible for a judge to say, if it be the case, that whatever happens, whether the accused pleads guilty or not guilty, the sentence will or will not take a particular form, e.g. a probation order or a fine, or a custodial sentence[137].

At the time of the decision in ***Turner*** Lord Parker LCJ's dicta was also the prevailing jurisprudence in the United States of America. The Supreme Court of California[138] (per Christian

[135] ***Turner*** at 327
[136] ***Turner*** at 327
[137] *Ibid* at 327

J) held that special problems are presented when the judge participates in plea negotiations. The Court found from that experience suggests that such judicial activity risks more, in terms of unintentional coercion of defendants, than it gains in promoting understanding and voluntary pleas, and thus most authorities recommend that it be kept to a minimum.

In addition the Federal Court of Appeals Fifth Circuit[139] (per Wisdom J) also found that the system of justice is undermined when the trial participates in the negotiations. The Court found that a plea agreement by the trial judge and the defendant may carry the connotation of an unseemly bargain between a malefactor and Justice. The judge, almost all-powerful in his sentencing capacity, has the duty of protecting an accused's constitutional rights as well as the duty of protecting society's interest in law enforcement.

Lastly the Court of Appeals DC Circuit[140] (per Bazelon CJ) held that the role of the trial judge is limited to ensuring that the accused person has entered into the agreement voluntarily and informed of all the consequences of his agreeing to plead guilty. The Court stated that the trial judge should neither participate directly in plea bargaining nor create incentives for guilty pleas by a policy of differential sentences. However that must be balanced by the fact that the trial judge cannot ignore the plea bargaining process. A guilty plea must be not only voluntary, but also knowing and understanding. If the defendant has decided to admit his guilt because of a commitment from the prosecutor, it is essential for the validity of his plea that he has a full and intelligent understanding of the nature and extent of that commitment. To fulfil the requirement that a plea is made only after proper advice and with full understanding of the consequences, the trial judge must make certain that the defendant has made a knowing appraisal of the alternatives open to him.

It is this position by the DC Circuit that has been enacted into law by the **CJPNA**. The **CJPNA** in this regard is in accordance with case law from the Court of Appeal of Jamaica. In ***Regina v Bernard***[141] Fox JA held:-

> …the judge must adopt and maintain an objective and impartial attitude to the proceedings. He must refrain from inordinate intervention during a trial, from usurping the functions of counsel, from interfering with the continuity of examination and cross-examination, from prejudging the outcome of the trial, from indicating that he favours the prosecution or the accused, and from indulging in comments, observations and discussions which may tend to compromise or reduce that patience, that willingness to listen, that humanity and that prestige, power, and probity which makes him the epitome of our judicial system, and, in the eyes of the public, 'a very special person'[142].

The principle in ***Bernard*** was applied in ***Richard Francis o/c Delroy Reid v Regina***[143].

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[138] ***People v. Williams*** *(1969)* 269 Cal. App. 2d 879
[139] ***Brown v J Beto*** [1967] USCA5 411; 377 F.2d 950 (12 May 1967)
[140] ***Vincent Scott v United States*** [1968] USCADC 357; 419 F.2d 264 (9 September 1968)
[141] 12 JLR 1203
[142] At 1213
[143] [2010] JMCA Crim 68 (October 22, 2010)

On 8 October 2008 the applicant was convicted in the High Court Division of the Gun Court on an indictment which charged him with three counts. On count one he was charged with illegal possession of firearm, on count two, with illegal possession of ammunition and on count three robbery with aggravation. He was sentenced to 12 years imprisonment at hard labour on count one, two years imprisonment at hard labour on count two and 15 years imprisonment at hard labour on count three. It was ordered that the sentences should run concurrently.

RF appealed on one of the grounds that:-

> That the Learned judge commenced the trial having pre-determined the issues, and approached the trial with a closed mind.

It was submitted that the learned trial judge, in remarks made by her prior to the commencement of the trial, stated that the case was one involving DNA evidence and informed defence attorney that he should advise his client to enter a plea of guilty, failing which, if he was found guilty, the court would not extend any leniency to him. These remarks, he contended, showed that she had predetermined the issues before the trial. Accordingly, the applicant was not afforded a fair trial.

Harris JA who delivered the judgement of the Court held at para. 24 that

> It is obligatory on the part of a trial judge, in the execution of his duty, to maintain an impartial attitude at all times.

She went on to say

> …trial judges should always be mindful of their roles as impartial arbiters and should proceed with great care in discharging their duties. They should at all times be aware that, in the execution of their functions, they are duty bound to ensure that an accused is accorded such fairness as the system permits. Any act of a judge which can be perceived as an infringement of the rights of an accused may operate so as to affect the safety of his conviction[144].

The position articulated by the Jamaican court and expressed in the provisions of the **CJPNA** is also the position in Australia. The High Court of Australia in ***GAS v The Queen; SJK v The Queen***[145] laid down principles which judges ought to follow whenever confronted by plea agreements[146]:-

> [i] First, it is the prosecutor, alone, who has the responsibility of deciding the charges to be preferred against an accused person. The judge has no role to play in that decision.

[144] At para.25
[145] [2004] HCA 22; 217 CLR 198; 206 ALR 116; 78 ALJR 786 (19 May 2004) per Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ
[146] Paras. 28-31

[ii] Secondly, it is the accused person, alone, who must decide whether to plead guilty to the charge preferred. That decision must be made freely….Once again, the judge is not,…involved in the decision. Such a decision is not made with any foreknowledge of the sentence that will be imposed. No doubt it will often be made in the light of professional advice as to what might reasonably be expected to happen, but that advice is the responsibility of the accused's legal representatives.

[iii] Thirdly, it is for the sentencing judge, alone, to decide the sentence to be imposed. For that purpose, the judge must find the relevant facts. In the case of a plea of guilty, any facts beyond what is necessarily involved as an element of the offence must be proved by evidence, or admitted formally (as in an agreed statement of facts), or informally (as occurred in the present case by a statement of facts from the bar table which was not contradicted).

