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OVERVIEW: PLEA BARGAINING IN TEXAS

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I. INTRODUCTION

Plea bargaining is a process whereby a criminal defendant gives up his right to trial in exchange for favorable treatment by the prosecuting attorney.[1] Such negotiation is controversial,[2] unpopu-

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1. *See, e.g.*, Santobello v. New York, 404 U.S. 257, 260 (1971) (disposition of charges by agreement); Smith v. Estelle, 562 F.2d 1006, 1007 (5th Cir. 1977) (defendant pled guilty and agreed to dismiss appeal of prior conviction in exchange for dismissal of six of ten indictments); Washington v. State, 559 S.W.2d 825, 826-27 (Tex. Crim. App. 1977) (defendant pled guilty to two counts after state agreed to recommend punishment and forego third count). *See generally* Berger, *The Case Against Plea Bargaining*, 62 A.B.A. J. 621, 621 (1976) (plea bargaining is "charge" or "sentence" bargaining); Dean, *The Illegitimacy of*

lar,[3] and often abused.[4] Nevertheless, plea bargaining accounts for the majority of all criminal convictions.[5] Properly employed, plea bargaining can produce desirable results such as reducing the number of cases pending on the criminal docket and assisting in the rehabilitative process of those persons convicted.[6]

This monograph is designed to provide a broad overview of plea bargains in Texas courts. A brief discussion of practical considerations is necessary to acquaint the practitioner with issues that affect plea negotiations. Further, an outline of the law related to plea bargaining, as it presently exists, will set forth requirements necessary to enter a guilty plea. Finally, a discussion of the ramifications and waivers resulting from a guilty plea gives further insight into plea bargaining.

Plea Bargaining, 38 FED. PROBATION, Sept. 1974, at 18, 19-20 (definition of plea bargaining).

2. *Compare* Berger, *The Case Against Plea Bargaining*, 62 A.B.A. J. 621, 621 (1976) (plea bargaining serves no useful purpose) *and* Jacks, *Suggested Guidelines for Plea Bargaining*, 41 TEX. B.J. 363, 363 (1978) (noting that National Advisory Commission on Criminal Justice Standards and Goals recommended abolition of plea bargaining) *with* Santobello v. New York, 404 U.S. 257, 261 (1971) (plea bargaining is highly desirable) *and* United States v. Cowan, 524 F.2d 504, 514 (5th Cir. 1975) (plea agreements have desirable function in criminal jurisprudence), *cert. denied*, 425 U.S. 971 (1976).

3. *See* Berger, *The Case Against Plea Bargaining*, 62 A.B.A. J. 621, 621 (1976) (public abhors plea bargaining). *But see* People v. Byrd, 162 N.W.2d 777, 792 (Mich. 1968) (Levins, J., concurring) (majority of judiciary favors plea bargaining).

4. *See* Hoffman, *Plea Bargaining and the Role of the Judge*, 53 F.R.D. 499, 500 (1971) (quoting President's Commission on Law Enforcement and Administration of Justice (1967) noting potential abuses by prosecutors and judges). Because of abuses, some commentators favor the abolition of plea bargaining. *See* Berger, *The Case Against Plea Bargaining*, 62 A.B.A. J. 621, 621-22 (1976) (advocating abolishment of plea negotiations); Dean, *The Illegitimacy of Plea Bargaining*, 38 FED. PROBATION, Sept. 1974, at 18, 23 (quoting the National Advisory Commission on Criminal Justice Standards and Goals which recommended abolition of plea bargaining).

5. *See* Santobello v. New York, 404 U.S. 257, 264 nn.1-2 (1971) (in 1964, 95% of New York general convictions and 90% of U.S. district court convictions resulted from guilty pleas); McCarthy v. United States, 394 U.S. 459, 463 n.7 (1969) (in 1968, 86% of all convictions in U.S. district courts resulted from guilty or nolo contendere pleas). In fact, many courts accept plea bargaining as a necessary and desirable practice designed to make the criminal justice system more efficient. *See, e.g.*, Santobello v. New York, 404 U.S. 257, 260 (1971) (criminal court system would be overburdened without plea negotiations); People v. Williams, 75 Cal. Rptr. 348, 351 (Ct. App. 1969) (plea negotiations essential to timely administration of justice); Hinckle v. State, 189 A.2d 432, 435 (Del. 1963) (plea bargains essential to court efficiency).

6. *See* Santobello v. New York, 404 U.S. 257, 260-61 (1971). *But see* Hoffman, *Plea Bargaining and the Role of the Judge*, 53 F.R.D. 499, 500 (1971) (noting abuses of plea bargaining).

II. FACTORS AFFECTING PLEA NEGOTIATIONS

Since plea bargaining culminates in an agreement between two opposing concerns,[7] various factors necessarily affect the parties' bargaining power.[8] For example, a complex case involving many issues may be more susceptible to negotiation than a case involving few unresolved issues.[9] Crimes against property are usually easier to negotiate than cases involving crimes against persons.[10] Additionally, the past criminal record of the defendant plays an important role in plea negotiations.[11] A case based on circumstantial evidence is normally easier to bargain than a case based on direct evidence,[12] in that the lack of physical and scientific evidence may assist the defendant in attempts to gain concessions from the prosecution.[13] Any grounds to contest the admissibility of evidence di-

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7. *See* Santobello v. New York, 404 U.S. 257, 260 (1971) (disposition of charges by agreement); Johnson v. Beto, 466 F.2d 478, 479 (5th Cir. 1972) (plea bargains are agreements between prosecutors and defendants). Note, however, that any plea negotiations performed by the defense attorney must have the defendant's permission. *See* Jackson v. State, 590 S.W.2d 514, 515 (Tex. Crim. App. 1979) (defendant may withdraw plea as matter of right); TEX. CODE CRIM. PRO. ANN. art. 27.13 (Vernon 1966) (in felony case, defendant must personally plead guilty in open court).

8. *See* Dean, *The Illegitimacy of Plea Bargaining*, 38 FED. PROBATION, Sept. 1974, at 18, 19-20 (summary of parties' relative bargaining power); Urquhart, *Plea Bargaining and Guilty Pleas (Including Appeal of Guilty Pleas)* in 2 STATE BAR OF TEXAS ADVANCED CRIMINAL LAW COURSE § N, at N-1 to N-6 (1979) (summary of factors affecting plea negotiations). For excellent discussions of factors considered in plea bargaining, see Bond, *Plea Bargaining in North Carolina*, 54 N.C.L. REV. 823, 833-37 (1976); Klonoski, Mitchell, & Gallagher, *Plea Bargaining in Oregon: An Exploratory Study*, 50 OR. L. REV. 114, 118-21 (1971).

9. *See* Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 55 (1968) (noting that cases which will require long trials are more easily negotiated than simple cases); Bond, *Plea Bargaining in North Carolina*, 54 N.C.L. REV. 823, 834 (1976) (time and energy necessary for trial is omnipresent factor).

10. *See* Klonoski, Mitchell, & Gallagher, *Plea Bargaining in Oregon: An Exploratory Study*, 50 OR. L. REV. 114, 120-21 (1971) (crimes involving force and violence less likely to be negotiated than other cases).

11. *See* Bond, *Plea Bargaining in North Carolina*, 54 N.C.L. REV. 823, 834 (1976) (second highest factor in bargaining is defendant's character and record); Klonoski, Mitchell, & Gallagher, *Plea Bargaining in Oregon: An Exploratory Study*, 50 OR. L. REV. 114, 119 (1971) (record of defendant is significant factor in negotiations).

12. *Compare* Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 59 (1968) (prosecutors negotiate when case is weak) *with* Wisdom v. State, 122 Tex. Crim. 271, 274, 54 S.W.2d 533, 534-35 (1932) (law prefers conviction based on direct rather than circumstantial evidence).

13. *Cf.* Bond, *Plea Bargaining in North Carolina*, 54 N.C.L. REV. 823, 834 (1976) (strength of case most important factor); Klonoski, Mitchell, & Gallagher, *Plea Bargaining in Oregon: An Exploratory Study*, 50 OR. L. REV. 114, 119 (1971) (major factor is strength

rectly affects the plea negotiations.[14] Moreover, witness availability and credibility directly affect the parties' willingness to bargain.[15]

Subjectively, the parties should consider the judge's predisposition toward plea negotiations in general, and, specifically, plea negotiations involving the particular crime alleged to have been committed.[16] Negotiations may be useless as judges are not required to accept any plea agreements;[17] however, overcrowding, both on the court's docket and in penal institutions, may affect judges' willingness to accept plea agreements.[18]

III. Possible Plea Bargains

An agreed disposition of a case may result in a defendant's guilty plea to a lower charge,[19] or the dropping of multiple charges or counts.[20] Further, a recommendation as to punishment[21] or en-

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of case).

