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Frank A. Porter

WITHDRAWAL OF THE PLEA OF GUILTY UPON A DECISION BY THE JUDGE NOT TO ACCEPT THE PLEA AGREEMENT

FRANK A. PORTER

In 1968 the number of new cases filed in New York City's criminal courts was 52 percent higher than in 1959. On the other hand, only 16 percent more cases were disposed of in 1968 than in 1959. As a result, the cumulative case backlog at the end of 1968 was greater than the number of cases which entered the court that year.[1] This problem is even more acute today than it was in 1968,[2] and it is common to all jurisdictions, both state and federal. In response to this congestion which overburdens courts and limits effective sentencing,[3] many states have employed the use of the "negotiated plea."[4]

The term "negotiated plea" is a generic term appearing in many forms and numerous instances.[5] It describes those situations in which a criminal defendant agrees to plead guilty in return for a concession from the prosecutor. While the bargained for concession is limited only by the imagination of the prosecutor, the defense attorney, or the defendant, there are only three concessions which are commonly used. First, the defendant may plead guilty to a lesser included offense in return for dismissal of the original criminal charge;[6] second, the defendant may plead guilty in return

1. Note, *Post-Conviction Relief from Pleas of Guilty: A Diminishing Right*, 38 BROOKLYN L. REV. 182 (1971).

2. *See* N.Y. Times, Feb. 11, 1975, at 1, col. 5.

3. Berger, *The State of the Judiciary—1970*, 56 A.B.A.J. 929, 931 (1970) (a 10 percent reduction in number of guilty pleas would require assignment of twice the judicial manpower and facilities). Pressed for time, judges do not give each sentence the consideration it deserves. As a result, imposition of sentences becomes mechanized and defendants are not given the sentences required for rehabilitation. *See* THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 128 (1967).

4. N.Y. Times, Feb. 11, 1975, at 1, col. 5. *See generally* J. BOND, PLEA BARGAINING AND GUILTY PLEAS (1975); D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL (1966); THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 10-14, 108-09 (1967).

5. Enker, *Perspectives in Plea Bargaining*, in THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 108 (1967).

6. *E.g.*, Neely v. Pennsylvania, 411 U.S. 954, 955 (1973) (defendant charged with murder pleaded guilty to voluntary manslaughter); Santobello v. New York, 404 U.S. 257, 258 (1971) (defendant charged with promoting gambling in first degree and possession of gambling records in first degree, but pleaded guilty to possession of gambling rec-

for dismissal of another count of the indictment or in return for dismissal of an unrelated charge;[7] or third, the defendant may plead guilty to the original charge in return for the prosecutor's promise to recommend a lesser sentence than that permitted by law or for his promise to omit a sentence recommendation.[8]

The practice of plea bargaining presents the serious and controversial legal problem of determining under what circumstances a plea of guilty may be withdrawn.[9] This problem becomes even more complicated when one adds the element of a judge who refuses to accept a sentence recommendation.[10] In this situation the judge, not bound by the agreement, accepts the plea of guilty but rejects the recommendation.[11] The defendant, having received a longer sentence than contemplated by the agreement, wishes to withdraw his plea and go to trial.

Withdrawal under these circumstances involves constitutional, statutory, and policy considerations. The *Standards* developed by the American Bar Association Project on Standards for Criminal Justice are one attempt to deal

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ords in second degree); Huffman v. State, 499 S.W.2d 565, 566 (Mo. Ct. App. 1973) (defendant charged with murder pleaded guilty to manslaughter by culpable negligence).

7. *E.g.*, United States v. Greenberg, 332 F. Supp. 1324, 1325 (D. Minn. 1971) (defendant pleaded guilty in return for dismissal of another count of the indictment); Davis v. State, 308 So. 2d 27, 28 (Fla. 1975) (plea of guilty in return for dismissal of another count of the indictment); People v. Norman, 205 N.W.2d 209, 210 (Mich. Ct. App. 1973) (defendant pleaded guilty in return for dismissal of unrelated charge); State v. Chrisco, 191 S.E.2d 399, 401 (N.C. Ct. App. 1972) (guilty plea in return for dismissal of unrelated charge).

8. Santobello v. New York, 404 U.S. 257, 258 (1971) (defendant pleaded guilty to possession of gambling records in second degree for prosecutor's promise to make no sentence recommendation); United States v. Gallington, 488 F.2d 637, 638 (8th Cir. 1973), *cert. denied*, 416 U.S. 907 (1974) (defendant pleaded guilty to kidnapping for sentence recommendation of 10 years); Watson v. State, 300 N.E.2d 354, 355 (Ind. 1973) (defendant pleaded guilty to possession of heroin for recommendation of suspended sentence); Commonwealth v. Stanton, 317 N.E.2d 487, 488 (Mass. Ct. App. 1974) (defendant pleaded guilty to rape and assault and battery for sentence recommendation of three to five years).

9. *See generally* Note, *Withdrawal of Guilty Pleas in the Federal Courts*, 55 COLUM. L. REV. 366 (1955); Note, *Criminal Law: Plea Agreements in Oklahoma*, 22 OKLA. L. REV. 81 (1969); Note, *Withdrawal of Negotiated Guilty Pleas: Quid Pro Quo From Defendants*, 5 SW. U.L. REV. 214 (1973); Note, *Withdrawal of Guilty Pleas Under Rule 32(d)*, 64 YALE L.J. 590 (1955).

10. Since the defendant succeeds in limiting the power of the judge to sentence him by pleading guilty to a lesser included offense or to one charge in return for the dismissal of others, the problem of withdrawal generally arises where the defendant pleads guilty in return for a sentence recommendation.

11. *E.g.*, United States *ex rel.* Culbreath v. Rundle, 466 F.2d 730, 734 (3d Cir. 1972) (it is within the sound discretion of the sentencing judge whether or not to accept prosecutor's sentence recommendation); People v. Goodman, 277 N.E.2d 136, 140 (Ill. Ct. App. 1971) (judge not bound by prosecutor's bargain); Commonwealth v. Wilson, 335 A.2d 777, 778 (Pa. Super. Ct. 1975) (decision whether to accept or reject the plea bargain is in the exclusive discretion of the trial judge).

with this problem.[12] In analyzing the effect of the particular standards that apply to guilty plea withdrawal, attention must be drawn not only to the *Standards* themselves but also to their impact on the statutory and case law of federal and state judicial systems. The scope of this discussion will include a detailed examination of the *Standards*, their recent statutory and judicial implementation, and a proposal, based on the *Standards*, for insuring postsentence guilty plea withdrawal when the plea is based upon a sentence recommendation that the trial judge has failed to accept.

