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“A Pious Fraud”:

The Prohibition of Conditional Guilty Pleas in Rhode Island¹

Marjorie Whalen*

1. Thomas Paine, author of the famous revolutionary pamphlet *Common Sense*, published *The Age of Reason* in colonial America in the late eighteenth century. In *The Age of Reason* Paine attacked the Christian religion and its defining ideas as irrational. Paine took the extreme position that churches “institutionalized fraudulence,” and that they “were neither legitimate nor productive of any social good.” Email from Drew McCoy, Ph.D, Jacob and Frances Hiatt Professor of History, Department of History, Clark University, to author (Nov. 11, 2011, 7:21 PM EST) (on file with author). The phrase “a pious fraud” in the title of this comment is a reference to a particular passage in *The Age of Reason*:

It is possible to believe, and I always feel pleasure in encouraging myself to believe it, that there have been men in the world who persuaded themselves that what is called a *pious fraud*, might, at least under particular circumstances, be productive of some good. But the fraud being once established, could not afterwards be explained; for it is with a pious fraud as with a bad action, it begets a calamitous necessity of going on. . . . From the first preachers the fraud went on to the second, and to the third, till the idea of its being a pious fraud became lost in the belief of its being true; and that belief became again encouraged by the interest of those who made a livelihood by preaching it.

THOMAS PAINE, *THE AGE OF REASON* 74 (Moncure Daniel Conway ed., Merchant Books 2010) (1896).

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INTRODUCTION

In Rhode Island, a defendant's "guilty plea represents a break in the chain of events which has preceded it in the criminal process."² When a defendant pleads guilty, his position in Rhode Island's criminal justice system has been irreversibly altered, and perhaps the most significant alteration is the defendant's loss of appellate rights.³ This sounds like a very sensible proposition; why should an individual who has accepted responsibility before a court for a criminal act have any rights whatsoever? This comment argues that Rhode Island should, as the Federal Rules of Criminal Procedure and a majority of states do, allow defendants to enter conditional guilty pleas.

While Rhode Island's traditional plea regime may serve the interests of justice in some cases, it is at war with efficiency and pragmatism in a particular type of recurring case, specifically, where defendants make case-dispositive pretrial motions.⁴ Defendants who make case-dispositive pretrial motions have a difficult choice when contemplating a plea bargain. A frequent example of such a situation is where a defendant moves to suppress evidence before trial, arguing that the government's search violated the defendant's Fourth Amendment rights. If the defendant loses his motion to suppress, as is common, he may very well be left with no live issues to litigate. However, if the defendant prevails on his motion to suppress, the government is

Hattie and Lili for all their love, encouragement and inspiration.

2. *Tollett v. Henderson*, 411 U.S. 258, 267 (1973); *accord* *State v. Keohane*, 814 A.2d 327, 328-29 (R.I. 2003) (per curiam).

3. *See Keohane*, 814 A.2d at 328-29. Even in jurisdictions like Rhode Island that do not permit conditional guilty pleas, defendants may appeal the entry of the guilty plea itself, such as on the basis of ineffective assistance of counsel, but may not appeal any substantive issues. *See* Alexandra W. Reimelt, Note, *An Unjust Bargain: Plea Bargains and Waiver of the Right to Appeal*, 51 B.C. L. REV. 871, 877 (2010) (explaining that the Supreme Court has held that double jeopardy and ineffective assistance of counsel claims survive a guilty plea).

4. It should be noted at the outset that, in jurisdictions that permit them, conditional guilty pleas are used in a relatively small number of cases because the statutes and court rules that provide for the entry of conditional guilty pleas contain strict limitations on the applicability of such pleas. For example, the Federal Rules of Criminal Procedure, upon which many state statutes providing for conditional guilty pleas are modeled, require the "consent of the court and the government." FED. R. CRIM. P. 11(a)(2).

left without evidence to bring its case. Therefore, the outcome of the case would have been decided before trial. At this critical pretrial juncture, the defendant has two choices: he can either plead guilty and accept a sentence, thereby sacrificing his constitutional claims, or he can go to trial for the sole purpose of preserving his right to appeal the denial of his pretrial motion. Given the near certainty of a guilty verdict and the likelihood of receiving a greater sentence at trial, defendants who may have valid arguments on their pretrial claims often plead guilty to avoid the considerable risk of a trial.

Conditional pleas address this problem by permitting defendants to plead guilty, and thereby forgo the risks of trial, while retaining the right to appeal specific pretrial motions.⁵ Through a conditional plea, a defendant leapfrogs from the entry of a plea straight to appeal, avoiding the time and expense of a trial where the outcome of that proceeding is inevitable. This procedure serves the judicial system, the public, and other litigants by preventing the expense and delay of unnecessary trials and preserving precious space on crowded trial court dockets for other cases and matters. Conditional guilty pleas also reduce the likelihood that defendants who have valid constitutional claims will be coerced into pleading guilty.

Part I of this comment discusses Rhode Island's prohibition of conditional guilty pleas and searches for the rationale behind the prohibition in Rhode Island Supreme Court decisions. Part II provides a survey of other jurisdictions that prohibit conditional guilty pleas and the arguments against conditional guilty pleas. Part III examines case law from jurisdictions that allow conditional guilty pleas and the arguments in favor of such pleas. Finally, Part IV argues that Rhode Island should permit the entry of conditional guilty pleas.

I. RHODE ISLAND'S RULE AGAINST CONDITIONAL GUILTY PLEAS AND ITS "RATIONALE"

The text of Rhode Island Superior Court Rule of Criminal

5. See, e.g., FED. R. CRIM. P. 11(a)(2); ARK. R. CRIM. P. 24.3(b) (permitting a defendant to enter a conditional guilty plea and to appeal "adverse determination of a pretrial motion to suppress seized evidence or a custodial statement or a pretrial motion to dismiss a charge because not brought to trial within the time provided in Rule 28.1 (b) or (c)").

Procedure 11 does not expressly permit the entry of conditional guilty pleas, and the Rhode Island Supreme Court has recently stated that it has never sanctioned a plea procedure that would allow a defendant to plead guilty but preserve his right to appeal.⁶ Despite several opportunities to do so, the Rhode Island Supreme Court has not explained the rationale for its prohibition on conditional guilty pleas.⁷ Even in the absence of an articulated rationale, the Court's cases involving conditional guilty pleas provide some scattered, if opaque, hints at the Court's possible reasoning.

