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**Sentence Reductions for a Guilty Plea:  
The Impact of the Revised Guideline on Rates of Pleas and 'Cracked  
Trials'**

**Journal of Criminal Law, in press 2021**

Julian V. Roberts and Jose Pina-Sanchez

**Introduction**

Defendants in all common law jurisdictions<sup>1</sup> benefit from plea-based sentence reductions, although the magnitude of these reductions is generally a matter for trial court discretion.<sup>2</sup> Without clear guidance from a sentencing council or the Court of Appeal, *prospectively*, defendants and their legal advisors can have only a vague idea of the level of reduction likely to be awarded. *Retrospectively*, offenders seldom know exactly how their sentence was affected by their guilty plea, since judgements often fail to identify the specific reduction awarded; the effect of the plea is bundled together with other factors such as remorse, assistance to the prosecution, and personal mitigation.

In contrast to the highly discretionary approach found in other common law jurisdictions, plea-based reductions in England and Wales<sup>3</sup> are underpinned by statute and regulated by a Sentencing Council guideline.<sup>4</sup> The guideline regarding plea-based sentence reductions is therefore one of the unique<sup>5</sup> features of sentencing in this jurisdiction. The current guideline (hereafter 'the revised Guideline') issued by the Council in 2017 amended in 2007 a previous version from the previous statutory body, Sentencing Guidelines Council. The revised guideline aimed (along with related initiatives such as the early plea schemes) to reduce the volume of 'late' guilty pleas – those occurring after the defendant's first reasonable

opportunity to plead. This would also have the effect of reducing the number of 'cracked trials'.

### *The Context*

Important issues relating to retributive and utilitarian motives are at stake. Regarding the former, plea-based reductions should be transparent, reasonably predictable, and should rest upon a principled foundation. Sentencing in England and Wales is informed by retributivism; sentences should be consistent with, or at least not greatly undermine proportionality.<sup>6</sup> Very large reductions would undermine proportional sentencing, as two equally culpable defendants convicted of the same crime could receive very different sentences if one enters an early plea while the other is convicted only after a contested trial. Since an early plea may change the sentence from custody to a community order, one defendant may be spared imprisonment while his co-accused was confined. The guideline attempts to protect proportionality by imposing a maximum of one third on the reduction awarded, even for early pleas.

With respect to utilitarian objectives, plea reductions need to achieve a balance. Large reductions may encourage 'wrongful' pleas as innocent defendants plead guilty, having been blinded to the costs of a conviction and attracted by the greatly reduced sentence. On the other hand, trivial sentence reductions will result in some defendants who otherwise would have pleaded guilty deciding to take their chances at trial. Very small reductions are also inappropriate because defendants are being asked to forgo a key due process entitlement, namely requiring the State to prove the offence beyond all reasonable doubt in a public forum.

A sentence reduction guideline needs to avoid two adverse, unintended consequences: (i) discouraging guilty pleas through a lack of incentive (as defendants see little benefit in pleading guilty) (ii) increasing the number of pleas from defendants who have a legal

defence, but who are pleading guilty purely to benefit from the reduction. If fewer defendants plead guilty, this will inevitably increase court and prison costs. Fewer guilty pleas create more trials, more admissions to prison, and for longer terms. It also means more victims and witnesses are required to testify at trial. With respect to the second adverse consequence, the Guideline makes it clear that its purpose is only to encourage *earlier* but not *more* guilty pleas: 'If the guidelines are successful, the proportion of pleas entered at the earliest stage of the court process will increase; the percentage of guilty pleas entered late in the process will decline. However, the overall proportion of cases resolved through a guilty plea should remain largely unchanged.'<sup>7</sup>