[iv] Fourthly, as a corollary to the third principle, there may be an understanding, between the prosecution and the defence, as to evidence that will be led, or admissions that will be made, but that does not bind the judge, except in the practical sense that the judge's capacity to find facts will be affected by the evidence and the admissions. In deciding the sentence, the judge must apply to the facts as found the relevant law and sentencing principles. It is for the judge, assisted by the submissions of counsel, to decide and apply the law. There may be an understanding between counsel as to the submissions of law that they will make, but that does not bind the judge in any sense. The judge's responsibility to find and apply the law is not circumscribed by the conduct of counsel.

The Supreme Court of South Australia refused to follow Lord Parker's dicta in ***Turner*** in ***Regina v Pugh***[147]***.***

In ***Pugh*** the appellant pleaded guilty in the District Court to two counts of taking part in the production of methylamphetamine. The convictions were entered on the basis of those pleas. On appeal the appellant claims that (a) the pleas were not entered out of a consciousness of guilt, (b) that the pleas were entered on inappropriate advice of counsel and (c) that the appellant, maintaining his innocence had defences to the charges. Bleby J in a concurring judgment dismissing the appeal against conviction and sentence held that he would not be prepared to follow ***R v Turner.***

The decision is not binding on this Court In any event, I do not think it follows that, merely because a sentence intimation may be reported as emanating from the trial Judge, an accused person necessarily ceases to exercise free choice in deciding to plead guilty.

In this jurisdiction, the question must turn on the particular circumstances and this Court's assessment as to whether, in all the circumstances, the plea was entered as a result of a genuine choice on the part of the appellant148.

[147] [2005] SASC 427 (16 November 2005)
[148] Paras 118-120

The advice given in this case about the likely sentence, even though with the apparent backing of the trial Judge, was not advice as to the strength of the prosecution case against the appellant, nor did it have any bearing on the strength of his defence. It was not advice to plead guilty, let alone advice to do so based on an assessment of the likelihood of the appellant's being found guilty of count 4.

However, this position in England was reversed in 2005 in the decision of The ***Queen v Karl Goodyear*** [149] where a five judge bench[150] of the Court of Criminal Appeal set aside the decision In ***Turner***.

Lord Woolf LCJ at paras.49-52 of the judgement held:-

[49] In our judgment, there is a significant distinction between a sentence indication given to a defendant who has deliberately chosen to seek it from the judge, and an unsolicited indication directed at him from the judge, and conveyed to him by his counsel. We do not see why a judicial response to a request for information from the defendant should automatically be deemed to constitute improper pressure on him. The judge is simply acceding to the defendant's wish to be fully informed before making his own decision whether to plead guilty or not guilty, by having the judge's views about sentence available to him rather than the advice counsel may give him about what counsel believes the judge's views would be likely to be.

[50] We cannot, and do not seek to water down the essential principle that the defendant's plea must always be made voluntarily and free from any improper pressure. On closer analysis, however, we cannot discern any clash between this principle, and a process by which the defendant personally may instruct his counsel to seek an indication from the judge of his current view of the maximum sentence which would be imposed on the defendant. In effect, this simply substitutes the defendant's legitimate reliance on counsel's assessment of the likely sentence with the more accurate indication provided by the judge himself. In such circumstances, the prohibition against the judge giving an unsolicited sentence indication would not be contravened, and any subsequent plea, whether guilty or not guilty, would be voluntary. Accordingly it would not constitute inappropriate judicial pressure on the defendant for the judge to respond to such a request if one were made.

[51] We have further reflected whether there should continue to be an absolute prohibition against the judge making any observations at all which may trigger this process. The judge is expected to check whether the defendant has been advised about the advantages which would follow an early guilty plea. Equally he is required to ascertain whether appropriate steps have been taken by both sides to enable the case to be disposed of without a trial. Following this present judgment he will know that counsel is entitled to advise the defendant that an advance indication of sentence may be sought from him. In these circumstances, we do not believe that it would be logical, and it would run contrary to the modern views of the judge's obligation to manage the case from the outset, to maintain as a matter of absolute prohibition that the judge is always and invariably precluded from reminding counsel in open court, in the presence of the defendant, of the defendant's entitlement to seek an advance indication of sentence. The judge would no doubt approach any observations to this effect with caution, first, to avoid creating pressure or the

[149] [2005] 1 WLR 2532
[150] Lord Woolf LCJ, LJ Judge, Treacey, Wakerley & Calvert-Smith JJ

perception of pressure on the defendant to plead guilty and, second, bearing in mind the risk of conveying to the defendant that he has already made up his own mind on the issue of guilt, or indeed that for some reason he does not wish to try the case. If notwithstanding any observations by the judge, the defendant does not seek an indication of sentence, then, at any rate for the time being, it would not be appropriate for the judge to give or insist on giving an indication of sentence, unless in any event he would be prepared to give the indication permitted by Turner (see paragraph 0) that the sentence will or will not take a particular form.

[52] To that extent therefore, and subject to the guidance which follows, the practice in Turner and the subsequent authorities which applied it, need no longer be followed.

The guidelines are set out in full and they are commended to all *mutatis mutandis*.

In paragraphs 55-61 Lord Woolf LCJ set out the duties and obligations of the Judge.

[55] The judge should not give an advance indication of sentence unless one has been sought by the defendant.

[56] He remains entitled, if he sees fit, to exercise the power recognised in Turner to indicate, that the sentence, or type of sentence, on the defendant would be the same, whether the case proceeded as a plea of guilty or went to trial, with a resulting conviction... He is also entitled in an appropriate case to remind the defence advocate that the defendant is entitled to seek an advance indication of sentence.