14. *Compare* Araj v. State, 592 S.W.2d 603, 604 (Tex. Crim. App. 1979) (warrantless search excluded evidence) *with* Klonoski, Mitchell, & Gallagher, *Plea Bargaining in Oregon: An Exploratory Study*, 50 Or. L. Rev. 114, 119 (1971) (strength of case is important factor in negotiations).

15. *Compare* McClanahan v. United States, 230 F.2d 919, 926 (5th Cir.) (failure to produce witness creates inference of unfavorable testimony), *cert. denied*, 352 U.S. 824 (1956) *and* Davis v. State, 142 Tex. Crim. 602, 605, 155 S.W.2d 801, 803 (1941) (incompetent witness' testimony excluded) *with* Bond, *Plea Bargaining in North Carolina*, 54 N.C.L. Rev. 823, 834 (1976) (case's strength most important factor in negotiations).

16. *See* Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. Chi. L. Rev. 50, 55 (1968) (noting judge's predisposition toward trying simple cases); Hoffman, *Plea Bargaining and the Role of the Judge*, 53 F.R.D. 499, 501 (1971) (noting A.B.A. standards allowing judge to give approval or disapproval of bargain). *But cf.* United States v. Adams, 634 F.2d 830, 835 (5th Cir. 1981) (judicial participation in plea negotiations prohibited).

17. *See* Morano v. State, 572 S.W.2d 550, 550-51 (Tex. Crim. App. 1978) (judge does not have to accept or allow bargains); Tex. Code Crim. Pro. Ann. art. 26.13(a)(2) (Vernon Supp. 1982) (judge must admonish defendant as to whether he will accept or reject bargain).

18. *See* Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. Chi. L. Rev. 50, 54-55 (1968) (prosecutors consider docket load in negotiations); *cf.* Hoffman, *Plea Bargaining and the Role of the Judge*, 53 F.R.D. 499, 499 (1971) (overcrowded penal facilities cause delays in criminal cases creating pressure on judiciary).

19. *See* Washington v. State, 559 S.W.2d 825, 826-27 (Tex. Crim. App. 1977) (reduction of capital murder charge to attempted murder); Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. Chi. L. Rev. 50, 58, 61 (1968) (prosecutors agree to lower charges).

20. *See* Santobello v. New York, 404 U.S. 257, 258 (1971) (prosecutor agreed to forego two felony charges); United States v. Broussard, 582 F.2d 10, 11 (5th Cir. 1978) (agreement to dismiss certain drug charges). *See generally* Dean, *The Illegitimacy of Plea Bargaining*, 38 Fed. Probation, Sept. 1974, 18, 19-20 (discussion of prosecutors' bargaining elements).

21. *See* Jones v. Estelle, 584 F.2d 687, 689 (5th Cir. 1978) (prosecutor agreed to make recommendation for 10 year sentence); Garza v. United States, 530 F.2d 1208, 1209 (5th Cir.

hancement of punishment is often offered as consideration for the bargain.[22] A defendant's agreement to be a state witness in another case may result in further leniency.[23] In summary, any combination of concessions may result as both parties seek some form of consideration in exchange for favorable treatment.[24]

IV. Authority For The Use Of Plea Bargains

A. *No Constitutional Right To Bargain*

Although plea bargaining has been held constitutionally valid,[25] there is, in fact, no constitutional right that such a procedure be made available to a defendant.[26] Because the offer of a plea bargain is within the discretion of the prosecutor, courts may not compel him to make such an offer, nor may a defendant demand that the state enter into a plea bargain.[27] States may even choose to

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1976) (prosecutor was to recommend concurrent sentences).

22. *See, e.g.*, Sand v. Estelle, 559 F.2d 364, 365 (5th Cir. 1977) (prosecution agreed not to seek enhancement), *cert. denied*, 434 U.S. 1076 (1978); Arch v. State, 526 S.W.2d 817, 817-18 (Tex. Crim. App. 1975) (agreement not to seek enhanced punishment); Garza v. State, 502 S.W.2d 155, 156-57 (Tex. Crim. App. 1973) (bargain to not seek enhancement of punishment).

23. *See* United States v. Goodman, 605 F.2d 870, 878 (5th Cir. 1979) (unindicted co-conspirator granted immunity in exchange for testimony).

24. *See* Jones v. Estelle, 584 F.2d 687, 689 (5th Cir. 1978) (plea bargain is contractual); *Ex parte* Burton, 623 S.W.2d 418, 419 (Tex. Crim. App. 1981) (agreement binds state to fulfill promises).

25. *See, e.g.*, Corbitt v. New Jersey, 439 U.S. 212, 219 (1978) (offering by state of benefits in return for guilty plea is permissible); Chaffin v. Stynchcombe, 412 U.S. 17, 31 n.18 (1973) (legitimacy of practice of plea bargaining not doubted); Santobello v. New York, 404 U.S. 257, 260 (1971) (plea bargaining essential to administration of justice).

26. *See* Corbitt v. New Jersey, 439 U.S. 212, 223 (1978) (states free to abolish plea bargaining); DeRusse v. State, 579 S.W.2d 224, 236 (Tex. Crim. App. 1979) (defendant has no right to demand state enter into plea bargain). Furthermore, the defendant has no constitutional right to have his guilty plea accepted by the court. *See* Santobello v. New York, 404 U.S. 257, 262 (1971). *But cf.* Machibroda v. United States, 368 U.S. 487, 493 (1962) (if prosecutor's promise induces guilty plea, breach of promise will render plea void).

27. *See* Quinones v. State, 592 S.W.2d 933, 941 (Tex. Crim. App. 1980) (offer of plea negotiations within discretion of prosecutor); DeRusse v. State, 579 S.W.2d 224, 236 (Tex. Crim. App. 1979) (defendant has no right to demand plea bargain from state). Thus, a defendant may not question an unappealing offer or the lack of an offer of concessions by the prosecutor. *See* Quinones v. State, 592 S.W.2d 933, 941 (Tex. Crim. App. 1980). If an offer to plea bargain is made by the state's attorney, that offer may be withdrawn prior to the entry of the defendant's plea. *See* DeRusse v. State, 579 S.W.2d 224, 236 (Tex. Crim. App. 1979). In this case, the defendant is in the same position he would have been in if no agree-

prohibit plea bargaining.[28] Additionally, trial courts with an announced policy of refusing to allow plea bargains cannot be compelled to accept such arrangements even though state laws provide for such a procedure.[29]

B. *Supreme Court Promulgations*

Constitutional waivers are inherent in guilty or nolo contendere pleas entered pursuant to plea bargains;[30] therefore, the Supreme Court of the United States has carefully scrutinized the making of guilty pleas to ensure that they have been voluntarily and intelligently made.[31] The Court has stated that, within the present criminal justice system, plea bargaining is not only permissible,[32] but

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ment had been made or if he had withdrawn his plea after the state indicated it would not accept the agreement. *See id.* at 236. Once the state has withdrawn the plea bargain or the defendant has rejected the offer, the prosecution is not bound to carry out the terms of the proposed plea bargain. *See* Bass v. State, 576 S.W.2d 400, 401 (Tex. Crim. App. 1979) (no breach occurs where no agreement exists); Rodriquez v. State, 509 S.W.2d 319, 320-21 (Tex. Crim. App. 1974) (if no agreement exists, no breach could occur). *See generally* Comment, *Constitutional Constraints On Prosecutorial Discretion In Plea Bargaining*, 17 HOUS. L. REV. 753, 753-58 (1980) (discussion of contract theory of plea bargaining).

28. *See* Corbitt v. New Jersey, 439 U.S. 212, 227 n.15 (1978); *cf.* North Carolina v. Alford, 400 U.S. 25, 38 n.11 (1970) (states free to legislate rules regarding acceptance or rejection of guilty pleas).

29. *See* Morano v. State, 572 S.W.2d 550, 551 (Tex. Crim. App. 1978). *But see* Santobello v. New York, 404 U.S. 257, 262 (1971) (if promise of prosecutor induces guilty plea, such promise must be fulfilled).

