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Specific Enforcement of Broken Plea Bargains in California: People v. Calloway

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SPECIFIC ENFORCEMENT OF BROKEN PLEA BARGAINS IN CALIFORNIA: *PEOPLE v. CALLOWAY*

I. INTRODUCTION

Since the California Supreme Court approved the practice of plea bargaining in *People v. West*,[1] the courts have struggled with determining the proper remedy for a broken plea bargain. The most common remedy is to allow the defendant to withdraw his plea.[2] Where a defendant agrees to plead guilty in exchange for an agreed upon disposition of the case, plea withdrawal adequately remedies a resulting broken agreement by returning the defendant to the pre-plea bargained position.

In certain cases, however, specific enforcement of the plea bargain may be allowed as an alternative remedy and is most likely to be available when the agreement is broken by either the prosecutor or the defendant. When the judge breaks the agreement, California courts are reluctant to order specific enforcement—possibly due to the legislative barriers of Califonia Penal Code section 1192.5.[3] Notwithstanding section 1192.5, specific enforcement seems the only adequate remedy in situations where a defendant, in reliance on the agreement, is placed in such a position that a return to the pre-plea bargained status quo is impossible. This was the position in which the defendant found himself in *People v. Calloway*.[4]

II. BACKGROUND

A. LEGISLATIVE HISTORY

In 1957 the California legislature enacted Penal Code sec-

1. 3 Cal. 3d 595, 477 P.2d 409, 91 Cal. Rptr. 385 (1970).
2. *E.g.*, People v. Kaanehe, 19 Cal. 3d 1, 559 P.2d 1028, 136 Cal. Rptr. 409 (1977); People v. Pinon, 35 Cal. App. 3d 120, 125, 110 Cal. Rptr. 406, 409 (1973).
3. CAL. PENAL CODE § 1192.5 (West 1970).
4. 29 Cal. 3d 666, 631 P.2d 30, 175 Cal. Rptr. 596 (1981).

tion 1192.3[5] which provided a limited form of plea bargaining. Pursuant to that section, a defendant who pled guilty could specify the punishment to the same extent it could be specified by a jury. If both the prosecutor and court accepted that specification, the punishment could not exceed that designated. The subsequent case law requiring that a guilty plea be voluntarily and intelligently waived on the record may have accounted for that section's later repeal.

For example, in 1969, the Supreme Court decided *Boykin v. Alabama*[6] which held that a trial record must affirmatively show that a defendant who pleaded guilty did so voluntarily and intelligently and that he waived the three principal constitutional rights surrendered by such a plea: the right to trial by jury, the right to confront one's accusers, and the privilege against self-incrimination.[7] Later that year, the California Supreme Court decided *In re Tahl*[8] which explicated the procedures necessitated by *Boykin*. *Boykin* and *Tahl* only involved simple guilty pleas, but since plea bargains may involve either a plea of guilty or nolo contendere, the same constitutional rights are waived and the same requirements apply in either case.

In 1970 the California legislature replaced Penal Code section 1192.3 with section 1192.5.[9] That section allows the defendant to state the maximum punishment or suspension of sentence. If either the judge or the prosecutor disapproves the sentencing recommendation, the plea is automatically withdrawn. If the court approves the plea, it must inform the defendant that its approval is not binding and may, at the time set for the hearing or the application for probation or pronouncement of judgment, withdraw its approval in light of further consideration. Such withdrawal empowers the defendant to withdraw his plea. The court must also question the defendant to satisfy itself that the plea is freely and voluntarily made and that there is a factual basis for such a plea.

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5. CAL. PENAL CODE § 1192.3 (repealed 1970).
6. 395 U.S. 238 (1969).
7. *Id.* at 243-44.
8. 1 Cal. 3d 122, 132, 460 P.2d 449, 456, 81 Cal. Rptr. 577, 584 (1969).
9. CAL. PENAL CODE § 1192.5 (West 1970).

In *People v. West*,[10] the California Supreme Court approved a plea bargain in which the defendant pleaded guilty to an offense which offered the trial judge the option for sentencing him as a misdemeanant. This benefit as not then available for the crime initially charged, since the lesser offense was not necessarily included within the crime initially charged but only reasonably related to it. Based on this act of leniency, the defendant tried to renege on the plea agreement.[11] The trial court refused to allow him to do so.

