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Plea Bargaining: Is Contract Law or Constitutional Law the Governing Principle?

Plea bargaining is now a recognized and important feature of the criminal justice system.[1] Although the plea bargaining process is an integral part of the administration of justice, there are inherent problems that require judicial safeguards. In *Cooper v. United States*,[2] the United States Court of Appeals for the Fourth Circuit was confronted with the problem of the unkept plea bargain and its effect on the fundamental rights of the defendant. The court, in refusing to use analogies from the law of contracts, held that the plea bargaining process is governed by principles of constitutional law. Constitutional fairness requires that the Government honor the bargain.

The defendant, while acting as an informer for the Drug Enforcement Administration, in a conversation with one Simpson against whom he was to be a witness, offered for $10,000 to remove himself as a witness against Simpson and flee to Mexico. As a result of this and subsequent conversations, Cooper was indicted on two counts of bribery of a witness and two counts of obstruction of justice.[3] On May 11, 1977 at around 11:00 a.m., an Assistant United States Attorney and Cooper's defense counsel met to discuss a possible plea bargain.[4] After some initial negotiations, an agreement was reached that provided *inter alia*, if Cooper pleaded guilty to one count of obstruction of justice and testified in on-going narcotics trials, the Government would inform the sentencing judge of his cooperation and dismiss all other counts in the indictment.[5] The defense counsel agreed to communicate the proposal to the defendant for his assent.

Defense counsel immediately visited Cooper and obtained his approval to the agreement. Beginning at approximately noon on May 11, defense counsel attempted to call the Assistant United States Attorney and notify him of Cooper's acceptance. Meanwhile, the Assistant United States Attorney was meeting with his superior who instructed him to withdraw the proposal. When the Assistant United States Attorney and defense counsel finally made contact between 2:30 and 3:30 p.m. that same afternoon, Cooper's attorney was notified at the outset

1. *See, e.g.*, Santobello v. New York, 404 U.S. 257 (1971); Blackledge v. Allison, 431 U.S. 63 (1977); Bordenkircher v. Hayes, 434 U.S. 357 (1978).
2. 594 F.2d 12 (4th Cir. 1979).
3. *Id.* at 13.
4. *Id.* at 15.
5. *Id.*

that the offer was withdrawn.[6] Defense counsel protested the withdrawal of the agreement to both the Assistant United States Attorney and his superior, but to no avail. Defendant then moved to compel enforcement of the proposal, and at a pre-trial hearing the motion was denied by the district court. Thereafter, Cooper was convicted on all four counts of the indictment and sentenced to fifteen years imprisonment.[7]

Writing for the court, Judge Phillips, in acknowledging that the courts have drawn heavily on analogies from substantive and remedial contract law in regulating plea bargaining,[8] found that within classical contract doctrines the defendant here could claim no right nor a resulting remedy because there was no enforceable agreement. The defendant's attempted acceptance was preceded by the Government's withdrawal of the offer. The court also found the alternative argument of promissory estoppel to be of no avail because of the lack of "tangible" reliance by the defendant.

While recognizing that no relief can be given under contract law, the court nonetheless finds that a right and violation of that right have been shown and that relief must be given.[9] In emphasizing that it is not questioning the utility of contract law to plea disputes, the court states that the constitutional right of fairness is wider in scope and thus encompasses the defendant's right violated by the Government. Furthermore, constitutional decisions cannot be made to turn in favor of the Goverment on the fortuities of communications or on a refusal by the Government to accord any substantive value to reasonably induced expectations that it will honor its firmly advanced proposals. The court specifically finds two distinct sources for the constitutional rights involved: the right to fundamental fairness embraced within the substantive due process guarantees and the right to effective counsel.[10]

The term "plea bargaining" suggests a give-and-take process whereby a plea is negotiated. Generally the accused will plead guilty as charged or guilty to a lesser included offense in return for a promise of leniency or a promise to drop other pending charges.[11] Beginning in 1927 with the landmark case of *Kercheval v. United States*,[12] the Supreme Court began the process of articulating a standard for the acceptance of guilty pleas. Mr. Justice Butler, speaking for the Court,

6. *Id.*
7. *Id.*
8. *Id.* at 15-16.
9. *Id.* at 16.
10. *Id.* at 18.
11. Note, *Enforcement of Plea Bargaining Agreements*, 51 N.C.L. REV. 602 (1973). For a brief discussion of the origin and the various types of plea bargain arrangements *see* J. BOND, PLEA BARGAINING AND GUILTY PLEAS §§ 1.07-.09 (1978).
12. 274 U.S. 220 (1927).

