PLEA BARGAINING: DEFENDANT'S RIGHTS TO THE USE OF POLYGRAPH TEST*

Abstract
It is almost customary that when offenders are apprehended they often tend to tell half -truth. Often, neither the best investigations nor the most discreet surveillance will reveal the more lucrative assets derived from criminal enterprise. The efforts of Economic and Financial Crimes Commission in the recovery of assets that are proceeds of crime have yielded results but these financial investigators and analysts after having painstakingly examined loads of documents and records still hit a dead wall as to determining whether or not a particular asset can be forfeited or not. The recent decision of the court to unfreeze the accounts of the wife of the former President of Nigeria Mrs. Patience Jonathan is one example. Another example is the case of Cecilia Ibru who due to poor administration of the recovery and implementation of the plea bargain, Cecilia Ibru still controls most of the assets and shares recovered under the plea bargain. This paper examines the right of both parties in plea bargaining to the use of Polygraph machine in detection of lies. This paper is doctrinal and relies on library materials.

Keywords: Plea bargaining, Defendant's rights, Use of, Polygraph test

1. Introduction:

For as long as human beings have deceived one another; people have tried to develop techniques for detecting deception and finding the truth. Lie detection took on aspects of modern science with the development in the 20th Century of techniques intended for the psychophysiological detection of deception, most prominently, polygraph testing. The polygraph instrument measures several physiological processes (e.g., heart rate) and changes in those processes.[1] The search for justice is as old as the existence of man on earth. Plea bargain is yet just one more attempt at finding a solution to *populi* yearning for justice. The idea that lying produces physical side-effects has long been claimed. In West Africa persons suspected of a crime were made to pass a bird's egg to one another. If a person broke the egg, then he or she was considered guilty, based on the idea that their nervousness was to blame. In ancient China the suspect held a handful of rice in his or her mouth during a prosecutor's speech. Since salivation was believed to cease at times of emotional anxiety, the person was considered guilty if by the end of that speech the rice was dry.[2]

It is necessary at the outset to define Polygraph. A polygraph (commonly referred to as a lie detector) is an instrument that measures and records several physiological responses such as blood pressure, pulse, respiration and skin conductivity while the subject is asked and answers a series of questions, on the basis that false answers will produce distinctive measurements. The polygraph measures physiological changes caused by the sympathetic nervous system during questioning.[3] A polygraph is a machine which, according to its proponents, allows a trained operator to detect lies in the statements of a person attached to the machine.[4] The theory behind the machines (there are various types of the machine[5]) is 'that there is a definite relationship between willful lying and an elevation of blood pressure, fluctuations and the depth of respiration and variations in the resistance to electric current; that such relationship could be ascertained by means of a polygraph which simultaneously records these reactions on paper.'[6]

The Plea Agreement or sometimes called also Plea Bargaining is a criminal proceeding arising from the Anglo-American judicial establishment that requires a pragmatic attribution of criminal responsibility for a person who committed one or more crimes, in the sense that both the prosecutor and the Defense, taking into account the specific circumstances of the case, reach a mutually beneficial agreement.[7]

The introduction of the concept of plea bargaining into our justice system more than a decade ago made players and stakeholders at the legal parlance become divided and painfully suspicious of the concept. Various criticisms

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[1] Lie detectors and detection—Evaluation. I. Committee to Review the Scientific Evidence on the Polygraph. The National Academies press 500 fifth street, N.W. Washington, DC 20001 (national research council U.S)) HV8078 .P64 2003 363.25'4—dc21 access online at http://www.nap.edu on 27/11/2017 p.1
[2] www.newworldencyclopeadia.org assessed online on 26/11/2017
[3]Lie detector, Ibid, p.1
[4]Resartus, S, 'The Courtroom Status of the Polygraph', *Akron Law Review*, Vol. 14:1 Summer 1980
[5] A. Moenssens, Moses, R & Inbau, F, *Scientific Evidence in Criminal Cases* 541 (1973).
[6] Sartor Resartus, 'The Courtroom Status of the Polygraph', *Akron Law Review*, Vol. 14:1 Summer 1980
[7] Lascu, LA, 'Is the Plea Agreement Practice of the International Criminal Tribunals a Pathway to Negotiated Justice within National Jurisdictions?', *Law Review vol. III, issue 2, July-December 2013, p. 63-89*

have greeted its adoption and subsequent application as it was regrettably concentrated on economic and financial crimes. However, the law as it is today is that plea bargaining is part of our legal system.[8]

2. The Analytical Framework

An extensive literature has criticized the use of plea bargaining in criminal cases, on the grounds that plea bargaining undermines the rights of defendants, such as the presumption of innocence and the right against self-incrimination. In addition, plea bargaining has been criticized for subverting the system of justice and fairness as sanctions become subject to negotiated deals and perpetrators are unjustifiably rewarded when they decide to plead guilty.[9] However, concerns seem not to be accorded the fact that a defendant who understands the lacuna in the law explores it and sabotage the country's economy. Hence, presuming the defendant innocent and assuming he has told the whole truth about his criminal involvement, a lie detector test will clear his mind and assure the prosecution the truth in his claim. The Frye's case[10] is often the reference point for the rejection of polygraph examination in criminal trials. The District Colombia Court judge in Frye's case held:

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs. We think the systolic blood pressure deception test has not yet gained such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony deduced from the discovery, development, and experiments thus far made.