The Supreme Court noted that, although Penal Code section 1192.5 did not encompass the form of the plea bargain present in *West* (pleading to a non-included lesser offense), it demonstrated "the growing legislative recognition and approval of plea bargaining."[12] The court perceived section 1192.5 as providing "guidelines which the trial court can utilize in receiving and considering plea bargains involving pleas to lesser offenses."[13]

In some cases, the courts apparently perceive section 1192.5 as providing guidelines in considering the proper remedy when a plea agreement is rejected.[14] Because plea withdrawal is the only remedy mentioned in Penal Code section 1192.5, courts may be reluctant to allow specific enforcement as an alternative remedy.

B. Development in the Courts

The Supreme Court decision in *Santobello v. New York*[15] is important because it attests to the Court's view that specific enforcement is an option to be considered when determining the proper remedy for a broken plea bargain. The Court also stated that plea bargaining "is an essential component of the administration of justice. Properly administered, it is to be encouraged. If any criminal case were subjected to a full-scale trial, the states and federal government would need to multiply by many times

10. 3 Cal. 3d 595, 477 P.2d 409, 91 Cal. Rptr. 385 (1970).

11. See the vacated opinion of the Court of Appeal at 83 Cal. Rptr. 383 (1970).

12. 3 Cal. 3d at 608, 477 P.2d at 416, 91 Cal. Rptr. at 393.

13. *Id.*

14. *See* People v. Calloway, 29 Cal. 3d 666, 631 P.2d 30, 175 Cal. Rptr. 596 (1981); People v. Johnson, 10 Cal. 3d 868, 519 P.2d 604, 112 Cal. Rptr. 556 (1974).

15. 404 U.S. 257 (1971).

the number of judges and court facilities."[16]

Santobello was indicted in New York on two gambling charges and agreed to plead guilty to a lesser included offense in exchange for the prosecutor's promise to make no sentencing recommendation. After prolonged delays, the matter came up for the probation and sentence hearing, at which a new prosecutor, apparently unaware of the prior agreement, recommended the maximum sentence. Claiming that the recommendation had no effect on his decision, the judge imposed the maximum sentence.[17]

After recognizing that defendants have a constitutional right to relief for broken plea agreements,[18] the then seven-member Court[19] reversed and remanded to the New York state courts to determine whether specific performance of the state's promise with resentencing before a different judge, or recission of the plea was the appropriate remedy.[20] The Court sharply divided in determining to what extent the defendant's preference should be considered by the Court in affording him an appropriate remedy.[21]

In a concurring opinion, Justice Douglas was of the view that due process requires specific enforcement or the option to go to trial whenever the prosecutor breaks a plea bargain.[22] He observed that the lower court "ought to accord a defendant's preference considerable, if not controlling weight, inasmuch as the fundamental rights flouted by a prosecutor's breach of a plea bargain are those of the defendant, not of the state."[23]

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16. *Id.* at 260.

17. *Id.*

18. *Id.* at 262.

19. Justices Black and Harlan retired prior to the filing of the decision on December 20, 1971. Justices Powell and Rehnquist were not sworn in until January 7, 1972.

20. 404 U.S. at 263.

21. While Justices Burger, White and Blackmun were silent on what weight to give to the defendant's preference as to remedy, Justice Douglas, concurring, urged that the defendant's preference should be given much weight while Justice Marshall, joined by Justices Brennan and Stewart, dissenting, believed that since the defendant here was reasonably requesting plea withdrawal, he should be given his chosen remedy. *See* discussion accompanying notes 22-25, *infra*.

22. 404 U.S. at 267.

23. *Id.*

Justice Marshall, joined by Justices Brennan and Stewart, dissented in part, arguing that Santobello's choice of plea withdrawal should be honored because the prosecutor's breach of the bargain "undercuts the basis for the waiver of the constitutional rights implicit in the plea" and furnishes defendant with "ample justification for rescinding the plea."[24] Noting that of the seven members sitting at the time of the decision a majority favored looking to defendant's wishes,[25] Justice Marshall concluded that the defendant should be allowed to regain his right to trial if that is what he desires.

While *Santobello* was a case in which the prosecutor reneged, Justices Marshall and Douglas expressed similar views in a case where the judge "injected himself into the process."[26]

Past California cases have acknowledged the availability of specific enforcement to a criminal defendant, when a judge had breached the plea bargained agreement.[27] In *People v. Delles*,[28] decided prior to the enactment of section 1192.5, the defendant pleaded guilty to a charge of possession of marijuana in return for a grant of probation upon condition that he serve some time in county jail. The defendant was granted probation and was given a short stay before commencing the jail term.[29] The judge was unaware that the defendant had been arrested for selling narcotics after the bargain was struck. On the day defendant appeared to commence his sentence, the judge stated that he had learned of the new charge, denied defendant's motion for plea withdrawal and sentenced him to state prison.[30]

The California Supreme Court held it was improper to hold defendant to his guilty plea while denying him the bargained grant of probation, and therefore the trial court was obligated either to allow defendant to withdraw his guilty plea or to grant

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24. *Id.* at 268.

