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Plea Bargains: What to Do When the Prosecutor Says No

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PLEA BARGAINS: WHAT TO DO WHEN THE PROSECUTOR SAYS NO

I. INTRODUCTION

A common misconception of the American criminal justice system is the belief that "an accused may only be convicted by a jury of his peers after a trial in which his defense lawyer and the prosecutor sharply contest his guilt."[1] In a majority of cases, however, this scenario never occurs.[2] Instead, the prosecution and defense usually make a deal; that is, the defendant agrees to plead guilty[3] and the prosecutor agrees to make concessions in return.[4] One study has estimated that guilty pleas account for ninety percent of all convictions and that most of these pleas are the result of plea bargaining.[5] In short, plea bargaining has become an important part of our criminal justice system.[6]

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1. J. BOND, PLEA BARGAINING AND GUILTY PLEAS § 1.01 (1975) [hereinafter cited as GUILTY PLEAS].

2. One judge has gone as far as to say that "[a]s a practical matter I know of no pleas in my court where they [guilty pleas] are not the result of plea bargaining. I no longer even pretend that the plea is not the result of at least an understanding that a certain recommendation is going to be made." Note, *The Trial Judges Satisfaction as to Voluntariness and Understanding of Guilty Pleas*, WASH. U.L.Q. 289, 313 (1970).

3. This is not the only inducement a defendant can offer. *See, e.g.*, United States v. Silva, 449 F.2d 145 (1st Cir.), *cert. denied*, 405 U.S. 918 (1971) (promise to aid police in their investigation of a crime); United States v. Paiva, 294 F. Supp. 742 (D.C. Cir. 1969) (promise to give prosecutor information); People v. White, 116 Ill. App.2d 180, 253 N.E.2d 654 (1969) (waiver of jury trial); Bullock v. Indiana, 397 N.E.2d 310 (1980) (promise to testify as state's witness); Commonwealth v. Marsh, 448 Pa. 292, 293 A.2d 57 (1972) (promise to forego further appeals).

4. *See* notes 25-28 *infra* and accompanying text.

5. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 9 (1967) [hereinafter cited as TASK FORCE REPORT]. This figure may be misleading. The incidence of guilty pleas and plea bargaining varies among jurisdictions. For example, in one state the frequency ranged from zero percent in one county to 95 percent in another. Klonoski, Mitchell & Gallagher, *Plea Bargaining in Oregon: An Exploratory Study*, 50 OR. L. REV. 114, 118 (1971). *See generally* D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL (1966); Note, *The Role of Plea Negotiation in Modern Criminal Law*, 46 CHI-KENT L. REV. 116 (1969); Note, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas*, 112 U. PA. L. REV. 865 (1964) [hereinafter cited as *Compromises*]; Note, *Profile of a Guilty Plea: A Proposed Trial Court Procedure for Accepting Guilty Pleas*, 17 WAYNE L. REV. 1195 (1971) [hereinafter cited as *Proposed Procedure*] (author estimates that 99 percent of all guilty pleas in Wayne County, Michigan (Detroit) result from plea bargaining).

6. "[I]n recent years there has been a growing awareness of the practical importance of plea discussions and arrangements to the administration of justice." United States *ex rel.* Rosa v. Follette, 395 F.2d 721, 724 (2d Cir.), *cert. denied*, 393 U.S. 892

There are many advantages to the practice of plea bargaining.[7] First, plea bargaining alleviates congested court dockets.[8] In fact, if the percentage of defendants entering guilty pleas dropped by only ten percent, a doubling of judges, jurors, courtrooms, and other court facilities and personnel would be required.[9] On one hand, from the prosecutor's prospective, plea bargaining injects a needed element of flexibility into the criminal process.[10] On the other hand, the defendant

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(1968). *See also* Santobello v. New York, 404 U.S. 257, 261 (1971); Lesley v. Oklahoma, 407 F.2d 543, 544 (10th Cir. 1969). *See generally* M. MARCUS & R. WHEETON, PLEA BARGAINING: A SELECTED BIBLIOGRAPHY (1976); Alschuler, *The Trial Judges Role in Plea Bargaining*, 76 COLUM. L. REV. 1059 (1976); Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179 (1975); Finkelstein, *A Statistical Analysis of Guilty Plea Practices in the Federal Courts*, 89 HARV. L. REV. 293 (1975) [hereinafter cited as Finkelstein]; Goldstein, *For Harold Lasswell: Some Reflections on Human Dignity, Entrapment, Informed Consent, and the Plea Bargain*, 84 YALE L.J. 683 (1975); Thomas, *Plea Bargaining: The Clash Between Theory and Practice*, 20 LOY. L. REV. 303 (1974); White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U. PA. L. REV. 439 (1971), Note, *Plea Bargaining and the Transformation of the Criminal Process*, 90 HARV. L. REV. 564 (1977); Comment, *Plea Bargaining Mishaps—The Possibility of Collaterally attacking the Resultant Plea of Guilty*, 65 J. CRIM. L. & CRIMINOLOGY 170 (1974) [hereinafter cited as *Mishaps*]; Note, *The Legitimation of Plea Bargaining: Remedies for Broken Promises*, 11 AM. CRIM. L. REV. 771 (1973); [hereinafter cited as *Remedies*].

7. As the Supreme Court stated in Santobello v. New York, 404 U.S. 257 (1971):

> It [plea bargaining] leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pre-trial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pre-trial release; and by shortening the time between charge and disposition it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned.

Id. at 261. *See also* Brady v. United States, 397 U.S. 742, 751-52 (1970).

8. Burger, *The State of the Judiciary—1970*, 56 A.B.A.J. 929 (1970).

9. *Id.* at 931. *See also* Santobello v. New York, 404 U.S. 257, 260 (1971), wherein the Court stated that "[i]f every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities." 56 A.B.A.J. at 931. *But see* Berger, *The Case Against Plea Bargaining*, 62 A.B.A.J. 621 (1976) (author contends that most plea bargaining can be eliminated without increasing the rate of not guilty pleas); Bond, *Plea Bargaining in North Carolina*, 54 N.C.L. REV. 823, 840 n.44 (1976) (author contends that elimination of plea bargaining will increase the percentage of guilty pleas). The plea bargain-guilty plea process generates extensive appellate litigation. Machibroda v. United States, 368 U.S. 487, 497 (1962) (Mr. Justice Clark, dissenting, called attention to the steady increase in the volume of appeals under 28 U.S.C. § 2255 (1976)). *See also Proposed Procedure, supra* note 5 at 1211 (author contends that Michigan appellate courts spend four out of every five days reviewing appeals from guilty pleas).