[57] In whatever circumstances an advance indication of sentence is sought, the judge retains an unfettered discretion to refuse to give one. It may indeed be inappropriate for him to give any indication at all. For example, he may consider that for a variety of reasons the defendant is already under pressure (perhaps from a co-accused), or vulnerable, and that to give the requested indication, even in answer to a request, may create additional pressure. Similarly, he may be troubled that the particular defendant may not fully have appreciated that he should not plead guilty unless in fact he is guilty. Again, the judge may believe that if he were to give a sentence indication at the stage when it is sought, he would not properly be able to judge the true culpability of the defendant, or the differing levels of responsibility between defendants. In a case involving a number of defendants, he may be concerned that an indication given to one defendant who seeks it, may itself create pressure on another defendant. Yet again, the judge may consider that the application is no less than a "try on" by a defendant who intends or would be likely to plead guilty in any event, seeking to take a tactical advantage of the changed process envisaged in this judgment. If so, he would probably refuse to say anything at all, and indeed, a guilty plea tendered after such tactical manoeuvrings may strike the judge as a plea tendered later than the first reasonable opportunity for doing so, with a consequent reduction in the discount for the guilty plea.

[58] Just as the judge may refuse to give an indication, he may reserve his position until such time as he feels able to give one, for example, until a pre-sentence report is available. There will be occasions when experience will remind him that in some cases the psychiatric or other reports may provide valuable insight into the level of risk posed by the defendant, and if so, he may justifiably feel disinclined to give an indication at the stage when it is sought. Another problem may simply be

that the judge is not sufficiently familiar with the case to give an informed indication, and if so, he may defer doing so until he is.

[59] In short, the judge may refuse altogether to give an indication, or may postpone doing so. He may or may not give reasons. In many cases involving an outright refusal, he would probably conclude that it would be inappropriate to give his reasons. If he has in mind to defer an indication, the probability is that he would explain his reasons, and further indicate the circumstances in which, and when, he would be prepared to respond to a request for a sentence indication.

[60] If at any stage the judge refuses to give an indication (as opposed to deferring it) it remains open to the defendant to seek a further indication at a later stage. However once the judge has refused to give an indication, he should not normally initiate the process, except, where it arises, to indicate that the circumstances had changed sufficiently for him to be prepared to consider a renewed application for an indication.

[61] Once an indication has been given, it is binding and remains binding on the judge who has given it, and it also binds any other judge who becomes responsible for the case. In principle, the judge who has given an indication should, where possible, deal with the case immediately, and if that is not possible, any subsequent hearings should be listed before him. This cannot always apply. We recognise that a new judge has his own sentencing responsibilities, but judicial comity as well as the expectation aroused in a defendant that he will not receive a sentence in excess of whatever the first judge indicated, requires that a later sentencing judge should not exceed the earlier indication. If, after a reasonable opportunity to consider his position in the light of the indication, the defendant does not plead guilty, the indication will cease to have effect. In straightforward cases, once an indication has been sought and given, we do not anticipate an adjournment for the plea to be taken on another day.

Their Lordships opined that they did not believe that these guidelines would be practical in the Magistrates' Court and expressly stated that they were for High Court application.

Nevertheless they are guidelines and since the RM Courts operate with less rigour than the High Courts applying the principle *mutatis mutandis* there is no reason why the Clerks of Court and RMs could not be guided by these principles.

The English Court of Appeal laid down guidelines in relation to the Judge, defence counsel and the prosecution[iii] in seeking an advance indication of sentence. It is perhaps apposite that any such advance indication of sentence ought to take place during a plea and case management session.

It is the view of this author now that the plea and case management rules have been gazetted the **CJPNA** must be amended to take advantage of this new reality. Certainly, in a plea and case management procedure the Judge's role is not limited to only issues of sufficiency of evidence and agreement on non-contentious issues but should be expanded to include plea discussions and plea agreements.

Their Lordships House in ***McKinnon*** went on to observe that in 2008 the Attorney General issued a consultation paper on the feasibility of implementing plea negotiations at least for fraud cases. Jamaica in this respect is more advanced than the United Kingdom in that while plea negotiations still operate on a patchwork and informal basis there, there is a statutory and regulatory framework here.

VICTIMS' RIGHTS

Although not expressly stated in the Act, it seems that once a plea negotiation is being conducted the DPP shall permit the victim to make representation to her in writing and may take such representation into consideration in concluding a plea agreement[151]. The duty to communicate with the victim or victim's family is mandatory under the **CJPNA**. This mandatory duty also exists under the Trinidadian legislation[152].

However, in the Bahamas the legislation[153] there confers a discretion upon the prosecutor as to whether or not to consult with the victim or the victim's family.

> A prosecutor may obtain the views of the victim or a relative of the victim before concluding plea discussions.

Where the victim has died the DPP shall communicate with representatives of the deceased victim's immediate family and shall permit said family members to make representation to her in writing[154].

Where the victim is a child under the age of fourteen (14) representation may be made by one of his parents or his guardian or the Children's Advocate if the parent or guardian cannot be located[155].

Where the child victim is age fourteen years or over then representation may be made by the child himself and one of his parents or guardians or the Children's Advocate where the parent or guardian cannot be located[156].

Where the plea agreement is concluded it is mandatory that the DPP/Prosecutor as soon as is reasonably practicable communicate with the victim[157] in respect of –

> [a] the substance of and reasons for the plea agreement; and

[151] S.8(1)(a) **CJPNA**
[152] S.8 (1) **Criminal Procedure (Plea Discussions and Plea Agreements) Act**
[153] S.9(1) **Criminal Procedure (Plea Discussions and Plea Agreements) Act**
[154] S.8(2) **CJPNA**
[155] S.8(3)(a) **CJPNA**
[156] S.8(3)(b) **CJPNA**
[157] S.8 (1)(b)(i)(ii) **CJPNA**

[b] the entitlement of the victim to be present when the Court considers the plea agreement.