This was a 1923 decision, it therefore will stand logic on its head to continue to use this standard to undermine the contribution of modern science or scientific evidence to criminal trials especially the use of polygraph test. In Nigeria, the Economic and Financial Crimes Commission (Establishment) (EFCC) Act however provides, 'Subject to the provisions of section 174 of the Constitution of the Federal Republic of Nigeria 1999, the Commission may compound any offence punishable under this Act by accepting such sums of money as it thinks fit, exceeding the maximum amount to which that person would have been liable if he had been convicted of that offence.'[11] The above section no doubt empowers the EFCC to enter plea bargain with the accused and this is done by compounding the offence before the case is taken to court, they can agree with the suspect who would be told to return all the loot and the offence compounded. The question still remains; do the suspects in truth return all the loots? Do they tell all the truth knowing that they are in negotiation and all the Commission is interested in is a substantial release of what they (the commission) do not even know! The provision of section 13 (2) of the EFCC Act indicates that when an accused agrees to give up money stolen by him, the Commission may compound any offence for which such a person is charged under the Act. On the effect of the above provision of the EFCC Act, Alubo had this to say:

> Compounding here means the Commission may let go of the offence or put more succinctly may agree to drop the charges if the accused is prepared to give up such sums of money as the Commission may deem fit in accordance with the Act. It emphasizes by accepting such sums of money. It is obvious that this provision has no universal application to all criminal trials in Nigeria as negotiations there under are expressly limited to offences punishable under the Act, Sections 14-18 of the Act provides for crimes for which the Commission can exercise jurisdiction. These includes: offences relating to financial malpractices, offences in relation to terrorism, offences relating to public officers retention of proceeds of criminal conduct and offences in relation to economic and financial crimes. In practice however, the EFCC plea bargain on other offences.[12]

It will however be seen that the provision of the EFCC Act deals only with an aspect of plea bargain. Thus, this paper examined the use of polygraph and the rights of parties under plea bargaining agreement. Even where the concept deals with financial and economic crimes or other crimes there will be no room for short-changed. This paper tries to make the willing defendant reveal all and hide nothing. As instances abound where defendants only relinquish the few discovered by the prosecution and smile away after the plea arrangement is completed. Before

[8] Administration of Criminal Justice Act 2015, section 270

[9] Plea Bargaining/Settlement Of Cartel Cases, Directorate For Financial And Enterprise Affairs Competition Committee DAF/COMP(2007)38 available at http://www.oecd.org/competition assessed on 10/August/2017

[10] Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923).

[11] Section 13(2) EFCC (Establishment Act)

[12] Alubo, A.O., 'Plea Bargaining – An Analysis of the Concept' in Azinge, E. A. & Laura, A (Ed), *Plea Bargain in Nigeria: Law and Practice,* Abuja: Nigerian Institute of Advanced Legal Studies Press. 2012

the enactment of the Administration of Criminal Justice Act (ACJA 2015), states like Lagos,[13] Ekiti,[14] Anambra[15] have taken the bold step to incorporate the concept of plea bargain into their respective laws. We now have Enugu and Ebonyi following suit both 2017. The initial concerns whether state will incorporate and implement the ACJA is being allayed. Although, it must be said that no part of our laws contemplate the use of polygraph, however in order to allow for the anti-corruption war to yield the needed results and grant the public the much anticipated relief that plea bargaining is not another means to further encourage corruption as posited by Prince Bola Ajibola SAN,[16] adoption of techniques like lie detector may be a new dimension.

2. Review of the Literature

Alubo[17] was more quoted by most Nigerian writers on plea bargaining. His objective contributions might be instrumental to the eventual passage of the ACJA 2015. However, in his work titled, '*Plea bargaining: An analysis of the concept*' did not particularly touch on the possibility of applying plea bargaining to other offences other than financial and economic crimes as that was the prevalent at the time of his writings. This is the area where Alubo's work differs from this study, as this study considers acceptance of plea bargaining on a larger scale than it is now to help prevent wastage of scarce resources available. Oguche[18] after considering the arguments for and against plea bargaining, Oguche posited thus:

> The introduction of plea bargaining into our criminal justice system is, no doubt, revolutionary. We have no doubt that the practice of plea bargaining in Nigeria is still very embryonic, yet the gains are legion. In as much as plea bargaining is a welcome development in this country, it should not be an exclusive preserve of the rich. It should be applicable to all criminal cases but with great caution when it comes to corruption cases. Going by what we have seen in corruption cases in Nigeria, we say that the application of plea bargaining in this area is very premature and caution should be taken, especially with the international name Nigeria has gained in the context of corruption. It should be made available to all defendants in criminal cases, particularly, first offenders, irrespective of class and status.