30. *See, e.g.*, McMann v. Richardson, 397 U.S. 759, 766 (1970) (waiver of right to jury trial and grounds to contest admissibility of evidence); Brady v. United States, 397 U.S. 742, 748 (1970) (plea waives right to jury trial and right against self-incrimination); McCarthy v. United States, 394 U.S. 459, 466 (1969) (waiver of right against self-incrimination, right to jury trial, and right to confront witnesses). *See generally*, Bishop, *Waivers in Pleas of Guilty*, 60 F.R.D. 513, 530 (1974) (guilty plea waives constitutional rights). A guilty plea, however, does not waive all antecedent violations of the Constitution. *See* Menna v. New York, 423 U.S. 61, 62 n.2 (1975) (per curiam). A guilty plea renders immaterial constitutional violations "not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction, if factual guilt is established." *Id.* at 63. If it is claimed the state cannot convict the defendant, even if factual guilt is shown, then the claim is not waived. *See id.* at 63 (double jeopardy claim not waived).

31. *See, e.g.*, McMann v. Richardson, 397 U.S. 759, 762-72 (1970) (analysis of voluntary and intelligent plea requirements); Boykin v. Alabama, 395 U.S. 238, 240-44 (1969) (reversal of conviction because no showing of voluntariness and knowledge of consequences of plea); De Meerleer v. Michigan, 329 U.S. 663, 664-65 (1947) (violation of intelligent plea requirement found).

32. *See* Bordenkircher v. Hayes, 434 U.S. 357, 361-62 (1978) (plea bargaining important component of criminal justice system); Chaffin v. Stynchcombe, 412 U.S. 17, 31 n.18 (1973) (plea bargaining essential to criminal justice system).

inevitable and is to be encouraged.[33] The Court has noted that a state has a legitimate interest in facilitating plea negotiations which are mutually beneficial to both the defendant and the state;[34] consequently, states are free to legislate their own rules concerning plea bargaining.[35]

C. *Texas Authorization*

In Texas, the Code of Criminal Procedure addresses the practice of plea bargaining in Article 26.13 which provides that before the court accepts or rejects a plea of guilty or nolo contendere resulting from a plea bargaining agreement, the defendant must personally be informed whether the court will reject or follow the agreement.[36] If the court rejects the agreement, the defendant may withdraw his plea; neither the plea nor any statement made by the defendant at the hearing may be used against him in a subsequent criminal proceeding.[37] Since the plea bargaining process involves the waiver of rights,[38] as well as limiting appeals,[39] and raises questions as to punishments,[40] the code sections dealing with these issues are relevant to plea bargaining without specifically referring to the process.[41]

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33. *See* Santobello v. New York, 404 U.S. 257, 260-61 (1971) (plea agreements essential component of justice system and, if administered properly, encouraged).

34. *See* Corbitt v. New Jersey, 439 U.S. 212, 222 (1978) (state has interest in encouraging plea negotiations beneficial to defendant and state); Bordenkircher v. Hayes, 434 U.S. 357, 361-65 (1978) (discussion of plea bargaining benefits and dangers resulting therefrom encourages plea negotiations).

35. *See* North Carolina v. Alford, 400 U.S. 25, 38-39 (1970) (states may prescribe rules for accepting pleas); *cf.* Corbitt v. New Jersey, 439 U.S. 212, 222 (1978) (state statute allowed judge to accept pleas facilitating plea bargains).

36. *See* TEX. CODE CRIM. PRO. ANN. art. 26.13(a)(2) (Vernon Supp. 1982).

37. *See id.*

38. *See* Brady v. United States, 397 U.S. 742, 748 (1970) (plea waives privilege against self-incrimination and right to trial).

39. *See* Galitz v. State, 617 S.W.2d 949, 951-53 (Tex. Crim. App. 1981) (article 44.02 limits defendant's right to appeal where guilty plea entered).

40. *See* Bass v. State, 576 S.W.2d 400, 400-01 (Tex. Crim. App. 1979) (defendant claimed prosecutor breached agreement not to recommend punishment).

41. *See* TEX. CODE CRIM. PRO. ANN. arts. 1.13 (Vernon 1977) (waiver of right to jury trial), 1.14 (Vernon 1977) (waiver of any rights secured by law), 1.141 (Vernon 1977) (waiver of right to be accused by indictment), 1.15 (Vernon 1977) (procedure to waive jury and plead guilty), 44.02 (Vernon 1979) (rights to appeal limited upon entering guilty or nolo contendere plea).

V. GUILTY PLEAS ENTERED PURSUANT TO PLEA BARGAINS

The plea bargain is effected by the court's acceptance of a plea of guilty or nolo contendere.[42] A guilty plea admits all the elements of an offense.[43] A plea of nolo contendere does not admit the guilt of the defendant, yet its legal effect in a criminal prosecution is virtually the same as a guilty plea.[44] Guilty pleas coupled with claims of innocence propose a special consideration for the courts due to their apparent contradiction.[45] Once a guilty plea is entered, only the court's acceptance is necessary in order to convict the defendant.[46] It is essential, therefore, that the defendant's plea be a valid plea, determined by compliance with applicable state and

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42. *See* TEX. CODE CRIM. PRO. ANN. art. 26.13(a) (Vernon Supp. 1982) (court must inform defendant whether it will accept agreement before finding on plea). *See generally* Comment, *Constitutional Constraints on Prosecutorial Discretion in Plea Bargaining*, 17 HOUS. L. REV. 753, 755 (1980) (under contract theory of plea bargaining, no binding agreement prior to defendant's plea).

43. *E.g.*, Brinson v. State, 570 S.W.2d 937, 938 (Tex. Crim. App. 1978) (guilty plea admits all elements); Lewis v. State, 529 S.W.2d 550, 553 (Tex. Crim. App. 1975) (guilty plea admits existence of all factors necessary to establish guilt); *Ex parte* Taylor, 480 S.W.2d 692, 693 (Tex. Crim. App. 1972) (guilty plea admits all elements).

44. *See* TEX. CODE CRIM. PRO. ANN. art. 27.02(5) (Vernon Supp. 1982). A plea of nolo contendere literally means "I do not contest it." This plea is entered when a defendant does not wish to admit his guilt, yet he submits himself for punishment without contesting the charges. *See* North Carolina v. Alford, 400 U.S. 25, 36 n.8 (1970). Such a plea may not be used against the defendant as an admission in any civil suit growing out of the act upon which the criminal prosecution is based. TEX. CODE CRIM. PRO. ANN. art. 27.02(5) (Vernon Supp. 1982).

45. *See* North Carolina v. Alford, 400 U.S. 25, 37-38 (1970). The Supreme Court held that pleas of guilty coupled with claims of innocence should be rejected by the trial court until it inquires into the facts surrounding the plea so as to determine its valid factual basis. *See id.* at 38 n.10. Holding that an admission of guilt is not a constitutional requisite for criminal punishment, the Court stated, "an individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime." *Id.* at 37.

46. *See* Kerchaval v. United States, 274 U.S. 220, 223 (1927). The Court stated:

> A plea of guilty differs in purpose and effect from a mere admission or an extrajudicial confession; it is itself a conviction. Like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give judgment and sentence. Out of just consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences.

Id. at 223.

The courts in Texas, however, lack authority to accept pleas that are conditional on agreements that cannot be fulfilled. *See* Mooney v. State, 615 S.W.2d 776, 778 (Tex. Crim. App. 1981) (court lacked authority to accept plea conditioned on right to appeal where matters were not appealable).

federal law,[47] to avoid a denial of due process of law.[48]

A. *Voluntariness Requirement*

In order for a guilty or nolo plea to be valid, the plea must be made voluntarily.[49] The defendant must have a full understanding of the charges against him and the consequences of his plea.[50] Whether or not the plea is voluntary is determined by looking to the entire record.[51] A plea may be considered voluntary even

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47. *See* Brady v. United States, 397 U.S. 742, 748-49 (1970) (plea must be voluntarily and intelligently made); TEX. CODE CRIM. PRO. ANN. art. 26.13 (Vernon Supp. 1982) (requirements for valid guilty plea); *see also* Buckner v. State, 538 S.W.2d 132, 134 (Tex. Crim. App. 1976) (article 26.13 held constitutionally valid; in establishing validity of plea, court need not determine whether constitutional rights violated at any stage prior to plea being entered). Every guilty plea accepted in state courts will be measured not only by standards set by the state courts, but also by standards set by the United States Supreme Court. The state courts may have generally established more stringent requirements for a valid plea than the Supreme Court. *Compare* North Carolina v. Alford, 400 U.S. 25, 31, 39 (1970) (guilty plea not invalid despite defendant's testimony that he was innocent) *with* Woodberry v. State, 547 S.W.2d 629, 631 (Tex. Crim. App. 1977) (guilty plea invalid because of equivocal nature of defendant's testimony).