Likewise, the Trinidadian law also confers this mandatory duty upon the prosecutor[158]. The Jamaican prosecutor unlike his Trinidadian counterpart must inform the victim or the victim's family about the plea agreement. The Trinidadian legislation provides an exception to this mandatory duty.

> A prosecutor who arrives at a plea agreement with the accused person shall ensure that victim is told the substance of, and reasons for, the agreement, unless compelling reasons, such as the likelihood of serious harm to the accused or to another person, require otherwise[159].

The Bahamian legislation has a similarly worded provision as the Trinidadian except that it provides a discretion to the prosecutor as to whether or not she should inform the victim or victims family as to the existence of a plea agreement:-

> A prosecutor who arrives at a plea agreement with the accused person may ensure that the victim is told the substance of, and reasons for, the agreement, unless compelling reasons, such as the likelihood of serious harm to the accused or to another person, requires otherwise[160].

What is left unsaid by the **CJPNA** is whether or not a plea agreement is invalidated if the DPP fails to follow through on these guidelines.

Furthermore the **CJPNA** is deficient on the rights of victims. Having conferred an entitlement of the victim to be present in Court it does not confer a voice or *locus standi* to the victim at Court.

This is in contrast to the Trinidadian legislation which confers such standing on the victim. Section 11 of their Act states:-

[1] Subject to subsection (2) the Judge or Magistrate shall in open Court seek the views of the victim or a relative of the victim, before recording the terms of the agreement and passing sentence.

[2] The Judge or Magistrate may, where he considers it prudent to do so, retire to Chambers to hear the views of the victim or relative, as the case may be, and such views shall be heard in the presence of the prosecutor and the Attorney-at-law for the accused or, in event that the accused is unrepresented, in the presence of the accused[161].

Likewise the Bahamian legislation except in the Bahamas the Judge/Magistrate has discretion whether or not to canvass the views of the victim.

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[158] S.8(2) of the **Criminal Procedure (Plea Discussion and Plea Agreement) Act**
[159] S.8(2) of the **Criminal Procedure (Plea Discussion and Plea Agreement) Act**
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It would seem that if the policy makers are serious about victim rights and victim support then in relation to these provisions they can and should adopt the model in the Trinidadian Act.

The other major consideration which had not been considered by Parliament in enacting this legislation with mandatory requirements for victim notification by the DPP is that many cases within the purview of the DPP are being prosecuted under section 31 D of the **Evidence Act**. Which states that a statement made by a person in a document shall be admissible in criminal proceedings as evidence of any fact of which direct oral evidence by him would be admissible if it is proved to the satisfaction of the court that such person:-

(a) is dead;

(b) is unfit, by reason of his bodily or mental condition, to attend as a witness;

(c) is outside of Jamaica and it is not reasonably practicable to secure his attendance;

(d) cannot be found after all reasonable steps have been taken to find him; or

(e) is kept away from the proceedings by threats of bodily harm and no reasonable steps can be taken to protect the person.

How then are the requirements of the **CJPNA** to be fulfilled when the victim cannot be found and the nearest relative provisions of the Act are limited to the relatives of deceased or incapacitated victims.

This provision in the **CJPNA** is in need of amendment to plug lacunae in the legislation which would hamper the effective administration of the law.

CONFIDENTIALITY OF PLEA NEGOTIATIONS

The **CJPNA** imposes an obligation for secrecy on all parties having an official duty or being employed in the administration of the **CJPNA**[163].

[162] S.11(1)(2) **Criminal Procedure (Plea Discussion and Plea Agreement) Act**
[163] S.19(1) **CJPNA**

One can construe all parties to include the DPP (all prosecutors), defence counsel and accused person and Court staff.

All information [164] touching and concerning a plea agreement is secret and confidential until it is presented to the Court. Where the plea agreement has been sealed by the Court then information contained therein can only be released by an order of the Court.

Any person having possession of or control over any documents, information or records, who communicates or attempts to communicate anything contained in such documents, records or information shall be guilty of an offence and is liable on summary conviction before a RM to a fine not exceeding $1 million or twelve (12) months imprisonment or to both fine and imprisonment[165].

Furthermore, any person to whom confidential information is communicated with in accordance with the provisions of the **CJPNA** shall regard and deal with such information as secret and confidential[166].

Where such a person having received this information communicates or attempts to communicate it with any other person then he/she is guilty of an offence and is liable on summary conviction before a RM to a fine not exceeding $1 million or twelve (12) months imprisonment or to both fine and imprisonment[167].

ACCEPTANCE OF PLEAS BY PROSECUTORS

A few words on the acceptance of pleas in general again to ensure that outrages to public sensibilities and public justice *ala* ***Lloydell Richards*** do not occur and recur. The guidelines are an adaptation of the **ATTORNEY-GENERAL'S GUIDELINES ON THE ACCEPTANCE OF PLEAS[168]** and dicta in the Australian decisions of ***GAS v Regina*[169] and *R v McQuire & Porter (No. 2)*[170].** They are put forward for discussion and consideration and one is not bound by them.

The guidelines as framed are intended to cover formal situations pursuant to the provisions of the **CJPNA** and also informal plea agreements.

[a] Justice in this jurisdiction, save in the most exceptional circumstances, is conducted in public. This includes the acceptance of pleas by the prosecution and sentencing.

[b] While there is no code for prosecutors in Jamaica which sets out the circumstances in which pleas to a reduced number of charges, or less serious charges, can be accepted,

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[164] S.19(1)(2) **CJPNA**
[165] S.19(2) **CJPNA**
[166] S.19(3) **CJPNA**
[167] S.19(4) **CJPNA**
[168] [2001] 1 Cr. App.R. 28
[169] [2004] HCA 22; 217 CLR 198; 206 ALR 116; 78 ALJR 786 (19 May 2004) *en banc* judgment of Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ
[170] [2000] QCA 40 (10 February 2000) per De Jersey CJ

where this is done, the prosecution should be prepared to explain their reasons in open court.