THE REQUIREMENT THAT A PLEA OF GUILTY MUST BE VOLUNTARILY AND KNOWINGLY ENTERED

The plea of guilty is the basis of plea bargaining. Such a plea is a significant step for the defendant because it is, in effect, a conviction[13] and waives the constitutional rights of trial by jury, presentation of witnesses, self-incrimination, and conviction by proof beyond all reasonable doubt.[14] As a result, courts, while recognizing the validity of the plea, have exercised caution before accepting it.[15]

The Plea of Guilty is Not Invalid Per Se

The present test for the validity of a guilty plea is that it must be entered voluntarily and with full understanding of the charge and the consequences of the plea.[16] A distinction must be made, however, between the conventional and the judicial meaning of the word "voluntary." The general meaning of voluntary is positive and connotes a decision made freely without

12. ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE (hereinafter cited as STANDARDS). *See also* ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE §§ 350.1-.9 (Proposed Official Draft, 1975).

13. Boykin v. Alabama, 395 U.S. 238, 242 (1969); Kercheval v. United States, 274 U.S. 220, 223 (1927).

14. Santobello v. New York, 404 U.S. 257, 264 (1971) (concurring opinion); *see In re* Winship, 397 U.S. 358, 364 (1970) (defendant has due process right to be convicted by proof beyond all reasonable doubt); Duncan v. Louisiana, 391 U.S. 145, 150, 157-58 (1968) (defendant has constitutional right to trial by jury); Washington v. Texas, 388 U.S. 14, 19 (1967) (defendant has due process right to present witnesses in his behalf); Pointer v. Texas, 380 U.S. 400, 406 (1965) (defendant has constitutional right to confront his accusers); Malloy v. Hogan, 378 U.S. 1, 11 (1964) (defendant has constitutional right to remain silent).

15. *See* Fontaine v. United States, 411 U.S. 213, 215 (1973); Kercheval v. United States, 274 U.S. 220, 223 (1927). Courts are particularly careful where the defendant is not represented by counsel. Brady v. United States, 397 U.S. 742, 748 n.6 (1970).

16. Brady v. United States, 397 U.S. 742, 755 (1970) (plea entered by one fully aware of direct consequences must stand unless coerced); Machibroda v. United States, 368 U.S. 487, 493 (1962) (promises or threats depriving guilty plea of its voluntary character are void); Kercheval v. United States, 274 U.S. 220, 223 (1927) (guilty plea is not to be accepted unless voluntarily made with full understanding of consequences after full advice). There must also be a factual basis for the plea. Santobello v. New York, 404 U.S. 257, 261 (1971).

any controlling external influence.[17] The courts, however, have defined "voluntary" in a negative manner as the absence of governmental coercion.[18] Consequently, non-governmental influences such as friends and family, which would make a plea involuntary in the conventional sense, will not lead a court to hold that the plea was involuntarily entered.[19] Legally, all that must appear is that the defendant surveyed his situation and determined that his interests required the entry of a guilty plea and that the record contains strong evidence of guilt.[20]

Plea Bargaining Does Not Vitiate an Otherwise Voluntary Plea

The judicial reluctance to accept guilty pleas which led to the establishment of the "voluntary" and "full understanding" requirements has also affected the acceptance of the negotiated plea.[21] The objection has been that plea bargaining places the defendant in the dilemma of either forfeiting a constitutional right or the chance for a shorter sentence or reduced charge. The result is an unacceptable chilling of constitutional rights.[22] The United States Supreme Court, however, has held that a plea, otherwise voluntary, is not made involuntary because the inducement was the defendant's desire to limit his possible maximum sentence to less than that authorized by statute.[23] Indeed, both the administrative problems associated with the accelerating crime rate and legitimate correctional objectives make plea bargaining essential,[24] and the procedure, if properly handled, should be encouraged.[25]

17. Nakashima v. Acheson, 98 F. Supp. 11, 12 (S.D. Cal. 1951); *accord*, Paroczay v. Hodges, 219 F. Supp. 89, 93 (D.D.C. 1963); Ryckman v. Acheson, 106 F. Supp. 739, 741 (S.D. Tex. 1952).

18. *See* Fontaine v. United States, 411 U.S. 213, 215 (1973) (coerced plea is effective basis for collateral attack); North Carolina v. Alford, 400 U.S. 25, 31 (1970) (guilty plea induced by fear of death penalty valid); McMann v. Richardson, 397 U.S. 759, 774 (1970) (although defendant might have pleaded differently had later cases then been law, he is bound by his plea); Brady v. United States, 397 U.S. 742, 750 (1970) (guilty plea resulting from state agent's threatened harm or mental coercion is invalid); Machibroda v. United States, 368 U.S. 487, 493 (1962) (plea is void if promises or threats deprive it of its voluntary character); Hawk v. Olson, 326 U.S. 271, 276 (1945) (conviction by trickery in state cases violates due process).

19. United States *ex rel.* Brown v. La Vallee, 424 F.2d 457, 461 (2d Cir. 1970), *cert. denied*, 401 U.S. 942 (1971) (pressures exerted by defendant's mother and attorney do not vitiate plea but possibly would do so if exerted by agents of State).

20. North Carolina v. Alford, 400 U.S. 25, 37 (1970). Absent misconduct by the State, a plea of guilty made in the light of the then applicable law does not become involuntary because later judicial decisions indicate that the plea rested on a faulty premise. Brady v. United States, 397 U.S. 742, 757 (1970).

21. *See* Note, *Illegitimacy of Plea Bargaining*, 38 FED. PROB. 18 (1974); Note, *The Unconstitutionality of Plea Bargaining*, 83 HARV. L. REV. 1387 (1970).

22. *See* Note, *The Unconstitutionality of Plea Bargaining*, 83 HARV. L. REV. 1387, 1400 (1970).

23. North Carolina v. Alford, 400 U.S. 25, 31 (1970); Brady v. United States, 397 U.S. 742, 755 (1970).

24. *See* STANDARDS, PLEAS OF GUILTY 2-3 (Approved Draft, 1968).