The last sentence distinguishes Oguche's work from this study, in the sense that this study tends to accommodate the offences to be plea bargained to include misdemeanor and simple offences as these offences largely contribute to the congestion of our prisons in Nigeria. Kalu[19] while genuinely expressing concerns in his paper titled, 'Role of Plea bargaining in Modern Criminal Law', quoting Sir Elwyn Jones, posited thus:

> It is not always in the public interest to go through the whole process of the criminal law if, at the end of the day, perhaps because of mitigating circumstances, perhaps because of what the defendant has already suffered, only a nominal penalty is likely to be imposed….it is the duty of Attorney General in deciding whether or not to authorize a prosecution to acquaint himself with all the relevant facts, including for instance, the effect which the prosecution, successful or unsuccessful as the case may be, would have upon public morale and order.[20]

The writer was of critical opinion in the adoption and application of plea bargaining in Nigeria. He strongly recommended a redirection from the use of plea bargaining option for offences in financial and economic crimes. However this study seeks to extend the application of plea bargaining to offences other than economic and financial crimes not necessarily turning away completely from finding a way to recover stolen money in Nigeria. This is difference between Kalu's work and this study.

Alschuler[21] holds that based on a survey of available studies, approximately 70 percent of successful prosecutions in Canada are disposed of by guilty pleas. Hence, this study found this as basis to derive lessons from how the Canadians did it to achieve such success. Verdun-Jones and Tijerino are of the view that a critical analysis of Canadian court cases reveals that, while judges accept retribution as a valid sentencing goal, they have clearly

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[13] Administration of Criminal Justice Law of Lagos State 2011

[14] Administration of Criminal Justice Law of Ekiti State 2010

[15] Administration of Criminal Justice Law of Anambra State 2014

[16] See Odebude, N. & Makind, F., 'Plea Bargain is Corruption – Bola Ajibola', *Punch Newspaper*, 5th August 2007

[17] Alubo A. O., 'Plea Bargaining: An Analysis of the Concept', *Essays in Honour of Honourable Justice B. A Adejumo (Ibadan Constellation Publishers 2009) p.33*

[18] Oguche, S, 'Development of Plea Bargaining in the Administration of criminal Justice in Nigeria: A revolution, vaccination against punishment or mere expediency*?' NIALS Journal of Law and Development vol. 1, 2011 p.92*

[19] Awa, UK, 'Plea Bargaining in Modern Criminal Law', *NIALS Journal of Law and Development vol. 2, 2012 p134-191*

[20] Remarking on the outcome of Tafa Balogun's case in justifying the comment of the AG, he said, 'In line with the dictum of Sir Shawcross, despite the hullabaloo surrounding the prosecution for Tafa Balogun for instance, at the end of the day the matter ended with a six month jail sentence for the former police boss

[21] Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System, 50 U. CHI. L. REV. 931, 973-74 (1983)

differentiated it from revenge.[22] This positing is considered by this study as essential and noteworthy. The situation where Government is seen to witch-hunt a perceived political enemy in the fight against corruption can be eliminated. Levenson posits that Plea bargain reduces the work load and pressure on the prosecutor and the judge, thereby saving time' to prepare for grave case by leaving the effortless and petty offences to settle through plea bargain.'[23] This position is shared by this study.

Ozekhome[24] raises a poser. 'The question is, has the plea bargaining as it is implemented today, met the objectives of the society? Why is it protecting the high and the mighty…' this leaves no one in doubt as to his concerns as a Human Rights lawyer and his position with respect to the application of the concept in Nigeria. Lamenting the application of plea deals in Nigeria Ezekhome quoted the former Chief Justice of Nigeria, Justice Dahiru Musdapher as saying, '…when I described the concept as of 'dubious origin', I was not referring to the original raison-d'etre or the juridical motive behind its conception way back in the United States or England in the early 19th century. I was referring to the sneaky motive behind its introduction into our legal system, or its evident fraudulent application…' The writer at the end however advocated for a suspended sentence on misdemeanor or simple offences, where as a first offender you are not punished but freed to go home and be observed for a while but if you commit another offence then you will go to jail. This differentiates this study from the learned silk's, simple offences and misdemeanor can also be plea bargained which is the objective of this study. Ani[25] avers that, 'Where appropriately applied, plea bargaining unlike core retributive responses to crime, has the potential to repair the financial and perhaps relational harms that crime has left in its aftermath through forfeiture, restitution, restoration and/or compensation'. Although her views were akin to mine but she was not specific about the types and nature of crimes that can be plea bargained. This study is however taking it further to specifically advocate incorporation of simple offences and misdemeanor in to plea negotiations.