stated that a guilty plea is not valid unless it is voluntary and tendered with a full understanding of the consequences.[13] Following *Kercheval*, the Court later held that a guilty plea induced by promises or threats, which deprive it of its voluntary character, is void.[14] In *Boykin v. Alabama*,[15] the Court held that it cannot assume that a guilty plea was voluntary from a silent record. The fact that the defendant voluntarily and intelligently entered a plea of guilty must be spread across the face of the record.[16]

In *Brady v. United States*,[17] the Supreme Court recognized the legitimacy of plea bargaining, holding that the fifth amendment does not prohibit prosecutors from extending a benefit to the defendant in exchange for a guilty plea. To be sure, the Court acknowledged and gave its imprimatur to the plea bargaining process in *Santobello v. New York*,[18]where Chief Justice Burger, speaking for the majority, emphasized that plea bargaining is an integral and highly desirable part of the criminal justice system.[19]

However important plea bargaining is in the criminal justice system, pleading guilty to a criminal offense is a serious matter. A guilty plea automatically results in a conviction. "More is not required; the court has nothing to do but give judgment and sentence."[20] A guilty plea constitutes a waiver of the fundamental right to trial by jury,[21] to confront one's accusers,[22] to present witnesses in one's defense,[23] to remain silent,[24] and to be convicted based on evidence that establishes guilt beyond a reasonable doubt.[25]It is primarily for these reasons that the courts will give relief from an unkept plea bargain.

The courts have employed three somewhat overlapping theories in granting relief to the defendant when the prosecutor has failed to fulfill

13. *Id.* at 223.

14. Machibroda v. United States, 368 U.S. 487 (1962). Petitioner alleged that the Government threatened to prosecute him on two additional counts of bank robbery if he told anyone of the alleged promise. *Contra* Bordenkircher v. Hayes, 434 U.S. 357 (1978), where the defendant refused to accept the plea arrangement and pleaded not guilty. Prosecution carried out its threat to seek indictment under the habitual offender act. In upholding the prosecutor's use of available leverage in the bargaining process, the Court stated: "[A]cceptance of the basic legitimacy of plea bargaining necessarily implies rejection of any notion that a guilty plea is involuntary in a constitutional sense simply because it is the end result of the bargaining process." *Id.* at 363.

15. 395 U.S. 238 (1969).

16. *Id.* at 242.

17. 397 U.S. 742 (1970).

18. 404 U.S. 257 (1971).

19. *Id.* at 261.

20. Kercheval v. United States, 274 U.S. 220, 223 (1927).

21. Duncan v. Louisiana, 391 U.S. 145 (1968).

22. Pointer v. Texas, 380 U.S. 400 (1965).

23. Washington v. Texas, 388 U.S. 14 (1967).

24. Malloy v. Hogan, 378 U.S. 1 (1964).

25. In re Winship, 397 U.S. 358 (1970).

his end of the bargain: (1) voluntariness; (2) fair play; and (3) due process.[26]

The voluntariness theory originally was developed because the courts ignored the bargained basis for a guilty plea and reviewed its validity by the same standard used for the non-negotiated guilty plea.[27] The theory is ill-suited for safeguarding the plea bargaining process because, technically, any guilty plea induced by promises of the prosecutor is void.[28] The courts have reasoned circuitously that if the guilty plea was entered as a result of plea bargaining and the bargain is not kept, the plea is deprived of its voluntariness.[29]

The second theory for remedying unkept plea bargain agreements is the "fair play" theory. Relief is granted on an unkept plea bargain if the negotiations are not conducted fairly by the prosecution and the defendant is prejudiced. In *United States v. Carter*,[30] the defendant pleaded guilty to possession of stolen checks in exchange for a promise by the Assistant United States Attorney for the District of Columbia that he would not be prosecuted anywhere else for anything having to do with the stolen checks.[31] In violation of the agreement the defendant was subsequently prosecuted in the United States District Court for the Eastern District of Virginia for possession of stolen checks. In enforcing the promise against a federal district not a party to the agreement, the court held that the honor of the government and public confidence in the fair administration of justice were at stake.[32]

The third theory for remedying unkept plea bargains requires that the accused be afforded due process of law. If the accused pleaded guilty because of prosecutorial misrepresentations, then it is said that the defendant was deprived of liberty without due process of law.[33] The courts have been reluctant to invoke this powerful constitutional directive to secure relief from unkept plea bargains, although there are a few decisions that have relied on due process.[34] Such a constitutional

26. Note, *Enforcing Unfulfillable Plea Bargaining Promises*, 13 WAKE FOREST L. REV. 842 (1977) [hereinafter cited as *Unfulfillable Plea Bargaining*].