In the Bahamas and Trinidad and Tobago limitations are placed on the types of pleas agreements that prosecutors can negotiate. In these two (2) CARICOM territories prosecutors are forbidden to

> …suggest, conclude or participate in any plea discussion that requires the accused person to plead guilty to an offence that—
>
> [a] is not disclosed by the evidence;
>
> [b] inadequately reflects the gravity of the provable conduct of the accused person unless, in exceptional circumstances, the charge is justifiable in terms of the benefits that will accrue to the administration of justice, the protection of society, or the protection of the accused;
>
> [c] requires the prosecutor to withhold or distort evidence[171].

It is suggested that these public interest provisions be included in the Jamaican **CJPNA** and even if Parliament is not so minded to include these provisions that these provisions be included in any future code being drafted by the Office of the Director of Public Prosecutions on plea discussions and plea agreements.

[c] Where plea and sentence are being discussed in chambers the prosecution advocate should at the outset, if necessary, remind the judge of the principle that an independent record must always be kept of such discussions. The record made by the Court should be made available to the prosecuting authority. The prosecution advocate should also make a full note of such an event, recording all decisions and comments. Please be aware that these notes may be called upon for scrutiny and review by other tribunals (e.g. Full Court, Court of Appeal) and in exceptional cases it may be that the prosecutor's notes may have to be disclosed.

[d] Where there is to be a discussion on plea and sentence and the prosecution advocate takes the view that the circumstances are not exceptional, then it is the duty of that advocate to remind the judge of the relevant decisions of the Court of Appeal and disassociate himself or herself from involvement in any discussion on sentence. The advocate should not do or say anything which could be construed as expressly or impliedly agreeing to a particular sentence.

[e] When a case is listed for trial and the prosecution forms the view that the appropriate course is to accept a plea before the proceedings commence or continue, or to offer no evidence on the indictment or any part of it, the prosecution should whenever

[171] This provision is not in the Bahamian legislation.

practicable, speak with the victim or the victim's family, so that the position can be explained and their views and interests can be taken into account as part of the decision making process. The victim or victim's family should then be kept informed and decisions explained once they are made at court. The victim or victim's family should also be inside the Courtroom when the Crown takes the drastic step.

[f] There should be a basis in law for accepting the plea. So one ought not to accept pleas for manslaughter in cases which are plainly murder or carnal abuse/indecent assault for clear cases of rapes etc.

[g] The Crown ought to resist blandishments from judges who treat court as a bird shoot and that they have their bag/quota of cases to be acquired/removed and seek to urge this view on the prosecutors to move cases along. For even though justice delayed is justice denied – Justice rushed is also justice crushed.

[h] Overall the interests of justice – not only for the accused person - but for the victim and victim's family are paramount. Plea agreements must be carefully considered and negotiations carefully thought out and not entered into lightly and it must be carefully thought-out what impact the evidence of the cooperating defendant will have on the prosecution's case.

[i] The seriousness and extent of the accused person's role in the offence must be clearly considered.

[j] Is the sentence proposed adequate to punish the guilty conduct?

[k] It is also advisable that the Crown also consult and canvass the views of the police and other investigative bodies relevant to the matter (INDECOMM, FID etc) before accepting any plea to a lesser offence.

CONCLUSION

This legislation culminates years of lobbying by the Jamaica Constabulary Force who see it as an essential tool for crime fighting especially in the struggle against organised crime.

It remains to be seen how well it will work. Members of the Jamaican bar have been heard to dismiss the legislation derisively as *"the informer law".*

We expect the usual constitutional challenges (they will fail) or applications for Judicial Review (enjoying a renaissance in Jamaica) in relation to decisions made by the Court or the Prosecutor.

The greatest hurdle that will be faced is a legal culture that does not readily embrace change and where accused persons do not plead guilty even in the face of overwhelming evidence and an *"informer fe dead culture"* which permeates all strata of society.

One adopts the words of White J of the United States Supreme Court who held[172]:-

> The issue we deal with is inherent in the criminal law and its administration, because guilty pleas are not constitutionally forbidden, because the criminal law characteristically extends to judge or jury a range of choice in setting the sentence in individual cases, and because both the State and the defendant often find it advantageous to preclude the possibility of the maximum penalty authorized by law.
>
> For a defendant who sees slight possibility of acquittal, the advantages of pleading guilty and limiting the probable penalty are obvious -- his exposure is reduced, the correctional processes can begin immediately, and the practical burdens of a trial are eliminated.
>
> For the State, there are also advantages -- the more promptly imposed punishment after an admission of guilt may more effectively attain the objectives of punishment, and, with the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof.
>
> It is this mutuality of advantage that perhaps explains the fact that, at present, well over three-fourths of the criminal convictions in this country rest on pleas of guilty, a great many of them no doubt motivated at least in part by the hope or assurance of a lesser penalty than might be imposed if there were a guilty verdict after a trial to judge or jury.

With 588 cases for trial in the Home Circuit Court (340 of them murder), over 140 in St. Catherine and over 72 in St. Ann it behoves all of us as the stakeholders in the legal system to do our part in preventing the entire system from collapsing or at the very least from grinding to a halt.