10. "Plea bargaining also permits the courts to treat the defendant as an individual, to analyze his emotional and physical characteristics, and to adapt the punishment to the facts of the particular offense." People v. West, 3 Cal.3d 595, 605, 477 P.2d 409, 414, 91 Cal. Rptr. 385, 390 (1970) (en banc). *But see* People v. Byrd, 12 Mich. App. 186, 201, 162 N.W.2d 777, 784 (1968) (Levin, J., concurring) (where it was

who negotiates a plea may benefit by receiving reduced penalties and by avoiding the time, expense, and embarrassment which often accompany a criminal trial.[11]

Despite these advantages, plea bargaining is not without its critics.[12] One critic has written that when plea negotiations occur "the rule of law is invariably sacrificed to the rule of convenience."[13] Furthermore, plea bargaining may create a danger that defendants will be deterred from exercising their constitutional rights[14] and, in some cases, may even induce innocent defendants to plead guilty.[15] Other critics maintain that plea bargaining compromises the prosecutor's duty to enforce the law.[16] Nevertheless, courts could not handle the workload if all criminal defendants insisted on a trial.[17] In light of this fact, "plea bargaining is a bureaucratic necessity which has become indispensible to the administration of the present criminal justice system."[18]

The practice of plea bargaining was expressly sanctioned by the United States Supreme Court in *Santobello v. New York*.[19] Many

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asserted that "[t]he only individualization is that those who plead guilty do so to some other, lesser charge and those who stand trial must answer for the greater offense. To defend this on the ground it is 'individualization of justice ' is an obvious distortion of terms."

11. This is particularly true where society has deemed the behavior of the defendant deviant. *See, e.g.*, State v. Ashby, 43 N.J. 273, 204 A.2d 1 (1964) (defendant pled guilty to five indictments for disorderly conduct in return for dismissal of five indictments for open lewdness).

12. *See, e.g.*, Finkelstein, note 6 *supra*; Note, *The Unconstitutionality of Plea Bargaining*, 83 HARV. L. REV. 1387 (1970) [hereinafter cited as *Plea Bargaining*]; Dash, *Cracks in the Foundation of Criminal Justice*, 46 ILL. L. REV. 385 (1951) [hereinafter cited as Dash].

13. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 85 (1968) [hereinafter cited as *The Prosecutor's Role*].

14. Chief Judge Bazelon of the Court of Appeals for the District of Columbia Circuit disscussed this problem in Scott v. United States, 419 F.2d 264, 276-77 (D.C. Cir. 1969), stating that prosecutors may, in the exercise of their discretion, take a "sure half loaf rather than to await the outcome of trial," but that prosecutors may not use plea bargaining as a measure to deter defendants from demanding a trial. *See also Plea Bargaining, supra* note 12 at 1395-98.

15. *See The Prosecutor's Role, supra* note 13 at 60-61. Simply stated, the prosecutor made the defendant an offer he could not refuse. People v. Byrd, 12 Mich. App. 186, 206-07, 162 N.W.2d 777, 787 (1968) (there is no way of knowing whether a particular guilty plea was given because the accused believed he was guilty or because of the promised concession).

16. *See* Dash, *supra* note 12 at 395-97. *See also* Arnold, *Law Enforcement—An Attempt at Social Dissection*, 42 YALE L.J. 1, 19 (1932); Comment, *Equivocal Guilty Pleas—Should They Be Accepted?*, 75 DICK. L. REV. 366 (1970-71).

17. *See* notes 8 and 9 *supra*.

18. *Remedies, supra* note 6 at 774.

19. 404 U.S. 257 (1971). Chief Justice Burger, speaking for the majority, stated that "[t]he disposition of criminal charges by agreement between the prosecutor and

issues, however, remain unresolved. This comment will examine the remedies available to a defendant who, having entered a negotiated plea, subsequently alleges that the prosecutor breached his part of the bargain. In this context, the relevant questions that will be examined are: 1) Was there in fact a promise? 2) Was the promise broken? 3) Under what theory may relief be given? and 4) What type of relief is appropriate?

II. THE PROMISE OF THE PROSECUTOR

The process by which a plea agreement is reached is very similar to the process of contract formation.[20] Typically, defense counsel and the prosecution meet and negotiate what the defendant will do[21] and what the prosecutor will or will not do in return.[22] The actions of the defendant and the promise of the prosecutor constitute the consideration for the bargain.[23] The consideration given by the defendant can vary, but the most common consideration involves his plea of guilty.[24]

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the accused, sometimes loosely called 'plea bargaining,' is an essential component of the administration of justice. Properly administered, it [plea bargaining] is to be encouraged." *Id.* at 260.

20. Courts often analyze plea bargaining problems under principles of contract law. *See, e.g.*, Cooper v. United States, 594 F.2d 12 (4th Cir. 1979) (court analyzes 'offer' and 'acceptance' in the context of plea agreements); United States *ex rel.* Williams v. McMann, 436 F.2d 103 (2d Cir. 1970), *cert. denied*, 402 U.S. 914 (1971). Judge Kaufman's opinion characterizes the prosecutor's reduction of the charges as the consideration for the defendant's guilty plea, while the defendant's appeal is characterized as a revocation of the bargain. This allows the prosecutor to rescind his offer and retry the defendant on the original charges. *But see* United States v. Hughes, 223 F. Supp. 477, 480 (S.D.N.Y.) *aff'd*, 325 F.2d 789 (2d Cir. 1964) ("the court will not be governed by the technical concept of promise as used in contract law"); Barker v. State, 259 So.2d 200, 204 (Fla. 1972) ("we are reluctant to extend the status of a plea bargain to that of a specifically enforceable contract since appropriate relief may ordinarily be afforded otherwise"). *See also* Tigar, *Forward: Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 HARV. L. REV. 1 (1970). Westen & Westin, *A Constitutional Law of Remedies for Broken Plea Bargains*, 66 CALIF. L. REV. 471 (1978) [hereinafter cited as *Constitutional Law*]; Note, *The Constitutionality of Reindicting Successful Plea Bargain Appellants on the Original Higher Charges*, 62 CALIF. L. REV. 258 (1974).

21. *See* note 3 *supra*.

22. *See* notes 25-28 *infra* and accompanying text.

23. When viewed in light of the analogous law of contracts, it is clear that plea agreements normally arise in the form of unilateral contracts. The consideration given for the prosecutor's promise is not defendant's corresponding promise to plead guilty, but rather is defendant's actual performance by so pleading. Thus, the prosecutor agrees to perform if and when defendant performs but has no right to compel defendant's performance.
State v. Collins, 27 CRIM. L. REP. (BNA) 2311 (N.C. May 6, 1980).

24. *See* note 3 *supra* and accompanying text. *See also* GUILTY PLEAS, *supra* note 1 at § 1.08.

The most common types of consideration given by the prosecutor are: 1) promises as to sentence recommendations;[25] 2) promises to dismiss additional charges[26] or not to bring potential charges;[27] and 3) acceptance of pleas to lesser included offenses.[28] Promises given by the prosecutor must be kept because, as one court has analogized, "[t]he State may not sell the cow and hope to continue to sup on her milk."[29]

If the prosecutor gives a promise in order to induce a plea, the promise must be fulfilled.[30] Chief Justice Burger stated in *Santobello v.*

25. *See, e.g.*, White v. Gaffney, 435 F.2d 1241 (10th Cir. 1971); Bailey v. MacDougall, 392 F.2d 155 (4th Cir.), *cert. denied*, 393 U.S. 847 (1968); Smith v. United States, 321 F.2d 954 (9th Cir. 1963); People v. Mitchell, 46 Ill.2d 133, 262 N.E.2d 915 (1970); State v. Loyd, 290 Minn. 528, 190 N.W.2d 123 (1971).