27. J. BOND, *supra* note 11, at § 7.18.

28. Machibroda v. United States, 368 U.S. at 493 (1962).

29. *See e.g.*, Correale v. United States, 479 F.2d 944 (1st Cir. 1973) (fulfillment of the plea bargain is a necessary predicate to a conclusion of voluntariness); Harris v. Superintendent, 518 F.2d 1173 (4th Cir. 1975) (failure to make sentencing recommendation renders guilty plea involuntary); United States v. Lester, 247 F.2d 496 (2d Cir. 1957). (guilty plea entered without full understanding of the consequences was not voluntarily entered).

30. 454 F.2d 426 (4th Cir. 1972), *cert. denied*, 417 U.S. 933 (1974).

31. *Id.* at 427.

32. *Id.* at 428.

33. *Unfulfillable Plea Bargaining*, *supra* note 26, at 845.

34. *See e.g.*, Walker v. Johnston, 312 U.S. 275 (1941) (if the accused is deprived of due process); United States v. Wilkins, 281 F.2d 707 (2d Cir. 1960) (guilty plea induced by prosecutorial promises not intended to be kept deprives the accused of due process); Dillon v. United Staes, 307

rule was advocated by Justice Douglas in his concurring opinion in *Santobello v. New York*.[35] Justice Douglas urged where the plea bargain is not kept, that any sentence entered in reliance thereof should be vacated and the trial court should determine whether in the interest of due process the bargain should be specifically enforced or allow the defendant to withdraw his plea and plead anew to the original charges.[36]

The criminal justice system is continually confronted with claims of ineffective counsel by dissatisfied clients. This problem bears a special significance to plea bargaining because of the extraordinary trust the defendant has in his attorney to negotiate the most advantageous agreement. In appraising claims of ineffective counsel, the courts have been confronted with the dilemma of protecting the attorney "from frivolous . . . claims and the need to extract *bona fide* cases of ineffective counsel from the multitude of accusations."[37] Traditionally, the courts have framed the standard of ineffective counsel in terms of "a mockery of justice,"[38] "so inept as to reduce the representation to a farce,"[39] "shocking to the conscience of the reviewing court,"[40] or "a deliberate abdication of an attorney's ethical duty to his client."[41] In effect, to sustain a claim of ineffective counsel, the derelictions on the part of counsel must have been of an extremely serious nature.[42]

In addressing the problem of effective counsel during plea bargaining, the court in *People v. Gilbert*[43] required that in order for a claim of ineffective counsel to be sustained, it must appear that counsel unequivocably represented to the defendant that a plea bargain had been accepted and that the defendant justifiably relied on the representation, when in fact no such bargain had been accepted. In *McMann v. Rich-*

F.2d 445 (9th Cir. 1962) (a plea induced by a promise not intended to be kept deprives the accused of due process).

35. 404 U.S. at 266 (1971).

36. *Id.*

37. Note, *Effective Assistance of Counsel in Plea Bargaining: What is the Standard?*, 12 DUQ. L. REV. 321 (1973) [hereinafter cited as *Effective Assistance*].

38. *See, e.g.*, United States v. Martin, 489 F.2d 674 (9th Cir. 1973), *cert. denied*; 417 U.S. 948 (1974); Slawek v. United States, 413 F.2d 957 (8th Cir. 1969); United States v. Long, 419 F.2d 91 (5th Cir. 1969); Bell v. Alabama, 367 F.2d 243 (5th Cir. 1966).

39. *See, e.g.*, Stidham v. Wingo, 482 F.2d 817 (6th Cir. 1973); United States v. Roche, 443 F.2d 98 (10th Cir. 1971); Busby v. Holman, 356 F.2d 75 (5th Cir. 1966); Bouchard v. United States, 344 F.2d 872 (9th Cir. 1965).