Like most critics of the concept, Waziri[26] also holds a strong position against plea bargaining, she opined, 'Plea bargains do not always represent improved choice for the defendants but rather a coordinated trap'. She concluded by citing the case of a bank robber in the United States of America who got 8 years instead of 25 years imprisonment who claimed, 'I gambled really, I won' as an indictment of the practice of plea bargaining. The writer did not hide her disbelief in the concept. However this work believes the concept can be used within our understanding and tradition. Adeleke[27] opines thus, 'The argument is that plea bargain is immoral and anti-utilitist in nature as it tend to favour the upper class of the society and not for the benefit of the greatest number of people and therefore it is an instrument of the ruling class to escape the wrath of law, and thus a machine that aid the perpetrators of corruption in Nigeria and this is not good for Nigeria as a society in need of financial resources to build her economy, since it has been realized that corruption derails socio-economic development of the society'. Adeleke only joined the retinue of critics who see nothing right about the concept of plea bargaining. This study tries to explore beyond criticism. Agaba[28] says that plea bargain involved the prosecutor, the accused the victim and the court. The writer is of the opinion that the court is non-existent in the negotiation process between parties to a casein plea bargain. This is so because the court is not made to be interfering in any negotiation process holding to the common principle of unbiased and fair adjudication of justice. The writer laments the rubber-stamp position of the courts in plea bargaining process.[29] This study finds his position agreeable and considers it one of the shortfalls of the concept. However, since the objective of this study is to employ the concept of plea bargaining in its proper application to decongest our prisons, reduce caseload in courts, prevent wastage of meager resources of the nation, a major difference exist in Agaba's work and this study. Bar-Gill and Ben-Shahar[30] Canadian authors posit:

> How can a prosecutor, who has only limited resources, credibly threaten so many defendants with costly and risky trials and extract plea bargains involving harsh sentences? Had defendants refused to settle, many of them would not have been charged or would have escaped with lenient sanctions. But such collective stonewalling requires coordination among defendants, which is difficult if not

[22] Verdun-Jones, SN & Tijerino, AA, 'Victim Participation In The Plea Negotiation Process In Canada: A Review Of The Literature And Four Models for Law Reform Research and Statistics Division' rr2002-5e 2002 available online at www.torontopubliclibrary.ca/detail.jsp?Entt=RDM1590733&R=1590733

[23] Levenson, L, Peeking Behind the Plea Bargaining Process: Missouri v Frye and Lafler v Cooper", (2013), Loyola of Los Angeles Law Review, http://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=2844&context=llr, Accessed January 15 2017

[24] Mike A. A. Ozekhome, Coercion to Compromise: The Imperatives of Plea *NIALS Journal of Law and Development vol. 2, 2012 p226-266*

[25] Ani, CC, Plea bargain: Immunity from Punishment? *NIALS Journal of Law and Development vol. 2, 2012 p267-301*

[26] Fatima Waziri, 'The Paradox of Plea Bargaining', *NIALS Journal of Law and Development vol. 2, 2012 p302-318*

[27] Adeleke, G. O., 'Prosecuting Corruption and the Application of Plea Bargaining in Nigeria: A Critique'. *International Journal of Advanced Legal Studies and Governance* Vol. 3 (No.1, April 2012) p. 53-70

[28] Agaba, JA, *Practical Approach to Criminal Litigation in Nigeria* 3rd Edition 2015

[29] Agaba, *Practical Approach to Criminal Litigation in Nigeria*, 1st ed. Pan of Press, Abuja 2012, Page 590

[30] Bar-Gill, Ben-Shahar, 'The Prisoners' (Plea Bargain) Dilemma', *Journal of Legal Analysis* Volume 1, (No. 2) Summer, 2009 p.737-773

> impossible to attain. Moreover, the prosecutor, by strategically timing and targeting her plea offers, can create conflicts of interest among defendants, frustrating any attempt at coordination. The substantial bargaining power of the resource-constrained prosecutor is therefore the product of the collective action problem that plagues defendants.