25. Santobello v. New York, 404 U.S. 257, 260 (1971).

The role of the courts is to "police the bargain" and to insure that the constitutional rights of the defendant are protected[26] and that the interests of society are being served by the bargain.[27]

The Supreme Court and the Right to Withdraw a Guilty Plea

The "voluntary" and "full understanding" test provides prophylactic safeguards to the defendant; however, it is not the only manner in which the court can "police the bargain." By allowing withdrawal of the plea, the court may provide saving protection to the defendant. Such protection is particularly important where the defendant pleads guilty in return for a sentence recommendation that has been rejected by the trial judge. While the entry of the plea appears to be voluntary, actually it is involuntary because the defendant would not have entered the plea had he thought the sentence would be greater than that recommended by the prosecutor.

Nevertheless, the United States Supreme Court has never specifically ruled on this issue.[28] The only case to have even remotely addressed the issue was *Santobello v. New York*[29] which dealt with a prosecutor's, not a judge's, failure to keep a plea bargain. The Court held that if the guilty plea was induced by promises, the essence of the promises must in some way be made known.[30] Further, the Court stated that where a defendant pleads guilty there must be safeguards to protect him, and although circumstances will vary the required safeguards, one constant factor is 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 a part of the inducement or consideration, such promise must be fulfilled."[31] The required safeguards were not delineated nor was it stated whether or not the defendant "gets his due" when he bargains for a recommendation which the prosecutor makes but the judge rejects.

26. *See, e.g., id.* at 262-63 (prosecutor must keep his part of the bargain); Hansen v. Mathews, 424 F.2d 1205, 1208 (7th Cir.), *cert. denied*, 397 U.S. 1057 (1970) (guilty plea induced by unfulfilled promise of prosecutor invalid); State v. Wolske, 160 N.W.2d 146, 149 (Minn. 1968) (where prosecutor fails to keep bargain, defendant may withdraw and enter plea of not guilty).

27. For example, the prosecutor may abuse his discretion by allowing a notorious criminal to receive a lighter sentence than he deserves. *See* United States v. Ammidown, 497 F.2d 615, 617 (D.C. Cir. 1973) (lower court rejection of guilty plea reversed based on theory that maximum sentence with bargain would not be severe enough to fit defendant's crime).

28. Neely v. Pennsylvania, 411 U.S. 954 (1973) (dissenting opinion). The right to withdraw has only been discussed in a few dissenting opinions. *Id.; see* Dukes v. Warden, 406 U.S. 250, 259 (1972) (dissenting opinion); Santobello v. New York, 404 U.S. 257, 267-68 (1971) (dissenting opinion).

29. 404 U.S. 257 (1971). While the decision may seem to treat withdrawal, it is not directly in point because it deals with the defendant's right to obtain what he bargained for and not his right to withdraw. *Id.* at 262.

30. *Id.* at 261-62.

31. *Id.* at 262.

AMERICAN BAR ASSOCIATION STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE

The A.B.A. Standards Relating to the Administration of Criminal Justice specifically provide for both prophylactic and saving protections. The *Standards* are the result of an A.B.A. special project which began with the appointment of the Committee on Minimum Standards for the Administration of Criminal Justice.[32] Pleas of guilty and plea negotiation were given high priority since one of the purposes of the project was to highlight low visibility areas in the criminal process.[33] The underlying premise of the standards relating to pleas of guilty is that conviction without trial should continue to be a frequent means for the disposition of criminal cases.[34]

Withdrawal Permitted for Manifest Injustice or Fair and Just Reason

The cornerstone of the *Standards'* withdrawal procedure is *Standards, Pleas of Guilty*.[35] Under this standard, the withdrawal procedure is based on a single rule for presentence and postsentence withdrawal: withdrawal is to be permitted as a matter of right only if the defendant, upon timely motion, establishes that withdrawal is necessary to prevent manifest injustice.[36] Manifest injustice is conclusively said to exist when any of the

32. STANDARDS, COMPILATION iv (1974). The special committee supervised and coordinated the work of seven advisory committees which drew up the *Standards*. *Id.* The *Standards* were first circulated in tentative draft form and later were adopted by the A.B.A. *Id.* at 467. Adoption made the *Standards* the official policy of the A.B.A. STANDARDS, PLEAS OF GUILTY v (Approved Draft, 1968). The *Standards* are recommended for application in all serious cases, while more simple procedures may be developed for less serious offenses. *Id.* at 1. This category will vary from jurisdiction to jurisdiction depending upon allocation of jurisdiction between courts, availability of facilities, and understanding by the general public of penalties for certain crimes. *Id.* at 1.

33. STANDARDS, PLEAS OF GUILTY vii (Approved Draft, 1968).

34. *Id.* at 2. In fact, properly conducted, a plea arrangement should bring about the same result as a trial but without the undesirable aspects of a trial. *Id.* at 2. The special committee correctly recognized that plea bargaining is dealt with by each actor in the criminal justice system. Consequently, the *Standards* deal with plea agreements in four interrelated compositions: STANDARDS, FUNCTION OF THE TRIAL JUDGE (Approved Draft, 1972); STANDARDS, THE DEFENSE FUNCTION (Approved Draft, 1971); STANDARDS, THE PROSECUTION FUNCTION (Approved Draft, 1971); and STANDARDS, PLEAS OF GUILTY (Approved Draft, 1968).

35. This *Standard* recognizes the propriety of three plea arrangements. STANDARDS, PLEAS OF GUILTY § 3.1(b) (Approved Draft, 1968). It also provides tests for the judge to employ in deciding whether or not to accept the plea and incorporates all the constitutional requirements relating to the entry of the guilty plea. *Id.* §§ 1.4-.8. Finally, it provides a procedure for withdrawing the plea. *Id.* § 2.1(a). The other relevant *Standards* supplement STANDARDS, PLEAS OF GUILTY by recognizing the respective demands of professional responsibility upon the prosecutor, the defense counsel, and the trial judge. STANDARDS, FUNCTION OF THE TRIAL JUDGE §§ 4.1, 4.2 (Approved Draft, 1972); STANDARDS, THE DEFENSE FUNCTION §§ 6.1, 6.2 (Approved Draft, 1971); STANDARDS, THE PROSECUTION FUNCTION §§ 4.1-.4 (Approved Draft, 1971).