In *Soares*, a one-page 1993 order involving a defendant's appeal of his motion to suppress subsequent to pleading guilty, the Court rejected the defendant's appeal and remanded the case to the Superior Court with instructions to vacate the defendant's plea of *nolo contendere*.⁸ In disposing of the defendant's appeal, the Court tersely remarked that although the Federal Rules of Criminal Procedure permit conditional guilty pleas, "there is no

6. See R.I. SUPER. CT. R. CRIM. P. 11; *State v. Keohane*, 814 A.2d 327, 329 (R.I. 2003).

7. See *State v. Paiva*, 967 A.2d 1103, 1104-05 (R.I. 2009); *State v. Beechum*, 933 A.2d 687, 690 (R.I. 2007); *State v. Dustin*, 874 A.2d 244, 246-47 (R.I. 2005) (per curiam); *Keohane*, 814 A.2d at 329; *State v. Soares*, 633 A.2d 1356, 1356 (R.I. 1993) (mem.); *State v. Feng*, 421 A.2d 1258, 1263 n.5 (R.I. 1980) (noting that "[a] plea of guilty or *nolo contendere* to a charged offense operates as a waiver of the defendant's right to appeal his conviction of that offense"). See also *State v. Huy*, 960 A.2d 550, 558 (R.I. 2008) (Flaherty, J., dissenting) (acknowledging the ban on conditional guilty pleas while arguing that a stipulated-bench trial should avoid the waiver rule). It appears that the Rhode Island Supreme Court first articulated its prohibition of conditional pleas in *Soares*. 633 A.2d at 1356 (denying appeal from plea of *nolo contendere* and stating that although the Federal Rules of Criminal Procedure permit conditional guilty pleas, "there is no comparable Rhode Island rule"). Conditional pleas themselves are "of relatively recent origin." 1A CHARLES ALAN WRIGHT & ANDREW D. LEIPOLD, FEDERAL PRACTICE AND PROCEDURE § 174 n.1 (4th ed. 2008). Commentators have suggested that the origin of conditional pleas can be traced to *United States v. Doyle*, 348 F.2d 715, 719 (2d Cir. 1965), and *Jaben v. United States*, 333 F.2d 535, 538 (8th Cir.) *aff'd*, 381 U.S. 214 (1965). See WRIGHT & LEIPOLD, *supra*, at § 174 n.3 and accompanying text (noting that "[t]he record, but not the reported opinions, in *Jaben* show that [the defendant's] *nolo* plea" was expressly conditioned on the defendant's right to appeal the trial court's denial of his motion to dismiss). Rule 11 of the Federal Rules of Criminal Procedure was amended in 1983 to provide for the entry of conditional guilty pleas. See FED. R. CRIM. P. 11(a) advisory committee's note on 1983 amendments.

8. 633 A.2d at 1356.

comparable Rhode Island rule.”⁹ An interesting aspect of the succinct *Soares* order is that the defendant entered not a guilty plea, but a plea of *nolo contendere*.¹⁰ One argument against conditional guilty pleas is the perception of a logical inconsistency in permitting a defendant who has pled guilty to then attempt to escape punishment on appeal.¹¹ Clearly, this reasoning would not apply to a plea of *nolo contendere*, through which a defendant accepts a conviction without admitting guilt.¹² The Court’s refusal to recognize the defendant’s appeal of a pretrial motion subsequent to a plea of *nolo contendere* suggests that something other than, or in addition to, the perception of a logical inconsistency is behind the Court’s prohibition of conditional guilty pleas.

In *State v. Keohane*, the Court reached the defendant’s appeal despite the defendant’s entry of a conditional guilty plea.¹³ The Court reasoned that although the trial court permitted the defendant to enter a conditional guilty plea, a denial of the defendant’s appeal likely would have resulted in *Keohane* challenging his plea via post-conviction relief.¹⁴ Other courts and commentators have reached similar conclusions in looking at court-blessed plea bargains from a contract perspective.¹⁵ In a 2005 opinion, *State v. Dustin*, the Court permitted the defendant to appeal the denial of his pretrial suppression motion after he “stipulated to the criminal information packet and waived his right to a jury trial.”¹⁶ In consideration of the Court’s ban on

9. *Id.*

10. *Id.*

11. Note, *Conditional Guilty Pleas*, 93 HARV. L. REV. 564, 569 (1980).

12. *But see Cote v. State*, 994 A.2d 59, 63 (R.I. 2010) (“In Rhode Island, a plea of *nolo contendere* is treated as a guilty plea.”) (citing *State v. Feng*, 421 A.2d 1258, 1266 (R.I. 1980)).

13. 814 A.2d 327, 328-29 (R.I. 2003) (per curiam).

14. *Id.* at 329.

15. *See, e.g., United States v. Cox*, 464 F.2d 937, 945-46 (6th Cir. 1972) (considering the merits of an appeal because the right to appeal following a guilty plea was “consideration within the plea bargaining process,” even though the court prohibited subsequent conditional guilty pleas); Reimelt, *supra* note 3, at 899-900 (arguing that plea agreements waiving a defendant’s right to appeal are often extracted under coercive circumstances that violate due process and contract law principles).

16. 874 A.2d 244, 246-47 (R.I. 2005) (per curiam) (footnote omitted). The criminal information packet included “the narcotics, toxicology reports identifying the substances as marijuana and cocaine, and a police report

conditional guilty pleas and its rejection of a conditional nolo contendere plea in *Soares*, *Dustin* appears to be somewhat of an outlier.¹⁷ An important distinction between *Dustin* and the Rhode Island Supreme Court's other conditional guilty plea cases is that although the defendant stipulated to the evidence on the record and waived his right to a jury trial, he did not do so pursuant to a plea agreement.¹⁸ In what appears to be an oblique attempt to narrow its holding, the Court in *Dustin* noted that it permitted the defendant's appeal "with reservation" because it found that the trial court procedure had been "sufficiently adversarial."¹⁹ The Court did not indicate what characteristics of the trial court procedure rendered it "sufficiently adversarial"; instead, it simply stated that the procedure was so.²⁰

Identical to the procedure described in *Dustin*, the defendant in *State v. Paiva* did not enter a plea after her pretrial motion was denied but proceeded to waive her right to a jury trial and stipulate to the evidence on the record.²¹ However, in *Paiva* the Court was "concern[ed] that the proceedings below were insufficiently adversarial," and remanded the case for a determination of whether the proceedings were sufficiently adversarial.²² In a strained effort to distinguish *Dustin* from *Paiva*, the Court pointed to "a strong indication on the record" that the procedure employed in *Paiva* was a conditional plea clothed as a jury-waived, stipulated-fact trial.²³ Specifically, the Court cited the trial justice's statement that the proceedings looked like a "slow guilty plea" and the fact that the trial justice gave the defendant the immigration warnings that are required when a defendant pleads guilty or nolo contendere.²⁴ Also bearing on the Court's analysis in *Paiva* was the defendant's waiver of a presentencing report.²⁵ Curiously, despite its statement that the

detailing the arrest and subsequent search." *Id.* at 246 n.2.

17. *See id.* 246-47; *State v. Soares*, 633 A.2d 1356, 1356 (R.I. 1993) (mem.).

18. 874 A.2d at 246-47.

19. *Id.* at 247.