26. *See, e.g.*, Zaffarano v. United States, 306 F.2d 707 (9th Cir. 1962) (defendant pled guilty to one charge of possessing and transporting stolen traveler's checks interstate while two related charges were dismissed); State v. Thomas, 61 N.J. 314, 294 A.2d 57 (1972) (defendant pled guilty to a charge of attrocious assault and battery while two other charges arising from the same incident were dismissed).

This has lead to the allegation that prosecutors often overcharge in order to increase their bargaining power. Judge Bazelon, dissenting, in *Irby v. United States*, 390 F.2d 432, 439 (D.C. Cir. 1967), stated that "often it takes nothing more than a fertile imagination to spin several crimes out of a single transaction." *See also* Heberling, *Judicial Review of the Guilty Plea*, 7 LINCOLN L. REV. 137, 148 (1972) (author distinguishes between horizontal overcharging—the multiplication of counts in the indictment, and vertical overcharging—the inclusion of every conceivable charge); Note, *Plea Bargaining: A Model Court Rule*, 4 U. MICH. J. L. REV. 487 (1971); *Compromises*, note 5 *supra*.

Overcharging has not gone unnoticed by the courts. In *Brady v. United States*, 397 U.S. 742, 751 n.8 (1970) the United States Supreme Court implied that a plea bargain should not be approved "where the prosecution or judge or both deliberately employ their charging and sentencing power to induce a particular defendant to tender a plea of guilty." However, in *Brady* the Court expressly held that this was not at issue. *See also* AMERICAN LAW INSTITUTE, A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, ARTICLE 350 (1975) (forbids charging or threatening to charge the defendant with a crime not supported by the facts believed to be provable, or a crime not ordinarily charged in the jurisdiction for the conduct allegedly engaged in by him).

27. *See, e.g.*, Austin v. State, 49 Wis.2d 727, 183 N.W.2d 56 (1971) (where a district attorney agreed not to prosecute an uncharged crime if the defendant agreed to permit the court to consider the charge at sentencing). *See also* D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL (1966).

28. "Such felonies as robbery, burglary and rape are cut down to petty larceny, assault and battery, and contributing to the delinquency of a minor. Crimes which carry such penalties as twenty years or life . . . are punished with as little as thirty days in the county jail." Dash, *supra* note 12, at 393. *See, e.g.*, People v. Fratianno, 6 Cal. App. 3d 211, 85 Cal. Rptr. 755 (1970) (where a charge of grand larceny was reduced to Conspiracy to commit petty larceny); People v. Clairborne, 29 N.Y.2d 950, 280 N.E.2d 366, 328 N.Y.S.2d 580 (1972) (murder reduced to voluntary manslaughter). *See generally* Church, *Plea Bargains, Concessions, and the Courts: Analysis of a Quasi-Experiment*, 10 LAW & SOC. REV. 377 (1976); Kuh, *Plea Copping*, 24 N.Y. CO. B. BULL. 160 (1966-67); Polstein, *How to "Settle" a Criminal Case*, 8 PRAC. LAW. 35 (1962).

29. Wynn v. State, 22 Md. 165, 173, 322 A.2d 564, 568 (1974).

30. Santobello v. New York, 404 U.S. 257 (1971).

New York[31] that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled."[32] Although this rule seems quite simple, the court must still resolve several difficult questions before a defendant is entitled to relief.

A. Was a Promise Made?

The issue whether a promise was ever actually made can arise in two distinct situations. The first situation occurs when the prosecutor disclaims any knowledge of an agreement whatsoever.[33] The second situation occurs when the defendant mistakenly believes that there is an agreement when, in fact, none exists.[34]

When a prosecutor denies having made an agreement, the courts generally decide that the defendant's allegations have not been proven.[35] The burden of proof rests on the defendant[36] and, because this proof is a factual determination, the trial court's finding that an agreement was not made will not be disturbed on appeal unless clearly erroneous.[37] In addition, a defendant in this predicament may have two

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31. *Id.*

32. *Id.* at 262.

33. *See, e.g.*, Kramer v. United States, 166 F.2d 515 (9th Cir. 1948); Rosenweig v. United States, 144 F.2d 30 (9th Cir.), *cert. denied*, 323 U.S. 764 (1944). *See generally* Note, *Withdrawal of Guilty Pleas Under Rule 32(d)*, 64 YALE L.J. 590 (1955).

34. *See, e.g.*, United States v. Battle, 467 F.2d 569 (5th Cir. 1972); United States v. Frontero, 452 F.2d 406 (5th Cir. 1971); Holt v. United States, 329 F.2d 368 (7th Cir. 1964); Bryant v. United States, 189 F. Supp. 224 (N.D. 1960), *modified*, 303 F.2d 563 (8th Cir. 1962); People v. Kessler, 41 Ill. App. 501, 244 N.E.2d 142 (1969); People v. Farina, 2 A.D.2d 776, 154 N.Y.S. 2d 501 (1956) *aff'd*, 2 A.D.2d 777, 2 N.Y.2d 454 (1957); Commonwealth v. Wilkins, 442 Pa. 524, 277 A.2d 341 (1971).

35. *See* note 33 *supra*.

36. Allegations of unkept promises or misunderstandings usually require the trial court to conduct an evidentiary hearing. *See, e.g.*, Walters v. Harris, 460 F.2d 988 (4th Cir.), *cert. denied sub. nom. Wren v. United States*, 409 U.S. 1129 (1972); Macon v. Craven, 457 F.2d 342 (9th Cir. 1972); United States v. Wallace, 327 F.2d 711 (5th Cir. 1964); People v. Wadkins, 63 Cal.2d 110, 403 P.2d 429, 45 Cal. Rptr. 173 (1965) (en banc). *But see* Pennsylvania *ex rel.* Herman v. Claudy, 350 U.S. 116, 119 (1956) (it is not improper to deny motion to vacate sentence without an evidentiary hearing if the claim is patently frivolous and false). *Accord*, Townsend v. Sain, 372 U.S. 293 (1963); United States v. Tweedy, 419 F.2d 192 (9th Cir. 1969); United States *ex rel.* McGrath v. LaVallee, 319 F.2d 308 (2d Cir. 1963). If an evidentiary hearing is held, the burden of proof is on the defendant. Hunter v. United States, 449 F.2d 156 (5th Cir. 1971), *cert. denied*, 405 U.S. 931 (1972); United States v. Webster, 468 F.2d 769 (9th Cir. 1972); Smith v. People, 162 Colo. 558, 428 P.2d 69 (1967) (en banc); State v. Krug, 187 Neb. 551, 192 N.W.2d 163 (1971). *But see* People v. Wadkins, 63 Cal. App. 2d 110, 403 P.2d 429, 45 Cal. Rptr. 173 (1965) (en banc); Davis v. Page, 431 P.2d 951 (Okla. Crim. App. 1967). *See generally Compromises supra* note 5, at 878.