This conclusion suggests that, despite the common view to the contrary, the institution of plea bargain may not improve the well-being of defendants. Absent the plea bargain option, many defendants would not have been charged in the first place. Thus, we can no longer count on the fact that plea bargains are entered voluntarily to argue that they are desirable for all parties involved.' The writer's position is that prosecutor's role in plea bargaining needs to be streamlined. This study will be greatly enriched by this position as one of the critical assessment of the plea negotiation in Canada. Savitsky[31] observes as follows, 'Plea bargains are a convergence of the expectations of the two sides to a negotiation. In order for both sides to agree to a bargain, both must believe that they are better off by making the bargain. The prosecutor must believe that the certainty of a conviction and the cost savings of avoiding a trial are worth the concessions made to the defendant, and the defendant must believe that the sentence is lower than his expected sentence at trial. However, because a Black defendant is more likely than a white defendant to view the criminal justice system as biased against him, his subjective expected sentence is higher than that of a white defendant. That is, Black defendants will tend to be more risk averse than white defendants, owing to a cultural and historical distrust in the criminal justice system. Plea bargains offer a risk averse defendant a way to avoid extreme punishment, often seen by the defendant as inevitable, by accepting costs that are more modest. Consequently, Black defendant will ironically tend to accept bargains with comparatively worse outcomes. His work argued that plea bargaining contributes to the racial inequality found in the American prison population by disproportionately impacting African American defendants. Although there is more to benefit from his work but his environment and hypothesis does not operate here as there is not case of racial discrimination in Nigeria and this study is based on the application of plea bargaining in Nigeria. Commenting on the cases of Lafler[32] and Missouri,[33] Bibas[34] recommends that 'Some of the most important solutions will come from prosecutors. He observed that at an adversarial trial, prosecutors' interests are largely antithetical to those of defendants even though their job is to do justice, not to win convictions.

It must however be said that Plea bargaining today is fundamentally not adversarial but collaborative (some would say collusive). The world of criminal justice has been transformed from a gladiatorial ring to a negotiating table and that transformation has revolutionized the parties' incentives. He saw plea bargaining as an avenue for Prosecutors who now have strong self-interests and institutional interests in disposing of their cases quickly and consensually lighten their own workloads. This study also believes that application of plea bargaining in Nigeria properly will certainly enhance speedy dispense of justice and save time, manpower and cost. Bibas' work is an exposition of the decisions of the Supreme Court of United States of America on the two mentioned cases this differentiates his work from this study. Again, Bibas opines that 'the conventional wisdom is that litigants bargain toward settlement in the shadow of expected trial outcomes. In this model, rational parties forecast the expected trial outcome and strike bargains that leave both sides better off by splitting the saved costs of trial'. Bibas' idea strengthens this study in the sense that there is no point making a defendant a convict before resolving the issue[35].

Mnookin and Kornhauser note in passing that the preferences of the parties, transaction costs, attitudes toward risk, and strategic behavior will substantially affect the negotiated outcomes.[36] Hence, saw danger in plea negotiation as not equal its advantages. This study also shares their view and differs only on the ground that inducement of the defendant may amount to infringement on their fundamental rights. Easterbrook recognizes

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[31] Savitsky, D, The Problem with Plea Bargaining: Differential Subjective Decision Making as an Engine of Racial Disparity In the United States Prison System. A Dissertation Presented to the Faculty of the Graduate School of Cornell University in Partial Fulfillment of the Requirements for the Degree of Doctor of Philosophy, 2009 available online at www.researchconnections.org/DSDR/biblio/series/00038/.../107792?...1

[32] *Lafler v. Cooper*, 132S. Ct. 1376(2012)

[33] *Missouri v. Frye*, 132S. Ct. 1399(2012).

[34] Bibas, S, 'Incompetent Plea Bargaining and Extrajudicial Reforms', *Harvard Law Review [Vol. 126] p.150 -175.* In Frye, Scalia, J., dissenting) ('The plea-bargaining process is a subject worthy of regulation, since it is the means by which most criminal convictions are obtained. It happens not to be, however, a subject covered by the Sixth Amendment, which is concerned not with the fairness of bargaining but with the fairness of conviction.'); while in Lafler, 132S. Ct. at 1393 (Scalia, J., dissenting) (characterizing the majority's extension of Sixth Amendment protection to plea bargaining as 'a vast departure from our past cases, protecting not just the constitutionally prescribed right to a fair adjudication of guilt and punishment, but a judicially invented right to effective plea bargaining')

[35] Bibas supra

[36] Mnookin, RH & Kornhauser, L, 'Bargaining in the Shadow of the Law: The Case of Divorce', 88 *YALE L.J.* 950(1979), which treats the legal rights of each party as 'bargaining chips 'that affect settlement outcomes. Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior, 11J. *LEGALSTUD.* 225(1982); George L. Priest & Benjamin Klein, 'The Selection of Disputes for Litigation', 13J. *LEGAL STUD.* 1(1984); Steven Shavell, Suit, Settlement, and Trial: A Theoretical Analysis under Alternative Methods for the Allocation of Legal Costs, 11J. *LEGAL STUD.* 55(1982).

that time discounting, risk preferences, limited funds, and agency costs may affect pleas. He considers these impediments however, as minor footnotes to a fundamentally rational model. He saw agency costs, as 'true but trivial.'[37] He finally reasoned that agency costs, are as pressing throughout the criminal process as at the time of plea and thus dismisses the adverse impact of poverty on bail determinations and plea bargaining. This study although may consider some of the shortfalls of plea bargaining but does not make it the subject of the study, hence the difference between Easterbrook work and this study. Scott and Stuntz[38] acknowledge that the psychology of framing, poor judgment, and risk preferences affect plea bargains. They dismiss the importance of framing, however, and barely consider variations in risk preferences. They do recognize the significant roles of plea bargain in criminal justice system. Their work will significantly contribute to the examination of the criticism of plea bargain whereas this study concentrates on the application of the concept of plea bargaining for effective justice system.

