UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 51 | Number 3 Article 13

2-1-1973

Criminal Law -- Enforcement of Plea Bargaining Agreements

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The term "plea bargaining" suggests a give-and-take process whereby a plea is bargained for between the accused and the prosecuting attorney, both making concessions. Generally the accused will plead guilty as charged or guilty to a lesser included offense in return for a promise by the prosecution to make sentence concessions, to ignore recidivism, or to drop other pending charges.[1]

The typical plea bargaining agreement arises after a plea of not guilty. After negotiations with the prosecutor, the defendant withdraws his previously entered plea of not guilty and enters a guilty plea pursuant to a plea bargaining agreement. Entry of the guilty plea has fulfilled the defendant's part of the bargain. Does the prosecuting attorney have to perform as agreed? Is anyone other than the promisor—the prosecuting attorney or the judge who makes the promise on behalf of the state—bound by the agreement? In *Santobello v. New York*,[2] the United States Supreme Court held that a promise made by an assistant district attorney must be honored if it was a material inducement to the petitioner's guilty plea. In ordering enforcement of the promise, the Court bound a prosecutor who neither participated in nor had knowledge of the plea bargaining agreement. The opinion did not order any specific relief. Instead, a choice of alternative remedies—withdrawal of the guilty plea or specific performance of the promise—was left for state court determination.[3]

In 1969 Santobello was indicted in New York for two first degree gambling offenses.[4] After negotiations with the assistant district attorney, Santobello withdrew a not-guilty plea and pleaded guilty to the lesser included offense of possession of gambling records in the second degree. The assistant district attorney agreed to make no recommendation as to the sentence. Before sentencing and after obtaining new defense counsel, Santobello moved to withdraw the guilty plea on grounds of newly discovered evidence.[5] The motion was subsequently denied but

[1]Comment, *Constitutional Law—Plea Bargaining—New Jersey Statute Allowing A Defendant to Avoid the Death Penalty by Pleading Non Vult or Nolo Contendere Held Valid*, 44 N.Y.U.L. REV. 612, 617-618 (1969).

[2]92 S. Ct. 495 (1971).

[3]*Id.* at 499.

[4]The offenses charged were promoting gambling in the first degree and possession of gambling records in the first degree. N.Y. PENAL LAW §§ 225.10, .20 (McKinney 1967).

[5]Upon discovery of the new evidence—possible illegal search—the petitioner moved to withdraw the guilty plea, to suppress the evidence obtained as a result of the "illegal search," and to inspect the grand jury minutes. All three motions were denied by the trial court. 92 S. Ct. at 497.

only after a series of delays. At length Santobello was sentenced, but not before a new prosecuting attorney had been appointed. The new prosecutor presented petitioner's criminal record to the court and recommended the maximum sentence of one year. Defense counsel immediately objected that during plea negotiations the assistant district attorney had agreed not to make any sentence recommendations to the trial judge, but the presiding trial judge overruled defense counsel's objections, stating that he was "not at all influenced by what the District Attorney says" and that his imposition of the maximum sentence was entirely justified and mandated by evidence from other sources.[6] The Appellate Division of the Supreme Court of New York affirmed.[7]

On certiorari the Supreme Court held that where a promise is "part of the inducement or consideration"[8] for the guilty plea, fulfillment of the promise is necessary. The burden of informing all those concerned is on the prosecuting official making the promise; anyone who later takes up the prosecution is bound by the agreement.[9]

Speaking for the majority, Chief Justice Burger emphasized the importance of maintaining a functional plea bargaining system. The Court spoke of plea negotiations as "not only an *essential* part of the process but a highly *desirable* part for many reasons."[10] Underlying the decision, however, are due process considerations: the circumstances surrounding plea negotiations "presuppose *fairness* in securing agreement between an accused and a prosecutor,"[11] and in order that fairness may be achieved and the integrity of the system preserved, plea negotiations "must be attended by *safeguards* to insure the defendant what is reasonably due . . . ."[12] The Court carefully pointed out that although a promise must be a material *inducement* to the entry of the plea, the materiality of the *breach* is not a proper subject of inquiry.[13] Thus, the fact that the trial judge would have imposed the maximum sentence of one year regardless of the sentencing recommendation made by the prosecutor was deemed to be of no relevance to the enforceability of the promise.[14] The inquiry is a subjective one—did the accused plead guilty

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[6] *Id.* at 497-98.
[7] Santobello v. New York, 35 App. Div. 2d 1084, 316 N.Y.S.2d 194 (mem.).
[8] 92 S. Ct. at 499.
[9] *Id.*
[10] *Id.* at 498 (emphasis added).
[11] *Id.* (emphasis added).
[12] *Id.* at 499 (emphasis added).
[13] *Id.* at 501.
[14] *Id.* at 499.

in reliance on the prosecution's promise? The court was brief in its treatment of the issue of who is bound by the promise of a prosecuting official:[15] if the accused is to be assured of "safeguards," the sovereign must be found; otherwise the Court's mandate would be rendered meaningless.