37. United States v. Minnesota Mining & Mfg. Co., 551 F.2d 1106 (8th Cir. 1977); United States v. Pihakis, 545 F.2d 973 (5th Cir.), *cert. denied*, 434 U.S. 818 (1977).

other obstacles to overcome. First, because plea agreements are generally not in writing,[38] the defendant must often rely on the good faith of the prosecutor, a reliance that often proves to be unreasonable.[39] Second, some courts have held that the defendant is estopped from asserting an agreement because of his negative answer given in response to the question whether the defendant's plea was induced by promises of the prosecutor.[40] Estopping the defendant on these grounds, however, has been severely criticized:

> [u]sually the rules under which the game is played insist that a defendant state in court at the time the plea is entered that no promise has been made to induce the plea. Yet, everyone in the courtroom, including the judge, the prosecutor, and the defendant's lawyer, knows that negotiations have occurred, and the proceedings, therefore, take on the air of a solemn charade.[41]

In the federal courts, this occurrence is no longer a problem be-

38. For an example of a plea agreement which is in writing, *see* Bailey v. MacDougall, 392 F.2d 155 (4th Cir.), *cert. denied*, 393 U.S. 847 (1968). The trend seems to be to incorporate the plea agreement into the record in some fashion. *See, e.g.*, Walters v. Harris, 460 F.2d 988 (4th Cir.), *cert. denied sub. nom. Wren v. United States*, 409 U.S. 1129 (1972); Jones v. United States, 423 F.2d 252 (9th Cir.), *cert. denied*, 400 U.S. 839 (1970); United States *ex rel.* Rosa v. Follette, 395 F.2d 721 (2d Cir.), *cert. denied*, 393 U.S. 892 (1968); Smith v. United States, 277 F. Supp. 850 (D. Md. 1967); People v. Ramos, 26 Cal. App. 3d 108, 102 Cal. Rptr. 502 (1972); People v. White, 5 Ill. App. 3d 205, 282 N.E.2d 467 (1972).

39. Consider *The Prosecutor's Role*, *supra* note 13, at 66-67:

> [I]t is especially difficult to check the prosecutor's bluff when he resorts to deliberate misrepresentation in an effort to sustain it. A Houston defense attorney recalls a case in which negotiations had broken down. Suddenly the prosecutor offered to recommend an award of probation if the defendant would plead guilty.
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> The defense attorney, who had attempted unsuccessfully to locate the prosecuting witness for more than a year, thought that he knew what lay behind the prosecutor's offer. He replied, 'So you can't find your witness. I'll take probation when I see her in the courtroom.'
>
> The prosecutor answered, 'If she has to come in, we'll try the case. But I had her served yesterday, and you can check the return if you like.'
>
> The defense attorney checked, and it was as the prosecutor had reported. But the defense attorney was not Little Red Riding Hood; he suspected that the process server had been made a party to the bluff and had filed a fraudulent return. He therefore refused the prosecutor's offer, and the case was dismissed.
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> Cases of missing or reluctant witnesses are not the only situations in which prosecutors may resort to bluffing. A Philadelphia prosecutor says, 'I would never tell a defense attorney that the red material on the defendant's underpants was someone's blood when I knew the material was paint. But I have sometimes misrepresented the facts in an effort to induce the compromise of constitutional defenses. In plea bargaining, the rule is *caveat emptor*, lawyer.'

40. *See, e.g.*, United States v. Jackson, 390 F.2d 130 (7th Cir. 1968); Harrell v. United states, 371 F.2d 160 (7th Cir. 1967).

41. Rosett, *The Negotiated Guilty Plea*, 374 ANNALS 70, 72 (1967). *See also* United States v. Jackson, 390 F.2d 130, 134 (7th Cir. 1968) (Kiley, J., dissenting). *Compare* FED. R. CRIM. P. 11(e), note 42 *infra*.

cause of the implementation of Federal Rule of Criminal Procedure 11(e),[42] which makes plea agreements a part of the record. The problem may still exist, however, in those states which have not adopted some form of this rule.[43] In those states, critics recommend that some

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42. Federal Rule of Criminal Procedure 11(e) provides:
Plea Agreement Procedure
(1) In General. The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:
(A) move for dismissal of other charges; or
(B) make a recommendation, or agree not to oppose defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or
(C) agree that a specific sentence is the appropriate disposition of the case. The court shall not participate in any such discussions.
(2) Notice of Such Agreement. If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. If the agreement is of the type specified in subdivision (e)(1)(A) or (C), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in Subdivision (e)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw his plea.
(3) Acceptance of a Plea Agreement. If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.
(4) Rejection of a Plea Agreement. If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw his plea, and advise the defendant that if he persists in his guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.
(5) Time of Plea Agreement Procedure. Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.
(6) Inadmissibility of Pleas, Offers of Pleas, and Related Statements. Except as otherwise provided in this paragraph, evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connections with, and relevant to, any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer. However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later withdrawn, a plea of nolo contendere or an offer to plead guilty or nolo contendere to the crime charged or any other crime, is admissible in a criminal proceeding for per-jury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

43. Or in those states which do not provide an aggrieved defendant with some other form of relief.

form of Rule 11(e) be adopted or, in the alternative, that plea agreements be reduced to writing.[44]

The defendant may also mistakenly believe that an agreement has been made.[45] The Court of Appeals for the Fifth Circuit discussed this problem in *United States v. Frontero*:[46]

> inherent in the "plea bargaining" process is the possibilty of a misunderstanding on the part of the participants as to possible consequences of a guilty plea. The defendant is often told by his attorney that a "promise" of a certain sentence has been made in exchange for his plea of guilty when, in fact, the "promise" has come from one, such as the prosecutor, who is in no position to make promises concerning sentence or has been made by the trial judge in terms of "probably" "maybe" or "I am inclined toward." These "promises" are occassionally communicated to the defendant as firm deals.[47]

When a defendant pleads guilty on the basis of a misinterpretation of a "promise," the plea may be invalid in certain cases.[48]

Other courts have focused on the actions of the prosecutor, rather than the misunderstandings of the defendant, in determining whether a promise was made. For example, in *United States v. Battle*,[49] the court held that there was no promise where the prosecutor expressed the belief to defense counsel that the judge would probably give a lenient sentence. In other words, the court distinguished between a prosecutor's "promise" and the expression of his "opinion."[50]

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44. In *People v. West*, 3 Cal. 3d 595, 610, 477 P.2d 409, 418, 91 Cal. Rptr. 385, 394 (1970) (en banc), the court offered four alternatives for incorporating the plea agreement into the record of the case:

> (1) the bargain could be stated orally and recorded by the court reporter, whose notes then must be preserved or transcribed; (2) the bargain could be set forth by the clerk in the minutes of the court; (3) the parties could file a written stipulation stating the terms of the bargain; (4) finally, counsel or the court itself may find it useful to prepare and utilize forms for the recordation of plea bargains.

45. *See* cases cited in note 34 *supra*.

46. 452 F.2d 406 (5th Cir. 1971).