36. STANDARDS, PLEAS OF GUILTY § 2.1(a) (Approved Draft, 1968).

following take place: the defendant is denied effective assistance of counsel; the defendant did not enter or ratify the plea or authorize the person who entered the plea to so act; the plea was entered involuntarily or without understanding; the defendant did not receive the bargained for consideration and the prosecutor breached his promise; or the defendant did not receive the bargained for consideration, conditionally approved by the court, and the defendant was not given the option of affirming or withdrawing his plea after being advised that the court no longer concurred.[37] In the absence of manifest injustice, the defendant has no right to withdraw after his plea has been accepted by the court. Before sentence, however, the court may, in its discretion, allow the defendant to withdraw for any fair and just reason unless the prosecution would be thereby prejudiced.[38]

The effect of the two bases for plea withdrawal is to divide judicial sentencing discretion into two parts: first, whether or not to accept the plea agreement, and second, what sentence to give the defendant. Neither decision should influence the other. The *Standards* deal only with the question of when it is an abuse of discretion for the judge to accept the plea and reject the agreement. Manifest injustice establishes instances of abuse of discretion while the fair and just reason test leaves this determination to appellate courts.

The Problem of Conditional Concurrence

The difficulty with the manifest injustice test is that it is not applicable to all cases involving a sentence recommendation. Only the discretionary act of conditional acceptance of the guilty plea gives rise to the right of withdrawal when the judge decides to reject the bargain.[39] The test does not deal with the situation where the judge elects not to be informed of the agreement. Since this situation is not dealt with, no right to withdraw is granted where the defendant enters a plea of guilty without "clearing" the bargain with the trial judge. Rather, the defendant must rely on the fair and just reason test to be applied by the appellate court.

This conclusion, however, conflicts with the provision of *Standards, Function of the Trial Judge*, which requires the trial judge to permit the defendant to withdraw his plea of guilty whenever the judge decides to impose a penalty not in compliance with the plea agreement.[40] Resort to the

37. *Id.* §§ 2.1(a)(ii)(1)-(5) (Proposed Revision, 1968).

38. *Id.* § 2.1(b) (Approved Draft, 1968).

39. STANDARDS, PLEAS OF GUILTY § 3.3(b), comment at 76 (Approved Draft, 1968). Conditional acceptance occurs when the trial judge avails himself of his right to be informed of the proposed plea agreement and then indicates that he will approve it unless facts which developed later, such as those in a presentence report, change his mind. While the propriety of this advance consultation is recognized, the procedure is not required. *Id.*

40. STANDARDS, FUNCTION OF THE TRIAL JUDGE § 4.1(c)(iii) (Approved Draft, 1972).

comments does not resolve this conflict; rather, it is better to view the difference not as a conflict but as a case of a more comprehensive standard incorporating a less comprehensive one. Here, *Standards, Function of the Trial Judge* imposes on the judge the duty to allow the defendant to reaffirm or withdraw whenever a negotiated plea is rejected. This includes the situation which *Standards, Pleas of Guilty* labels manifest injustice. It can be argued that just as *Standards, Function of the Trial Judge* contemplates the situation dealt with in *Standards, Pleas of Guilty*, the latter treats a situation where the judge does not accept a bargain as an unspecified instance of manifest injustice.

While interrelationship of these two standards helps resolve the conditional concurrence dilemma, other problems cannot be so easily resolved.[41] These problems are not treated by the *Standards* and their solution must be sought in statutory and case law expansion. To the extent that there are "gaps" in the *Standards*, the project has failed in its purpose of providing uniform standards to guide the administration of criminal justice.

STATUTORY IMPLEMENTATION OF THE STANDARDS

Federal Statutory Provisions

In the federal system there are four means of effecting plea withdrawal: writ of coram nobis,[42] writ of habeas corpus,[43] withdrawal pursuant to rule 32(d) of the Federal Rules of Criminal Procedure,[44] and withdrawal pursuant to rule 11 of the Federal Rules of Criminal Procedure.[45] Of the four methods, only federal rule 11 will be discussed.

For the most part, rule 11 has merely incorporated the United States Supreme Court's guilty plea requirements into statutory law.[46] The new rule, effective December 1, 1975,[47] however, is a step forward in that it

41. For example, what constitutes fair and just reason, whether the same judge who rejected the plea bargain may still hear the trial, and distinctions between error and reversible error are not dealt with by the *Standards*.

42. Grene v. United States, 448 F.2d 720 (5th Cir. 1971) (writ of coram nobis permitted by 28 U.S.C. § 1651 [1970]).

43. 28 U.S.C. § 2255 (1970).

44. FED. R. CRIM. P. 32(d) provides:

> A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

This rule is the antecedent of the *Standards'* manifest injustice test. *See* STANDARDS, PLEAS OF GUILTY § 2.1(a), comment at 54 (Approved Draft, 1968).

45. FED. R. CRIM. P. 11. *See generally*, Note, *Plea Bargaining: Proposed Amendments to Federal Criminal Rule 11*, 56 MINN. L. REV. 718 (1972); Note, *Pleading Guilty: Illinois Supreme Court Rule 402 and the New Federal Rule of Criminal Procedure 11*, 1975 U. ILL. L.F. 116 (1975).

46. *See* FED. R. CRIM. P. 11 (notes of advisory committee).

47. FED. R. CRIM. P. 11(e)(6) went into effect on a different date, August 1, 1975. FED. R. CRIM. P. 11 (Historical Note).

specifically prescribes the procedures to be followed when plea bargaining is employed.[48] Like the *Standards*, there are both prophylactic[49] and saving provisions.[50] Also like the *Standards*, the rule provides for judicial non-participation in the discussions and prescribes acceptable bargains.[51]

A significant aspect of federal rule 11 is its provisions which are applicable when a judge rejects the plea bargain:

> 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.[52]

The key is the requirement that the judge tell the defendant whether he has accepted or rejected the bargain. If the latter, the court must give the defendant an opportunity to affirm or withdraw his plea. The procedure contemplates withdrawal both where the judge elects to grant provisional approval and the situation where he elects not to do so. This eliminates the problem of conditional concurrence found in the *Standards*.[53]

State Statutory Provisions

State guilty plea statutes can be divided into seven categories: (1) states which have no withdrawal provisions and only limited preventative safeguards;[54] (2) states which have no provisions for withdrawal but which have enacted prophylactic procedures;[55] (3) states in which withdrawal is

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48. FED. R. CRIM. P. 11(e).

49. The judge must address the defendant personally to insure that the plea is voluntarily entered. *See* STANDARDS, PLEAS OF GUILTY § 1.5 (Approved Draft, 1968). Further, the judge must require disclosure of the agreement. *See* STANDARDS, FUNCTION OF THE TRIAL JUDGE § 4.1(b) (Approved Draft, 1972). *But see* FED. R. CRIM. P. 11(e)(2) which allows disclosure in camera in some cases.