Scott and Stuntz[39] see plea bargaining as a contractual agreement between the prosecutor and the defendant concerning the disposition of a criminal charge. However, unlike most contractual agreements; it is not enforceable until a judge approves it. According to Guidorizzi,[40] a proper definition of plea bargaining must encompass the broad range of practices that constitute plea bargaining and must include both explicit plea bargaining and implicit plea bargaining. He defines plea bargaining as 'the defendant's agreement to plead guilty to a criminal charge with the reasonable expectation of receiving some consideration from the State. Barde founds his argument in support of plea bargain on the premise of eradicating delay in criminal justice trials. In his opinion, 'an efficient plea bargain therefore will help to reduce impunity and strengthen faith in the system'. People have lost faith in the system because cases are not concluded speedily. He further posited that the strongest deterrence to criminal activity is a combination of the possibility of apprehension and the knowledge that the accused will be speedily brought to justice by the state.[41] This work was also only particular about an advantage of plea bargain but not its application to minor offences as the focus of this study.

A study conducted by Juristat on Adult criminal court statistics in Canada, 2013/2014 reveals that In 2013/2014, there were more than 360,000 cases completed in adult criminal court, which represented a 7% decrease in the number of cases from the previous year. It also showed that most adult criminal court cases in 2013/2014 involved non-violent crime, representing 76% of all completed cases. Impaired driving continued to represent the largest proportion of all completed cases, at 11%. This was closely followed by cases involving theft (10%) and failure to comply with a court order (10%)[42]. The essence of this report to this study is not farfetched, this study proposes that when simple offences that contributed largely to the congestion of our prisons are given priority in plea negotiations, there will certainly be drastic reduction in caseloads in courts and prisons will become decongested. Luca, Dann, and Davies[43] observe that the criminal justice system has not, traditionally, been well-suited to accommodate the interests and complexities of family relationships. They observed that Criminal proceedings involving allegations of family violence often have a disruptive effect on the lives of the complainant and the accused – families may be separated, communication between spouses and parents restricted, residences changed, contact with children limited and financial demands increased. Hence, they proposed the adoption of plea bargaining in resolving family violence.

3. The Use of Polygraph and how the Machine works

With the development of suitable apparatus for gauging emotions, many significant studies became possible, and there was a growing interest in the concrete problems of deception. The early years of the 19th Century, however, provided no startling innovations. In 1811, Mahon[44], in a book on legal medicine, related that Galen, a Greek medical writer (131-201 A. D.), detected deceit in an individual who complained of a violent colic on being summoned to attend an assembly of the people. According to Mahon, Galen suspected feigning and prescribed 'only a few fomentations, although this same person had not long before been cured of the same complaint by the use of philonium.' In 1814, Hill,[45] a medical surgeon, wrote an essay 'on the rules for detection of pretenders to madness.' Although both- Mahon and Hill were interested in simulation, they appear to be concerned only with

[37] Easterbrook, Criminal Procedure, supra note 2, at 309.
[38] Robert E. Scott & William J. Stuntz, 'Plea Bargaining as Contract', 101 *YALE L.J.* 1909, 1912(1992))
[39] Scott R. E. and Stuntz W. J., 'Plea Bargaining as Contract', *1912, The Yale Law Journal, (Vol. 101) June (1992)*
[40] Guidoroizzi D.D., 'Should We Really 'Ban' Plea Bargaining? : The Core Concerns of Plea Bargaining Critics' *47 Emory Law Journals. (1998)*
[41]Barde, J, 'Eradicating delay in Criminal Administration of Justice in Nigeria courts: The Plea Bargain option', *EBSU Journal of International Law and Judicial Review vol. 4, 2016 pp 137-153*
[42]Maxwell, A, Adult criminal court statistics in Canada, 2013/2014 Canadian Centre for Justice Statistics
Adult criminal court statistics in Canada, 2013/2014 Release date: September 28, 2015 available online at www.statcan.gc.ca.
[43]Luca, J, Dann, E & Davies, B, 'Best Practices where there is Family Violence (Criminal Law Perspective)' Presented to Family, Children and Youth Section Department of Justice Canada 2012
[44] Mahon, P. A., *Medecine Legale, et Police Medicale*, 3 vols. (1811).
[45] Hill, G. N., *An Essay on the Prevention and Cure of Insanity; With Observations on the Rules for the Detection of Pretenders to Madness* (1814).