48. *See* Brady v. United States, 397 U.S. 742, 748-49 (1970) (due process requirement that plea be voluntary and intelligent); Boykin v. Alabama, 395 U.S. 238, 242-44 (1969) (voluntary and intelligent waiver of fifth amendment rights must be affirmatively shown); *see also,* Note, *Article 26.13: Is Substantial Compliance Really Sufficient? An Admonition To The Admonishers,* 32 BAYLOR L. REV. 436, 436-46 (1980) (discussion of whether Texas admonishment procedure meets federal due process standards for acceptance of guilty plea).

49. *See, e.g.,* Brady v. United States, 397 U.S. 742, 748 (1970); Boykin v. Alabama, 395 U.S. 238, 242 (1969); Richards v. State, 562 S.W.2d 456, 457 (Tex. Crim. App. 1977). The Fifth Circuit Court of Appeals discussed the importance of a guilty plea being voluntarily made in Schnautz v. Beto, 416 F.2d 214 (5th Cir. 1969). The court stated:

> All pleas of guilty are the result of some pressures or influences on the mind of the defendant. . . . [A] plea is not rendered involuntary solely because it was induced as a result of a plea bargaining situation. . . . The crucial issue is whether, under all the facts and circumstances, the plea was truly voluntary. The plea must be a genuine one by a defendant who understands the situation, his rights, and the consequences of his plea and is neither deceived nor coerced.

Id. at 215-16.

50. *See, e.g.,* Basham v. State, 608 S.W.2d 677, 678 (Tex. Crim. App. 1980) (purpose of article 26.13 of Texas Code of Criminal Procedure to assure full understanding of consequences of plea); Lincoln v. State, 560 S.W.2d 657, 659 (Tex. Crim. App. 1978) (no denial of due process based on alleged misunderstanding where indictment containing elements of offense read to mentally competent defendant); Vasquez v. State, 477 S.W.2d 629, 633 (Tex. Crim. App. 1972) (failure to admonish defendant as to consequences of plea is reversible error). The record must affirmatively disclose that a guilty plea was entered knowingly and voluntarily. *See* Boykin v. Alabama, 395 U.S. 238, 242 (1969).

51. *See* Richards v. State, 562 S.W.2d 456, 459 (Tex. Crim. App. 1978); Williams v. State, 522 S.W.2d 483, 485 (Tex. Crim. App. 1975). The record as a whole must affirmatively

though it is entered in order to avoid a harsher punishment.[52] Ineffective assistance of counsel, however, will render an otherwise voluntary plea invalid.[53] Further, a plea motivated by an involuntary confession may still be a voluntary plea where the defendant is represented by reasonably competent counsel.[54] Voluntariness of a plea may be in doubt, however, where the plea is given in anticipation of leniency in regard to third parties.[55]

B. *Intelligent Plea and Mental Competence Requirements*

Closely akin to voluntariness is the idea that the plea should be intelligently made.[56] For example, a plea made through ignorance or inadvertence, or upon erroneous advice of a government agent, would not be considered an intelligent choice.[57] The defendant must have a full understanding of the charges against him and the consequences of his plea for the plea to be intelligently made.[58]

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show that the plea was intelligently and voluntarily made. *Cf.* Maxey v. State, 626 S.W.2d 180, 182 (Tex. Ct. App.—Corpus Christi 1981, no petition) (defendant's statement that he wanted to pay fine and take what was coming to him held sufficient to show guilty plea voluntarily entered).

52. *See* Arch v. State, 526 S.W.2d 817, 817-18 (Tex. Crim. App. 1975) (defendant's plea not rendered involuntary because entered to avoid punishment enhancement); Trevino v. State, 519 S.W.2d 864, 868 (Tex. Crim. App. 1975) (pleading guilty to try to escape higher sentence does not invalidate plea); Valdez v. State, 507 S.W.2d 202, 203 (Tex. Crim. App. 1974) (guilty plea not invalid even though entered in anticipation of avoiding higher punishment).

53. *See* Meyers v. State, 623 S.W.2d 397, 401 (Tex. Crim. App. 1981) (constitutionally valid guilty plea requires voluntary and intelligent plea made upon effective assistance of reasonably competent counsel).

54. *See* McMann v. Richardson, 397 U.S. 759, 770 (1970) (guilty plea given pursuant to reasonably competent advice but based on erroneous judgment of admissibility of confession is not involuntary).

55. *See* United States v. Nuckols, 606 F.2d 566, 569 (5th Cir. 1979) (guilty plea given in return for leniency against third parties poses danger of coercion).

56. *See, e.g.*, North Carolina v. Alford, 400 U.S. 25, 31 (1970) (plea must be intelligently made); Boykin v. Alabama, 395 U.S. 238, 243 n.5 (1969) (plea must be made by defendant who understands law related to case); Machibroda v. United States, 368 U.S. 487, 493 (1962) (voluntary plea not accepted unless made with understanding of consequences). *See generally* Comment, *Appellate Review of Constitutional Infirmities Notwithstanding A Plea of Guilty*, 9 HOUS. L. REV. 305, 310 (1971) (discussion of intelligence requirement).

57. *See* Brady v. United States, 397 U.S. 742, 748-49 n.6 (1970) (plea must be intelligently made with full understanding of consequences); Boykin v. Alabama, 395 U.S. 238, 243 (1969) (must understand law as related to facts of case); McCarthy v. United States, 394 U.S. 459, 466 (1969) (not voluntary unless defendant understands pertinent law); Pennsylvania *ex rel.* Herman v. Claudy, 350 U.S. 116, 118, 122 (1956) (must understand charges).

58. *See* Henderson v. Morgan, 426 U.S. 637, 649 n.1 (1976) (White, J., concurring)

Similarly, the defendant should appear mentally competent before the court accepts a plea of guilty or nolo contendere.[59]

C. *Miscellaneous Requirements*

Aside from the two basic requirements of a guilty or nolo contendere plea,[60] other considerations must be met depending upon whether the charge is a felony or misdemeanor.[61] For example, in misdemeanor cases, either a defendant or his counsel may plead in open court;[62] either may waive a jury trial and have punishment assessed by the court.[63] No evidence showing commission of the misdemeanor is required,[64] nor is it necessary to show proper

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(must understand elements of crime); Brady v. United States, 397 U.S. 742, 748-49 n.6 (1970) (full understanding of consequences).

59. *See* TEX. CODE CRIM. PRO. ANN. art. 26.13(b) (Vernon Supp. 1982) (plea of guilty or nolo contendere not acceptable unless defendant appears mentally competent and plea is voluntary). The Texas Court of Criminal Appeals has said that a trial judge has a duty to hold a sanity hearing if the judge learns from personal observation, facts, evidence, or any credible source that a bona fide question exists as to the defendant's competency to understand the situation and make his defense. *See* Garcia v. State, 595 S.W.2d 538, 541 (Tex. Crim. App. 1980); Townsend v. State, 427 S.W.2d 55, 63 (Tex. Crim. App. 1968); TEX. CODE CRIM. PRO. ANN. art. 46.02 (Vernon 1979 & Supp. 1982) (competency hearing); *cf.* Pate v. Robinson, 383 U.S. 375, 385-87 (1966) (evidence raised issue of incompetency requiring competency hearing to satisfy due process). Once the defendant announces ready and enters a plea without any suggestion of incompetency, the trial court is no longer required to hold a pre-trial competency hearing. *See, e.g.*, Morales v. State, 587 S.W.2d 418, 421 (Tex. Crim. App. 1979); Thomas v. State, 562 S.W.2d 240, 243 (Tex. Crim. App. 1978); Perryman v. State, 507 S.W.2d 541, 543 (Tex. Crim. App. 1974).

60. *See* Kerchaval v. United States, 274 U.S. 220, 223 (1927) (pleas should not be accepted unless made voluntarily after competent advice and with complete understanding of consequences).