20. *Id.*

21. *See* 967 A.2d 1103, 1104 (R.I. 2009); 874 A.2d at 246.

22. 967 A.2d at 1105.

23. *Id.*

24. *Id.*

25. *Id.* at 1104-05.

trial court lacked the benefit of a presentencing report, the Court did not bother to explain the purpose, role, or putative benefits of a presentencing report, or the connection between that report and the adversarial nature of the trial court proceeding.²⁶ Nor did the Court address why the procedure in *Dustin* was “sufficiently adversarial” despite the absence of a presentencing report, but in *Paiva* the defendant’s waiver of her presentencing report indicated that the trial court proceedings might have been insufficiently adversarial.²⁷

The Court’s attempt to distinguish *Paiva* from *Dustin* is utterly unconvincing. Is the teaching of *Dustin* and *Paiva* that litigants may engage in a conditional guilty plea-like procedure as long as neither the trial justice nor the parties acknowledge this truth on the record? The Court has implicitly answered that question in the affirmative in *State v. Beechum*.²⁸

Like the defendant in *Dustin*, the defendant in *Beechum* waived his right to a jury trial and “stood trial without contesting any facts” after his pretrial motions to dismiss were denied.²⁹ What makes *Beechum* stand out from the Court’s other opinions addressing conditional guilty pleas is that both the prosecution and defense attorneys had the gall to admit on the record that their joint purpose “was to preserve an appeal on the pretrial motion . . . and to avoid the expense and uncertainty of a jury trial.”³⁰ In response, the Court repeated its familiar refrain, stating that it does not recognize conditional pleas.³¹ Interestingly, the Court noted that “this procedure ensured the

26. *Id.* at 1105. One possible reason the Court discussed the presentencing report in *Dustin* and *Paiva* is that the Court was searching for indications of whether the trial court procedure was “adversarial” or whether the procedure was tantamount to a conditional guilty plea. *Id.*; 874 A.2d at 247. In the Court’s analysis, the absence of a presentence report seems to indicate a trial court procedure that was insufficiently adversarial, i.e., a violation of the Court’s rule against conditional guilty pleas. 967 A.2d at 1105.

27. 967 A.2d at 1105; 874 A.2d at 247.

28. See 933 A.2d 687, 690 (R.I. 2007).

29. *Id.* at 688; 874 A.2d at 246. Unlike the other Rhode Island cases cited, the *Beechum* defendant’s pretrial motions included “a motion to dismiss the indictment for undue delay and a motion to dismiss due to allegedly unconstitutional jury selection.” See *Beechum*, 933 A.2d at 688.

30. 933 A.2d at 690.

31. *Id.* (citing *State v. Keohane*, 814 A.2d 327, 329 (R.I. 2003)).

state a conviction and afforded defendant a reduced charge and a significantly reduced sentence.”³² In *Paiva* the Court expressed its aversion to such agreed-upon dispositions, which are presumptively the inverse of a “sufficiently adversarial” proceeding.³³ The *Beechum* Court echoed this sentiment through its determination that, in light of the mutually beneficial agreement between the parties, the trial court proceedings in that case were “tantamount to a conditional plea.”³⁴

II. JURISDICTIONS THAT PROHIBIT CONDITIONAL GUILTY PLEAS AND THEIR RATIONALES

Against the backdrop of Rhode Island’s case law regarding conditional guilty pleas, the reasoning of which is cryptic at best, it is useful to examine the rationales upon which other courts have relied in prohibiting such pleas. States that prohibit conditional guilty pleas include Colorado,³⁵ Delaware,³⁶ Georgia,³⁷ Indiana,³⁸ Iowa,³⁹ Kansas,⁴⁰ Maryland,⁴¹ New Hampshire,⁴² and South Dakota.⁴³ Prior to the 1983 addition of a provision authorizing conditional guilty pleas to the Federal Rules of

32. *Id.*

33. 967 A.2d 1103, 1105-06 (R.I. 2009).

34. 933 A.2d at 690.

35. *People v. Neuhaus*, 240 P.3d 391, 395-98 (Colo. App. 2009) (holding that Colorado does not permit conditional guilty pleas), *petition for cert. granted*, No. 10SC27, 2010 Colo. LEXIS 646, at *1 (Colo. Aug. 30, 2010) (granting certiorari to decide “[w]hether the court of appeals erred in announcing a new rule prohibiting conditional pleas in Colorado, thereby creating a split in the court of appeals regarding the permissibility of conditional pleas”).

36. DEL. SUPER. CT. CRIM. R. 11 (LEXIS through 2012 legislation).

37. *Hooten v. State*, 442 S.E.2d 836, 838-40 (Ga. Ct. App. 1994); *see* GA. CODE ANN. § 17-7-93 (2008).

38. *Alvey v. State*, 911 N.E.2d 1248, 1250-51 (Ind. 2009).

39. *State v. Stufflebeam*, No. 4-129/03-1164, 2004 Iowa App. LEXIS 418, at *4 (Iowa Ct. App. Mar. 10, 2004).

40. KAN. STAT. ANN. § 22-3602 (2007).

41. *Bishop v. State*, 417 Md. 1, 16 n.5 (Md. 2010) (noting that Maryland does not have a rule like Federal Rule of Criminal Procedure 11(a)(2), but suggesting that the Rules Committee “consider whether to recommend the adoption of a Rule embodying a conditional guilty plea akin to that” in the Federal Rules of Criminal Procedure). *See* MD. CODE ANN., Pleas, § 4-242(c) and (e) (LexisNexis 2011).

42. *State v. Parkhurst*, 435 A.2d 522, 523 (N.H. 1981).

43. *State v. Rondell*, 791 N.W.2d 641, 644-45 (S.D. 2010).

Criminal Procedure, the Fourth, Fifth, Sixth, Seventh, Ninth, and Tenth Circuits had also disapproved of conditional guilty pleas.⁴⁴ Arguments against permitting conditional guilty pleas include “that the procedure encourages a flood of appellate litigation, militates against achieving finality in the criminal process, reduces effectiveness of appellate review due to the lack of a full trial record, and forces decision on constitutional questions that could otherwise be avoided by invoking the harmless error doctrine.”⁴⁵ The Iowa Supreme Court, for instance, described conditional pleas as “ingenious and appealing” but nonetheless declined to permit them because such a procedure “would create numerous appellate problems and endless confusion.”⁴⁶ Presented with a “limited record” of the trial court’s hearing on the defendant’s motion to suppress in *Cox*, the Court of Appeals for the Sixth Circuit found that it was possible to infer that the prosecution had additional evidence it did not present, and therefore the constitutional question before the Court might have been avoided through the harmless error doctrine.⁴⁷

Central to the resistance to conditional pleas is a discomfort with what some courts perceive as a moral and/or logical conflict presented by conditional pleas.⁴⁸ The Indiana Supreme Court has reasoned that “it is inconsistent to allow defendants both to plead guilty and to challenge evidence supporting the underlying convictions.”⁴⁹ According to the *Alvey* court, defendants should not be permitted to “benefit from both the advantages of pleading guilty and the right to raise allegations of error with respect to pre-trial rulings.”⁵⁰ The Supreme Court of New Hampshire

44. See *Neuhaus*, 240 P.3d at 394 (citing *United States v. Benson*, 579 F.2d 508, 509-11 (9th Cir. 1978); *United States v. Nooner*, 565 F.2d 633, 634 (10th Cir. 1977); *United States v. Brown*, 499 F.2d 829, 832 (7th Cir. 1974); *United States v. Sepe*, 486 F.2d 1044, 1045 (5th Cir. 1973); *United States v. Matthews*, 472 F.2d 1173, 1174 (4th Cir. 1973); *United States v. Cox*, 464 F.2d 937, 941-42 (6th Cir. 1972)).