subjective symptoms. So, too, was Beck,[46] an instructor in a medical college, who, in 1825, referred to 'a very curious work published at New Haven in 1817 under the title of 'The Mysterious Stranger, or Memoirs of Henry More Smith.'' Herein was described the case of a prisoner who contrived to seek attention and escape by striking his elbows on the cell floor to vary his pulse and thus trick the authorities by a simulated illness! In the two decades between 1870 and 1890, both Galton and Wundt were very active in the development of 'association' tests, and made brief references to the possibilities of their use in ascertaining emotions connected with deceit. Although these ideas led to some practical applications by other workers, we should first call attention to the significant work of Mosso, an Italian physiologist of that era[47]. Mosso, like many other workers in the field of the emotions, did not invent a 'lie-detector.' However, he, and others to be mentioned, did make many observations which subsequently formed the basis for detection techniques. (Lie detection came about through the application of a method or methods to a specific end; it was never a first act in the growth of an idea. Rather it should be considered the fruit of centuries of germination, some of which, indeed, was plucked before it was ripe). Mosso was encouraged in his studies of the emotions by Lombroso, his tutor and contemporary. His work is of unusual interest to the student of deception, particularly his studies of fear and of its influence on the heart and respiration. As early as 1875[48] Mosso demonstrated, by means of a 'plethysmograph' (an instrument for measuring blood pressure and pulse changes) periodic undulations in man's blood pressure caused by the respiration cycle;'[49] and his ingenuous studies of the circulation of the blood in the brain opened up new avenues for the study of the influences of fear. In 1895 he described a new device for measuring blood pressure, giving credit to Vierordt for first measuring man's blood pressure, from the outside, in 1855. Many of the current workers in the deception technique might well study some of the carefully recorded observations of this Italian physiologist. One, of especial interest, was made on a woman whose brain, as the result of a disease, had been partially exposed through an opening in the skull.[50]

The intention to introduce use of polygraph is to discourage criminals from adopting plea bargaining as a shield and hit their other relevant vital information. Hence in the application of polygraph test to a defendant, three different types of questions all equally important are to be tested; (National Security or Suitability, Honest & Integrity, and Known Truth).

A. The polygraph instrument is designed to record an individual's respiration, electrodermal activity, blood volume, and heart rate. It records changes and variations in these factors, which may occur during the asking of certain questions. The degree and nature of the physiological changes are the criteria from which deception is inferred. The theory of detection of deception is predicated upon the principle that individuals usually have certain physiological reactions when practicing deception, particularly if the truth might produce a serious or undesirable effect on their personal welfare. The reactions are primarily involuntary and generally cannot be controlled.
B. The polygraph instrument records certain physiological manifestations, which may accompany these reactions. After a thorough review of these recordings, the polygraph examiner will make an inference and can render one of four opinions:

1. The examinee was truthful when answering the relevant questions.
2. The examinee was deceptive when answering the relevant questions.
3. Physiological manifestations were either absent, erratic, inconsistent or contained anomalies that precluded a conclusive determination. In this instance the test result will be identified as Inconclusive or No Opinion.
4. The examination protocol was terminated prior to completion, resulting in a No Opinion determination.

C. The polygraph is a scientific, diagnostic instrument that graphically records physiological changes, which may take place in a person at a specific time. In the hands of a trained examiner, it is reliable in detecting deception being practiced by a subject regarding a specific issue. However, the goal of polygraph is not merely detection of deception, but also the discovery of truth concerning a specific matter. The detection of deception is only part of the procedure. Examinations are considered completely successful when the final outcome is full disclosure of the truth.
D. The polygraph is an investigative tool that should be administered only after the case agent has attempted to exhaust all feasible investigative leads, but has not resolved the primary issue of the case. Prior to requesting a polygraph examination, it is the case agent's responsibility to possess a strong working knowledge of the case and to have conducted a thorough interview with the prospective examinee regarding his/her knowledge of the investigation. When possible, a sworn statement should be obtained from the examinee prior to the polygraph examination.[51]

[46] Beck, T. R., Elements of Medical Jurisprudence (2d. ed., 1825).
[47] Paul V. Trovillo, 'History of Lie Detection', 29 *Am. Inst. Crim. L. & Criminology* 848 (1938-1939)
[48] Mosso, A., Supra
[49] Mosso, Ibid
[50] Trovillo, supra
[51] U.S. Customs and Border Protection Office of Internal Affairs Credibility Assessment Division; Policy and Reference Manual With Appendices from DACA and Federal Standards, 2010 assessed online on 27/11/2017