47. *Id.* at 411.

48. *See, e.g.*, United States v. Lester, 247 F.2d 496 (2d Cir. 1957); People *ex rel.* Valle v. Bannan, 364 Mich. 471, 110 N.W.2d 673 (1961); State v. Brown, 71 N.J. 578, 367 A.2d 417 (1976). *Cf.* Cardenas v. Meacham, 545 P.2d 632 (Wyo. 1976) (if the defendant erroneously but reasonably believes something to be part of the bargain, the guilty plea is involuntary unless the judge inquired into his understanding).

49. 467 F.2d 569 (5th Cir. 1972).

50. In the words of the court:

> [T]he crux of the controversy seems to be that the United States Attorney had expressed to defense counsel the *belief* that the District Court would *probably* mete out a minimal sentence if the defendant pleaded guilty . . . . [d]efendant's testimony indicates that this information was relayed to him in equivocal terms such as "could" and "perhaps."

Id. at 570. (emphasis in original).

Regardless which method of inquiry is used, the court must find that an agreement was made before a defendant can get relief. If the court does not find an agreement no other questions need be asked. If, however, the court finds that an agreement does exist, further inquiry is then necessary.

B. Was the Promise Broken?

The general rule is that a court must find that the prosecutor has not lived up to his part of the bargain before the defendant will be entitled to relief. This determination depends on the facts of each particular case and, therefore, no hard and fast rule can be applied. This issue frequently arises when the prosecutor agrees to recommend a particular sentence but the judge does not follow the recommendation.[51] *State v. Mixon*[52] is illustrative of this situation. In *Mixon*, the prosecutor recommended the sentence agreed upon but the judge did not follow it. On appeal the court found that the promise was not broken because the prosecutor had lived up to his part of the bargain in making the recommendation. Other courts have been more inclined toward relief. In *United States v. Brown*,[53] the court found that the judge had not followed the recommendation because the prosecutor had not ad-

51. *See generally* Note, *Discretion of the Court to Refuse a Guilty Plea Under Rule 11*, 20 WAYNE L. REV. 1359 (1974).

It must be noted that the trial judge does not have an absolute right to reject a plea agreement. *See* People v. Smith, 22 Cal. App. 3d 25, 99 Cal. Rptr. 171, (1971) (judge does not have to accept a guilty plea; but he must, at least, consider it). The court in *United States v. Ammidown*, 497 F.2d 615 (D.C. Cir. 1974), described the limits of the judge's sentencing discretion.

> First, the trial judge must provide a reasoned exercise of discretion in order to justify a departure from the course agreed on by the prosecution and defense. This is not a matter of absolute judicial prerogative. The authority has been granted to the judge to assure protection of the public interest, and this in turn involves one or more of the following components: (a) Fairness to the defense, such as protection against harassment; (b) fairness to the prosecution, as in avoiding a disposition that does not serve due and legitimate prosecutorial interests; (c) protection of the sentencing authority reserved to the judge. The judge's statement or opinion must identify the particular interest that leads him to require an unwilling defendant and prosecution to go to trial . . . .
>
> We start with the presumption that the determination of the United States Attorney is to be followed in the overwhelming number of cases. He alone is in a position to evaluate the government's prosecution resources and the number of cases it is able to prosecute.
>
> Where vigorous prosecution of one case threatens to undermine successful prosecution of another, it has traditionally been the prosecutor who determines which case will be pressed to conclusion, and his decision has been given great deference by the courts.

Id. at 621-22 (citations omitted).

52. 27 Ariz. App. 306, 554 P.2d 902 (1976).

53. 500 F.2d 375 (4th Cir. 1974).

vocated it strenuously enough and, therefore, had not lived up to his part of the bargain. The *Brown* court held that the bargain included an implied agreement to support the recommendation with some degree of enthusiasm.

Another situation which may contribute to allegations of broken promises occurs when the judge does something unforeseen by the parties to the agreement. In *State v. Fuentes*,[54] the prosecutor promised the defendant a three year sentence. The judge, however, gave the defendant probation. Subsequently, probation was revoked and the defendant was given an eight to ten year sentence. The *Fuentes* court held that the plea agreement was not broken merely because of the occurrence of unforeseen circumstances. The factual differences of each case makes it difficult to predict whether a court will find that an agreement has been broken in any particular case. Assuming that a defendant can prove that the agreement was broken in his case, however, he is not automatically entitled to relief.

C. Did the Defendant Rely on the Promise?

The defendant must have relied on the prosecutor's promise in order to obtain relief.[55] In *Shields v. State*,[56] the court wrote that "the State may withdraw from a plea bargain agreement at any time prior to, but not after, the actual entry of the guilty plea by the defendant or other action by him constituting detrimental reliance upon the agreement."[57] Furthermore, this reliance must be reasonable.[58] In determining the reasonableness of the defendant's reliance, courts have looked at several factors. Some courts focus on the nature of the promise; thus, if the promise is one which the defendant knew or should have

54. 26 Ariz. App. 444, 549 P.2d 224 (1976).

55. *See* United States v. Podell, 519 F.2d 144 (2d Cir.), *cert. denied*, 423 U.S. 926 (1975); Walters v. Harris, 460 F.2d 988 (4th Cir.), *cert. denied, sub. nom. Wren v. United States*, 409 U.S. 1129 (1972); Johnson v. Beto, 466 F.2d 478 (5th Cir. 1972); Villarreal v. United States, 461 F.2d 765 (9th Cir. 1972).

56. 374 A.2d 816 (Del.), *cert. denied*, 434 U.S. 893 (1977). *Accord,* Virgin Islands v. Scotland, 48 U.S.L.W. 2554 (3rd Cir. Feb. 6, 1980).

57. 374 A.2d 816, 820 (Del. 1977).

58. United States *ex rel.* Wissenfeld v. Wilkins, 281 F.2d 707 (2d Cir. 1960). *But see* State v. White, 308 Minn. 214, ____ , 245 N.W.2d 438, 439 (1976), wherein the court stated that the issue of reliance "should be construed to favor the defendants. This practice best serves the important interest in fair, honest and open plea bargaining as an integral part of the criminal justice system." Some courts have gone as far as to hold that the defendant's reliance is reasonable unless he has been told that he may not rely on a statement. *See, e.g.*, United States v. Frontero, 452 F.2d 406 (5th Cir. 1971); United States v. Schneer, 105 F. Supp. 883 (E.D. Pa. 1952); People *ex rel.* Valle v. Bannan, 364 Mich. 471, 110 N.W.2d 673 (1961); Commonwealth v. Alvarado, 442 Pa. 516, 276 A.2d 526 (1971).

known could not be fulfilled, reliance on it is probably unreasonable.[59] Other courts look to the source of the promise as an indicator of reasonableness.[60] Generally, only promises from an official source may reasonably be relied upon.[61] The working definition of an official source may vary, however, depending on the jurisdiction.[62] If the defendant can prove that a plea agreement was made and broken, and that he relied on it, he will be entitled to relief. The reasons for this relief, however, vary among the courts.