In a concurring opinion, Justice Douglas was even more inclined to justify enforcement of the agreement on constitutional grounds. After pointing out the close scrutiny given by the Court in past cases concerning guilty pleas, Justice Douglas concluded that enforcement of plea bargains should be a "constitutional rule," with the remedy, whether it be withdrawal of the plea or specific performance of the promise, left to state court determination in accordance with due process.[16] He indicated that the petitioner's preference as to the remedy applicable in a given case should be given due weight. Justice Marshall, with whom Justice Brennan and Justice Stewart joined, concurred in part and dissented in part.[17]

It has been estimated that ninety to ninety-five percent of all criminal convictions and seventy to eighty-five percent of felony convictions are obtained by guilty pleas.[18] There can be little doubt that plea bargains have been instrumental in a majority of these guilty pleas. Many policy reasons support the use of plea bargains, including relief for the already overburdened courts and reduction of the expenses involved in trials and in the individualized administration of justice.[19] On the other hand, a number of Supreme Court decisions, as Justice Douglas indicated in *Santobello*,[20] have established that a guilty plea involves the

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[15]*Id.*

[16]*Id.* at 501. The majority opinion made no specific reference to a "constitutional rule."

[17]Justice Marshall expressed the opinion that the petitioner's preference of relief should be given priority because the basis of the waiver of substantial constitutional rights had been removed when the prosecutor reneged on the promise. *Id.* at 501-02.

[18]D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 3 & n.1 (1966).

[19]*Id.* at 4; *see* Note, *The Role of Plea Negotiations In Modern Criminal Law*, 46 CHI.-KENT L. REV. 116 (1969). For a brief discussion of the advantages and disadvantages of plea negotiations *see* Note, *Plea Bargaining—Justice Off the Record*, 9 WASHBURN L.J. 430, 433 (1970). For an in-depth discussion *see* Alshuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968). Alshuler sees the bargaining prosecutor as an administrator, advocate, judge, and legislator.

[20]92 S. Ct. at 500. Justice Douglas cites the following cases: *In re* Winship, 397 U.S. 358 (1970) (right to be convicted of proof beyond all reasonable doubt); Duncan v. Louisiana, 391 U.S. 145 (1968) (right to jury trial); Washington v. Texas, 388 U.S. 14 (1967) (right to present defense witnesses); Pointer v. Texas, 380 U.S. 400 (1965) (right to confront one's accusers); Malloy v. Hogan, 378 U.S. 1 (1964) (right to remain silent).

waiver of a number of fundamental constitutional rights, such as the right to a jury trial and the right to confront one's accusers. For this reason, a line of decisions has established requirements for the acceptance and withdrawal of guilty pleas for both state and federal courts. Beginning in 1927 with the landmark case of *Kercheval v. United States*,[21] the Court held that federal courts could not accept guilty pleas unless the pleas were voluntarily made upon proper advice and with full understanding of the consequences. A guilty plea should be vacated if unfairly obtained or if entered through ignorance, fear, or inadvertence.[22] Following *Kercheval*, the Court, in cases involving federal prosecutions, established that due process is offended where prosecutorial misrepresentations lead to the guilty plea[23] and that promises or threats could deprive a guilty plea of its voluntariness.[24] In 1970 the Supreme Court, in *Brady v. United States*, recognized the legitimacy of plea bargains by holding that the Fifth Amendment did not prohibit judges and prosecutors from accepting guilty pleas to lesser included offenses or reducing charges in return for a guilty plea.[25]

In 1969 the Supreme Court held in *Boykin v. Alabama*[26] that it was error for the state trial judge not to disclose on the record whether the defendant voluntarily and understandingly entered his guilty plea. The language of the opinion indicated that since a guilty plea was a waiver of fundamental constitutonal rights, federal due process standards must come into play.[27] The impact of *Boykin* appears at least to provide better safeguards and standards for the acceptance of guilty pleas. This constitutional reading of *Boykin* accords with the general trend during the last decade toward "enlargement of the constitutionally protected rights of a defendant."[28]

One of the safeguards governing acceptance of guilty pleas has been judicial circumscription of the freedom of the prosecuting officials and judges to ignore plea bargaining agreements. The judicial approach, however, has not been uniform. The nature of the promise given by the

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[21]274 U.S. 220, 223 (1927).