### **Classifying Trials**

The Ministry of Justice assigns all cases to one of three categories.<sup>8</sup> *Effective trials* in the magistrates' courts are classified as those which start on the scheduled date and reach a conclusion. In the Crown Court, a trial is recorded once a jury has been sworn. *Ineffective trials* are those which, for a variety of reasons, do not begin on the due date, and which require rescheduling. Finally, *Cracked trials* are those which do not commence on the scheduled date and which are not rescheduled, as they are no longer required. Again, a variety of circumstances may result in the trial being abandoned. The prosecution may offer no evidence at trial – effectively 'dropping the case'<sup>9</sup> – or the defendant may plead guilty near or after the commencement of the trial. Some impending trials are cancelled close to the trial date as a result of the defendant changing plea from not guilty to guilty. By the time a case nears the trial stage, significant resources may have been consumed, by the police, the Crown Prosecution Service and HMCTS. The volume of late pleas has long been a cause for concern. Almost 20 years ago the Royal Commission on Criminal Justice argued that a 'clearer system of graduated discounts would help alleviate the problem of cracked trials'.<sup>10</sup>

## **The Evolution of the Sentencing Guideline**

### *Structure of the Guideline*

As with the offence-specific guidelines, the Council's Plea-based sentence reduction Guideline lays down a staged approach for courts to follow when determining the appropriate reduction for a guilty plea. The guideline prescribes levels of reduction according to a sliding scale: later pleas attract more modest sentence reductions. If a plea is indicated at the first stage<sup>11</sup> of the proceedings, a maximum sentence reduction of one third should normally be made. A plea entered after this point in the process attracts a maximum reduction of one quarter (subject to several exceptions noted in the guideline). The reduction decreases to a maximum of one tenth if the defendant pleads guilty on the first day of trial, and may decline still further if the plea is entered during the trial. In addition to reducing the quantum of punishment, as noted a plea, particularly if entered early, may also result in the imposition of a different, less severe sanction. In this way, a plea can change the nature as well as the quantum of punishment imposed.

A guideline containing a system of graduated reductions was duly introduced by the Sentencing Guidelines Council (SGC) in 2004.<sup>12</sup> The SGC reviewed the guideline and re-issued a revised version in 2007.<sup>13</sup> In 2010 the SGC was replaced by the Sentencing Council, created by the Coroners and Justice Act 2009. Curiously, although a guideline had been in place for six years (and had been revised only three years earlier), s. 120(3(a) of the Coroners Act required the Council to 'prepare sentencing guidelines about the discharge of a court's duty under section 144 of the Criminal Justice Act 2003 (c.44) (reduction in sentences for guilty pleas)'. The Council's work on a revised guideline was stalled when the government indicated it might legislate a 50% reduction, only to ultimately resile from this proposal. The Council issued a revised guideline in 2017.

## **Objectives of the 2017 Guideline**

The Sentencing Council noted in its consultation document that the previous guideline was ‘not always applied consistently’<sup>14</sup> and that the new guideline was intended to ‘provide more certainty’.<sup>15</sup> As noted, the 2017 guideline was intended only to encourage *earlier* guilty pleas and not *more* guilty pleas: If the guideline has contributed towards accelerating the entry of guilty pleas, the proportion of pleas entered at the earliest stage of the court process should have increased while the percentage of guilty pleas entered late in the process would have declined. However, the overall proportion of cases resolved through a guilty plea should remain largely unchanged.’<sup>16</sup> One possible benefit of the 2017 guideline may have been a reduction in the number of such cracked trials, by encouraging defendants who intend to plead guilty to do so early rather than late in the process.<sup>17</sup> In 2015, as the Council was revising its guideline, cracked trials accounted for approximately 30% of guilty plea cases.<sup>18</sup>

## **Changes introduced by the revised guideline**

The 2017 guideline attempted to achieve its objectives by modifying the previous guideline in several ways. First, the previous (2007) guideline contained recommendations for levels rather than maximums. The 2017 guideline specifies *maximum* levels of reduction. Another change was that in the definitive, revised guideline, in order to benefit from the maximum reduction of one third a defendant must plead guilty, or indicate a guilty plea at the first hearing. This applies to all cases, including indictable only cases. This brief article reviews recent data trends relating to the impact of the guideline, drawing upon Ministry of Justice data before and after the introduction of the revised guideline in 2017. Did it achieve its stated objectives?