50. FED. R. CRIM. P. 11(e)(4); *see* STANDARDS, FUNCTION OF THE TRIAL JUDGE § 4.1(c)(iii) (Approved Draft, 1972).

51. FED. R. CRIM. P. 11(e)(1); *see* STANDARDS, FUNCTION OF THE TRIAL JUDGE § 4.1(a) (Approved Draft, 1972); STANDARDS, PLEAS OF GUILTY §§ 3.1(b), 3.3(a) (Approved Draft, 1968).

52. FED. R. CRIM. P. 11(e)(4).

53. While federal rule 11(e)(2) allows the judge to immediately accept, reject, or to defer judgment until the presentence report has been considered, the procedure of plea bargaining is not mandatory. It is discretionary with each federal judge as to what extent he will permit the procedure. Rule 11(e) regulates the practice only to the extent that it is permitted. H.R. REP. No. 94-247, 94th Cong., 1st Sess. 6 (1975).

54. NEB. CONST. art. V, § 9; ALA. CODE tit. 15, §§ 260-66 (1959); CONN. GEN. STAT. REV. §§ 54-60 (1958); MISS. CODE ANN. §§ 99-15-25, 99-19-3 (1972); NEB. REV. STAT. § 24-317 (Supp. 1969); N.J. REV. STAT. § 2A:113-3 (1969); TENN. CODE ANN. § 40-2310 (1975).

55. N.H. REV. STAT. ANN. § 605:3 (1955); TEX. CODE CRIM. PROC. ANN. arts. 1.14,

discretionary with the trial judge;[56] (4) one state which has adopted the manifest injustice test;[57] (5) states in which prejudgment withdrawal is discretionary with the judge and postjudgment withdrawal is permitted only to avoid manifest injustice;[58] (6) states which provide for conditional concurrence;[59] and, (7) one state which allows withdrawal as a matter of right.[60]

While the states have adopted widely divergent approaches, when viewed in a historical context they can be put into perspective. The oldest laws seem to be those offering limited protection, apparently leaving such protection to judicial decisions. Then, compelled to act by developing constitutional or policy concerns, preventative provisions were introduced.[61] When it

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1.15, 26.13 (Supp. 1976); W. VA. CODE ANN. § 62-3-1a (1966); WYO. R. CRIM. P. 15 (Supp. 1976).

56. ARK. STAT. ANN. § 43-1222 (1947) (any time before judgment); CAL. PENAL CODE § 1018 (Deering 1959) (any time before judgment); IDAHO CODE ANN. § 19-1714 (1948) (any time before judgment); IOWA CODE § 777.15 (1946) (any time before judgment); LA. CRIM. PROC. CODE ANN. § 559 (1966) (any time before sentence); MASS. GEN. LAWS ch. 278, § 29c (1968) (within 60 days after sentence); MONT. REV. CODES ANN. § 95-1902 (1969) (at any time); N.Y. CRIM. PROC. LAW § 220.60(3) (McKinney Supp. 1975) (before imposition of sentence); OKLA. STAT. tit. 22, § 517 (1969) (any time before judgment); ORE. REV. STAT. § 135.365 (1953) (any time before judgment); S.D. CODE § 23-35-22 (1967) (any time before judgment); UTAH CODE ANN. § 77-24-3 (1953) (any time before judgment); WIS. STAT. § 971.08 (1971) (within 120 days after conviction); MD. R. PROC. 722 (at any time).

57. WASH. SUPER. CT. CRIM. R. 4.2(f).

58. KAN. STAT. ANN. § 22-3210 (1974); NEV. REV. STAT. § 176.165 (1973); DEL. SUPER. CT. (CRIM.) R. 32(d); MO. RULES 27.25.

59. COLO. REV. STAT. ANN. § 16-7-302(2) (1974); IND. ANN. STAT. § 35-4.1-1-5 (1975); N.C. GEN. STAT. §§ 15A-1021(c), 15A-1024 (1975); ALAS. R. CRIM. P. 11(e)(2); ARIZ. R. CRIM. P. 17.4(d); FLA. R. CRIM. P. 3.171(c); ILL. S. CT. R. 402(d)(2); ME. R. CRIM. P. 11(b)(2); MINN. R. CRIM. P. 15.04(3)(1); PA. R. CRIM. P. 319(b)(3); VT. R. CRIM. P. 11(e)(2).

60. GA. CODE ANN. § 27-1404 (1972) (before judgment).

61. Texas seems to be the state that has extended this point of view to the extreme. Before accepting a guilty plea, the judge must warn the defendant of the range of punishments and the fact that any sentence recommendation is not binding on him. It must also appear that the defendant is competent and that the plea is voluntarily entered. TEX. CODE CRIM. PROC. ANN. art. 26.13 (Supp. 1976). To insure that the plea is voluntary, a plea of guilty does not waive a trial by jury. This right must be specifically waived in writing in open court with the consent and approval of the court and prosecutor. Before such a waiver can be effected, a defendant must be provided with an attorney if he has none. Even if the defendant waives trial by jury, the State must still introduce sufficient evidence to support conviction. Further, the right of confrontation must be waived in writing and approved by the court in writing. TEX. CODE CRIM. PROC. ANN. art. 1.15 (Supp. 1976). While no other jurisdiction has been found that prescribes such strict preventive measures to protect the defendant from inadvertently entering a plea of guilty, Texas has no statutory provision for withdrawal. Given an apparent concern for the rights of the defendant, the rationale must be that the defendant will be sufficiently protected so long as there are either preventative or saving protections—both are not necessary. Here, if saving devices are to be employed, they must be introduced through the judiciary.

was recognized that withdrawal was required in addition to the preventive provisions, the fair and just reason test was adopted.[62] This was followed by the adoption of the manifest injustice test, perhaps because manifest injustice is always a fair and just reason for withdrawal.[63] Adoption of the *Standards* is the final step, withdrawal as a matter of right being viewed as the peculiarity of a single state. The impact of the *Standards* on legislatures is seen both in those jurisdictions recognizing the fair and just reason test and the manifest injustice test as well as in those adopting the *Standards*. The effect of the *Standards* is significant since it is reflected in positive law and not just in judicial policy.

Those state statutes which recognize the two tests but which do not define manifest injustice tend to resemble the federal rules as they existed prior to the 1975 amendments.[64] While federal rule 32(d) established what is now the *Standards*' rule for withdrawal, the *Standards* have advanced the law by defining manifest injustice. The flow of influence then, has been from the statutes to the *Standards* and not the converse. As a result, the usefulness of the *Standards* will be in urging the courts and legislatures to adopt the advances made by the new federal rules.