[172] ***Brady v United States*** (1970)397 U.S. 742

Jeremy C. Taylor
Deputy DPP
September 29, 2012

- [i] Charges should not be laid with the intention of providing scope for subsequent charge negotiations
- The charges to be proceeded must bear a reasonable relationship to the nature of your alleged criminal conduct The charges must provide an adequate basis for an appropriate sentence
- There must be evidence to support the charges
- The prosecution should not agree to a plea bargaining proposal initiated by the defence if you continue to assert your innocence with respect to charges to which you have offered to plead guilty
- Whether you are willing to co-operate with the investigation or prosecution of others, or the extent to which you have already done so
- Whether the sentence that is likely to be imposed if the charges are varied as proposed would be appropriate for the criminal conduct involved. (Here, it is also relevant to take into account whether they are already serving a term of imprisonment.)
- The desirability of dealing with the case in a prompt and certain manner
- Your past criminal history
- The strength of the prosecution case
- The likelihood of adverse consequences to witnesses
- Whether it will save a vulnerable witness or a victim from the stress of testifying in a trial
- Where there has been financial loss to the Commonwealth or any person – whether you have made arrangements for reimbursement
- The need to avoid delay in resolving other pending cases
- The time and expense involved in a trial and any appeal proceedings
- The views of the referring department or agency; and

- The views of the victim if available, and where it is appropriate to take those into account
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[ii] **ATTORNEY GENERAL'S GUIDELINES ON THE ACCEPTANCE OF PLEAS (REVISED 2009)**
Attorney General's guidelines on the acceptance of pleas and the prosecutor's role in the sentencing exercise

A: Foreword

A1. Prosecutors have an important role in protecting the victim's interests in the criminal justice process, not least in the acceptance of pleas and the sentencing exercise. The basis of plea, particularly in a case that is not contested, is the vehicle through which the victim's voice is heard. Factual inaccuracies in pleas in mitigation cause distress and offence to victims, the families of victims and witnesses. This can take many forms but may be most acutely felt when the victim is dead and the family hears inaccurate assertions about the victim's character or lifestyle. Prosecution advocates are reminded that they are required to adhere to the standards set out in the Victim's Charter, which places the needs of the victim at the heart of the criminal justice process, and that they are subject to a similar obligation in respect of the Code of Practice for Victims of Crime.

A2. The principle of fairness is central to the administration of justice. The implementation of Human Rights Act 1998 in October 2000 incorporated into domestic law the principle of fairness to the accused articulated in the European Convention on Human Rights. Accuracy and reasonableness of plea plays an important part in ensuring fairness both to the accused and to the victim.

A3. The Attorney General's Guidelines on the Acceptance of Pleas issued on December 7, 2000 highlighted the importance of transparency in the conduct of justice. The basis of plea agreed by the parties in a criminal trial is central to the sentencing process. An illogical or unsupported basis of plea can lead to an unduly lenient sentence being passed, and has a consequential effect where consideration arises as to whether to refer the sentence to the Court of Appeal under section 36 of the Criminal Justice Act 1988.

A4. These Guidelines, which replace the Guidelines issued in October 2005, give guidance on how prosecutors should meet these objectives of protection of victims' interests and of securing fairness and transparency in the process. They take into account paragraphs IV.45.4 and following of the Consolidated Criminal Practice Direction, amended May 2009 and the guidance issued by the Court of Appeal (Criminal) Division in R -v- Beswick [1996] 1 Cr.App.R. 343, R -v- Tolera [1999] 1 Cr.App.R. 25 and R v Underwood [2005] 1 Cr.App.R 178. They complement the Bar Council Guidance on Written Standards for the Conduct of Professional Work issued with the 7th edition of the Code of Conduct for the Bar of England and Wales and the Law Society's Professional Conduct Rules. When considering the acceptance of a guilty plea prosecution advocates are also reminded of the need to apply "The Farquharson Guidelines on The Role and Responsibilities of the Prosecution Advocate".

A5. The Guidelines should be followed by all prosecutors and those persons designated under section 7 of the Prosecution of Offences Act 1985 (designated caseworkers) and apply to prosecutions conducted in England and Wales.

B: General Principles

B1. Justice in this jurisdiction, save in the most exceptional circumstances, is conducted in public. This includes the acceptance of pleas by the prosecution and sentencing.

B2. The Code for Crown Prosecutors governs the prosecutor's decision-making prior to the commencement of the trial hearing

and sets out the circumstances in which pleas to a reduced number of charges, or less serious charges, can be accepted .

B3. When a case is listed for trial and the prosecution form the view that the appropriate course is to accept a plea before the proceedings commence or continue, or to offer no evidence on the indictment or any part of it, the prosecution should whenever practicable speak to the victim or the victim's family, so that the position can be explained. The views of the victim or the family may assist in informing the prosecutor's decision as to whether it is the public interest, as defined by the Code for Crown Prosecutors, to accept or reject the plea. The victim or victim's family should then be kept informed and decisions explained once they are made at court.

B4. The appropriate disposal of a criminal case after conviction is as much a part of the criminal justice process as the trial of guilt or innocence. The prosecution advocate represents the public interest, and should be ready to assist the court to reach its decision as to the appropriate sentence. This will include drawing the court's attention to:

- any victim personal statement or other information available to the prosecution advocate as to the impact of the offence on the victim;
- where appropriate, to any evidence of the impact of the offending on a community;
- any statutory provisions relevant to the offender and the offences under consideration;
- any relevant sentencing guidelines and guideline cases; and
- the aggravating and mitigating factors of the offence under consideration.

B5. The prosecution advocate may also offer assistance to the court by making submissions, in the light of all these factors, as to the appropriate sentencing range. In all cases, it is the prosecution advocate's duty to apply for appropriate ancillary orders, such as anti-social behaviour orders and confiscation orders. When considering which ancillary orders to apply for, prosecution advocates must always have regard to the victim's needs, including the question of his or her future protection.

C: The Basis of Plea

C1. The basis of a guilty plea must not be agreed on a misleading or untrue set of facts and must take proper account of the victim's interests. An illogical or insupportable basis of plea will inevitably result in the imposition of an inappropriate sentence and is capable of damaging public confidence in the criminal justice system. In cases involving multiple defendants the bases of plea for each defendant must be factually consistent with each other.

C2. When the defendant indicates an acceptable plea, the defence advocate should reduce the basis of the plea to writing. This must be done in all cases save for those in which the defendant has indicated that the guilty plea has been or will be tendered on the basis of the prosecution case.