## **Effects of The Revised Guideline on Pleas in the Crown Court**

### *(a) Guilty Plea Rates in the Crown Court*

The guilty plea rate is the number of defendants pleading guilty as a proportion of all defendants who entered a plea. As noted, one of the guideline's objectives was to encourage defendants intending to plead guilty to enter their plea earlier rather than later in the criminal process. The guideline was not intended to change the rate of cases resolved by a guilty plea. Table 1 summarises trends in guilty pleas in the Crown Court. These trends include all cases disposed of during the reporting period. Ministry statistics indicate that overall guilty plea rates remained stable following the introduction of the 2017 Guideline. Data from the two year prior to the introduction of the Guideline (2015/2016) reveal an average guilty plea rate of 67.5%<sup>19</sup> while the average in the two years after 2017 (2018/2019) was 67%.<sup>20</sup> One adverse impact – a higher proportion of defendants pleading guilty, including possibly some who are innocent – appears to have been avoided.

### *(b) Timing of Guilty Pleas*

Although the overall plea rate remained stable, the distribution of pleas over time did change over the period examined. Using the Ministry data, we defined as 'early' all guilty pleas entered prior to trial. This category includes pleas entered at the plea and case management hearing ('PCMH') or at a 'Newton' hearing (with no further trial time required). We combined the categories of 'guilty plea cracked trial' and 'plea at trial' to constitute 'late' pleas. (Almost all of these cases -- 99% in each year -- involved a cracked trial rather than a late plea entered once the trial has commenced.) With respect to the balance of early vs late pleas, Table 1 reveals that the percentage of early pleas *declined* from 70% in 2014 to a low of 58% in 2018, rising slightly to 61% in 2019 (Table 1). The proportion of late pleas rose from 23% in 2014 to 31% in 2019. If we exclude cases where the timing of the plea was unknown, in 2014, 75% of these pleas were early, 25% late; in 2019 early pleas fell to 66%, late pleas

34%. In short, early pleas accounted for a smaller percentage of pleas after 2017, the opposite of expectation.

Table 1  
Distribution of Guilty Pleas by Time of Plea, Crown Court (2014-2019)

	2014	2015	2016	2017	2018	2019
<b>Early Plea</b>	44,697 70%	42,406 66%	36,544 64%	31,123 60%	26,084 58%	25,157 61%
<b>Late Plea</b>	15,014 23%	16,573 26%	16,536 29%	17,121 33%	14,372 32%	12,856 31%
<b>Timing unknown</b>	4,582 7%	5,410 8%	4,377 8%	3,502 7%	4,513 10%	3,421 8%
<b>Guilty Plea Total</b>	64,293 100%	64,389 100%	57,457 100%	51,746 100%	44,969 100%	41,434 100%

Notes: percentages rounded; see text for definitions of 'early' and 'late'.

### *Specific Offence Categories*

The next analyses explore the possibility that the overall trends mask differential effects for specific offence categories. Figure 1 confirms that plea rates for four offence categories (violence; theft; sexual offences and drug offences) were stable both before and after introduction of the guideline for all offence categories, with the exception of sexual offences. The proportion of guilty pleas rose for sexual offences, from 36% in 2014 to 42% in 2019. It is unclear why the guilty plea rate rose for this category of offence but the explanation is unlikely to be related to the guideline. To summarise, the revised 2017 guideline appears to have failed to encourage more early guilty pleas.



Figure 1  
 Guilty pleas as a percentage of all cases, Four Offence Categories, before and after the 2017  
 Guideline<sup>21</sup>