There are also a number of state statutes which comply with the *Standards*. Their immediate inspiration seems to be the new federal rules in some cases and the *Standards* in others.[65] Even those statutes that take their form from the federal rules have, nevertheless, been influenced by the *Standards*.[66] The impact of the *Standards* is even more significant since

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62. Preventative safeguards, however, are not eliminated. *E.g.*, IOWA CODE ANN. § 777.12 (Supp. 1976) (defendant must plead guilty in person in open court); MONT. REV. CODES ANN. § 95-1902 (1947) (defendant must enter plea in open court and court must inform defendant of consequences of his plea); KY. R. CRIM. P. 8.08 (court must determine the plea is made voluntarily and with understanding of the nature of the charge).

63. Here too the prophylactic provisions are not eliminated. KAN. STAT. ANN. § 22-3210 (1974); DEL. SUPER. CT. (CRIM.) R. 11.

64. For example, rule 32(d) of the Delaware Superior Court is a copy of federal rule 32(d). While other state provisions do not copy the rule, they still have a similar effect. The most common formulation is that a motion to withdraw is permitted only before imposition of sentence but, to correct manifest injustice, the court may set aside judgment and allow the defendant to withdraw his plea. *See* KAN. STAT. ANN. § 22-3210 (1974); NEV. REV. STAT. § 176:165 (1973).

65. *Compare* N.M. STAT. ANN. § 41-23-21(g) (Supp. 1975); ALAS. R. CRIM. P. 11(3); ARIZ. R. CRIM. P. 17.4; N.D.R. CRIM. P. 11(d), *with* COLO. REV. STAT. ANN. § 16-7-302(2) (1974); FLA. R. CRIM. P. 3.171(c), *and* MINN. R. CRIM. P. 15.04(3), 15.05. *But see* N.C. GEN. STAT. § 15A:1024 (1975) (modeled after ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE).

66. ARIZ. R. CRIM. P. 17.4. The rule is derived from STANDARDS, PLEAS OF GUILTY, §§ 2.1(a)(ii)(4), (5) (Approved Draft, 1968). ARIZ. R. CRIM. P. 17.4, comment. The Vermont Rules of Criminal Procedure, rule 11(e), while based on the federal rule, is in compliance with the *Standards*, particularly with *Standards, Pleas of Guilty* § 2.1(a)(ii)(5) (Proposed Revision 1968). VT. R. CRIM. P. 11, comment.

these are all recent statutes which indicates a discernible trend toward national implementation of the *Standards*.[67]

State statutes have also tended to clarify the *Standards* and remedy some of their failures. Those statutes following the federal rules, for example, are not faced with the problem of conditional concurrence since a defendant's right to withdraw his plea is derived from the rejection of the plea agreement.[68]

USE OF THE STANDARDS IN JUDICIAL DECISIONS

Adoption of the Manifest Injustice and Fair and Just Reason Tests

The majority of courts dealing with the issue have permitted withdrawal when the judge fails to incorporate the agreement in his sentence.[69] The attorney then wonders how effective the *Standards* have been in this trend and how they can be used. In fact, the *Standards* have been readily accepted,[70] being used frequently in withdrawal cases to support the proposition that the judge *must* permit withdrawal to correct manifest injustice and *may*, in his discretion, do so for a fair and just reason before sentence.[71] In *People v. Riebe*,[72] the Illinois Supreme Court was one of the first courts to adopt the position of the *Standards*. There the prosecutor met with the defendant's attorney in the judge's chambers to discuss a bargain. With the judge's assistance a tentative sentence was agreed upon with the judge stating that the minimum sentence would be "in the area" suggested by the two attorneys. The defendant decided to plead guilty. To his surprise the judge sentenced him to a greater sentence than that contemplated by the agreement—a classic example of the defendant's predicament. Two different rationales were employed in reversing the action of the trial court judge. First, relying on *Standards, Pleas of Guilty*,[73] the court held that fairness

67. *But see* N.Y. CRIM. PROC. LAW § 220.60(4) (McKinney 1971) (court, in its discretion, may allow withdrawal before sentence); TEX. CODE CRIM. PROC. ANN. art. 26.13 (Supp. 1976) (no withdrawal provisions); WASH. SUPER. CT. CRIM. R. 4.2(f) (only manifest injustice test).

68. *But see* COLO. REV. STAT. ANN. § 16-7-302 (1974); FLA. R. CRIM. P. 3.171(c).

69. *E.g.*, Quintana v. Robinson, 319 A.2d 515, 519 (Conn. Super. Ct. 1973); State v. Wolske, 160 N.W.2d 146, 152 (Minn. 1968) (withdrawal permitted); State v. Nuss, 330 A.2d 610, 612 (N.J. Super. Ct. 1974) (duty of judge to allow withdrawal). *But see* Cruz v. State, 530 S.W.2d 817, 821 (Tex. Crim. App. 1975) (no right to withdraw).

70. *E.g.*, People v. Clark, 515 P.2d 1242, 1243 (Colo. 1973) (referring to *Standards, Function of the Trial Judge* § 4.1); Szarwak v. Warden, 320 A.2d 12, 15 (Conn. Super. Ct. 1974) (referring to *Standards, Function of the Trial Judge* § 4.1); Anderson v. State, 335 N.E.2d 225, 227 (Ind. 1975) (referring to *Standards, Pleas of Guilty*); State v. Henderson, 259 So. 2d 557, 561 n.4 (La. 1972) (referring to *Standards, Pleas of Guilty*).

71. State v. Warren, 153 N.W.2d 273, 278 (Minn. 1967).

72. 241 N.E.2d 313 (Ill. 1968).

73. §§ 2.1, 3.3 (Approved Draft, 1968).

required that the judge inform the defendant that he no longer concurred and that he then allow the defendant to withdraw his plea.[74] Second, the right to withdraw was said to be compelled by general policy considerations including liberal plea withdrawal, justice, and jury trials.[75]

Riebe holds only that withdrawal must be permitted if the judge changes his mind. There is no hint of the problem of conditional concurrence or of a remedy other than withdrawal. Nor is any position taken on the propriety of the judge remaining on the case after withdrawal. *Riebe*'s significance lies in the recognition of the right to withdraw advocated by the *Standards* and that this right is based on fairness rather than upon voluntariness.