[22]*Id.* at 224.

[23]Walter v. Johnston, 312 U.S. 275, 286 (1941).

[24]Machibroda v. United States, 368 U.S. 487 (1962).

[25]397 U.S. 742, 751-55 (1970).

[26]395 U.S. 238 (1969).

[27]*Id.* at 243.

[28]Comment, *The Guilty Plea and Bargaining*, 17 LOYOLA L. REV. 703, 713 (1971); *accord*, Note, *Criminal Procedure—Requirements for Acceptance of Guilty Pleas*, 48 N.C.L. REV. 352 (1970).

prosecution has in the past made a difference. Promises of immunity to prosecution have generally received a treatment different from promises to reduce sentences or to substitute a lesser included offense for that initially charged. Possibly this different treatment is due to the *Whiskey Cases*[29] in which promises of complete immunity and of leniency were made to certain defendants and accomplices in return for testimony implicating their co-defendants. While recognizing that such promises were generally fulfilled, the Court held that they were no defense to subsequent indictment and that they constituted, at most, only an "equitable claim" to immunity.[30] A number of lower federal and state courts have followed the language of the *Whiskey Cases*,[31] basing the denial of enforcement on the lack of authority on the part of the prosecutor to grant such immunity.

A substantial number of promise-of-immunity cases have refused to follow the *Whiskey Cases*.[32] For example, in *United States v. Paiva*,[33] the defendant agreed to plead guilty to four specified felonies in return for the assistant district attorney's agreement to drop other charges. In a well-reasoned opinion, the district court held in *Paiva* that later indictments in violation of the plea bargaining agreement must be dismissed. Although the *Paiva* court clearly did not consider the *Whiskey Cases* to be sound judicial authority, it distinguished them on the grounds that they involved promises of leniency made to co-defendants and accomplices.[34] In the recent case of *United States v. Carter*,[35] the Fourth Circuit, relying heavily on *Paiva*, indicated that it would not only enforce an immunity-of-prosecution promise made by the U.S. assistant district attorney for the District of Columbia but also bind the U.S. District Attorney's Office in Virginia to the same promise.

Where prosecutorial promises have not involved immunity of pros-

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[29]99 U.S. 594 (1878).

[30]The only relief available to the accused was hope of an executive pardon. *Id.* at 595-96.

[31]Hunter v. United States, 405 F.2d 1187 (9th Cir. 1969); Huerta v. United States, 322 F.2d 1 (9th Cir. 1963), *cert. denied*, 376 U.S. 954 (1964); District of Columbia v. Buckley, 128 F.2d 17 (D.C. Cir.), *cert. denied*, 317 U.S. 658 (1942); People v. Groves, 63 Cal. App. 709, 219 P. 1033 (1923); State v. Crow, 367 S.W.2d 601 (Mo. 1963); Tullis v. State, 41 Tex. Crim. 87, 52 S.W. 83 (1899).

[32]Annot., 43 A.L.R.3d 281, 288 (1972) suggests that the deciding factor has been whether the lower court approved the agreement in the first instance.

[33]294 F. Supp. 742 (D.D.C. 1969).

[34]*Id.* at 744-46. The court relied heavily on Dixon v. District of Columbia, 394 F.2d 966 (D.C. Cir. 1968), to conclude that the separation of powers doctrine was no bar to enforcement because of the general powers of the court to supervise the administration of criminal justice.

[35]454 F.2d 426 (4th Cir. 1972); *see* note 41 *infra*.

ecution, federal courts have been more willing to enforce the plea bargaining agreements. For example, in *Dillon v. United States*[36] the assistant district attorney promised that if he were asked by the court to make a sentencing recommendation, he would recommend a sentence of ten years. Relying on this promise, the petitioner pleaded guilty. It appeared from the record that the sentencing judge rarely asked for the prosecution's recommendation at sentencing. The Ninth Circuit held that the prosecutor's promise was illusory if he knew that the judge was unlikely to request a sentence recommendation and that the deception violated due process if the illusory promise had acted as an inducement to the petitioner's plea of guilty.[37]