40. *See, e.g.*, Hanks v. United States, 420 F.2d 412 (10th Cir.), *cert. denied*, 398 U.S. 913 (1970); Borchert v. United States, 405 F.2d 735 (9th Cir. 1968); Odom v. United States, 377 F.2d 853 (5th Cir. 1967); Cardarella v. United States, 375 F.2d 222 (8th Cir. 1967).

41. *See, e.g.*, Kelton v. United States, 394 F. Supp. 173 (W.D. Mo. 1975); Brown v. Swenson, 487 F.2d 1236 (8th Cir. 1973), *cert. denied*, 416 U.S. 944 (1974); Peterson v. Missouri, 355 F. Supp. 1371 (W.D. Mo. 1973); Redus v. Swenson, 339 F. Supp. 571 (E.D. Mo.), *aff'd*, 468 F.2d 606 (8th Cir. 1972); Robinson v. United States, 448 F.2d 1255 (8th Cir. 1971).

42. *Effective Assistance*, *supra* note 37, at 323.

43. 25 Cal. 2d. 422, 154 P.2d 657 (1944).

ardson,[44] the Supreme Court directed itself to the inquiry as to what level of competency is required of counsel in plea negotiations. Justice White, speaking for the majority, remarked:

> In our view a defendant's plea of guilty based on *reasonably competent* advice is an intelligent plea not open to attack on the ground that counsel may have misjudged the admissibility of the defendant's confession. Whether a plea of guilty is unintelligent and therefore vulnerable when motivated by a confession erroneously thought admissible in evidence depends as an initial matter not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was *within the range of competence demanded of attorneys in criminal cases*.[45] (Emphasis added).

This "range of competency" standard enunciated in *McMann*, appeared to relax the stringent "mockery of justice" standard. Hence, the defendant could more readily question the effectiveness of counsel in negotiating and accepting a plea agreement.

The "range of competency" test of *McMann* has been frequently evoked by the courts together with the older, more stringent "mockery of justice" standard. The result has been that the courts have refused to sever the "range of competency" test from the old standard, reducing it to "virtually a redundant equivalent."[46] Thus, the standard of effective counsel is intentionally stringent and ambiguous in order to protect the attorney from the multitude of complaints from disappointed clients.

In deciding to foresake the beguiling precision offered by analogies drawn from the substantive and remedial contract law, the court in *Cooper*[47] adopted a constitutional rule for regulating plea bargaining. The court was able to arrive at its constitutional rule by employing both the due process and fair play theories for granting relief from unkept plea bargains.

The court found the basis for its decision in the fifth and sixth amendments to the United States Constitution. The fifth amendment provides that no person shall be compelled to be a witness against himself, nor shall he be deprived of liberty without due process of law.[48] This amendment is apposite because the defendant who pleads guilty, whether it be the result of a negotiated or non-negotiated plea, waives his right against self-incrimination. By pleading guilty the defendant is the sole witness against himself; his guilty plea is the sole basis for his conviction; nothing more is required but for the court to give judgment

44. 397 U.S. 759 (1970).

45. *Id.* at 771-72.

46. "The 'range of competency' test has thus been de-emphasized primarily due to the court's desire to give the attorney as much tactical leverage as possible." *Effective Assistance*, *supra* note 37, at 330.

47. 594 F.2d at 12.

48. U.S. CONST. amend. V.

and sentence.[49] To allow the prosecutor to induce the defendant to plead guilty and then renege on the promise would be violative of "those fundamental principles of liberty and justice which lie at the base of our civil and political institutions."[50]

Inherent in the principles of fundamental liberty and justice is the right of the accused to be treated fairly by the prosecution in negotiating and fulfilling the plea bargain. Although fair play is an essential and uncompromising element of due process,[51] the courts, in declaring that the defendant must be treated fairly throughout the bargaining process, have not characterized it as such.[52]

Implicit in the *Cooper* decision is an awareness by the court that the principle of "fair play" is a necessary concomitant of due process. There is a fundamental obligation on the Government to negotiate and treat the defendant with scrupulous fairness. Thus, the defendant who pleads guilty as a result of a plea bargain is not treated fairly and has been substantially prejudiced by waiving his right against self-incrimination when the prosecution reneges on the bargain.