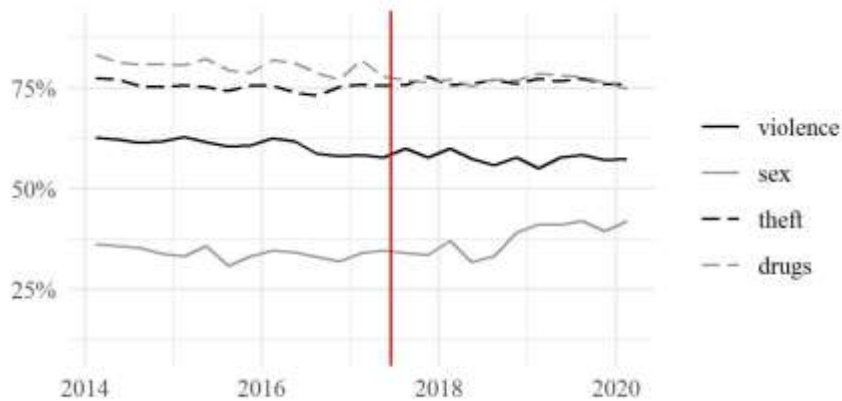
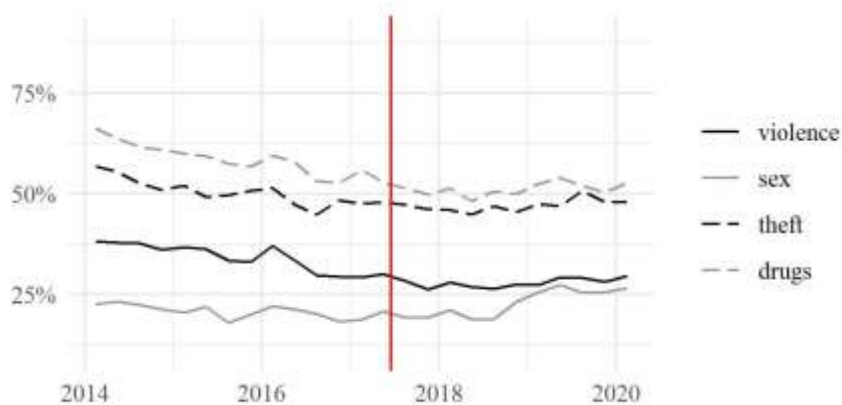


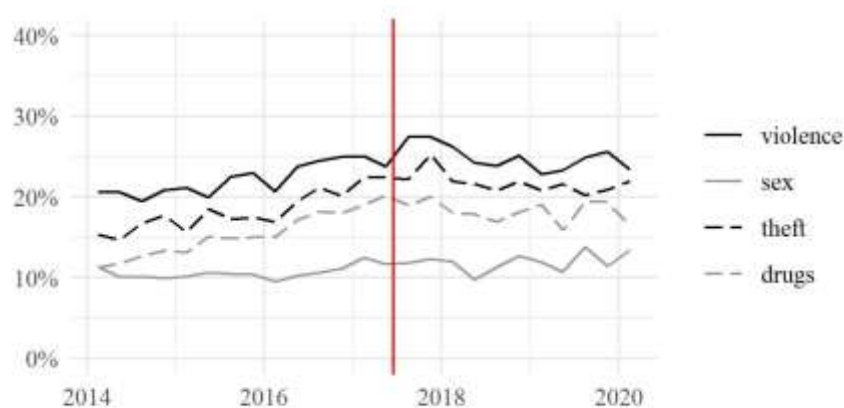
Figure 2 provides category-specific trends and confirms for the individual categories the pattern emerging for the total sample of cases. The percentage of early pleas (before trial) had been declining prior to 2017, but remained stable thereafter for crimes of violence, theft and drugs. Once again, a different pattern emerged for sexual offences. For this category of offence, early pleas accounted for a slightly higher percentage of pleas a year after the guideline came into force.

Figure 2  
 Early Guilty pleas as a percentage of all cases, Four Offence Categories before and after the  
 2017 Guideline



Finally, Figure 3 displays the offence-specific rates of cracked trials which were increasing prior to 2017, but again remained relatively stable thereafter (Figure 3). The average percentage of cracked trials in the Crown Court from the third quarter of 2017 to the first of 2020 (11 quarters in total) was 34.31%. The average across the 11 quarters up to the second quarter of 2017 was 34.46%.