There are a substantial number of state decisions retreating from the *Whiskey Cases*. In *Austin v. State*,[38] the Wisconsin court expressly refused to follow the line of decisions holding promises of immunity unenforceable. The court did not base the enforcement merely on the usual grounds of public policy and good faith.[39] The *Austin* court said, "We consider that the facts constituting good public policy require the application of the doctrine of *due process* . . . ."[40] State courts have frequently stated that a guilty plea induced by coercion, promise, and deceit on the part of the prosecuting attorney is invalid as violative of due process.[41] In *State v. Rose*,[42] the Missouri Supreme Court sanctioned a subjective test of voluntariness and held that a guilty plea may well be involuntary even where defense counsel was responsible for the defendant's mistaken belief that a sentence concession had been granted. These decisions lack any mention of the *Whiskey Cases*; such a retreat supports the observation in *United States v. Paiva* that the *Whiskey Cases* are not considered to be sound judicial authority.[43]

Apparent from the history of plea bargaining is the need for a rule of enforcement of plea bargaining agreements which is not dependent

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[36]307 F.2d 445 (9th Cir. 1962).

[37]*Id.* at 449; *see* United States *ex rel.* Elksnis v. Gilligan, 256 F. Supp. 244 (S.D.N.Y. 1966), where the court held that a breach of a material promise results in an "unfairly obtained" plea, violating the fourteenth amendment.

[38]49 Wis. 2d 727, 183 N.W.2d 56 (1971).

[39]Such grounds were the basis for the holdings in the following cases: State v. Davis, 188 So. 2d 24 (Fla. App. 1966); State v. Hingle, 242 La. 844, 139 So. 2d 205 (1962); State v. Ward, 112 W. Va. 552, 165 S.E. 803 (1932).

[40]49 Wis. 2d at 736, 183 N.W.2d at 61 (emphasis added).

[41]*E.g.*, Maloney v. Coiner, 152 W. Va. 437, 164 S.E.2d 205 (1968).

[42]440 S.W.2d 441 (Mo. 1969). The court in *Rose* relied heavily on the reasoning found in United States *ex rel.* Thurmond v. Mancusi, 275 F. Supp. 508 (E.D.N.Y. 1967).

[43]*See* text accompanying note 33 *supra*.

on the type of prosecutorial promise made. *Santobello* marks the first time the Supreme Court has spoken in favor of enforcement of plea bargaining agreements and is the first case to bind a third person to the agreement. One result of the decision will be that "material" promises of sentence recommendations will be uniformly honored in both federal and state courts. Also, the prosecutor who makes the promise will bind all within his prosecutorial office. While the Court did not deal with the question whether another prosecutorial office would be bound to the promise, the result logically follows. However, the extent that non-participating prosecutors may be bound is still not known, although a permissive if not mandatory extension of *Santobello* may sanction cases like *United States v. Carter*,[44] which bound two federal districts by a single prosecutorial promise.[45]

Does *Santobello* dictate that all "material" promises be honored, including promises of immunity from prosecution? The answer depends upon the basis for the Court's decision. Close scrutiny of the history of guilty pleas and of the evasive language used by the Court reveals that the Court must have considered its determination to be constitutionally required. There is no doubt that Chief Justice Burger's decision was motivated by the importance of plea bargaining in the administration of criminal justice and by the Court's notions of justice and fair play. If prosecutorial promises were not enforced, the number of guilty pleas would surely decline and the judiciary would soon feel the impact. Also, reneging on prosecutorial promises outrages common American notions of courtroom justice. However, interpreting *Santobello* exclusively in terms of justice and convenience of administration attributes to the Court a non-constitutonal and perhaps unconstitutional interference with state criminal proceedings.[46]

Significant in the *Santobello* opinion is the absence of any description of Santobello's plea as "involuntary." In this respect the decision

[44]454 F.2d 426 (4th Cir. 1972).

[45]The court in *Carter* bound the District Attorney's office in the District of Columbia Circuit. The opinion was written but not printed before the decision in *Santobello*. Subsequently, the *Carter* court filed an Addendum stating that *Santobello* was "additional support for the result we reach." *Id.* at 428-29. Query if *Santobello* would support the enforcement of a plea bargaining promise as between two sovereigns. *Cf.* Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964). *But cf.* Bartkus v. Illinois, 359 U.S. 121 (1959).