The right to effective counsel derived its initial validity from the text of the sixth amendment, which provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."[53] Subsequent to the Supreme Court's declaration in *Powell v. Alabama*[54] that the accused was entitled to the effective assistance of counsel, the courts have been struggling to assay what constitutes effective counsel.[55] The ruling in *Cooper* appears to relax the standard for determining whether the defendant had effective counsel. The confidence a defendant has in his counsel is jeopardized when counsel has communicated a bargain to the defendant and the bargain is withdrawn. Although this is a subtle point, it nonetheless may amount to ineffective counsel. The reason is that since all communications regarding a plea bargain should be mediated to the defendant through his counsel,[56] the credibility of not only the Government, but more importantly, defense counsel is involved in the defendant's perception of the process.[57]

In many, if not all jurisdictions, the courts have been reluctant to ease the prophylactic rule developed in other areas concerning attorney

49. *See* 274 U.S. at 223.
50. Powell v. Alabama, 287 U.S. 45, 67 (1932).
51. Shaughnessy v. Mezei, 345 U.S. 206, 224 (1952) (dissenting opinion).
52. *See, e.g.*, Santabello v. New York, 404 U.S. at 257; United States v. Carter 454 F.2d 426 (4th Cir. 1972).
53. U.S. CONST. amend. VI.
54. 287 U.S. 45 (1932).
55. *See* text accompanying notes 37-42 *supra*.
56. *See* FED. R. CRIM. P. 11(e)(1).
57. 594 F.2d at 18.

conduct when considering plea bargaining related claims of ineffective counsel. The majority of courts prefer to adhere to the traditional standards of "gross ineptness" or "mockery of justice."[58] The standard articulated by the court in *Cooper* is perhaps a subtle attempt at further developing these standards and appears better suited for measuring effective counsel claims arising out of the plea bargaining process. The standard presupposes that a very high degree of trust and confidence will be placed by the defendant in counsel's ability to make the most advantageous agreement. When the prosecution makes a firm offer to the defendant which is accepted through his counsel and then withdraws the offer for reasons such as a superior disagreeing with the subordinate's judgment in making the offer, then the defendant's confidence that his counsel pursued the most advantageous course is lost. This subtlety is further illuminated by the instant case where the defendant replaced counsel involved in the plea negotiations before trial, indicating a lack of confidence.[59]

After finding that there was a right and a violation of that right, the court was confronted with deciding upon a remedy for the defendant. Chief Justice Burger, in *Santobello v. New York*,[60] noted that there are two alternative forms of relief available to a defendant in the broken plea situation. The court can permit the defendant to withdraw his plea and plead anew or the court can grant specific performance of the agreement.[61]

Withdrawal of the plea is often ill-suited to provide the defendant, who has entered a guilty plea in reliance on an unkept bargain, sufficient relief. This remedy is designed to restore the defendant to the *status quo ante*, but this aim is difficult to accomplish after a bargained plea. The defendant has often given information[62] or provided the prosecution with invaluable assistance.[63] It is difficult to effectively restore the defendant to the status existing before the bargain; thus, withdrawal may provide an illusory promise to the defendant who has entered a guilty plea in reliance upon the good faith of the prosecution.[64]

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58. Green, Word & Arcuri, *Plea Bargaining: Fairness and Inadequacy of Representation*, 7 COLUM. HUMAN RIGHTS L. REV. 495 (1975).

59. 594 F.2d at 19 n.9.

60. 404 U.S. 257 (1971).

61. *Id.* at 263.

62. *See, e.g.*, United States v. Carter, 457 F.2d 426 (4th Cir. 1975) (defendant incriminated himself and others in prosecution involving stolen Treasury checks); United States v. Paiva, 294 F. Supp. 742 (D.D.C. 1969) (defendant admitted that he forged and uttered stolen savings bonds).

63. *See, e.g.*, United States v. Paiva, 294 F. Supp. 742 (D.D.C. 1969) (defendant provided handwriting exemplars).

64. Note, *The Legitimation of Plea Bargaining: Remedies for Broken Promises*, 11 AMER. CRIM. L. REV. 771, 793 (1973) [hereinafter cited as *Remedies*].