III. THEORIES OF RELIEF

Several bases exist by which a court may grant relief for a broken plea agreement. Generally, relief is granted under a theory of "voluntariness" or "fair play." There are, however, alternative bases upon which to grant relief.

A. Voluntariness

Traditionally, most courts have granted relief for broken plea agreements under the theory of voluntariness.[63] This theory provides

59. *See, e.g.*, United States v. McGahey, 449 F.2d 738 (9th Cir. 1971), *cert. denied*, 405 U.S. 977 (1972); Pursley v. United States, 391 F.2d 224 (5th Cir. 1968); Smith v. United States, 321 F.2d 954 (9th Cir. 1963). *Cf.* Greathouse v. United States, 548 F.2d 225 (8th Cir.), *cert. denied*, 434 U.S. 838 (1977) (defendant knew that his federal sentence could run consecutively, instead of concurrently with state sentence, and therefore judge's failure to inform him that he lacked the power to order concurrent sentences did not prejudice defendant).

60. *See, e.g.*, United States *ex rel.* Wissenfeld v. Wilkins, 281 F.2d 707 (2d Cir. 1960) (judge held that the defendant could not reasonably have relied on the prosecutor's promise). *See generally* D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 37 (1966) (author concludes that police promises should have little affect upon the reasonableness of defendant's reliance); Note, *A New Ground for Withdrawal of Plea of Guilty: Plea Involuntarily Induced by Defendant's Attorney*, 36 MO. L. REV. 139 (1971); Note, *Withdrawal of Guilty Pleas Under Rule 32(d)*, 64 YALE L.J. 590 (1955). *But see* People v. Butterfield, 37 Cal. App.2d 140, 99 P.2d 310 (1940) (court ignored the source of the promise, which was a fellow prisoner); Bennet v. State, 75 Okla. Crim. 42, 128 P.2d 253 (1942) (prosecuting witness made promise).

61. *See, e.g.*, United States *ex rel.* LaFay v. Fritz, 455 F.2d 297 (2d Cir.), *cert. denied*, 407 U.S. 923 (1972); United States v. Frontero, 452 F.2d 406 (5th Cir. 1971), wherein the court stated that the defendant "[c]annot, in the ordinary case rely on the promise of the prosecutor who has no authority to make sentencing promises, . . . or on the inaccurate representations of an overzealous attorney." *Id.* at 411.

62. *Compare* People v. Delles, 69 Cal. 2d 906, 447 P.2d 629, 73 Cal. Rptr. 389 (1968) (apparently authoritative and reliable public official) [*and*] Sloan v. State, 54 Okla. Crim. 324, 20 P.2d 917 (1933) (person in apparent authority) *with* Wilson v. Rose, 366 F.2d 611 (9th Cir. 1966) [*and*] State v. Tunender, 182 Neb. 701, 157 N.W.2d 165 (1968) (promise came from defense counsel).

63. "If a plea of guilty is made upon any understanding or agreement as to the punishment to be recommended, it is essential that before the trial court accepts such a

that the defendant's subsequent realization that the prosecutor has misrepresented his promises or will not fulfill them, causes the plea to be viewed as involuntary.[64] Being involuntary, the plea would not conform to the standards which must be met in order to enter a guilty plea.[65] The application of the voluntariness rule in this context, however, is in error for two reasons. First, the prosecutor's breach of his promise has no effect on the voluntariness of defendant's plea because the breach occurs subsequent to the plea. "Since 'voluntary' refers to the state of defendant's will at the time of his plea, it should be possible to determine whether the plea was voluntary immediately after it was made by looking at the circumstances in which it was made."[66] The subsequent failure of the prosecutor to perform does not have any effect on the defendant at the time he makes his plea and, therefore, cannot render defendant's plea involuntary.[67] Justice Stevens[68] stated in *Bachner v. United States*[69] that "the plea is either voluntary or involuntary at the time the defendant makes his choice."

This "relation back" application of the voluntariness rule is also inconsistent with the holding of the majority of courts that sentence recommendations are not binding on the judge.[70] Applying the volun-

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plea, it must appear that the plea was in fact made voluntarily." Cooper v. Holman, 356 F.2d 82, 85 (5th Cir.), *cert. denied*, 385 U.S. 855 (1966). The Supreme Court has long held that for a guilty plea to be valid it must be voluntary. *See* North Carolina v. Alford, 400 U.S. 25, 31 (1970); Boykin v. Alabama, 395 U.S. 238, 242 (1969); Machibroda v. United States, 368 U.S. 487, 493 (1962); Waley v. Johnston, 316 U.S. 101, 104 (1942); Walker v. Johnston, 312 U.S. 275, 286 (1941); Kercheval v. United States, 274 U.S. 220, 223 (1927).

64. *See Remedies, supra* note 6, at 786.

65. A guilty plea must be voluntary. *See* note 63 *supra*. A guilty plea must also be "intelligent" and "knowing", although these two latter requirements are sometimes grouped together. *See* Boykin v. Alabama, 395 U.S. 238, 242 (1969); Brady v. United States, 397 U.S. 742, 748 (1970) ("waivers [of constitutional rights] must also be knowingly made). The rule that guilty pleas must be voluntary and intelligent is based on the reasoning that a guilty plea constitutes a waiver of constitutional rights; namely, the right to a jury trial, the right against self-incrimination, and the right to confront one's accusers. Boykin v. Alabama, 395 U.S. 238, 243 (1969). *See generally* GUILTY PLEAS, *supra* note 1; Alschuler, *The Supreme Court, the Defense Attorney, and the Guilty Plea*, 47 U. COLO. L. REV. 1 (1975); Davis, *The Guilty Plea Process: Exploring the Issues of Voluntariness and Accuracy*, 6 VAL. U.L. REV. 111 (1972); Heberling, *Judicial Review of the Guilty Plea*, 7 LINCOLN L. REV. 137 (1972).

66. Comment, *Official Inducements to Plead Guilty: Suggested Morals for a Marketplace*, 32 U. CHI. L. REV. 167, 169 n.9 (1964).

67. It is more accurate to say that while the subsequent breach of the prosecutor's promise does not affect the voluntariness of the plea, it does affect one of the interests protected by voluntariness, that is, the appearance of legitimacy in the criminal justice system. *See Constitutional Law, supra* note 20 at 500, n.106.

68. Then Judge.

69. 517 F.2d 589, 598 (7th Cir. 1975) (Steven, J., concurring).

70. *See* note 51 *supra*. Indeed, to be consistent the rule would have to apply in any situation in which a defendant's expectation interests were not met.

tary standard in the context of broken prosecutorial promises is, in effect, holding that if the defendant knew that the prosecutor was going to break his promise he would not have plead guilty and, therefore, the plea is involuntary. Applying this analysis to sentence recommendations, one could say that if the defendant knew the judge was not going to follow the recommendation he would not have plead guilty. Therefore, the voluntariness standard would have to be applied consistently in all situations when the defendant's expectations are not met. This application, however, is not being made. Following that reasoning, the voluntariness requirement should not be used as grounds for relief of broken plea agreements. Instead, the basis for relief must be found elsewhere.