45. WAYNE R. LAFAVE ET AL., *CRIMINAL PROCEDURE* § 21.6(b) (5th ed. 2009).

46. *State v. Dorr*, 184 N.W.2d 673, 674 (Iowa 1971).

47. 464 F.2d at 945.

48. See *Cox*, 464 F.2d at 942 (citing *Brady v. United States*, 397 U.S. 742, 748 (1970)).

49. *Alvey v. State*, 911 N.E.2d 1248, 1249 (Ind. 2009) (citing *Norris v. State*, 896 N.E.2d 1149, 1153 (Ind. 2008)).

50. *Id.* at 1251.

articulated a similar concern:

Permitting a defendant to proclaim his guilt in open court and still avoid conviction is incompatible with the sound administration of justice Although some justify the use of conditional guilty pleas in the name of “judicial economy,” we believe that such a practice can only undermine the public’s confidence in the integrity of the criminal justice system.⁵¹

These opinions overlook the separation between factual guilt and legal guilt, which is discussed below.⁵²

There is “a certain psychological satisfaction” when a criminal defendant admits his guilt.⁵³ One court determined that the relationship between rehabilitation and the act of pleading guilty was too significant to dismiss through the authorization of conditional guilty pleas.⁵⁴ “[N]o valid reason exists,” that court reasoned, for allowing defendants who have pled guilty to escape the effect of their free and voluntary admissions of guilt.⁵⁵ Additionally, in its compilation of model plea standards, the American Bar Association recommends that courts consider “the views of the parties, the interests of the victims and the interest of the public in the effective administration of justice” in the context of all pleas.⁵⁶ One of the chief interests of the state, the public, and the victims is the finality of criminal justice proceedings.

A less frequently cited factor in the decision to prohibit conditional pleas is the availability of an alternate route to judicial review through an interlocutory appeal. In affirming its prohibition of conditional guilty pleas, the Indiana Supreme Court noted that the defendant could have requested “certification of the trial court’s ruling for an interlocutory appeal on the denial of his motion to suppress.”⁵⁷ In general, however, interlocutory appeals

51. *State v. Parkhurst*, 435 A.2d 522, 523 (N.H. 1981) (internal citation omitted).

52. *See infra* Part IV.B.

53. *See* DONALD J. NEWMAN, *CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL* 96 (Frank J. Remington ed., 1966).

54. *Hooten v. State*, 442 S.E.2d 836, 838 (Ga. Ct. App. 1994).

55. *Id.* at 840.

56. AM. BAR ASS’N, *ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY* § 14-1.1 (3d ed. 1999).

57. *Alvey v. State*, 911 N.E.2d 1248, 1250 (Ind. 2009).

are rarely allowed in such circumstances.⁵⁸ A Georgia court that had previously authorized conditional guilty pleas prohibited them two years later, in part because a state statute provided defendants with the option to seek an interlocutory appeal.⁵⁹

Like Rhode Island, jurisdictions that prohibit conditional guilty pleas may nonetheless proceed to the merits of a defendant's appeal from a conditional guilty plea in certain circumstances. Courts in such jurisdictions have justified judicial review of prohibited pleas in terms of contract principles and equity considerations. For example, in *Cox*, the United States Court of Appeals for the Sixth Circuit found that conditional guilty pleas were against sound public and judicial policy and declared that such pleas would "not be countenanced in the future in this Circuit."⁶⁰ However, the Sixth Circuit felt compelled to honor the agreement between the government and the defendant, which was premised on the defendant's ability to enter a conditional guilty plea, because a refusal to do so "would constitute a failure of consideration within the plea bargaining process."⁶¹ Similarly, in *United States v. Brown*, the Seventh Circuit, citing *Cox*, expressed disapproval of conditional guilty pleas but considered the merits of the defendant's appeal on equity grounds.⁶²

At least some jurisdictions that prohibit conditional pleas approve of various procedures that permit defendants to preserve their appellate rights by participating in a summary "trial," sometimes labeled a "stipulated facts trial" or a "slow plea."⁶³ The Rhode Island Supreme Court has permitted stipulated facts trials in criminal cases.⁶⁴ In a stipulated facts trial, the defendant

58. See FED. R. CRIM. P. 11(a) advisory committee's note on 1983 amendments; LAFAVE ET AL. *supra* note 45, § 21.6(b) (noting that interlocutory appeals are rare).

59. *Hooten*, 442 S.E.2d at 840 (reinstating prohibition of conditional guilty pleas).

60. 464 F.2d 937, 942-45 (6th Cir. 1972).

61. *Id.* at 946.

62. 499 F.2d 829, 832 (7th Cir. 1974).

63. See *State v. Paiva*, 967 A.2d 1103, 1105 (R.I. 2009); LAFAVE ET AL., *supra* note 45, § 21.6(c).

64. See *State v. Huy*, 960 A.2d 550, 558 & n.8 (R.I. 2008) (Flaherty, J., dissenting) (citing *State v. Swindell*, 895 A.2d 100, 103-04 (R.I. 2006); *State v. Black*, 721 A.2d 826, 828 (R.I. 1998); *State v. Roberts*, 420 A.2d 837, 839 (R.I. 1980)).

pleads not guilty, and the hearing justice reviews the record to determine whether the defendant has stipulated to the facts necessary to meet the required elements of the crime charged.⁶⁵ If the defendant has stipulated to the necessary facts, the court finds the defendant guilty. The defendant is then able to appeal an adverse determination of his pretrial motion. The difference between a stipulated facts trial and a conditional guilty plea is in the presence of one word.⁶⁶ In a conditional guilty plea, the defendant pleads “guilty,” whereas in a stipulated facts trial, the defendant pleads “not guilty.”⁶⁷ Indeed, the trial court judge in *Paiva* remarked that “it is often said that a stipulated fact trial, if you want to call them [sic] that, are [sic] nothing more than a slow guilty plea.”⁶⁸

III. JURISDICTIONS THAT ALLOW CONDITIONAL GUILTY PLEAS AND THEIR RATIONALES

Rule 11 of the Federal Rules of Criminal Procedure was amended in 1983 to provide for the entry of conditional guilty pleas.⁶⁹ Federal Rule of Criminal Procedure 11(a)(2) provides, in its entirety:

With the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an

65. See *Paiva*, 967 A.2d at 1105-06; *Huy*, 960 A.2d at 552-554; *State v. Beechum*, 933 A.2d 687, 688 (R.I. 2007); *State v. Dustin*, 874 A.2d 244, 246-47 (R.I. 2005) (per curiam).