25. *Id.*

26. Martinez v. Mancusi, 409 U.S. 959 (1972) (Marshall and Douglas, J.J., dissenting from denial of certiorari). For the court of appeals decision, see United States *ex rel.* Mancusi v. Martinez, 455 F.2d 705 (2nd Cir. 1972).

27. See text accompanying notes 28-38, *infra.*

28. 69 Cal. 2d 906, 447 P.2d 629, 73 Cal. Rptr. 389 (1968).

29. *Id.* at 908, 447 P.2d at 630, 73 Cal. Rptr. at 390.

30. *Id.*

probation despite the new circumstances.[31]

Cases heard subsequent to the enactment of section 1192.5 have also mentioned the availability of specific enforcement of a bargained agreement. In *People v. Flores*[32] defendant pleaded guilty to one court of first degree robbery in exchange for a dismissal of fourteen remaining counts. When the judge asked the defendant if he knew the maximum setence that could be imposed, the defendant replied, "five to life."[33] At sentencing, the judgment included a recital that defendant had used a firearm during the robbery which invoked a California statute[34] adding a mandatory consecutive term of five years to his minimum sentence. In setting aside the additional five year term, a unanimous court stated:

> [W]here a defendant's guilty plea has been entered as part of a bargain with recognized authorities, and judgment entered contrary to the terms of the bargain, he may move to have his plea set aside, or the judgment may be modified to conform with the terms of his bargain.[35]

Although the court never mentioned the term "specific performance," it noted that defendant was allowed the "benefit of his plea bargain."[36]

In *People v. Ramos*,[37] defendant pleaded guilty to one of seven counts in exchange for promises to dismiss the remaining counts, strike five prior convictions, grant probation, and sentence him to no additional time. The court approved the plea bargain, granted probation, then sentenced defendant to prison for violating probation on three of the five prior cases. Defendant sought to withdraw his plea, arguing that he understood the plea bargain covered all cases. In reversing the conviction, the California Supreme Court held that the trial judge had the option of allowing withdrawal of the guilty plea or to grant probation not subject to immediate revocation of probation in the

31. *Id.* at 910, 447 P.2d at 632, 73 Cal. Rptr. at 392.
32. 6 Cal. 3d 305, 491 P.2d 406, 98 Cal. Rptr. 822 (1971).
33. *Id.* at 309, 491 P.2d at 408, 98 Cal. Rptr. at 824.
34. CAL. PENAL CODE § 12022.5 (West 1970).
35. 6 Cal. 3d at 308-09, 491 P.2d at 408, 98 Cal. Rptr. at 824.
36. *Id.* at 309, 491 P.2d at 408, 98 Cal. Rptr. at 824.
37. 26 Cal. App. 3d 108, 102 Cal. Rptr. 502 (1972).

other cases.[38]

The significance of these cases is that the court recognized the availability of specific enforcement of a plea bargain as an alternative to withdrawal of the guilty plea. While both the *Delles* and *Ramos* courts left the ultimate decision on the remedy with the trial court, the *Flores* court ordered the trial court to give the defendant the benefit of the bargain.

More recent cases appear to deny the availability of specific enforcement as an alternative remedy for plea withdrawal. In *People v. Johnson*,[39] defendant pleaded guilty to credit card forgery in return for a misdemeanor sentence, suspension of sentence and a grant of probation. Upon later discovering that defendant had concealed his true name and past criminal record, the court sentenced him to state prison, contrary to the plea bargain. Because the court failed to advise Johnson of his right under section 1192.5 to withdraw his plea, the California Supreme Court reversed.[40]

Johnson argued the court's failure to inform him of his right to withdraw should allow him to opt for specific enforcement as an alternative,[41] but the court found that "implicit in the language of section 1192.5 is the premise that the court upon sentencing has broad discretion to withdraw its prior approval of a negotiated plea."[42] The court also said it was the "serious misrepresentations by the defendant which reinforced the court's reluctance to create a right of specific performance of a plea bargain whenever the court has failed to advise a defendant of his rights under Section 1192.5."[43]

While the court was concerned with the misrepresentation made during plea negotiations, its remedy for the trial court's failure to advise Johnson of his right to withdraw his plea appears to have been dictated by section 1192.5 which makes no

38. *Id.* at 112, 102 Cal. Rptr. at 505.