C3. The written basis of plea must be considered with great care, taking account of the position of any other relevant defendant where appropriate. The prosecution should not lend itself to any agreement whereby a case is presented to the sentencing judge on a misleading or untrue set of facts or on a basis that is detrimental to the victim's interests. There will be cases where a defendant seeks to mitigate on the basis of assertions of fact which are outside the scope of the prosecution's knowledge. A typical example concerns the defendant's state of mind. If a defendant wishes to be sentenced on this basis, the prosecution advocate should invite the judge not to accept the defendant's version unless he or she gives evidence on oath to be tested in cross-examination. Paragraph IV.45.14 of the Consolidated Criminal Practice Direction states that in such circumstances the

defence advocate should be prepared to call the defendant and, if the defendant is not willing to testify, subject to any explanation that may be given, the judge may draw such inferences as appear appropriate.

C4. The prosecution advocate should show the prosecuting authority any written record relating to the plea and agree with them the basis on which the case will be opened to the court. If, as may well be the case, the basis of plea differs in its implications for sentencing or the making of ancillary orders from the case originally outlined by the prosecution, the prosecution advocate must ensure that such differences are accurately reflected in the written record prior to showing it to the prosecuting authority.

C5. It is the responsibility of the prosecution advocate thereafter to ensure that the defence advocate is aware of the basis on which the plea is accepted by the prosecution and the way in which the prosecution case will be opened to the court.

C6. In all cases where it is likely to assist the court where the sentencing issues are complex or unfamiliar the prosecution must add to the written outline of the case which is served upon the court a summary of the key considerations. This should take the form of very brief notes on:
- any relevant statutory limitations
- the names of any relevant sentencing authorities or guidelines
- the scope for any ancillary orders (e.g. concerning anti-social behaviour, confiscation or deportation will need to be considered.
- The outline should also include the age of the defendant and information regarding any outstanding offences.

C7. It remains open to the prosecutor to provide further written information (for example to supplement and update the analysis at later stages of the case) where he or she thought that likely to assist the court, or if the judge requests it.

C8. When the prosecution advocate has agreed the written basis of plea submitted by the defence advocate, he or she should endorse the document accordingly. If the prosecution advocate takes issue with all or part of the written basis of plea, the procedure set out in the Consolidated Criminal Practice Direction (and in Part 37.10(5) of the Criminal Procedure Rules) should be followed. The defendant's basis of plea must be set out in writing identifying what is in dispute; the court may invite the parties to make representations about whether the dispute is material to sentence; and if the court decides that it is a material dispute, the court will invite further representations or evidence as it may require and decide the dispute in accordance with the principles set out in R v Newton, 77 Cr.App.R.13, CA. The signed original document setting out the disputed factual matters should be made available to the trial judge and thereafter lodged with the court papers, as it will form part of the record of the hearing.

C9. Where the basis of plea cannot be agreed and the discrepancy between the two accounts is such as to have a potentially significant effect on the level of sentence, it is the duty of the defence advocate so to inform the court before the sentencing process begins. There remains an overriding duty on the prosecution advocate to ensure that the sentencing judge is made aware of the discrepancy and of the consideration which must be given to holding a Newton hearing to resolve the issue. The court should be told where a derogatory reference to a victim, witness or third party is not accepted, even though there may be no effect on sentence.

C10. As emphasised in paragraph IV.45.10 of the Consolidated Criminal Practice Direction, whenever an agreement as to the basis of plea is made between the prosecution and defence, any such agreement will be subject to the approval of the trial judge, who may of his or her own motion disregard the agreement and direct that a Newton hearing should be held to determine the proper basis on which sentence should be passed.

C11. Where a defendant declines to admit an offence that he or she previously indicated should be taken into consideration, the

prosecution advocate should indicate to the defence advocate and the court that, subject to further review, the offence may now form the basis of a new prosecution.

D: Sentence Indications

D1. Only in the Crown Court may sentence indications be sought. Advocates there are reminded that indications as to sentence should not be sought from the trial judge unless issues between the prosecution and defence have been addressed and resolved. Therefore, in difficult or complicated cases, no less than seven days notice in writing of an intention to seek an indication should normally be given to the prosecution and the court. When deciding whether the circumstances of a case require such notice to be given, defence advocates are reminded that prosecutors should not agree a basis of plea unless and until the necessary consultation has taken place first with the victim and/or the victim's family and second, in the case of an independent prosecution advocate, with the prosecuting authority.

D2. If there is no final agreement about the plea to the indictment, or the basis of plea, and the defence nevertheless proceeds to seek an indication of sentence, which the judge appears minded to give, the prosecution advocate should remind him or her of the guidance given in R v Goodyear (Karl) [2005] EWCA 888 that normally speaking an indication of sentence should not be given until the basis of the plea has been agreed or the judge has concluded that he or she can properly deal with the case without the need for a trial of the issue.

D3. If an indication is sought, the prosecution advocate should normally enquire whether the judge is in possession of or has access to all the evidence relied on by the prosecution, including any victim personal statement, as well as any information about relevant previous convictions recorded against the defendant.

D4. Before the judge gives the indication, the prosecution advocate should draw the judge's attention to any minimum or mandatory statutory sentencing requirements. Where the prosecution advocate would be expected to offer the judge assistance with relevant guideline cases or the views of the Sentencing Guidelines Council, he or she should invite the judge to allow them to do so. Where it applies, the prosecution advocate should remind the judge that the position of the Attorney General to refer any sentencing decision as unduly lenient is unaffected. In any event, the prosecution advocate should not say anything which may create the impression that the sentence indication has the support or approval of the Crown.

E: Pleas In Mitigation

E1. The prosecution advocate must challenge any assertion by the defence in mitigation which is derogatory to a person's character, (for instance, because it suggests that his or her conduct is or has been criminal, immoral or improper) and which is either false or irrelevant to proper sentencing considerations. If the defence advocate persists in that assertion, the prosecution advocate should invite the court to consider holding a Newton hearing to determine the issue.