66. See *Lefkowitz v. Newsome*, 420 U.S. 283, 290 n.7 (1975) (explaining that the “only difference” between a stipulated facts trial and a conditional guilty plea in New York “is that the plea entered [in a stipulated facts trial] is labeled a plea of ‘not guilty’ rather than ‘guilty’ and there is a stipulation by the defendant as to the facts the State would prove demonstrating his guilt rather than a recitation by the defendant in court”).

67. Ordinarily, the difference between a plea of guilty and a plea of not guilty is more significant than in the context of conditional guilty plea-type procedures. Where the outcome of a trial on the merits is foreordained and the defendant is simply attempting to preserve for appeal an issue that is unrelated to factual guilt, such as whether a confession or other evidence was illegally obtained, it is irrelevant whether that defendant pleads “guilty” or “not guilty.”

68. 967 A.2d at 1105 (internal quotation marks omitted).

69. FED. R. CRIM. P. 11(a) advisory committee's note on 1983 amendments.

appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea.

A majority of jurisdictions have since amended their own court rules or statutes to allow for the entry of conditional guilty pleas, or have sanctioned such pleas through judicial decision.⁷⁰ At least twenty-nine states, as well as federal courts, the District of Columbia, and military courts, permit conditional guilty pleas.⁷¹ Ten jurisdictions have statutes permitting conditional guilty pleas, sixteen have court rules so permitting, and six other jurisdictions permit conditional guilty pleas through judicial decision.⁷²

Many of the jurisdictions that have adopted conditional guilty plea procedures have done so on efficiency grounds. For example, in *Cooksey v. State* the Alaska Supreme Court concluded that because a violation of the right to a speedy trial was the defendant's only issue on appeal, "it would [have] be[en] wasteful of legal resources to require that [the defendant] undergo a full trial for the mere sake of preserving the right to appeal the speedy

70. See *People v. Neuhaus*, 240 P.3d 391, 394 (Colo. App. 2009) ("[A]t least thirty-two jurisdictions, including federal courts and the United States military, have approved of conditional guilty pleas.").

71. *Id.* at 394-95. States that permit conditional guilty pleas include: Alabama, Alaska, Arkansas, California, Connecticut, Florida, Hawaii, Idaho, Kentucky, Louisiana, Maine, Michigan, Montana, Nevada, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming. *Id.*

72. *Id.* Some states authorize conditional guilty pleas by statute. See CAL. PENAL CODE §§ 1237.5 & 1538.5(m) (West 2004); CONN. GEN. STAT. § 54-94a (2009) & Practice Book § 61-6(a)(2)(ii); MONT. CODE ANN. § 46-12-204(3) (2007); NEV. REV. STAT. ANN. § 174.035(3) (Lexis-Nexis 2006); N.Y. CRIM. PROC. LAW § 710.70(2) (CONSOL. 2011); N.C. GEN. STAT. § 15A-979(b) (2011); OR. REV. STAT. § 135.335(3) (2011); TEX. CODE CRIM. PROC. ANN. art. 44.02 (2006) & TEX. R. APP. P. 25.2(a)(2); VA. CODE ANN. § 19.2-254 (2008); WIS. STAT. ANN. § 971.31(10) (West 2007). Some jurisdictions authorize conditional guilty pleas through court rules. See FED. R. CRIM. P. 11(a)(2); R. COURTS-MARTIAL 910(a)(2); ARK. R. CRIM. P. 24.3(b); D.C. SUPER. CT. R. CRIM. P. 11(a)(2); FLA. R. APP. P. 9.140(b)(2)(A)(i); HAW. R. PENAL P. 11(a)(2); IDAHO CRIM. R. 11(a)(2); KY. R. CRIM. P. 8.09; ME. R. CRIM. P. 11(a)(2); N.J. R. CRIM. P. 3:9-3(f); N.D. R. CRIM. P. 11(a)(2); OHIO R. CRIM. P. 12(D); TENN. R. CRIM. P. 37(b)(2)(A); VT. R. CRIM. P. 11(a)(2); W. VA. R. CRIM. P. 11(a)(2); WYO. R. CRIM. P. 11(a)(2). Finally, some jurisdictions permit conditional guilty pleas through judicial decision. *Neuhaus*, 240 P.3d at 394-95 (listing Alabama, Alaska, Louisiana, Michigan, New Mexico, and Utah).

trial ruling” of the trial court.⁷³ The Fourth Circuit explained that the Federal Rules of Criminal Procedure authorized conditional guilty pleas “[t]o avoid the waste of prosecutorial and judicial resources and the delay in the trial of other cases occasioned by such a litigation strategy.”⁷⁴ The advisory committee’s notes to Federal Rule of Criminal Procedure 11 state that conditional pleas avoid the “unfortunate consequences” of litigating with the sole purpose of preserving a pretrial issue for appellate review and cite numerous practice manuals praising conditional guilty pleas as a mechanism to avoid unnecessary trials.⁷⁵

Since a plea of guilty or *nolo contendere* waives many significant rights guaranteed by the U.S. Constitution or the applicable state constitution, courts require defendants to voluntarily and intelligently enter such pleas.⁷⁶ If the plea is not knowing and voluntary, “it is generally not regarded as valid and binding.”⁷⁷ In federal and state systems, reaching a disposition through plea bargaining is not merely a procedure permitted by the courts; “it is the criminal justice system.”⁷⁸ The criminal justice system heavily depends on informal bargaining between litigants as opposed to formal court processes.⁷⁹ Because of this bargaining process, some courts have depended on contract principles in upholding conditional plea agreements, even in the absence of a statute or court rule explicitly permitting such a

73. 524 P.2d 1251, 1256 (Alaska 1974).

74. *United States v. Bundy*, 392 F.3d 641, 645 (4th Cir. 2004) (internal quotation marks omitted).

75. FED. R. CRIM. P. 11(a)(2) advisory committee’s notes on 1983 amendments (citing ABA STANDARDS RELATING TO THE ADMIN. OF CRIM. JUSTICE, standard 21-1.3(c) (2d ed. 1978); MODEL CODE OF PRE-ARRAIGNMENT P. § SS 290.1(4)(b) (1975); UNIF. R. OF CRIM. P., rule 444(d) (Approved Draft, 1974); 1 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE—CRIMINAL § 175 (1969); 3 W. LAFAVE, SEARCH AND SEIZURE § 11.1 (1978))

76. *See, e.g.*, FED. R. CRIM. P. 11(b)(1) & (2); R.I. SUPER. CT. R. CRIM. P. 11 (requiring courts to advise defendant of the consequences of a plea of guilty or *nolo contendere* and requiring that the plea be voluntary).