39. 10 Cal. 3d 868, 519 P.2d 604, 112 Cal. Rptr. 556 (1974).

40. *Id.* at 873, 519 P.2d at 607, 112 Cal. Rptr. at 559.

41. *Id.* The main issue in *Johnson*, however, was whether defendant had a right to withdraw his plea after the trial court rejected its prior approval of the negotiated plea bargain.

42. *Id.*

43. *Id.*

reference to specific enforcement as an option to the defendant. Arguably, *Johnson* can best be understood as standing for the proposition that a criminal defendant will never be allowed specific enforcement of his plea bargain when the defendant's deception leads to a plea bargain which he would not receive if the true facts were known.

While *Delles, Flores, Ramos* and *Johnson* were cases in which the defendants sought specific enforcement of the plea agreement, in *People v. Kaanehe,*[44] the prosecution sought specific enforcement[45] while the defendant sought to withdraw his plea. Although this case involved a breach by the prosecutor, not the judge, it is significant because the California Supreme Court gave the defendant the option of withdrawing his plea or obtaining specific enforcement.[46]

In *Kaanehe,* the defendant pleaded guilty to one count of grand theft in exchange for the prosecutor's promise to refrain from arguing disposition or type of sentence to the court. While the defendant was held in the Department of Corrections for a diagnostic study, the prosecutor's office sent a letter to the superintendent of the facilities in which defendant was detained, arguing, in effect, that defendant should be sent to state prison. Prior to the formal sentencing hearing, the prosecutor argued in the judge's chambers for imposition of a prison sentence.[47] When formally arraigned for sentencing, the defendant moved to withdraw his plea, claiming the prosecutor breached the bargain. Although both the diagnostic study and the probation officer recommended a suspended sentence along with time in the county jail, the judge sentenced the defendant to state prison.

While recognizing that the proper "remedy differs depending upon the nature of the breach and which party is seeking specific enforcement,"[48] the court noted that "a defendant should not be entitled to enforce an agreement between himself

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44. 19 Cal. 3d 1, 559 P.2d 1028, 136 Cal. Rptr. 409 (1977).

45. *Id.* at 13, 559 P.2d at 1036, 136 Cal. Rptr. at 417. The prosecution argued that the defendant should be arraigned for sentencing, the prosecutor's letter stricken from the record and the prosecutor be ordered to comply with the terms of the agreement.

46. *Id.* at 13, 559 P.2d at 1037, 136 Cal. Rptr. at 418.

47. *Id.* at 11, 559 P.2d at 1035, 136 Cal. Rptr. at 416.

48. *Id.* at 13, 559 P.2d at 1037, 136 Cal. Rptr. at 418.

and the prosecutor calling for a particular disposition against the trial court absent very special circumstances."[49] The court stated that "specific enforcement . . . must be strictly limited because it is not intended that a defendant and prosecutor should be able to bind a trial court which is required to weigh the pre-sentence report and exercise its customary sentencing discretion,"[50] and, consequently, the preferred remedy is to allow plea withdrawal to restore the proceedings to the status quo.[51]

Although specific enforcement did not bind the trial judge here, the court found specific enforcement would not repair the harm caused by the prosecutor's breach because it would be inappropriate to require defendant to undergo another diagnostic study not tainted by the prosecutor's letter.[52] Another factor was the deliberate and wilful nature of the breach.[53]

It appears that in determining the proper remedy for a plea bargained agreement breached by the judge, the overriding concerns of the court are two-fold: (1) The deference to the trial court's discretion to withdraw its prior approval of a plea bargained agreement upon weighing the presentencing reports;[54] and (2) the probability of returning the defendant to his pre-plea bargained position.[55] While these seem to be the logical elements with which the court would concern itself, the *Calloway* decision diminishes, if not destroys, the importance of this latter concern.

III. *PEOPLE v. CALLOWAY*

A. FACTS

Calloway entered into a plea bargain, approved by the judge, in which he admitted violating the terms of his probation (based on a battery conviction) and accepted a 90-day prison

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49. *Id.*

50. *Id.* at 14, 559 P.2d at 1036-37, 136 Cal. Rptr. at 417-18.

51. *Id.* at 13-14, 559 P.2d at 1036, 136 Cal. Rptr. at 417.

52. *Id.* Although the diagnostic evaluation did not recommend state prison, it was entirely possible that the study would have made an even more lenient recommendation had it not been influenced by the prosecutor's letter.

53. *Id.* at 14, 559 P.2d at 1037, 136 Cal. Rptr. at 418.