Figure 3  
Guilty pleas associated with a cracked trial as a percentage of all cases, Four Offence Categories before and after the 2017 Guideline



It is unclear why the overall cracked trial rate was rising in the pre-guideline period, or why it failed to decline following implementation of the 2017 guideline. Perhaps the elements of the guideline designed to encourage earlier guilty pleas were too modest to have any effect. Indirect support for this explanation comes from research conducted by the Sentencing Council. The Council's content analysis of Crown Court judges' sentencing remarks found that the new guideline was 'rarely mentioned'<sup>22</sup>, suggesting that any changes to the guideline were not sufficiently significant to be noted in judges' reasons for sentence. Moreover, although it was based on a small sample of interviews, the Council's report concluded that: 'the guideline did not seem to have any noticeable impact on defendants' pleading behaviour.'<sup>23</sup> Had the guideline been effective in changing defendants' perceptions, it should have been detected by research of this nature. A second explanation is that factors

unrelated to the level of sentence reduction guideline determine when the defendant decides to plead guilty. If this is the case, tweaking the guideline is unlikely to achieve any benefits in terms of expediting pleas from defendants who accept their guilt.

The revised guideline may have introduced greater certainty into the sentence reduction regime but it does not appear to have had the effect of eliciting earlier guilty pleas from defendants intending to plead guilty. At least this is the conclusion we draw from the trends two years after the revised guideline was introduced. It is possible that the guideline may still have this effect, but only after a longer period. The 2017 data reflect decision-making by defendants during the implementation period. Over the period 2017-2019 the late plea rate was steadily rising – for unknown reasons. This rising rate may be changing, as seen in the data in Table 1. The arrival of the Covid pandemic will inevitably obscure attempts to understand the longer-term effect of the revised guideline on defendants' decisions, research over a longer period is necessary.

#### *Causes of Cracked Trials*

Some information on the causes of trials being 'cracked' is available from the Ministry. Table 2 reveals that for the most recent complete year (2019), defence decisions accounted for approximately six 'cracked trial' cases in ten. The most frequent reason (accounting for 53% of cases) was a late guilty plea entered for the first time. These data provide no insight into the reasons for these late guilty pleas (for example whether it was due to late disclosure by the CPS, strategic decision-making by the defence, or some other reason). In light of the failure of the revised guideline to influence defendants' decision-making and thereby reduce the number of cracked trials, perhaps it is time to explore other solutions. Table 2 suggests that reasons relating to the CPS, including witness issues and termination on public interest grounds accounted for a substantial percentage (approximately

one quarter) of cases. Perhaps efforts to reduce the number of 'cracked trials' should focus upon challenges in this area.

Table 2  
Reasons for Cracked Trial, Percentage and Number of Cases (2019)

<b>Guilty plea entered late and for first time</b>	<b>53%</b> <b>(22,276)</b>
<b>Prosecution end case, insufficient evidence</b>	16% (6,638)
<b>Prosecution end case, witness absent/withdrawn</b>	15% (6,223)
<b>Prosecution end case on Public Interest grounds</b>	6% (2,534)
<b>Prosecution end case, adjournment refused</b>	4% (1,902)
<b>Guilty plea to alternate charge, first time offered by defence</b>	4% (1,619)
<b>Guilty plea entered late, having previously been rejected by prosecution</b>	2% (772)
<b>Other Reasons</b>	<1% (414)
<b><i>Total</i></b>	<b>100%</b> <b>(42,414)</b>

Source: HMCTS Libra Management Information System and HMCTS XHIBIT systems

### *Research Priorities*

Research involving offenders reported by the Sentencing Council suggests that the magnitude of the reductions is not a significant factor affecting their decision to plead, as evidenced by the absence of any positive effects in the trends reported here. The report notes that 'The main factor determining whether or not offenders plead guilty was the likelihood of being found guilty at trial.'<sup>24</sup> If this finding can be generalised to all defendants, adjusting the levels of reduction awarded is unlikely to change the pattern of pleas. Further research with litigants or their legal advisors would clarify this issue.