[46]While Chief Justice Burger failed to use the term "constitutional" in his opinion, it is unlikely that he intended to overrule a line of decisions beginning with Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816), in which the Supreme Court has refused to exercise supervisory powers over state courts.

does not line up with prior plea bargaining and voluntariness decisions. Does the question of whether the plea was entered voluntarily have any bearing on the enforcement of plea bargaining agreements? In a sense, any guilty plea induced by a prosecutorial promise renders such a plea involuntary. As in the theory of entrapment,[47] the crucial question is whether the defendant would have pleaded guilty without the participation of the prosecutor. If not, then the plea is involuntary. Such a guilty plea becomes voluntary, if at all, when the promise is fulfilled. However, the voluntariness issue can be examined from a different perspective. Arguably, after a guilty plea is entered, subsequent events have no bearing on voluntariness—plea bargaining agreements are totally divorced from the voluntariness issue. Whichever perspective is correct, the opinion in *Santobello* did focus on the promise as an inducement to the guilty plea, but other factors were also important to the decision, indicating that both the "voluntariness" issue and other factors are necessary in determining the enforceability of plea bargains. Hence, it would be more correct to say that because of all the factors involved in such a guilty plea—the convenience to the administration of criminal justice, justice and fair play, the waiver of constitutional rights—due process requires either that the promise which induced the guilty plea be fulfilled or that withdrawal of the plea be permitted.

While *Santobello* could have been more explicitly reasoned and more specific upon the question of its applicability to all plea bargaining promises, the opinion supports the theory that due process requires fulfillment of plea bargaining promises whenever "material" promises are involved. Furthermore, the language is broad enough to include all plea bargaining promises, for nowhere did the majority opinion limit enforcement to promises of sentence concessions. As a result, more uniformity of proscutorial conduct will result from *Santobello*, and accused persons will be able to more confidently rely upon prosecutorial promises.

Perhaps the *Santobello* decision will bring about a uniform state and federal requirement of disclosure and recordation of every accepted plea bargain. Such a courtroom procedure has been widely advocated.[48]

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[47]R. Perkins, CRIMINAL LAW 1033 (2d ed. 1969).

[48]ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY §§ 1.5, .7 (1967); D. NEWMAN, *supra* note 17, at 218 PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATON OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 136 (1967); S. RUBIN, THE LAW OF CRIMINAL CORRECTION 69 (1963); Gentile, *Fair Bargains And Accurate Pleas*, 49 B.U.L. REV. 514, 518 (1969); Thompson, *The Judge's Responsibility on a Plea of Guilty*, 62 W. VA. L. REV. 213, 221 (1960).

Only in the past few years has any case law appeared which specifically addressed the problem. In *People v. West*[49] the California Supreme Court held that court room disclosure and recordation of plea bargaining agreements would be required in California. To avoid the needless waste of courtroom time and expense which would occur every time a defendant alleged a breach of a plea bargaining agreement, courts will necessarily have to begin disclosing and recording these agreements. Otherwise, false allegations of plea bargains will surely occur. Disclosure and recordation of plea bargains would also provide further protection for defendants by eliminating the almost impossible task of proving a plea bargain.

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Criminal Procedure—Fourth Amendment Protection and Handwriting Exemplars—Is Probable Cause Unreasonable?

After the Supreme Court decision in *Gilbert v. California*,[1] which specifically rejected any constitutional objection to the compulsion of handwriting exemplars grounded on either the fifth amendment privilege against self-incrimination or the sixth amendment right to counsel, defendants have redoubled their efforts to bring handwriting exemplars within the fourth amendment's protection against unreasonable search and seizure.[2] They have argued that courts should deny any governmental request for handwriting exemplars that, if granted, would violate the defendant's fourth amendment rights and that the exclusionary rule should be available to enforce that requirement.[3]

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[49]3 Cal. 3d 595, 477 P.2d 409, 91 Cal. Rptr. 385 (1970); *see* United States v. Williams, 407 F.2d 940 (4th Cir. 1969); State *ex rel.* Clancy v. Coiner, ___ W. Va. ___, 179 S.E.2d 726 (1971).

[1]388 U.S. 263 (1967).

[2]The fourth amendment provides that: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV. This protection is guaranteed by the judicially imposed exclusionary rule. In Weeks v. United States, 232 U.S. 383 (1914), the Supreme Court barred, in a federal prosecution, the use of evidence secured through an illegal search or seizure. Mapp v. Ohio, 367 U.S. 643 (1961), extended this protection to criminal trials in state courts.

[3]*See, e.g.*, United States v. Harris, 453 F.2d 1317 (8th Cir. 1972), where the court applied the exclusionary rule to suppress handwriting exemplars taken from one defendant, finding that the defendant was subjected to an unreasonable search and seizure.