61. *Compare* TEX. CODE CRIM. PRO. ANN. art. 27.13 (Vernon 1966) (plea of guilty or nolo contendere in felony must be made in open court by defendant personally) *with id.* at art. 27.14(a) (Vernon Supp. 1982) (plea of guilty or nolo contendere in misdemeanor may be made by either defendant or counsel in open court; jury may be waived).

62. *See* TEX. CODE CRIM. PRO. ANN. art. 27.14(a) (Vernon Supp. 1982).

63. *See* Bruce v. State, 419 S.W.2d 646, 647 (Tex. Crim. App. 1967) (defendant may waive jury and have court set punishment); Carter v. State, 400 S.W.2d 571, 571 (Tex. Crim. App. 1966) (defendant may waive jury and have punishment given by court); TEX. CODE CRIM. PRO. ANN. art. 27.14(a) (Vernon Supp. 1982) (defendant or counsel may waive jury trial and have court-assessed punishment in misdemeanor cases).

64. *See, e.g.*, Brown v. State, 507 S.W.2d 235, 238 (Tex. Crim. App. 1974) (not required to receive evidence in misdemeanor plea); Albrecht v. State, 424 S.W.2d 447, 448 (Tex. Crim. App. 1968) (misdemeanor plea accepted regardless of evidence proving crime). Maxey v. State, 626 S.W.2d 180, 182 (Tex. Ct. App.—Corpus Christi 1981, no petition) (state not required to produce evidence to support misdemeanor plea). When a defendant pleads guilty before a jury, however, the state must introduce evidence of the offense to enable the

venue.[65] On the other hand, if the guilty or nolo contendere plea is to a felony, the plea may only be made by the defendant in open court[66] after the court has given the defendant his required admonishments.[67] Because there is no requirement that the plea be made under oath or in writing, an oral plea is sufficient.[68] Except in capital felony cases, the defendant may waive his right to a jury trial by a writing, signed by all parties to the plea.[69] In a guilty or nolo contendere plea to a felony the state is required to introduce evidence showing defendant's guilt.[70] This may be done by written stipulation,[71] testimonial affidavit,[72] or by oral judicial confession.[73]

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jury to intelligently exercise its discretion in assessing the penalty. *See* Brinson v. State, 570 S.W.2d 937, 938-39 (Tex. Crim. App. 1978).

65. *See* Clark v. State, 417 S.W.2d 402, 403 (Tex. Crim. App. 1967) (upon guilty plea in misdemeanor, venue need not be proven).

66. *See* TEX. CODE CRIM. PRO. ANN. art. 27.13 (Vernon 1966).

67. *See id.* at arts. 26.13 (Vernon Supp. 1982) (required admonishments), 27.13 (Vernon 1966) (court must comply with article 26.13 when defendant pleads guilty to felony).

68. *See* Neal v. State, 400 S.W.2d 550, 551 (Tex. Crim. App. 1966) (oral plea sufficient); TEX. CODE CRIM. PRO. ANN. art. 27.13 (Vernon 1966) (no requirement of oath or writing). Although article 27.13 notes that a plea may be made before the court, the defendant may not waive his right to a jury trial in a capital felony case. *See* TEX. CODE CRIM. PRO. ANN. arts. 1.15 (Vernon 1977) (defendant may not waive jury in capital felony), 27.13 (Vernon 1966) (defendant's plea may be before court). *Compare Ex parte* Dowden, 580 S.W.2d 365, 366 (Tex. Crim. App. 1979) (capital felony defendant cannot waive jury trial) *with Ex parte* McClelland, 588 S.W.2d 957, 958-59 (Tex. Crim. App. 1979) (state may reduce capital murder charge to murder, allowing defendant to waive jury trial).

69. *See* TEX. CODE CRIM. PRO. ANN. art. 1.13 (Vernon 1977). It is clear that a form not signed by the defendant cannot be valid. *See Ex parte* Felton, 590 S.W.2d 471, 472 (Tex. Crim. App. 1979). The real question, however, is whether the failure of the prosecutor to sign the form invalidates the defendant's waiver. It has been consistently held that when the deficiency has been raised by direct appeal, the absence renders the waiver ineffective. *See* Lawrence v. State, 626 S.W. 2d 56, 57 (Tex. Crim. App. 1982); *Ex parte* Felton, 590 S.W.2d 471, 471 (Tex. Crim. App. 1981). In collateral attacks, however, there must be a showing of harm to set aside the conviction. *See Ex Parte* Collier, 614 S.W.2d 429, 434 (Tex. Crim. App. 1981). For an interesting discussion on the history of this question, see Justice Clinton's dissent in *Collier*. *See generally id.* at 435 (Clinton, J., dissenting). Normally, the judge assesses punishment in all non-capital cases. *See* TEX. CODE CRIM. PRO. ANN. art. 37.07, § 2(b) (Vernon 1981). Exceptions arise where the jury recommends probation in a case where the defendant filed a pre-trial motion for probation and where the defendant makes a written request in open court at the time he enters his plea. *See id.* In capital felonies, the punishment proceeding must be before a jury. *See id.* at art. 37.071(a).

70. *See* TEX. CODE CRIM. PRO. ANN. art. 1.15 (Vernon 1977). From this evidence the jury is able to intelligently exercise its discretion in assessing the penalty. *See* Brinson v. State, 570 S.W.2d 937, 938 (Tex. Crim. App. 1978).

71. *See* TEX. CODE CRIM. PRO. ANN. art. 1.15 (Vernon 1977). The stipulation must be in writing. *See* Valdez v. State, 555 S.W.2d 463, 464 (Tex. Crim. App. 1977). An unauthorized stipulation will not result in reversal if there is a "judicial 'confession' or an 'admission'

VI. ADMONISHMENTS

In all felony pleas of guilty or nolo contendere, the court is required to admonish the defendant as to the punishment range,[74] the non-binding nature of the state's punishment recommendation,[75] whether the court will honor the plea bargain,[76] and the limitation on appeal if the actual punishment imposed does not exceed the state's recommendation.[77] In a felony case,[78] the judge must admonish[79] the defendant[80] verbally or in writing[81] at the time of arraignment before the impaneling of a jury to set punishment.[82]

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deemed adequate" to prove guilt. *See* Brewster v. State, 606 S.W.2d 325, 328 (Tex. Crim. App. 1980).

72. *See* TEX. CODE CRIM. PRO. ANN. art. 1.15 (Vernon 1977).

73. *See id.* An oral judicial confession is one made during a legal proceeding. *See* Dinnery v. State, 592 S.W.2d 343, 352 (Tex. Crim. App. 1980) (Onion, J., opinion on reh'g). Such a confession needs no corroboration in order to be sufficient. *See id.* at 352. If the judicial confession tracks the language of the indictment, it must recite all the necessary elements of the offense. *See* Thornton v. State, 601 S.W.2d 340, 343-44 (Tex. Crim. App. 1980) (on motion for reh'g). An oral judicial confession tracking the indictment is called a "catch-all stipulation." *See* Potts v. State, 571 S.W.2d 180, 181-82 (Tex. Crim. App. 1978).

74. TEX. CODE CRIM. PRO. ANN. art. 26.13(a)(1) (Vernon Supp. 1982).

75. *See id.* at (a)(2).

76. *See id.* at (a)(2).

77. *See id.* at (a)(3).

78. No admonishments are necessary for a plea to a misdemeanor. *See, e.g.*, Johnson v. State, 614 S.W.2d 116, 120 n.1 (Tex. Crim. App. 1981) (admonishment requirements of article 26.13 do not apply to misdemeanors); Nash v. State, 591 S.W.2d 460, 463 (Tex. Crim. App. 1980) (admonishment statute does not apply to misdemeanors); Empy v. State, 571 S.W.2d 526, 529 (Tex. Crim. App. 1978) (held for 100 years that no admonishments to misdemeanor pleas).

79. *See* Jackson v. State, 587 S.W.2d 398, 398 (Tex. Crim. App. 1979) (trial judge must admonish defendant); Whitten v. State, 587 S.W.2d 156, 157 (Tex. Crim. App. 1979) (trial court, not prosecutor, must admonish defendant); Murray v. State, 561 S.W.2d 821, 822 (Tex. Crim. App. 1977) (plain language of statute requires trial court to admonish). *But see* Taylor v. State, 591 S.W.2d 826, 829 (Tex. Crim. App. 1980) (Douglas, J., dissenting) (prosecutor-stated admonishment clearly informed defendant); *cf.* Tellez v. State, 522 S.W.2d 500, 502 (Tex. Crim. App. 1975) (incorrect statement of punishment range deemed harmless).