B. Fair Play

The "fair play" theory of relief focuses not upon the defendant's free will, but rather "upon the equities involved in the *methods* and *procedures* adopted in obtaining a negotiated plea, or the actual result of the bargain to the defendant."[71] This theory originated in *Santobello v. New York*,[72] in which the United States Supreme Court stated that the benefits of a negotiated plea "presuppose fairness in securing agreement between an accused and a prosecutor."[73] Thus, if a prosecutor breaks his promise, "[i]njustice results because defendant's self-conviction has been induced by a form of official deceit or by means which are at least grossly unfair."[74]

Few courts use the fair play theory alone as a basis of relief.[75] The fair play theory is often used in conjunction with the voluntariness theory.[76] Because the voluntariness theory should not be used as a

71. *Remedies, supra* note 6 at 790. *See also* United States v. Carter, 454 F.2d 426 (4th Cir. 1972), *cert. denied*, 417 U.S. 933 (1974) (honor of the government is at stake); United States v. Graham, 325 F.2d 922 (6th Cir. 1963) (unlimited probationary period unjust); Dillon v. United States, 307 F.2d 445 (9th Cir. 1962) (promise of prosecutor to recommend sentence when he knew that the Judge never asked for recommendations held violation of due process); United States v. Paiva, 294 F. Supp. 742 (D.C. Cir. 1969) (inability to restore the defendant to his status quo ante requires specific performance in the interests of fairness); Hinkle v. State, 56 Del. 35, 189 A.2d 432 (1963) (indeterminate sentence on reduced charge is an unfair sentence); State v. Ashby, 43 N.J. 273, 204 A.2d 1 (1964) (judge's refusal to dismiss charges overborne by prosecutor's promise to withdraw charges).

72. 404 U.S. 257 (1971).

73. *Id.* at 261.

74. State v. Wolske, 280 Minn. 465, ____ , 160 N.W.2d 146, 151 (1968).

75. *See, e.g.*, Santobello v. New York, 404 U.S. 257 (1971) (which is the seminal case in this area). In *Santobello* the Supreme Court discussed the issues of voluntariness and fairness.

76. *Id.*

basis for relief, however, remedies granted in accordance with fair play should stand alone, or supplement another basis of relief.

C. Contract Theory

A distinct minority of courts have analyzed a defendant's right to relief from broken plea agreements strictly under principles of contract law.[77] This practice is logical because plea agreements are, in essence, contracts. Relief under a contractual analysis, however, would only protect a defendant's contract rights as opposed to his constitutional rights. Thus, while contractual analysis may be helpful, it cannot be controlling because *Santobello* stands for the proposition that a defendant has a constitutional right to relief from a broken plea agreement. The Court of Appeals for the Fourth Circuit stated in *Cooper v. United States*[78] that

> the courts have understandably drawn heavily on the ready analogies of substantive and remedial contract law to supply the body of doctrine necessary to order plea bargaining practices and to afford relief to defendants aggrieved in the negotiating process. To the extent therefore that there has evolved any general body of "plea bargain law," it is heavily freighted with these contract law analogies. When *Santobello* made it plain, however, that the core concept here is the existence of a constitutional right in the defendant to be treated with "fairness" throughout the process, this presaged inevitably the question of the extent to which contract law may be drawn upon to define the limits of this constitutional right.[79]

This argument is viable only if the defendant's relief is limited to actions based on constitutional rights. If a defendant could sue for breach of contract in broken plea bargain situations, there would be no need to "constitutionalize" the defendant's cause of action. It should be noted, however, that since *Santobello* the courts have looked to the broken plea bargain as a problem of constitutional dimension.

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77. *See, e.g.*, State v. Hingle, 242 La. 844, 139 So. 2d 205 (1962); State v. Mockosher, 205 La. 434, 17 So. 2d 575 (1944). *See also* Note, *Criminal Procedure—Court Consent To Plea Bargains*, 23 LA. L. REV. 783 (1963). *Cf.* United States v. Bridgeman, 523 F.2d 1099, 1109-10 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 961 (1976) (the decision in *Santobello* . . . involved fundamental principles of contract law). *But see* Cooper v. United States, 594 F.2d 12 (4th Cir. 1979); Bullock v. Indiana, ___ Ind. App. ___, 397 N.E.2d 310 (1979).

78. 594 F.2d 12 (4th Cir. 1979). In *Brewer v. Williams*, 430 U.S. 387, 401 n.8 (1977), the Court stated:

> "we do not deal here with notions of offer, acceptance, consideration, or other concepts of the law of contracts . . . [but] with constitutional law."

79. 594 F.2d at 15-16 (citations omitted).

Therefore, contract law will continue to have limited application in the context of broken plea bargains.

D. Public Policy

A general rule of procedure is that "[o]ur system of criminal justice has come to depend on the guilty plea. There are not enough judges, courtrooms, prosecutors, or defense counsel to operate a system in which most defendants go to trial."[80] The public interest dictates the encouragement of guilty pleas. Breaking plea agreements, however, tends to discourage guilty pleas.

> If a defendant cannot rely on an agreement made and accepted . . . the fairness of the entire criminal justice system would be thrown into question. No attorney in the state could in good conscience advise his client to plead guilty and strike a bargain if that attorney cannot be assured that the prosecution must keep the bargain.[81]

In accord with this reasoning, the state, in the interest of the efficient administration of justice, should not be allowed to break its word.

IV. REMEDIES AVAILABLE

Courts have typically given one of three types of relief in remedying broken plea agreements. A majority of the courts permit the defendant to withdraw his guilty plea.[82] Other courts order specific performance of the bargain.[83] Finally, a few courts have permitted the defendant to elect his remedy for a broken plea agreement.[84]

A. Withdrawal

Withdrawal is the most common form of relief granted to a defendant who has entered a negotiated plea only to have the prosecutor break his promise.[85] Most courts are "reluctant to extend the status of a plea bargain to that of a specifically enforceable

80. TASK FORCE REPORT, *supra* note 5, at 10.

81. State v. Tourtellotte, 88 Wash. 2d 579, ____ , 564 P.2d 799, 802 (1977).

82. *See* Compromises, note 5 *supra*; *Remedies*, note 6 *supra*.

83. *See, e.g.*, Bookout v. State, 243 So. 2d 188 (Fla. 1971); State v. Davis, 188 So. 2d 24 (Fla. 1966); State v. Hingle, 242 La. 844, 139 So. 2d 205 (1962); People v. Antonelli, 6 Misc.2d 78, 156 N.Y.S.2d 710 (1958); People v. Prado, 81 Misc.2d 710, 365 N.Y.S.2d 943 (1975); State v. Ward, 112 W. Va. 552, 165 S.E. 803 (1932).

84. *See, e.g.*, United States v. Graham, 325 F.2d 922 (6th Cir. 1963); Miller v. State, 272 Md. 249, 322 A.2d 527 (1974); State v. Poli, 112 N.J. Super. 374, 271 A.2d 447 (1970); People v. Farina, 2 N.Y. 2d 454, 141 N.E.2d 589, 161 N.Y.S.2d 88 (1957).