The Problem of Conditional Concurrence

In deciding *Riebe*, Illinois, like other jurisdictions, seems to have overlooked the problem of conditional acceptance. In fact, only the Pennsylvania Supreme Court in *Commonwealth v. Dickerson*[76] appears to have dealt with this problem. In *Dickerson* the court held that where the defendant is made aware that the court is not bound by the prosecutor's sentence recommendation and the judge has not indicated that he will accept the bargain, his refusal to accept it does not vitiate the plea.[77] While Pennsylvania had earlier adopted *Standards, Pleas of Guilty*,[78] the provisions were held inapplicable when the judge does not conditionally agree to accept the plea before its entry.[79] *Dickerson* is no longer the law in Pennsylvania[80] since it was decided prior to the adoption of article 319 of the Pennsylvania Code of Criminal Procedure. Its analysis of *Standards, Pleas of Guilty*, however, is still valid, and the case supports the proposition that conditional concurrence is the *sine qua non* of the right to withdraw when the judge rejects the plea bargain.[81] Since the *Standards* have been so readily used by the courts, and *Dickerson* seems to be the only case dealing with the problem of conditional acceptance, perhaps this problem is not often encountered.[82]

74. People v. Riebe, 241 N.E.2d 313, 314-15 (Ill. 1968).

75. *Id.* at 315; *accord*, State v. Nuss, 330 A.2d 610, 612 (N.J. Super. Ct. 1974) (judge must tell defendant of right to withdraw).

76. 295 A.2d 282 (Pa. 1972).

77. *Id.* at 285.

78. Commonwealth v. Evans, 252 A.2d 689, 691 (Pa. 1969) (adopted § 3.3(b)).

79. Commonwealth v. Dickerson, 295 A.2d 282, 284 (Pa. 1972).

80. Commonwealth v. Sutherland, 340 A.2d 582, 584 (Pa. Super. Ct. 1975).

81. *But see id.* at 584. In citing *Standards, Pleas of Guilty* § 3.3(b) as in point, the superior court implicitly disagreed with the supreme court's position in *Dickerson*. While *Dickerson* was only distinguished, its holding is incompatible with that of *Sutherland*.

82. Perhaps, as a rule, judges do indicate conditional acceptance. Also, there may be a tendency to expand the concept of conditional concurrence. *See* People v. Palma, 181 N.W.2d 808, 810 (Mich. Ct. App. 1970) (by not specifically telling defendant that only judge could grant leniency, judge impliedly participated in promises).

The Failure to Adopt Both the Voluntariness and Fairness Bases for Plea Withdrawal

Merely adopting the *Standards*' test in general terms, however, has not always proved to be enough for the defendant who wishes to withdraw after the judge has rejected the bargain. One reason for this is a propensity to quote from the approved rather than from the revised draft;[83] consequently, attorneys for such defendants must know whether their jurisdiction has adopted the revised draft.

Although conditional acceptance has not troubled the courts, great difficulties with the *Standards* occur when the courts mix discussions of discretion with those of manifest injustice. This leaves the mistaken impression that the two concepts are compatible.[84] For example, in *United States ex rel. Culbreath v. Rundle*,[85] a frequently cited case in favor of withdrawal, the Court of Appeals for the Second Circuit employed language of discretion by holding that where the judge rejects the bargain he *should* allow the defendant to withdraw but is not required to do so. The effect of the case is further limited by the reference to the element of prejudice to the government.[86] This element relates to judicial discretion and, while central to the fair and just reason test, is irrelevant to the manifest injustice test.

A common element in the decisions discussing discretion in the context of manifest injustice is a failure to recognize the *Standards*' provisions for two distinct types of safeguards, preventative and saving, and a reliance on only the preventative type.[87] The most recent example of the refusal to accept the *Standards*' correlative protection is *Cruz v. State*[88] in which the Texas Court of Criminal Appeals proposed a procedure "calculated to clear the atmosphere surrounding the plea negotiation process."[89] The suggested practice incorporates the plea entry provisions of the *Standards* and the professional responsibilities of both the prosecutor and the defense counsel.[90] Excluded, however, are both withdrawal provisions and some of the profes-

83. *E.g.*, State v. Olson, 220 N.W.2d 827, 828 n.1 (Minn. 1974); State v. Wolske, 160 N.W.2d 146, 150 (Minn. 1968); State v. Stone, 300 A.2d 331, 333 (N.H. 1973); Peters v. State, 184 N.W.2d 826, 828 (Wis. 1971).

84. *See* United States *ex rel.* Leeson v. Damon, 496 F.2d 718, 722 (2d Cir.), *cert. denied*, 419 U.S. 954 (1974).

85. 466 F.2d 730 (3d Cir. 1972).

86. *Id.* at 735. *See also* Bouchillon v. Estelle, 507 F.2d 622, 623 (5th Cir. 1975).

87. State v. Stone, 300 A.2d 331, 333 (N.H. 1973) (defendant with full understanding of his rights and consequences of his act voluntarily pleaded guilty even though judge rejected the bargain); State v. McClarron, 512 P.2d 1278, 1279 (N.M. Ct. App. 1973) (where circumstances show defendant was aware of her rights and consequences of her acts, there was no denial of due process in refusing to allow withdrawal when judge rejected the plea).

88. 530 S.W.2d 817 (Tex. Crim. App. 1975).

89. *Id.* at 821.

90. *Id.* at 822; *accord*, Gibson v. State, 532 S.W.2d 69, 75 (Tex. Crim. App. 1975).

sional duties of the trial judge. In this respect, the decision is in line with the judicial refusal in Texas to accept withdrawal as a remedy to complement accepted prophylactic provisions.[91] The effect is to adopt voluntariness as the only means of insuring that the defendant's rights are being protected.

This reliance on voluntariness seems to have two bases: (1) the judge cannot be bound by his bargain,[92] and (2) disappointed expectation of sentence in and of itself is not manifest injustice.[93] That the prosecutor cannot bind the judge's sentencing discretion is a well settled principle of plea bargaining. It is, however, irrelevant to the issue of withdrawal. Disappointed sentence expectation, on the other hand, is not related to the subject of plea bargaining; rather, it applies only to those situations where the defendant elects to plead guilty without bargaining—the so-called tacit plea bargain.[94]

The impact of the voluntariness rationale is further illustrated in that few decisions interrelate the appropriate *Standards*.[95] Such interrelationship leads to the conclusion that the *Standards*' rationale for permitting withdrawal is fairness rather than voluntariness. Consequently, expansion of the right to withdraw may be achieved by interrelating the pertinent standards.[96] On the other hand, judicial misuse of the *Standards* is also suggested since a standard viewed independently of the others appears out of context.[97]

91. *E.g.*, Galvan v. State, 525 S.W.2d 24, 26 (Tex. Crim. App. 1975) (judge told defendant that he did not have to accept recommendation); Valdez v. State, 507 S.W.2d 202, 203 (Tex. Crim. App. 1974) (record showed plea was intelligently and voluntarily entered); Kincaid v. State, 500 S.W.2d 487, 490 (Tex. Crim. App. 1973) (prosecutor fulfilled promise and judge did not agree to accept it). *See also* Garcia v. State, 91 Tex. Crim. 9, 10, 237 S.W. 279, 280 (1921) (liberal withdrawal policy based on prevention of improvident entry of guilty pleas).