E2. The defence advocate must not submit in mitigation anything that is derogatory to a person's character without giving advance notice in writing so as to afford the prosecution advocate the opportunity to consider their position under paragraph E1. When the prosecution advocate is so notified they must take all reasonable steps to establish whether the assertions are true. Reasonable steps will include seeking the views of the victim. This will involve seeking the views of the victim's family if the victim is deceased, and the victim's parents or legal guardian where the victim is a child. Reasonable steps may also include seeking the views of the police or other law enforcement authority, as appropriate. An assertion which is derogatory to a person's character will rarely amount to mitigation unless it has a causal connection to the circumstances of the offence or is otherwise

relevant to proper sentencing considerations.

E3. Where notice has not been given in accordance with paragraph E2, the prosecution advocate must not acquiesce in permitting mitigation which is derogatory to a person's character. In such circumstances, the prosecution advocate should draw the attention of the court to the failure to give advance notice and seek time, and if necessary, an adjournment to investigate the assertion in the same way as if proper notice had been given. Where, in the opinion of the prosecution advocate, there are substantial grounds for believing that such an assertion is false or irrelevant to sentence, he or she should inform the court of their opinion and invite the court to consider making an order under section 58(8) of the Criminal Procedure and Investigations Act 1996, preventing publication of the assertion.

E4. Where the prosecution advocate considers that the assertion is, if true, relevant to sentence, or the court has so indicated, he or she should seek time, and if necessary an adjournment, to establish whether the assertion is true. If the matter cannot be resolved to the satisfaction of the parties, the prosecution advocate should invite the court to consider holding a Newton hearing to determine the issue.

Her Majesty's Attorney General
[issued 5 November to take effect 1 December 2009]

[iii] In paragraphs 63-68 the English Court of Appeal dealt with the obligations of defence counsel.

[63] Subject to the judge's power to give an appropriate reminder to the advocate for the defendant the process of seeking a sentence indication should normally be started by the defendant.

[64] Whether or not the judge has given an appropriate reminder, the defendant's advocate should not seek an indication without written authority, signed by his client, that he, the client wishes to seek an indication.

[65] The advocate is personally responsible for ensuring that his client fully appreciates that:

(a) he should not plead guilty unless he is guilty;

(b) any sentence indication given by the judge remains subject to the entitlement of the Attorney General (where it arises) to refer an unduly lenient sentence to the Court of Appeal;

(c) any indication given by the judge reflects the situation at the time when it is given, and that if a "guilty plea" is not tendered in the light of that indication the indication ceases to have effect;

(d) any indication which may be given relates only to the matters about which an indication is sought. Thus, certain steps, like confiscation proceedings, follow automatically, and the judge cannot dispense with them, nor, by giving an indication of sentence, create an expectation that they will be dispensed with.

[66] An indication should not be sought while there is any uncertainty between the prosecution and the defence about an acceptable plea or pleas to the indictment, or any factual basis relating to the plea. Any agreed basis should be reduced into writing before an indication is sought. Where there is a dispute about a particular fact which counsel for the defendant believes to be effectively immaterial to the sentencing decision, the difference should be recorded, so that the judge can make up his own mind.

[67] The judge should never be invited to give an indication on the basis of what would be, or what would appear to be a "plea bargain". He should not be asked or become involved in discussions linking the acceptability to the prosecution of a plea or basis of plea, and the sentence which may be imposed. He is not conducting nor involving himself in any plea bargaining. In short, he is not to be asked to indicate levels of sentence which he may have in mind depending on possible different pleas. Thus, for example, he should refuse to

give an indication based on the possibility that the defendant might plead guilty to s 18, alternatively s 20, alternatively s 47.

[68] In the unusual event that the defendant is unrepresented, he would be entitled to seek a sentence indication of his own initiative. There would be difficulties in either the judge or prosecuting counsel taking any initiative, and informing an unrepresented defendant of this right. That might too readily be interpreted as or subsequently argued to have been improper pressure.

Finally in paragraphs 69 -70 he outlined the duties of the Crown relying mostly on the ***Attorney-General's Guidelines on the Acceptance of Pleas***[iii] promulgated in 2000 by Lord Williams of Mostyn then Attorney-General of the United Kingdom.

[69] As the request for indication comes from the defence, the prosecution is obliged to react, rather than initiate the process. This presented no problem in the days before Turner, when the common understanding, universally applied, was that the prosecution did not, indeed was obliged not to involve itself in or appeal against a sentencing decision. None of that continues to apply.

[70] We must expressly identify a number of specific matters for which the advocate for the prosecution is responsible.

(a) If there is no final agreement about the plea to the indictment, or the basis of plea, and the defence nevertheless proceeds to seek an indication, which the judge appears minded to give, prosecuting counsel should remind him of this guidance, that normally speaking an indication of sentence should not be given until the basis of the plea has been agreed, or the judge has concluded that he can properly deal with the case without the need for a Newton hearing.

(b) If an indication is sought, the prosecution should normally enquire whether the judge is in possession of or has had access to all the evidence relied on by the prosecution, including any personal impact statement from the victim of the crime, as well as any information of relevant previous convictions recorded against the defendant.

(c) If the process has been properly followed, it should not normally be necessary for counsel for the prosecution, before the judge gives any indication, to do more than, first, draw the judge's attention to any minimum or mandatory statutory sentencing requirements, and where he would be expected to offer the judge assistance with relevant guideline cases, or the views of the Sentencing Guidelines Council, to invite the judge to allow him to do so, and second, where it applies, to remind the judge that the position of the Attorney General to refer any eventual sentencing decision as unduly lenient is not affected.

(d) In any event, counsel should not say anything which may create the impression that the sentence indication has the support or approval of the Crown.