85. *See, e.g.*, White v. Gaffney, 435 F.2d 1241 (10th Cir. 1971); People v. Ramos, 26 Cal. App. 3d 108, 102 Cal. Rptr. 502 (1972); People v. Caskey, 4 Ill. App. 3d 920, 282 N.E.2d 250 (1972); Dube v. State, 257 Ind. 398, 275 N.E.2d 7 (1971).

contract."[86] In many cases, however, withdrawal is unfair to the defendant. He may have provided the prosecution with valuable and incriminating evidence.[87] He may have already spent considerable time and money in striking the bargain.[88] In these situations, it becomes impossible to restore the defendant to the *status quo ante*. Therefore, although withdrawal may be an adequate remedy when the defendant can be restored to his pre-bargaining position, unfairness results when the defendant cannot get back all that he gave. A defendant in this predicament should be entitled to have the bargain specifically enforced.[89]

B. Specific Performance

Traditionally, specific performance has rarely been granted as a remedy for broken plea agreements.[90] More courts are beginning to grant this relief, however, when the defendant cannot be restored to his *status quo ante*.[91] Although specific performance is clearly warranted in such situations, some critics have also argued that, even in the absence of such factors, specific performance should be the remedy given.[92] This argument is premised on the reasoning that specific performance makes the parties' expectations a reality and, if there has been a breach, shifts the burden onto the party who has acted in bad faith. The remedy of specific performance also has other important advantages. First, it facilitates the public policy of encouraging plea bargaining by assuring defendants that the state is bound by its word. This assurance would promote efficiency in our criminal justice

86. Barker v. State, 259 So. 2d 200, 204 (Fla. 1972).

87. *See, e.g.*, United States v. Carter, 454 F.2d 426 (4th Cir. 1976); United States v. Paiva, 294 F. Supp. 742 (D.C. Cir. 1969) (identification of forged bonds); People v. Wadkins, 63 Cal. 2d 110, 403 P.2d 429, 45 Cal. Rptr. 173 (1965) (defendant procured guns used in robbery).

88. *See, e.g.*, Commonwealth v. Todd, 186 Pa. Super. Ct. 272, 142 A.2d 174 (1958), *overruled*, ____ Pa. Super. Ct ____ , 156 A.2d 117 (1959) (defendant testified before grand jury and court). It is usually not until a defendant has acted that he discovers that the bargain has been breached. *See, e.g.*, United States v. Paiva, 294 F. Supp. 742 (D.C. Cir. 1969) (prosecutor reinstated dismissed charges after the defendant had pled and was sentenced).

89. If a defendant could not rely on a covenant made with her . . . then indeed would our whole system be brought under a cloud of suspicion. It is far better that [the bargain be specifically enforced] than that it be said that the officers of the law in charge of the prosecution of crimes may play fast and loose with their promises to defendants under indictment.

People v. Schwarz, 201 Cal. 309, 314, 257 P.71, 73 (1927).

90. *See* note 86 *supra* and accompanying text. *But see* note 83 *supra*.

91. *See* note 87 *supra*.

92. *See Constitutional Law, supra* note 20 at 512-28.

system.[93] Second, specific performance underscores the need for responsible prosecutorial negotiating; presumably, the prosecutor will be more earnest in his negotiations if he knows that he will be bound by them.[94] However desirable specific performance is as a remedy, it may be unavailable in some circumstances.[95] In these situations, the court's only alternative is to permit the defendant to withdraw his plea.

C. Election

Several courts have permitted the defendant to elect between withdrawal and specific performance.[96] This remedy has been given some support from the United States Supreme Court. Justice Douglas, concurring in *Santobello v. New York*, stated that "[i]n choosing a remedy, however, a court ought to accord a defendant's preference considerable, if not controlling, weight inasmuch as the fundamental rights flouted by a prosecutor's breach of a plea bargain are those of the defendant, not of the State.'"[97] Realistically, however, a defendant will base his choice on that remedy which will have the best result for him.[98] This election may, in effect, give the defendant more than his due while depriving society of what it deserves.

V. CONCLUSION

Plea bargaining has become a very important part of our criminal justice system. The practice can be both efficient and effective. The effectiveness of plea bargaining, however, is threatened by prosecutors who make an agreement only to break their word. To remedy this conduct courts could adopt the practice of entering plea agreements into the record. This recording would reduce the number of broken bar-

93. *See* Note, *Plea Bargains: Is Court Enforcement Appropriate?* 17 STAN. L. REV. 316 (1965).

94. *Id.* at 320.

95. *See, e.g.*, Doepke v. State, 465 S.W.2d 507 (Mo. 1971) (state court has not authority to sentence defendant to a federal prison); People v. Lopez, 28 N.Y.2d 148, 269 N.E.2d 28, 1320 N.Y.S. 235 (1971) (court cannot impose a sentence in excess of statutory maximum). *But cf.* Palermo v. Oswald, 412 F. Supp. 935 (S.D.N.Y.), *aff'd sub nom.* Palermo v. Warden, 545 F.2d 286 (2d Cir. 1976) (defendant entitled to parole even though prosecutor did not have the authority to promise it); Williams v. State, 341 So.2d 214 (Fla. 1977) (despite fact that trial court imposed invalid sentence, defendant had right to specific performance where he had complied with the bargain).

96. *See* note 84 *supra*.

97. 404 U.S. at 267 (Douglas, J., concurring).

98. *Cf.* Commonwealth v. Wilkins, 442 Pa. 524, ____ , 277 A.2d 341, 345 (1971) (Justice Jones, dissenting would not have permitted withdrawal but would have conformed sentence to bargained one).

gains,[99] enhance public confidence in the administration of justice[100] and reduce the number of subsequent collateral attacks.[101] Recording may also increase the rehabilitation prospects for the individual defendant.[102] Furthermore, these preventive measures would not be difficult to implement as indicated by their use in federal courts. Until these steps are taken, however, the rule in plea bargaining will remain "caveat emptor, lawyer."[103]

Kevin L. Swick

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99. *See* United States v. Williams, 407 F.2d 940 (4th Cir. 1969); 847 (1968); People v. West, 3 Cal. 3d 595, 477 P.2d 409, 91 Cal. Rptr. 385 (1970) (en banc).

100. *See* Jones v. United States, 423 F.2d 252 (9th Cir.), *cert. denied*, 400 U.S. 839 (1970); People v. West, 3 Cal. 3d 595, 477 P.2d 409, 91 Cal. Rptr. 385 (1970) (en banc).

101. *Id. See generally Mishaps*, note 6 *supra*.

102. "[A] prisoner whose plea of guilty is accepted only after a full disclosure and judicial scrutiny of the agreement upon which it rests, is more likely to accept the justness of his conviction, thus removing a substantial obstacle to rehabilitation." Jones v. United States, 423 F.2d 252, 256 (9th Cir.), *cert. denied*, 400 U.S. 839 (1970). *See also* Santobello v. New York, 404 U.S. 257, 261 (1971).

103. *See* note 39 *supra*.