77. *Cooksey*, 524 P.2d at 1256.

78. Reimelt, *supra* note 3, at 873 (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992)).

79. *See United States v. Cox*, 464 F.2d 937, 943 (6th Cir. 1972) (“Approximately 90% of all criminal proceedings commenced in the United States district courts are settled by the entrance of a plea of guilty or one of *nolo contendere*.”) (citing *Santobello v. New York*, 404 U.S. 257, 264 n.1a (1971) (Douglas, J., concurring)).

procedure. For example, in addition to finding conditional guilty pleas to be in the interest of judicial economy, the Colorado Court of Appeals found “no justification for barring a stipulation whereby a defendant pleads guilty to a charge on the condition that he or she may nevertheless seek review of an adverse pretrial ruling that directly affects that charge.”⁸⁰

In another decision, the Colorado Court of Appeals agreed with the advisory committee notes on the 1983 amendments to Federal Rule of Criminal Procedure 11 that an evaluation of the arguments for and against conditional guilty pleas demonstrated “that the obvious advantages of a conditional plea procedure are not outweighed by any significant or compelling disadvantages.”⁸¹ The advisory committee notes regarding Federal Rule of Criminal Procedure 11(a)(2) and the Colorado Court of Appeals’ *Hoffman* decision illustrate approval of conditional guilty pleas through the application of a balancing approach, a traditional means of reconciling conflicting legal doctrines.⁸²

IV. ARGUMENT FOR RHODE ISLAND TO PERMIT CONDITIONAL GUILTY PLEAS

A. Judicial Economy

The most significant reason for allowing conditional pleas is judicial economy and preservation of prosecutorial resources. If defendants in Rhode Island were allowed to enter conditional pleas, litigants would not be forced to put on sham trials in order to save their appellate rights. The United States Supreme Court has recognized that such trials may be “completely unnecessary waste of time and energy” because the “trial” is nothing more than a formality.⁸³ Even so, Rhode Island and some other jurisdictions emphatically insist that this “trial” via mechanical ritual is the only way for defendants to preserve their right to appeal adverse pretrial rulings.⁸⁴

80. *People v. Bachofer*, 85 P.3d 615, 617 (Colo. App. 2003).

81. *See People v. Hoffman*, No. 08CA1008, 2010 Colo. App. LEXIS 493, at *4 (Colo. App. Apr. 15, 2010).

82. *See Hoffman*, 2010 Colo. App. LEXIS 493, at *4; FED. R. CRIM. P. 11(a)(2) advisory committee’s notes on 1983 amendments.

83. *See Lefkowitz v. Newsome*, 420 U.S. 283, 292 (1975).

84. *See State v. Keohane*, 814 A.2d 327, 329 (R.I. 2003) (per curiam).

Rhode Island's prohibition on conditional guilty pleas is in direct contradiction to its clearly stated broad objectives: the Rhode Island Superior Court Rule of Criminal Procedure provides that the rules "shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay."⁸⁵ The Rhode Island Supreme Court's prohibition on conditional guilty pleas is directly opposed to this commendable objective of eliminating unjustifiable expense and delay in the state's trial court system. By refusing to permit conditional guilty pleas, the Court not only sanctions but also insists on expense and delay that is indeed unjustifiable. The refusal to permit such pleas not only burdens criminal defendants but, by absorbing valuable trial court time and resources, also has a domino effect on other litigants and the public.

The practice and procedure of law is one imbued with history and tradition, but as a musician's tempo is regulated by a metronome, the legitimacy of our criminal justice system depends in part on its ability to stay in time with the evolution of legal scholarship, social norms, and the demand for legal process and services. The Rhode Island Supreme Court's prohibition of conditional pleas elevates form over substance and its lack of persuasive rationale betrays an unwarranted stubbornness towards examining in earnest the merits of conditional guilty pleas in light of the needs of the state's criminal justice system.

When a defendant strategically litigates solely to preserve appellate rights, the trial is "a waste of prosecutorial and judicial resources, and causes delay in the trial of other cases."⁸⁶ The Fourth Circuit has said that the purpose of allowing conditional guilty pleas is to avoid the wasteful litigation strategy of going to trial simply to preserve pretrial issues for appellate review.⁸⁷ Using a similar rationale, the American Bar Association has concluded that "there is great value in modifying the traditional view that a plea of guilty waives all non-jurisdictional defects which could be raised by pretrial defensive motion."⁸⁸ Permitting

85. R.I. SUPER. CT. R. CRIM. P. 2.

86. WRIGHT & LEIPOLD, *supra* note 7, § 174 n.1 (4th ed. 2008) (quoting FED. R. CRIM. P. 11(a)(2) advisory committee's notes on 1983 amendments).

87. U.S. v. Bundy, 392 F.3d 641, 645 (4th Cir. 2004).

88. AM. BAR ASS'N, STANDARDS RELATING TO CRIMINAL APPEALS § 1.3 cmt. c (1970).

defendants to enter a conditional plea of guilty “avoids the unfortunate situation where the only reason a defendant goes to trial is to save the right to appeal denial of a pretrial motion to suppress evidence.”⁸⁹ “[I]t is wasteful to force a sham trial” to avoid “forfeiture of appellate review.”⁹⁰

Rhode Island needs its courts to conserve taxpayer funds while simultaneously serving the interests of justice and respecting the legal rights of all litigants.⁹¹ This is no easy task. In formulating their rules, courts and advisory committees must safeguard against sacrificing substantive rights in the name of efficiency. A conditional guilty plea procedure, however, does not result in the loss of any substantive rights. Rather, it encourages defendants with credible pretrial arguments to assert those arguments when those same defendants would not have done so under Rhode Island’s current plea regime. The time and resources the courts would save through the use of conditional guilty pleas would result in an increased availability of resources for criminal defendants in the aggregate by reducing the burden on the overextended Office of the Public Defender.⁹² The dissenting opinion in *State v. Huy* captured the exercise in senselessness that can result under Rhode Island’s current plea regime:

To preserve his appeal, the majority would have [the defendant] go through the repetition of a proceeding in which the state would call the exact same witnesses to offer the same testimony that already had been offered at the suppression hearing, and before the same trial justice, sitting as fact-finder in a jury-waived trial. This not only burdens the defendant by placing an unnecessary roadblock to the exercise of the right to appeal, but it also burdens the efficient administration of

89. *Id.*

90. *Id.*

91. See Katie Zezima, *In Rhode Island, Deficit Keeps Growing*, N.Y. TIMES (May 18, 2008), <http://www.nytimes.com/2008/05/18/us/18rhode.html?partner=rssnyt&emc=rss> (reporting on how Rhode Island’s budget shortfall will affect services available to its citizens).