80. *See* Whitten v. State, 587 S.W.2d 156, 159 (Tex. Crim. App. 1979) (on motion for reh'g) (defendant must be object of admonishment); Stewart v. State, 580 S.W.2d 594, 595 (Tex. Crim. App. 1979) (defendant must be admonished).

81. *See* Whitten v. State, 587 S.W.2d 156, 159 (Tex. Crim. App. 1979) (on motion for reh'g) (trial court not prohibited from admonishing defendant in writing); Williams v. State, 522 S.W.2d 483, 485 (Tex. Crim. App. 1975) (written instrument executed and approved by defendant may be trial court's admonishment); *cf.* TEX. CODE CRIM. PRO. ANN. art. 26.13 (Vernon Supp. 1982) (statute does not specify verbal or written admonishments).

82. *See, e.g.*, Tutor v. State, 599 S.W.2d 818, 819 (Tex. Crim. App. 1980) (proper time

Prior to the 1975 amendment to article 26.13,[83] an incorrect or incomplete admonishment was not sufficient to create reversible error unless the defendant was misled to his detriment.[84] Since 1975, the primary question is not whether the defendant was misled to his detriment, but whether there has been substantial compliance with the requirements of article 26.13.[85] If there has been substantial compliance,[86] the defendant must affirmatively show he was misled or harmed by the admonishment for there to be reversible error.[87] A total failure to admonish regarding the punishment range is reversible error without regard to whether the defendant

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to admonish is when defendant is arraigned and before impaneling jury to assess punishment); Gates v. State, 543 S.W.2d 360, 361 n.1 (Tex. Crim. App. 1976) (proper time for admonishments is at arraignment before jury impaneled); Wilson v. State 436 S.W.2d 542, 543 (Tex. Crim. App. 1968) (admonish defendant at arraignment before jury impaneled).

83. 1975 TEX. GEN. LAWS. ch. 341, § 3, at 909.

84. *See, e.g.*, Tellez v. State, 522 S.W.2d 500, 500-02 (Tex. Crim. App. 1975) (partial admonishment not error where defendant not harmed); Williams v. State, 522 S.W.2d 488, 489 (Tex. Crim. App. 1975) (admonishment sufficient if harmless error); Cameron v. State, 508 S.W.2d 618, 619 (Tex. Crim. App. 1974) (admonishment allowed where defendant not misled to detriment). *But see* Alvarez v. State, 511 S.W.2d 521, 522 (Tex. Crim. App. 1974) (failure to show proper admonishment caused reversal). *See generally* Cogan, *Entry of the Plea of Guilty in Texas: Requirements and Post-Conviction Review*, 29 Sw. L.J. 714, 719-21 (1975) (discussion of substantial compliance as to range of punishment admonishment).

85. *See, e.g.*, Taylor v. State, 610 S.W.2d 471, 477-78 (Tex. Crim. App. 1981) (on motion for reh'g) (substantial compliance required for admonishments); Whitten v. State, 587 S.W.2d 156, 158 (Tex. Crim. App. 1979) (substantial compliance for admonishments is statutorily required). TEX. CODE CRIM. PRO. ANN. art. 26.13(c) (Vernon Supp. 1982) (substantial compliance required).

86. *See* Whitten v. State, 587 S.W.2d 156, 158-59 (Tex. Crim. App. 1979) (on motion for reh'g). Deficient admonishments substantially comply with the statute in two situations. First, the total failure to make an admonishment will substantially comply with article 26.13 where the admonishment was irrelevant to the plea made. *See id.* at 158; *see also* Jamail v. State, 574 S.W.2d 137, 139 (Tex. Crim. App. 1978) (failure to admonish on non-binding nature of prosecutor's recommendation not error where no recommendation made). Secondly, an admonishment that does not comply with the prescribed statutory form will, nevertheless, substantially comply with the statute if it effectively meets the statutory requirements. *See* Whitten v. State, 587 S.W.2d 156, 158 (Tex. Crim. App. 1979) (different form sufficient if statute satisfied); Richards v. State, 562 S.W.2d 456, 458 (Tex. Crim. App. 1978) (admonishment failing to track statutory language substantially complied with statute). The latter category requires that the admonishment be made directly to the defendant. *See* Whitten v. State, 587 S.W.2d 156, 158 (Tex. Crim. App. 1979).

87. *See, e.g.*, LaFrance v. State, 626 S.W.2d 932, 933-34 (Tex. Ct. App.—Amarillo 1982, rev. ref'd) (defendant must prove misled or harmed by substantially complying admonishment); Taylor v. State, 610 S.W.2d 471, 477-78 (Tex. Crim. App. 1981) (on motion for reh'g) (defendant must show harm where admonishment substantially complied with statute); *Ex parte* McAtee, 599 S.W.2d 335, 336 (Tex. Crim. App. 1980) (defendant must show injury or prejudice).

was harmed.[88] Further, proof of the punishment admonishment must appear in the record or the plea is invalid.[89] Misstatements as to the range of punishment, however, have been found to constitute substantial compliance and harmless error where the defendant was not misled or harmed.[90] In *Taylor v. State*,[91] for example, a misstatement that the punishment range was two to twenty years instead of the correct two to ten years was held to be in substantial compliance with the statute because the defendant was assessed punishment within the correct sentence range.[92] Likewise, where there is a failure to admonish on the effect of the state's recommendation, substantial compliance exists when the state did not make a recommendation.[93] Moreover, a failure to admonish as to the state's recommendation will not be reversible error where no plea bargain was shown to exist and the court actually assessed the recommended punishment.[94]

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88. *See, e.g.*, Jackson v. State, 587 S.W.2d 398, 398 (Tex. Crim. App. 1979) (failure to admonish defendant as to punishment range is reversible error); Whitten v. State, 587 S.W.2d 156, 157 (Tex. Crim. App. 1979) (punishment admonishment required); McDade v. State, 562 S.W.2d 487, 488 (Tex. Crim. App. 1978) (judge must admonish defendant as to range of punishment).

89. *See* Whitten v. State, 587 S.W.2d 156, 157 (Tex. Crim. App. 1979) (record must affirmatively show admonishment); McDade v. State, 562 S.W.2d 487, 488 (Tex. Crim. App. 1978) (record must show punishment-range admonishment given).

90. *See* Tellez v. State, 522 S.W.2d 500, 501-02 (Tex. Crim. App. 1975) (exact admonishment not required where defendant not harmed); LaFrance v. State, 626 S.W.2d 932, 934 (Tex. Ct. App.—Amarillo 1982, rev. ref'd) (admonishment effectively satisfying statute sufficient).

91. 610 S.W.2d 471 (Tex. Crim. App. 1980).

92. *See id.* at 473, 478.

93. *See* Whitten v. State, 587 S.W.2d 156, 158 (Tex. Crim. App. 1981) (on motion for reh'g) (failure to admonish on effect of prosecutorial recommendation not error where no recommendation exists); Campbell v. State, 577 S.W.2d 493, 495 (Tex. Crim. App. 1979) (lack of admonishment substantially complied with statute where no recommendation made).

94. *See* Kidd v. State, 563 S.W.2d 939, 939-40 (Tex. Crim. App. 1978). Defendants often attempt to read additional required admonishments into article 26.13. The Court of Criminal Appeals has refused all attempted additions. *See, e.g.*, Shields v. State, 608 S.W.2d 924, 927 (Tex. Crim. App. 1980) (no admonishment as to consequences of deferred adjudication required); Decker v. State, 570 S.W.2d 948, 950-51 (Tex. Crim. App. 1978) (no admonishment as to waivers resulting from plea required); Brown v. State, 478 S.W.2d 550, 550 (Tex. Crim. App. 1972) (admonishment that defendant might not receive probation not required).