Specific performance has been rarely utilized by the courts to provide a remedy in the unkept bargain situation. After *Santobello*, however, there is an increasing tendency among the courts to grant this remedy when there are substantial factors calling for enforcement of the bargain. This increase can be directly attributed to the Supreme Court's recognition of specific performance as an appropriate remedy. Although the majority in *Santobello* remanded the case and left the remedy to be granted in the discretion of the trial court,[65] Justice Douglas, concurring, urged that the trial court in adopting a remedy should "accord a defendant's preference considerable, if not controlling, weight. . . ."[66] Moreover, Justice Marshall in his dissenting opinion suggested that the remedy granted by the trial court should be limited to that requested by the defendant.[67]

Specific performance is generally used to provide a remedy when the defendant cannot be restored to the *status quo ante*. This remedy is uniquely tailored to the exigencies of the unkept plea bargain. It is more compatible with the parties' original expectations and shifts the burden and loss resulting from the broken promise to the party who has not acted in good faith.[68]

The court in *Cooper* directed specific performance of the proposal because there were intervening causes that had so compromised the defendant's position that withdrawal of the plea could not restore him to the *status quo ante*. Moreover, the defendant had requested that the Government be forced to fullfill its end of the bargain. In granting specific performance the court accorded "considerable, if not controlling, weight" to the defendant's preference.

The decision in *Cooper* significantly expands the situations under which relief may be granted for an unkept plea bargain by evincing a willingness of the court to recognize that both analogies from contract law and constitutional rights can be used to safeguard the defendant from the possible abuses in the plea bargaining process.

The defendant who claims his guilty plea was the result of prosecutorial promises that were not kept will be granted relief where the agreement is within the mechanical contract law rules of offer and acceptance. The analogies from contract law would be the appropriate means for determining whether relief is in order when a firm offer has been made by the prosecution and the defendant effectively communicates his acceptance to the prosecution. If in this situation the prosecutor fails to carry out the agreement, the defendant is clearly entitled to

65. 404 U.S.at 263.
66. *Id.* at 266.
67. *Id.* at 268.
68. *Remedies*, *supra* note 64, at 794.

relief for this breach. Resort to principles of contract law can also be had where the defendant pleads guilty after a promise by the prosecutor that by its nature is unfulfillable and the defendant justifiably relies to his detriment.[69] The doctrine of promissory estoppel arises, the prosecutor is estopped to deny the existence of the promise, and relief is given to the defendant.

Although in most instances unkept plea bargains are readily remedied by resort to principles of contract law, the occasional situation arises where there has been no formal offer and acceptance, or, if an offer was made, it was withdrawn in an unreasonably short time. In the former, no right arises in the defendant because there was no agreement consumated, and in the latter, there is nothing giving rise to promissory estoppel because the defendant suffered no tangible detriment.

It is precisely toward these situations that the constitutional rule adopted by the court in *Cooper* is directed. To allow the prosecution to force the defendant's rights to liberty and fair treatment to turn on the fortuities of communications is to disregard the fact that it is the defendant's constitutional rights that are flouted by the prosecutor's failure to go forward. The defendant no longer has to show any tangible detriment but merely that his justifiable expectations that the prosecution will honor its proposal were not met. A refusal to recognize that the defendant in this situation is entitled to relief would be an abdication by the courts, of their duty to develop satisfactory standards for regulating plea bargaining, and would necessarily give judicial approval to a practice where the possibilities of abuse are abundantly clear.

Whatever might be the situation in the ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system.[70] It is incumbent upon the judiciary to promulgate standards which will adequately safeguard the defendant's right to be treated fairly, as well as the public's interest in effective and efficient administration of justice.

The court in *Cooper* recognized these sometimes competing interests

69. *See, e.g.*, Palermo v. Warden, 545 F.2d 286 (2d Cir. 1976) (unfulfillable promises are binding if fundamental fairness cannot be achieved without enforcing the agreement); United States v. Hammerman, 528 F.2d 326 (4th Cir. 1975) (defendant allowed to withdraw guilty plea made in reliance on prosecutorial misrepresentations that trial court had agreed to sentence defendant to probation rather than imprisonment); Geisser v. United States, 513 F.2d 862 (5th Cir. 1975) (defendant, who pleaded guilty in reliance on prosecutorial promises which by their nature were unfulfillable, granted specific performance of the agreement).

70. 434 U.S. at 361-62. "It follows that, by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty." *Id.* at 364.

and arrived at what must be viewed as a very beneficial compromise. This was accomplished while recognizing on the one hand that the defendant's rights may be violated before the formation of a bilateral contract, and on the other hand that the public's concern for optimal utilization of scarce judicial resources and its confidence that an accused will be afforded that to which he is reasonably entitled. The two-tier approach adopted by the court, when properly employed, can readily effectuate the interest of the defendant, the prosecutor, and the general public.

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