The large proportion of late pleas is likely to contain two problematic profiles. The most worrying profile is the defendant who has a legal defence to the charges laid, but who

ultimately pleads guilty simply to secure a reduced sentence. People who are held in remand might be particularly vulnerable in this respect. As Helm notes, the likelihood of defendants with a defence but who plead guilty simply to escape detention has been increased by the lengthy waiting times for a trial, and the expeditious means to enter a guilty plea.<sup>25</sup> The other profile of concern is defendants who delay their plea for purely strategic reasons – possibly in the hope that Crown witnesses may fail to attend at the trial. Any reform would seek to discourage this kind of decision-making. Taken together, a successful reform of the guideline would remove both profiles of late pleaders, reducing the incidence of wrongful convictions and conserving criminal justice resources by attracting earlier, legitimate guilty pleas.

### **Conclusion**

The failure to reduce the proportion of trials which 'crack' prior to opening should not distract us from the benefits of greater transparency achieved by the guideline. Defendants in all other common law jurisdictions must rely on their legal advisors to predict the likely benefits of pleading guilty. These predictions are often inaccurate as there is no clear regime of reductions to guide defendants and their legal advisors.<sup>26</sup> Defendants will also likely regard (reasonably) the plea reductions as reflecting the subjective views of individual judges. Finally, if both parties have a clear understanding of the likely sentence and reduction, this should facilitate negotiations (in the event that these take place). Publicly-declared levels of reduction also contribute to a level playing field, pre-trial. If the range of reductions is wide, and the sentence hard to predict, 'equality of arms' is compromised, as prosecutors may create great apprehension about the sentence, only to reassure the defendant with a steep reduction in the event that he or she pleads guilty.<sup>27</sup>

Finally, a word about costs. Had the Council's guideline successfully reduced the volume of late guilty pleas (and cracked trials), significant cost savings would have ensued. The Council's own resource assessment generated an optimistic and a pessimistic projection

of the costs, or cost savings of the guideline. The optimistic scenario predicted savings of £40 million by 2021-2022, while the pessimistic scenario predicted additional costs of £40 million.<sup>28</sup> The optimistic scenario assumed that the cracked trial rate would decline and the early plea rate would increase, hence the savings. The pessimistic scenario assumed that fewer defendants would plead guilty, creating the need for more trials. The Council's latest evaluation of the impact and implementation of the guideline did not address the issue of costs. It is important, however, to understand the effect of the guideline on criminal justice expenditures, as the plea regime itself, of which the guideline is a key element, is founded in large part on conserving resources. Understanding the fiscal impact of the revised guideline should be a priority for the Council to address.

#### Footnotes

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<sup>1</sup> Although civil law countries do not provide the opportunity to plead guilty, defendants may still benefit from sentence mitigation for accepting responsibility for the offence; see J. Turner and T. Weigend, 'Negotiated Case Dispositions in Germany, England and Wales and the United States' in: K. Ambos, A. Duff, J.V. Roberts and T. Weigend (eds.) *Core Issues in Criminal Law and Criminal Justice*. Volume 1. (Cambridge University Press: Cambridge, 2020); M. Langer 'Plea Bargaining, Conviction without trial, and the global administration of criminal convictions' (2021) 4 *Annual Review of Criminology*, 1-35.

<sup>2</sup> See A. Flynn and A. Freiberg (2018) *Plea Negotiations*. (Palgrave: London, 2018); D. Cole and J.V. Roberts, 'What's the Point of Pleading Guilty?' (2018) 44 *Criminal Reports*, 44.

<sup>3</sup> For a review of current issues and the latest research, see J. Gormley, J.V. Roberts, J. Bild and L. Harris, *Sentence Reductions for Guilty Pleas. A Review of policy, practice and research*. (Sentencing Academy: London, 2020); J. Gormley, R. McPherson and C. Tata

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(2020) *Sentence Discounting: Sentencing and Plea Decision-Making*.

<https://www.scottishsentencingcouncil.org.uk/media/2076/20201216-sentence-discounting-lit-review.pdf>

<sup>4</sup> <https://www.sentencingcouncil.org.uk/wp-content/uploads/Reduction-in-sentence-for-a-guilty-plea-consultation-paper-web.pdf>.

<sup>5</sup> The only other example of structured plea-based sentence reductions is the guideline proposed but never proclaimed into law in New Zealand.