92. *E.g.*, United States *ex rel.* Rundle v. Culbreath, 466 F.2d 730, 734 (3d Cir. 1972); People v. Goodman, 277 N.E.2d 136, 140 (Ill. Ct. App. 1971); Gibson v. State, 532 S.W.2d 69, 75 (Tex. Crim. App. 1975).

93. State v. Vantrump, 170 N.W.2d 453, 454 (Iowa 1969).

94. *See id.* at 454 (no mention of plea bargaining); Comment, *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, 66 YALE L.J. 204 (1956).

95. *See* State v. Fisher, 223 N.W.2d 243, 244-45 (Iowa 1974) (interrelates *Standards, Pleas of Guilty; Standards, The Prosecution Function;* and *Standards, Function of the Trial Judge.*

96. *But see* United States v. Gallington, 488 F.2d 637, 640 (8th Cir. 1973), *cert. denied*, 416 U.S. 907 (1974) (recognizes that judge's role in plea bargaining is limited to review by using *Standards, Pleas of Guilty* § 3.3(a) but not *Standards, Function of the Trial Judge* § 4.1(a)); State v. Nuss, 330 A.2d 610, 612 (N.J. Super. Ct. 1974) (establishes duty of trial judge by resort to *Standards, Pleas of Guilty* § 3.3(b) rather than to *Standards, Function of the Trial Judge* §§ 4.1, 4.2). This reluctance to use *Standards, The Prosecution Function* and *Standards, The Defense Function* may represent a policy of removing the breach of professional responsibility from the realm of substantive law in all but the most dire circumstances (ineffective representation) and of relegating such breaches to grievance committees. This policy, however, is far from compelling since very real substantive rights of the defendant are breached by misconduct involving guilty pleas.

97. *See* Gibson v. State, 532 S.W.2d 69, 74-75 (Tex. Crim. App. 1975) (selective

CONCLUSION

The Constitution does not render an otherwise voluntary plea of guilty involuntary merely because the trial judge rejects a negotiated sentence recommendation of the prosecutor. A negotiated plea is valid if, under the circumstances, it is the best decision for the defendant.[98] No authority supports the proposition that the plea must be entered as an uninfluenced act of free will. Indeed, where there is a factual basis for the plea, the defendant may plead guilty while protesting his innocence.[99] Similarly, the plea is valid if the defendant knows what constitutes the offense he is charged with and is generally aware of the direct consequences of his plea.[100]

Those cases which rely on voluntariness are employing the common and not the legal meaning of the term. While a strong argument can be made for an extension of the legal meaning of voluntariness, the legal meaning remains unchanged. It does not appear that a change is forthcoming in the near future. If the conventional meaning of "voluntary" is to be incorporated into the law, a means other than an attack on the legal definition of "voluntary" must be employed.

A better course might be to establish, as a right of due process, the requirement that the defendant be permitted to withdraw his plea of guilty when the judge rejects the bargained for sentence recommendation. The result would be a due process requirement independent of and correlative to the voluntary and knowing test. An examination of the *Standards* suggests such an approach.

The manifest injustice test of the *Standards* should be identified as an articulation of the fundamental fairness theory of due process. In fact, four of the specified examples of manifest injustice have been recognized as violations of due process.[101] Viewed in this manner, manifest injustice

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adoption of standards); Kincaid v. State, 500 S.W.2d 487, 490 (Tex. Crim. App. 1973) (proscription of judicial participation in plea bargaining without mention of conditional concurrence).

98. North Carolina v. Alford, 400 U.S. 25, 31 (1970).

99. *Id.* at 37.

100. *E.g.*, Brady v. United States, 397 U.S. 742, 748 (1970) (plea must be entered with sufficient awareness of relevant circumstances and likely consequences); Michel v. United States, 507 F.2d 461, 465 (2d Cir. 1974) (defendant's ignorance of collateral consequences did not vitiate plea); Meaton v. United States, 328 F.2d 379, 381 (5th Cir. 1964) (defendant's failure to understand collateral consequences did not require withdrawal).

101. Santobello v. New York, 404 U.S. 257, 262 (1971) (prosecutor must keep promise); McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) (defendant has right to effective assistance of counsel); Woods v. Nierstheimer, 328 U.S. 211, 213 (1946) (defendant did not consent to entry of guilty plea which formed basis of his sentence); Kercheval v. United States, 274 U.S. 220, 223 (1927) (guilty plea must be entered voluntarily and with full understanding of consequences).

takes on the status of constitutional due process. Since an involuntary plea is but one form of manifest injustice, the right to withdraw need not be based on the voluntary and knowing requirement. As a result, the conventional meaning of the word "voluntary" is incorporated within the scope of constitutional due process. Further, this approach establishes a basis for the right to withdraw independent of social, judicial, and legislative policy and compels adoption of the right to withdraw in all jurisdictions.

The recognition that manifest injustice is a due process concept, however, will not necessarily grant the right to withdraw to a defendant when the judge elects to reject the bargain. It must be further found that such a circumstance constitutes an independent violation of due process. While the other four examples of manifest injustice are well established as violations of due process, the right to withdraw when the trial judge decides to reject the negotiated sentence recommendation has not been given this recognition.

If manifest injustice is recognized to be fundamental fairness, however, the argument is the same as that found persuasive by the A.B.A. and several jurisdictions—that it is unfair to deny withdrawal under such circumstances because the defendant would not have entered a plea of guilty if he thought that his sentence would be different from that recommended by the prosecutor. Judicial discretion to sentence is not limited; the only restriction imposed is on the judge's discretion to accept the plea. Admittedly, this result expands the *Santobello* decision. The expansion, however, is mandated by *Santobello*'s requirement that the plea of guilty be attended by safeguards to insure that the defendant's rights are protected. Refusal to recognize withdrawal as a mandatory safeguard is a retreat from reality to a world of artificial legal distinctions which confuses defendants and perplexes lawyers.