E. It is the case agent's responsibility to arrange a suitable location for the polygraph examination, as well as arrange logistical support for the examiner. When a specifically designed interview/polygraph room is not available, a private office/room with a table and two chairs will suffice.
F. Upon receipt of the polygraph authorization, the case agent will notify the examinee of the date, time and location for the polygraph examination.
G. In the event that the examinee is a juvenile, a written Parental Consent for Minor must be obtained from their legal guardian.
H. Prior to every polygraph examination, the requesting agent, or designated representative, should provide the polygraph examiner with a detailed briefing of the case facts and relevant test issues as well as answer any specific questions the examiner may have.
I. At the beginning of every polygraph examination, the requesting case agent, or designated representative, should be available to witness the examinee's advice of rights and consent to undergo a polygraph examination. Whenever possible, the case agent should visually and/or audibly monitor the entire polygraph examination. If monitoring is not possible, the case agent should be available to confer with the examiner at any time during the examination, should the need arise.
J. In the event the examinee is found deceptive and a confession is obtained, it is incumbent upon the case agent, when possible, to obtain a written statement at the conclusion of the polygraph examination. This helps alleviate the burden of additional travel for the examiner to appear at any subsequent administrative or judicial proceedings.

4. The Rights of the Parties

Section 36 of the Constitution of the Federal Republic of Nigeria 1999 (as amended)[52] guarantees the rights of any person accused of any offence and presumes him innocent until it is otherwise established against him by court of competent jurisdiction. Presumption of innocence is contained in both international and regional instruments such as Universal Declaration of Human Rights, 1948 (Article II), the International Covenant on Civil and Political Rights (Article 14 (2)), the American Declaration of Rights and Duties of Man (Article XXVI), the American Convention on Human Rights (Article 7(b)), the Arab Charter on Human Rights (Article 16). It is also contained in the United Nations Standard Minimum Rules for Treatment of Prisoners (Rule 84 (2)). Hence, a defendant is protected from the pronouncement of guilt until the prosecution proves his case beyond reasonable doubt and this principle applies till judgment is delivered. However, the law permits the prosecution to make public the name of the accused person/defendant standing trial but avoid making statements that can be termed as prejudging the accused person. The prosecution may request the public for useful information respecting the accused standing trial; this is not considered prejudice to his right of innocence. Therefore, where an accused person voluntarily opts for plea negotiation, he cannot be heard to claim infringement on his rights. It must also be understood according to Wigwe 'that the cardinal basis conviction in our courts of law is the availing and unveiling of evidence, validly obtained and presented to the court for assessment and review to determine the weight of presented faces and confirmation of the level of each party's entitlement'.[53] However, the most tasking aspect of prosecuting a white collar crime, indeed any other crime, is the way and manner the evidence is gathered and presented to the courts for evaluation. The precept of the law of evidence is easily equated to the concept of law itself, where every prosecution, conviction and indeed adjudication is achieved through determinant to the work of conferment of justice, its placement at the grace of a disadvantaged prosecutor creates a desire and necessity to seek the option of a trial that satisfies the needed conviction of an offender through the width and latitude of the sentence obtained is not commensurate with the alleged offence. The stark reality of the position of the prosecutor in achieving the cause of justice and the factual reference of available evidence as fulcrum of the determinant position of the courts makes it expedient for prosecutorial authorities from the office of the Attorney-General of the Federation, EFCC, ICPC and indeed the Nigerian Police Force (NPF), should seek to proclaim the mechanism of judicial review that circumscribes the confines of the burden of proof in cases involving financial crimes, Where rather than the prosecution needing to prove the allegation of infraction against the accused, 'the onus would now lie on the accused to prove that the offence was not committed.'

It is important to note, Chris opined that 'the law does not say that an accused person shall be punished simply because his/her guilt is apparent /obvious to everyman on the street but rather, a person charged with a crime shall be tried before a competent court and shall be convicted, if shown beyond reasonable doubt'.[54]

5. Conclusion

From the foregoing, it is the conviction of this study that in order to reduce commission of crimes in the community, adoption of plea bargaining garnished with the use of polygraph test will go a long way in restoring the hope of the masses in our judicial system. This paper therefore recommends a proper utilization of the polygraph examination following the rules of evidence and respect for the rights of parties. It is the belief of this paper that adoption of polygraph test in the operation of plea bargain will go a long way to assist the government efforts to decongest both the courts and the prisons.

[52] Constitution of Federal Republic of Nigeria, 1999 section 36 (9)
[53]Wigwe, C, The Law and Morality of Plea Bargaining, available at: https://www.researchgate.net/publication/274509676 2015 assessed online on 27/11/2017
[54]Wigwe, The Law and Morality of Plea Bargaining, available at: https://www.researchgate.net/publication/274509676 2015 assessed online on 27/11/2017