<sup>6</sup> One example of this is found in s. 152(2) of the Criminal Justice Act 2003 creates a seriousness threshold for the imposition of a term of custody; see discussion in A. Ashworth, *Sentencing and Criminal Justice*, sixth edition (Cambridge University Press, Cambridge, 2015) at 311.

<sup>7</sup> Sentencing Council, *Final Resource Assessment: Reduction in Sentence for a Guilty Plea* (Sentencing Council: London, 2016), para. 2.2; and further: 'The guideline is directed only at defendants wishing to enter a guilty plea and nothing in the guideline should create pressure on defendants to plead guilty.' <https://www.sentencingcouncil.org.uk/wp-content/uploads/Reduction-in-sentence-for-a-guilty-plea-consultation-paper-web.pdf>

<sup>8</sup> Ministry of Justice, *Guide to Criminal Court Statistics* (Ministry of Justice London, 2020), p.8.

<sup>9</sup> For example, where it has decided not to proceed (such as where a guilty plea from a co-accused is accepted) or where there are issues with witnesses.

<sup>10</sup> The Royal Commission on Criminal Justice, Cm 2263 (1993) p. 11.

<sup>11</sup> The first stage will normally be the first hearing at which the defendant's plea (or indication of plea) is recorded by the court.

<sup>12</sup> Sentencing Guidelines Council (2004) *Reduction in Sentence for a Guilty Plea. Definitive Guideline*. London: Sentencing Guidelines Council.

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<sup>13</sup> J.V. Roberts and B. Bradford (2015) 'Sentence Reductions for a Guilty Plea: New Empirical Evidence from England and Wales'. *Journal of Empirical Legal Studies*, 12(2): 187-210.

<sup>14</sup> Sentencing Council, *Reduction in Sentence for a Guilty Plea Guideline. Consultation* (Sentencing Council: London, 2016) at 5.

<sup>15</sup> Ibid at 6.

<sup>16</sup> Above, note 6, para. 2.2.

<sup>17</sup> The effect of guilty plea reductions upon the volume of 'cracked trials' has long been discussed in this jurisdiction. The Royal Commission on Criminal Justice advocated making the system of sentence reductions more 'effective' because they believed a 'clearer system of graduated discounts would help alleviate the problem of "cracked" trials' (1993, para. 45).

<sup>18</sup> Ministry statistics for 2015 record 66,033 cases resolved by a guilty plea. Of these, 45,929 or 72% involved a plea before trial, 28% involved a cracked trial.

<https://www.gov.uk/government/statistics/criminal-court-statistics-quarterly-january-to-march-2020>.

<sup>19</sup> <https://www.gov.uk/government/statistics/criminal-court-statistics-quarterly-january-to-march-2020>.

<sup>20</sup> <https://www.gov.uk/government/statistics/criminal-court-statistics-quarterly-january-to-march-2020>.

<sup>21</sup> These figures have been created using data from the Ministry of Justice criminal court statistics quarterly (<https://www.gov.uk/government/statistics/criminal-court-statistics-quarterly-january-to-march-2020>).



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<sup>22</sup> Sentencing Council, *Assessing the Impact and Implementation of the Sentencing Council's Reduction in Sentence for a Guilty Plea Definitive Guideline* (Sentencing Council: London, 2020) 12.

<sup>23</sup> Ibid, 12.

<sup>24</sup> Sentencing Council, *Attitudes to Guilty Plea Reductions* (Sentencing Council: London, 2011), p. 32.

<sup>25</sup> R. Helm, (2019) 'Conviction by Consent? Vulnerability, Autonomy and Conviction by Guilty Plea' *The Journal of Criminal Law* 83(2): 161-172.

<sup>26</sup> See discussion in Cole and Roberts, note 2.

<sup>27</sup> This has been the case in the US, see R. Lippke, *The Ethics of Plea Bargaining*. (Oxford University Press: New York, 2011).

<sup>28</sup> Sentencing Council, *Final Resource Assessment: Reduction in Sentence for a Guilty Plea* (Sentencing Council: London, 2017) 5. 22/2