VII. RIGHT TO WITHDRAW THE PLEA

In Texas, courts liberally construe the defendant's right to withdraw from a guilty plea.[95] A defendant may, without assigning any reason, withdraw his plea at any time up until judgment is pronounced or the case taken under advisement,[96] or, in a trial by jury, until the jury has begun deliberations.[97] Withdrawal after those times is within the discretion of the trial judge.[98]

Until recently, the Texas Court of Criminal Appeals has stated that whenever evidence was introduced after a defendant had entered a plea of guilty or nolo contendere that reasonably raised the issue of defendant's innocence, the trial court was required, sua sponte, to withdraw the plea and enter a plea of not guilty for the defendant.[99] In *Moon v. State*,[100] however, this rule as applied to

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95. *See* DeVary v. State, 615 S.W.2d 739, 740 (Tex. Crim. App. 1981); Garcia v. State, 91 Tex. Crim. 9, 10, 237 S.W. 279, 280 (1921). *But see* Stanton v. State, 159 Tex. Crim. 275, 278, 262 S.W.2d 497, 498 (1953) (noting liberal policy, court cautioned against permitting indiscriminate and unlimited right of withdrawal).

96. *See* DeVary v. State, 615 S.W.2d 739, 740 (Tex. Crim. App. 1981) (withdrawal after findings of guilt but prior to assessment of punishment not allowed); Jackson v. State, 590 S.W.2d 514, 515 (Tex. Crim. App. 1979) (withdrawal request made after case taken under advisement but prior to sentencing was not timely); *see also* Milligan v. State, 324 S.W.2d 864, 865 (Tex. Crim. App. 1959) (upheld denial of request for withdrawal made after case taken under advisement).

97. *See* Fairfield v. State, 610 S.W.2d 771, 776 (Tex. Crim. App. 1981); McWherter v. State, 571 S.W.2d 312, 313 (Tex. Crim. App. 1978); *see also* Stanton v. State, 159 Tex. Crim. 275, 277, 262 S.W.2d 497, 498 (1953) (as general rule, withdrawal permitted any time before retirement of jury).

98. *See* Jackson v. State, 590 S.W.2d 514, 515 (Tex. Crim. App. 1979) (withdrawal of plea within court's discretion after judge takes case under advisement or pronounces judgment); McWherter v. State, 571 S.W.2d 312, 313 (Tex. Crim. App. 1978) (after jury retirement, withdrawal of plea within judge's discretion).

99. *See, e.g.*, Malone v. State, 548 S.W.2d 908, 909 (Tex. Crim. App. 1977) (rule applicable when plea made to jury); Sanchez v. State, 543 S.W.2d 132, 134 (Tex. Crim. App. 1976) (rule applicable when plea made to bench); Cooper v. State, 537 S.W.2d 940, 943 (Tex. Crim. App. 1976) (rule applicable when defendant pleads nolo contendere). The evidence must, however, do more than merely tend to show a defensive issue for withdrawal to be required. *See* Lewis v. State, 529 S.W.2d 550, 551-52 (Tex. Crim. App. 1975) (evidence that victim pointed gun at defendant did not raise issue of self-defense so as to require withdrawal); Lee v. State, 503 S.W.2d 244, 246 (Tex. Crim. App. 1973) (unsworn statement made by defendant regarding fear of attack by victim insufficient to raise self-defense issue and require withdrawal); Hayes v. State, 484 S.W.2d 922, 924 (Tex. Crim. App. 1972) (witness testimony as to defendant's behavior and appearance without evidence of prior psychiatric care insufficient evidence of insanity so as to require withdrawal).

100. 572 S.W.2d 681 (Tex. Crim. App. 1978).

pleas made before a court without a jury was overruled.[101] Thus, the admission of exculpatory evidence requires the court to sua sponte withdraw the guilty or nolo contendere plea entered before a jury,[102] but does not require such withdrawal of a plea made before the court.[103] Exculpatory evidence admitted during the punishment phase of a hearing does not, however, obligate the court to withdraw the plea.[104]

VIII. Binding Nature Of The Bargain

Although punishment may be agreed upon between the defendant and the state, the court is not bound to honor the bargain;[105] a plea bargain is nevertheless binding on the prosecution.[106] Enforcement of the state's promise given in the agreement is dependent upon the degree to which the state's promise was the "inducement" for the plea.[107] Thus, if the plea is based on a plea bargain which induced the plea, the defendant can enforce the agreement claiming breach of contract[108] or that the plea would not be "vol-

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101. *Id.* at 682 (Odom, J., dissenting).

102. *See* Beasley v. State, 634 S.W.2d 320, 321 (Tex. Crim. App. 1982) (case after *Moon v. State* holding as proper the sua sponte withdrawal of guilty plea to aggravated robbery because of defendant's testimony denying use of gun).

103. *E.g.*, Thomas v. State, 599 S.W.2d 823, 824 (Tex. Crim. App. 1980); Knight v. State, 581 S.W.2d 692, 694 (Tex. Crim. App. 1979); Sullivan v. State, 573 S.W.2d 1, 4 (Tex. Crim. App. 1978) (opinion on reh'g).

104. *See* Sullivan v. State, 573 S.W.2d 1, 3 (Tex. Crim. App. 1978) (opinion on original submission) (court under no duty to withdraw guilty plea sua sponte when exculpatory evidence introduced after adjudication of guilt); *cf.* Fairfield v. State, 610 S.W.2d 771, 778 (Tex. Crim. App. 1981) (sua sponte withdrawal of guilty plea not required despite admission of evidence during punishment phase raising issue of jurisdiction).

105. *See* Gibson v. State, 532 S.W.2d 69, 75 (Tex. Crim. App. 1975) (prosecutor and defense counsel have no authority to bind court by plea negotiation to fixed punishment). *Compare* Santobello v. New York, 404 U.S. 257, 262 (1971) (court is not bound by constitution to accept guilty plea) *with* North Carolina v. Alford, 400 U.S. 25, 38 n.11 (1970) (state may require court to accept guilty plea).

106. *See, e.g.*, Santobello v. New York, 404 U.S. 257, 262 (1971) (promise binding on prosecution); *Ex parte* Burton, 623 S.W.2d 418, 419 (Tex. Crim. App. 1981) (where defendant enters plea pursuant to bargain, state is bound); DeRusse v. State, 579 S.W.2d 224, 236 (Tex. Crim. App. 1979) (state bound where plea induced by plea bargain).

107. *See* Santobello v. New York, 404 U.S. 257, 262 (1971) (if bargain induced plea, then binding on prosecution).

108. *See* Bass v. State, 576 S.W.2d 400, 401 (Tex. Crim. App. 1979) (enforcement revolves around determination of existence of agreement); Rodriquez v. State, 509 S.W.2d 319, 321 (Tex. Crim. App. 1974) ("if no agreement, no breach of duty"). *See generally* Jones, *Negotiation, Ratification, and Recission of the Guilty Plea Agreement: A Contractual*

untary" without such enforcement.[109] Remedy for the state's failure to perform its plea agreement is to specifically enforce the promise or allow the defendant to withdraw his plea.[110] For example, relief has been granted where the state breached its agreement to make no recommendation nor give argument concerning punishment by giving argument at the punishment phase of the trial.[111] Similarly, relief has been given where an agreement to have defendant's sentences run concurrently was breached by the prosecutor's recommending consecutive sentences.[112] Nevertheless, in many instances the alleged breach by the state is not sufficient to invalidate the plea. Cross-examination of the defendant's witnesses at the punishment hearing and a punishment recommendation in the presentence report were held not to be violations of agreements by the state to make no recommendation.[113] Likewise, no violation of the state's agreement to drop all pending charges against the defendant was found when the prosecutor refused to drop charges unknown to him at the time of agreement.[114]

IX. Waivers Resulting From Guilty Pleas

A. *Constitutional Waivers*

Inherent in every guilty plea is a waiver of certain constitutional

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Analysis and Typology, 17 Duq. L. Rev. 591, 632 (1978-1979) (discussion of contract theory of plea bargaining); Comment, *Constitutional Constraints on Prosecutorial Discretion in Plea Bargaining*, 17 Hous. L. Rev. 753, 756 (1980) (breach of unilateral contract by prosecutor).

109. *See Ex parte* Burton, 623 S.W.2d 418, 419 (Tex. Crim. App. 1981) (prosecutorial breach casts doubt on voluntariness of plea); Bass v. State, 576 S.W.2d 400, 400-01 (Tex. Crim. App. 1979) (unenforced plea raises doubt as to voluntariness).

110. *Ex parte* Burton, 623 S.W.2d 418, 419 (Tex. Crim. App. 1981); Joiner v. State, 578 S.W.2d 739, 741 (Tex. Crim. App. 1979); *accord* Santobello v. New York, 404 U.S. 257, 262 (1971) (plea significantly resting on promise requires fulfillment of promise).