92. See Tracy Breton, *RI’s Indigent Defense Fund Broke For Rest of Fiscal Year*, PROVIDENCE J. (May 24, 2010 5:21 PM), <http://news.providencejournal.com/breaking-news/2010/05/ris-indigent-defense-fund-brok.html#.TtBURnFdo7C>.

justice and strains judicial resources.⁹³

The Supreme Court of Rhode Island must surely recognize the potential for increased efficiency that would result from allowing conditional guilty pleas. Thus, the Court must have additional, though unsaid, reasons for its prohibition of conditional pleas.

B. The Benefits of Plea Bargaining, Both Real and Illusory

One recurring argument against permitting conditional guilty pleas is that criminal defendants should not be able to reap the benefits of both a trial and a guilty plea.⁹⁴ The Rhode Island Supreme Court's disdain for this aspect of conditional guilty pleas was evident in its statement in *State v. Dustin* that it "w[ould] not allow a defendant to . . . escape the consequences of admitting guilt or pleading no contest" through a conditional plea-type procedure.⁹⁵ A major incentive to enter a guilty plea is a reduction in sentencing. The reduced sentence to which a defendant assents through plea-bargaining appears to be a good bargain for the defendant. However, "many of the bargains gained by defendants in plea negotiation are more apparent than real."⁹⁶ "A more realistic basis on which to calculate the value of the bargain" is "to determine the usual sentencing practice in similar cases."⁹⁷ If, for example, it is the government's practice to offer a defendant less than the full sentence in a particular type of case, then the defendant is not getting any significant value for his concessions. There are of course some cases in which the government offers a defendant a real bargain, but these tend to be more complex cases in which the prosecution is less sure about its chances at trial, and the defendant is most likely to prevail on his constitutional claims.⁹⁸

It is undisputed that the American criminal justice system could not function without reaching dispositions in a vast majority

93. 960 A.2d 550, 561-62 (R.I. 2008) (Flaherty, J., dissenting).

94. See *supra* Part II.

95. 874 A.2d 244, 247 (R.I. 2005); see also *State v. Beechum*, 933 A.2d 687, 690 (R.I. 2007) (use of impermissible procedure "ensured the state a conviction and afforded defendant a reduced charge and a significantly reduced sentence").

96. NEWMAN, *supra* note 53, at 98.

97. *Id.*

98. *Conditional Guilty Pleas*, *supra* note 11, at 565.

of criminal cases not through trial, but through plea bargains.⁹⁹ Because of the immense pressure on defendants to plea bargain, it is inevitable that some defendants will plead guilty when they are actually innocent or when they have legitimate legal defenses.¹⁰⁰ The uncertainty of a trial and the crippling expense of hiring a defense attorney for even the simplest cases, combined with an offer of a reduced sentence, make plea bargains difficult for many defendants to resist. Guilty pleas, however, are erroneously perceived as necessarily being confessions of guilt.¹⁰¹

A regime prohibiting conditional guilty pleas fails, or is unwilling, to distinguish legal guilt from factual guilt. Factual guilt refers to whether the defendant did in fact commit the crime he is accused of committing.¹⁰² A defendant is said to be legally guilty when the government has met its burden at trial by proving each element of the charged offense with competent evidence.¹⁰³ The defendant knows with divine certainty whether he is factually guilty, whereas an adjudication of legal guilt is a court's supposition that the defendant committed the crime charged. The rationale for distinguishing legal guilt from factual guilt springs from a concern for fairness in criminal proceedings and a desire to protect individual rights.¹⁰⁴ Where evidence against a defendant who is patently guilty has been obtained by illegal means, a court may nevertheless find that defendant to be not guilty.¹⁰⁵

A defendant does not forfeit all constitutional rights upon a

99. See *United States v. Cox*, 464 F.2d 937, 943 (6th Cir. 1972).

100. *Id.* (noting that where defendants initially pled not guilty, their choice to later plead guilty "was undoubtedly affected by the district court's ruling on the motion to suppress and . . . the likelihood of that ruling being set aside on appeal").

101. C. RONALD HUFF, ARYE RATTNER & EDWARD SAGARIN, *CONVICTED BUT INNOCENT: WRONGFUL CONVICTION & PUBLIC POLICY* 74 (1996).

102. See Peter Arenella, *Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication*, 78 MICH. L. REV. 463, 465 n.6 (1980) (defining factual guilt as "the substantive criminal law's definition of criminal conduct" and legal guilt as "procedural requirements that the state must satisfy in an accusatorial system of justice before it can apply the criminal sanction").

103. *Id.*

104. See *id.*

105. See *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) ("We hold that all evidence obtained by searches and seizures in violation of the Constitution is . . . inadmissible in a state court.").

finding of factual guilt.¹⁰⁶ A guilty plea “renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction if factual guilt is validly established.”¹⁰⁷ When a conditional guilty plea is employed, the defendant most likely seeks to appeal the denial of his motion to suppress evidence obtained in violation of the Fourth Amendment.¹⁰⁸ In this scenario, a defendant’s factual guilt is irrelevant and entering a conditional plea permitting appeal is not logically inconsistent.¹⁰⁹ From a juror’s perspective, separating factual guilt from legal guilt may seem to be an absurd and impossible division, but our criminal justice system insists that the two concepts can, and must, be distinguished.¹¹⁰

C. Adversarial Stipulated Fact Trials are Creatures of the Judicial Imagination

Justice Flaherty’s dissenting opinion in *State v. Huy* cited several cases in which the Rhode Island Supreme Court had reached the merits of appeals based on pretrial motions to suppress where there had been a stipulated facts trial in the court below.¹¹¹ The Court appears willing to reach the merits of an appeal after a stipulated facts trial where it finds that the procedure below was “sufficiently adversarial” and was not an attempt to circumvent its rule against conditional pleas.¹¹² Such a sanctimonious rule buckles under the weight of its own logic.

To prohibit conditional guilty pleas but to reach the merits of

106. See *Menna v. New York*, 423 U.S. 61, 62 n.2 (1975) (per curiam).

107. *Id.*

108. See Paul F. Rothstein, *Amendments to the Federal Rules of Criminal Procedure*, 69 A.B.A. J. 1838, 1839 (1983); see also Clark J. Brown, Comment, *Conditional Guilty Pleas in Arkansas: An Assessment and a Plea for Change*, 63 ARK. L. REV. 557, 560 (2010) (citing *United States v. Banks*, 540 U.S. 31, 33 (2003)).

109. See *Conditional Guilty Pleas*, *supra* note 11, at 570.

110. See *id.* at 569.

111. *State v. Huy*, 960 A.2d 550, 558 n.8 (Flaherty, J., dissenting) (citing *State v. Swindell*, 895 A.2d 100, 103-04 (R.I. 2006); *State v. Black*, 721 A.2d 826, 828 (R.I. 1998); *State v. Roberts*, 420 A.2d 837, 839 (R.I. 1980)).

112. See *State v. Dustin*, 874 A.2d 244, 247 (R.I. 2005); cf. *State v. Paiva*, 967 A.2d 1103, 1105 (R.I. 2009) (remanding for findings of fact because the court was concerned that the proceedings in the trial court were “insufficiently adversarial”).

an appeal after a stipulated facts trial where the court labels the procedure below as “sufficiently adversarial” requires the Court to perpetrate a pious fraud on itself and criminal defendants.¹¹³ Black’s Law Dictionary defines “adversary proceeding” as “[a] hearing involving a dispute between opposing parties.”¹¹⁴ The belief that a proceeding where the parties have agreed to all the essential facts, or at least those sufficient to meet the elements of the charged offense, could ever be “adversarial” requires the Court to willingly blind itself to undeniable truths. The United States Supreme Court addressed this very point in *Lefkowitz v. Newsome* when it made clear that “[t]he availability of federal habeas corpus depends upon functional reality, not upon an infatuation with labels.”¹¹⁵ Branding a stipulated facts trial as “sufficiently adversarial” does not convince anyone but the Court of any meaningful distinction between that procedure and the practical effect of a conditional guilty plea.

D. Conditional Guilty Plea Rules are Self-Limiting

The weakest reason for prohibiting conditional guilty pleas is underpinned by the fear that a flood of litigation would ensue if such pleas were permitted. A rule permitting conditional guilty pleas, as formulated by Federal Rule of Criminal Procedure 11(a)(2), is self-limiting. Under that rule, on which many state rules are modeled, a defendant must fulfill several requirements in order to enter a valid conditional guilty plea. First, Rule 11(a)(2) requires the consent of the court.¹¹⁶ This requirement ensures that the appellate court will not be asked to adjudicate the defendant’s appeal based on an insufficient record.¹¹⁷ Second, the government must also consent.¹¹⁸ Third, the defendant must reserve his right to a conditional plea in writing.¹¹⁹ Fourth, the defendant must specify the pretrial motion on which his appeal is based.¹²⁰ The limitations are “based on two separate, but related,

113. *See supra* note 1.

114. BLACK’S LAW DICTIONARY 58 (8th ed. 2004).

115. 420 U.S. 283, 290 n.7 (1975).

116. FED. R. CRIM. P. 11(a)(2).

117. FED. R. CRIM. P. 11(a)(2) advisory committee’s notes on 1983 amendments.

118. FED. R. CRIM. P. 11(a)(2).

119. *Id.*

120. *Id.*

concerns: first, that the conditional plea promote judicial economy, and second, that the conditional plea not be employed in a manner that renders appellate review difficult or impossible.”¹²¹

Some courts impose additional limitations on conditional guilty pleas. One common requirement is that the conditional plea be limited to case-dispositive issues.¹²² Other jurisdictions limit conditional guilty pleas to specific issues. For example, Rule 24.3(b) of the Arkansas Rules of Criminal Procedure limits the entry of a conditional guilty plea to defendants appealing the “denial of a pretrial motion to suppress or a motion for speedy trial.”¹²³ As a further limitation, one case suggested that the court “should give considerable weight to the Government’s assessment of the case.”¹²⁴ The inherent limits of the federal rule, combined with empirical evidence that conditional guilty pleas do not substantially increase the number of appeals, forecloses the “flood of litigation” argument.¹²⁵

E. Finality

Probably the most persuasive reason to prohibit conditional guilty pleas is the reduction in finality as compared to a traditional guilty plea. However, sacrificing finality in entering a conditional guilty plea actually results in a more streamlined case since a conditional plea eliminates the intermediate step of a sham trial before appeal. This streamlining effect is illustrated in *Paiva*, where the defendant’s pretrial motion was denied, and the hearing justice scheduled the defendant’s trial for later on that same day.¹²⁶ Furthermore, although finality is a legitimate and important objective, the United States Supreme Court has said that it is “not to be achieved at the expense of a constitutional

121. *United States v. Bundy*, 392 F.3d 641, 646 (4th Cir. 2004).

122. *Id.* at 645-46 (citing *United States v. Wise*, 179 F.3d 184, 186 (5th Cir. 1999)); *see also* TENN. R. CRIM. P. 37(b)(2)(A)(iv) (requiring issue on appeal to be dispositive of the case).

123. *See, e.g.*, *Brown*, *supra* note 108, at 565 (citing ARK. R. CRIM. P. 24.3(b)).

124. *Bundy*, 392 F.3d at 648.

125. *See* FED. R. CRIM. P. 11(a)(2) advisory committee’s notes on 1983 amendments (citing John B. Mullady, Comment, *Appellate Review of Constitutional Infirmities Notwithstanding a Plea of Guilty*, 9 HOUS. L. REV. 305, 315-19 (1971)).

126. *See State v. Paiva*, 967 A.2d 1103, 1104 (R.I. 2009).

right.”¹²⁷ Conditional guilty pleas are “as final as any conviction at trial that might be reversed on direct appeal, and [are] certainly no less final than a plea of not guilty accompanied by stipulation to the prosecution’s case.”¹²⁸

V. CONCLUSION

In consideration of the ambiguous state of Rhode Island case law, the lack of rationale supporting the Rhode Island Supreme Court’s prohibition on conditional guilty pleas, and the inefficiency of Rhode Island’s current guilty-plea regime, Rhode Island should allow defendants to enter conditional guilty pleas. Rhode Island is, of course, free to shape its own state criminal law. However, if Rhode Island refuses to allow its citizens to benefit from a policy that the American Bar Association, the United States Supreme Court, federal courts, military courts, and a majority of states have not only praised but actually implemented, it at least owes criminal defendants and the public a thorough and well-considered explanation as to the wisdom of its policy. “It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.”¹²⁹

Rhode Island’s prohibition of conditional guilty pleas might not stretch back to the reign of Henry IV, but the Rhode Island Supreme Court’s continued adherence to its rule against conditional guilty pleas is today unexplained and unexplainable. In the 1790s Thomas Paine shrewdly observed, “the fraud being once established, could not afterwards be explained; for it is with a pious fraud as with a bad action, it begets a calamitous necessity of going on.”¹³⁰ The prohibition of conditional guilty pleas in Rhode Island has begotten a calamitous line of cases and the myth of the sufficiently adversarial stipulated facts trial, an untenable judicial invention that, unless the Court decides to permit conditional guilty pleas, will out of necessity go on.

127. *Conditional Guilty Pleas*, *supra* note 11, at 574 (quoting *Jackson v. Virginia*, 443 U.S. 307, 323 (1979)).

128. *Id.* at 574-75.

129. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

130. PAINE, *supra* note 1, at 74.