111. *See* Miller v. State, 608 S.W.2d 931, 931-32 (Tex. Crim. App. 1980) (agreement to make no recommendation or argument breached by prosecutorial argument at punishment phase of trial); *see also* Bass v. State, 576 S.W.2d 400, 401-02 (Tex. Crim. App. 1979) (no punishment-argument agreement breached by prosecutorial argument).

112. *See* McFadden v. State, 544 S.W.2d 159, 161-63 (Tex. Crim. App. 1976). In *McFadden*, the punishment was reformed to reflect concurrent sentences. *See id.* at 163. A capital murder conviction was reversed and the indictment dismissed where the state proceeded with the capital murder prosecution after it had agreed to dismiss the charge in return for guilty pleas to other charges. *See* Washington v. State, 559 S.W.2d 825, 827-28.

113. *See* McKelvey v. State, 570 S.W.2d 951, 953-54 (Tex. Crim. App. 1978); Nunez v. State, 565 S.W.2d 536, 537-38 (Tex. Crim. App. 1978).

114. *See* Joiner v. State, 578 S.W.2d 739, 741 (Tex. Crim. App. 1979).

rights protecting the criminal defendant.[115] The plea generally waives claims relating to deprivation of constitutional rights that occurred prior to the entry of such plea.[116] Further, all non-jurisdictional errors, including claimed deprivations of due process, are waived by guilty pleas.[117] For example, the privilege against self-incrimination and the right to confront adverse witnesses are relinquished upon a plea of guilty.[118] Additionally, the defendant's guilty plea waives any error in the method of obtaining evidence if the plea is supported by other evidence.[119]

The right to trial by jury may, in most instances, be waived upon a plea of guilty.[120] A defendant cannot, however, waive a jury trial in a capital felony case[121] and in felony cases in which the procedural requirements for written waiver are not met.[122] The signatures

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115. *See* Boykin v. Alabama, 395 U.S. 238, 243 (1969) (incrimination, jury trial, confrontation). For excellent discussions of the waiver of constitutional rights in pleas of guilty and nolo contendere, see Bishop, *Waivers in Pleas of Guilty*, 60 F.R.D. 513, 517-23, 529-30 (1974); Comment, *Appellate Review of Constitutional Infirmities Notwithstanding a Plea of Guilty*, 9 HOUS. L. REV. 305, 306-13 (1971).

116. *See* Tollett v. Henderson, 411 U.S. 258, 266-67 (1973) (after plea, may not raise objection to violations of constitutional rights that occurred prior to plea); McMann v. Richardson, 397 U.S. 759, 771 (1970) (after plea, not entitled to raise issue of prior coerced confession). Note, however, that pleas of guilty do not inevitably waive all antecedent constitutional violations. *See* Menna v. New York, 423 U.S. 61, 62 (1975). Claims alleging the state cannot convict the defendant regardless of the defendant's factual guilt will not be waived. *See id.* at 63 (double jeopardy claim not waived).

117. *See* United States v. Grayson, 416 F.2d 1073, 1077 (5th Cir. 1969) (plea admits guilt and waives non-jurisdictional defects), *cert. denied*, 396 U.S. 1059 (1970); Chapman v. State, 525 S.W.2d 8, 9 (Tex. Crim. App. 1975) (voluntary and intelligent plea waives non-jurisdictional defects); Helms v. State, 484 S.W.2d 925, 927 (Tex. Crim. App. 1972) (understandable and voluntary plea waives non-jurisdictional defects).

118. *See* Brady v. United States, 397 U.S. 742, 748 (1970); McCarthy v. United States, 394 U.S. 459, 466 (1969); *see also* TEX. CODE CRIM. PRO. ANN. art. 1.14 (Vernon Supp. 1977). Article 1.14 provides that a defendant may waive any right secured him by law except the right to a jury trial in a capital felony case. *Id.*

119. *Cf.* Stiggers v. State, 506 S.W.2d 609, 611 (Tex. Crim. App. 1974) (inadmissible evidence not used in trial not grounds for error).

120. *See* Brady v. United States, 397 U.S. 742, 748 (1970) (right to trial by jury waived by guilty plea); McCarthy v. United States, 394 U.S. 459, 466 (1969) (jury trial waived due to guilty plea).

121. *See* TEX. CODE CRIM. PRO. ANN. art. 1.13 (Vernon 1977). Article 1.13 allows waiver of the right to a jury trial by the defendant's signature of a waiver in court with the consent of the court and attorney for the state. The consent by the court must be entered in the record. The consent by the state must be in writing and must be filed before the defendant enters his plea. The defendant must be represented by an attorney before he may waive his jury trial. *Id.*

122. *See* Lawrence v. State, 626 S.W.2d 56, 57 (Tex. Crim. App. 1981) (prosecutor did

of all parties are required to waive a jury trial in a felony case other than a capital felony.[123] On direct appeal, the lack of any party's signature will invalidate the waiver.[124] Collateral attacks on the validity of a plea where the state failed to sign the waiver of jury trial, however, will not set aside a conviction without a showing of harm.[125]

B. *Waivers Of Rights To Appeal*

Waiver of non-jurisdictional defects by a guilty or nolo contendere plea clearly limits the grounds upon which an appeal may be based. In a plea made to a jury, even the raising of non-jurisdictional objections on pre-trial motion does not preserve the defect for appeal.[126] The sole question on appeal, in a plea of guilty or nolo contendere to a jury, is whether the requirements of sections 1.15 and 26.13 of the Texas Code of Criminal Procedure have been satisfied.[127] The right to appeal for those who enter pleas before the court and are sentenced within the terms of the plea bargain are even further limited by statute.[128] Article 44.02 provides that where the plea is to the court and the court does not assess punishment greater than that recommended by the prosecution, the defendant must have permission of the court to appeal except as to issues raised by written pre-trial motion.[129] If a plea of guilty or nolo contendere is entered without a plea bargain, the defendant is free to appeal without complying with the article 44.02 require-

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not sign waiver); Thompson v. State, 226 S.W.2d 872, 872 (Tex. Crim. App. 1950) (state's attorney failed to sign waiver).

123. *See* Lawrence v. State, 626 S.W.2d 56, 57 (Tex. Crim. App. 1981) (prosecutor must sign to validate waiver); TEX. CODE CRIM. PRO. ANN. art. 1.13 (Vernon 1977) (defendant must make waiver in writing after written consent of prosecutor).

124. *See* Lawrence v. State, 626 S.W.2d 56, 57 (Tex. Crim. App. 1981); Thompson v. State, 226 S.W.2d 872, 872 (Tex. Crim. App. 1950).

125. *See Ex parte* Collier, 614 S.W.2d 429, 434 (Tex. Crim. App. 1981) (overruling contrary cases).

126. Wheeler v. State, 628 S.W.2d 800, 801-02 (Tex. Crim. App. 1982) (plea before jury precluded motion to suppress evidence).

127. *See id.* at 802-03.

128. *See* TEX. CODE CRIM. PRO. ANN. art. 44.02 (Vernon 1979); *see also* Galitz v. State, 617 S.W.2d 949, 951-52 (Tex. Crim. App. 1981) (appeal limited to matters allowed by court and matters raised by written pre-trial motions).

129. *See* Galitz v. State, 617 S.W.2d 949, 951-52 (Tex. Crim. App. 1981) (pretrial motion or consent needed to appeal); Haney v. State, 588 S.W.2d 913, 914 (Tex. Crim. App. 1979) (court granted permission to appeal).

ments.[130] This right to appeal will be limited, however, to claims attacking the jurisdiction of the court.[131] All non-jurisdictional defects are waived as in the case of a plea of guilty or nolo contendere made in light of a plea bargain.[132]

X. CONCLUSION

Plea bargaining has become a prevalent part of the criminal jurisprudence system. Such negotiations may be abused; consequently, the bench and bar must be cognizant of all issues surrounding plea negotiations and a subsequent guilty or nolo contendere plea. Properly understood and administered, plea negotiations can provide a desirable conduit for the effective administration of justice, while protecting the criminal defendant's constitutionally guaranteed rights.

130. *See* Galitz v. State, 617 S.W.2d 949, 952 n.8 (Tex. Crim. App. 1981); Cleveland v. State, 588 S.W.2d 942, 944 (Tex. Crim. App. 1979).

131. *See* Galitz v. State, 617 S.W.2d 949, 951-52 (Tex. Crim. App. 1981).

132. *See id.*