54. *See* People v. Johnson, 10 Cal. 3d at 873, 519 P.2d at 607, 112 Cal. Rptr. at 559.

55. *See* People v. Kaanehe, 19 Cal. 3d at 14, 559 P.2d at 1036, 136 Cal. Rptr. at 418.

commitment for a diagnostic study pursuant to California Penal Code section 1203.03.[56] In return, the judge promised to make no finding concerning the other allegations of probation violation[57] and not to sentence him to state prison.[58] After reading the section 1203.03 report recommending revocation of probation, the judge sentenced Calloway to two years in state prison. Neither the deputy district attorney nor the deputy public defender attending the sentencing proceedings had been present when the original bargain was struck. Consequently, neither party reminded the judge of the bargain.

A week later, Calloway wrote a letter to the judge reminding him of the plea bargain. The letter was treated as an ex parte request for rehearing and denied. Six months later Calloway was released on bail pending appeal.[59]

B. Majority's Analysis

Because Calloway did not receive an opportunity to withdraw his plea after the judge had reneged on the bargain, both the prosecution and the defense counsel agreed that the judgment could not stand. Consequently, the court had to decide the appropriate remedy for Calloway's breached plea bargain. The majority, in a 4-3 decision,[60] limited defendant's remedy to plea

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56. Cal. Penal Code § 1203.03 (West 1970) provides, in relevant part: "(a) In any case in which a defendant is convicted of an offense punishable by imprisonment in the state prison, the court . . . may order that defendant be placed temporarily with a diagnostic facility of the Department of Corrections for a period not to exceed 90 days . . . ."

57. Those violations were the failure to obey instructions of probations officers, desertion from probation, and failure to report to probation officers. 29 Cal. 3d at 669, 631 P.2d at 31, 175 Cal. Rptr. at 597.

58. The language of the judge is helpful in understanding the bargain:

> *My agreement on the record between the district attorney and your attorney is that I will not sentence you to the state prison when you return* [from the section 1203.03 study]. I will either sentence you to the county jail, put you back on probation, perhaps terminate probation completely in this case, allow you to have probation on your municipal court case . . . , change the conditions of probation. *I am really not telling you what I am going to do, but I am making a commitment that you will not be sent to state prison.*

Id. at 675, 631 P.2d at 34, 175 Cal. Rptr. at 600 (emphasis in original).

59. *Id.* at 670, 631 P.2d at 31-32, 175 Cal. Rptr. at 597-98.

60. Joining the court's majority opinion were Justices Tobriner, Mosk, Richardson, and Stephens. The dissenting opinion was written by Chief Justice Bird; Justices Newman, and Woods concurring in the dissent.

withdrawal, citing *Johnson* as controlling.

Calloway argued that *Johnson* was predicated upon section 1192.5 which is applicable only when a defendant enters a plea of guilty or nolo contendere to an accusatory pleading charging a felony, thus not applicable to an admission of a probation violation. The court rejected this argument, noting that the underlying principles of that section and *Johnson* apply, since it is no more appropriate for an appellate court to interfere with a trial court's discretion in this case when it would be in a case involving a guilty plea to a felony.[61] Defendant further argued that his case presented the "very special circumstances" discussed in *Kaanehe* which entitled him to specific performance of the plea bargain, since he had already spent six months in prison in reliance on the plea bargain. The court responded that Johnson spent far more than six months in prison and was not entitled to specific performance. The court also noted that "[i]n light of [Calloway's] inadequate performance on probation, fairness demanded no more than he be permitted an opportunity to withdraw his admission of probation violation and plead anew to the charge."[62]

The majority quickly disposed of *People v. Flores* where the defendant was allowed the benefit of his bargain, by noting that it preceded the *Johnson* and *Kaanehe* decisions, wherein the courts "expressed [their] reluctance to order specific performance of repudiated plea bargains."[63]

Similarly, the court disposed of *Santobello v. New York*.[64] In *Santobello*, the United States Supreme Court acknowledged that specific performance was a viable alternative to plea withdrawal, but left the ultimate relief to the discretion of the state courts.[65]

Noting that Calloway would receive the appropriate credit for time already served, the court emphasized his poor performance on probation, the unanimous recommendation of the diag-

61. 29 Cal. 3d at 672, 631 P.2d at 33, 175 Cal. Rptr. at 599.
62. *Id.*
63. *Id.* at 673, 731 P.2d at 33, 175 Cal. Rptr. at 599.
64. 404 U.S. 257 (1971).
65. *Id.* at 262-63.

nostic staff favoring a prison sentence and the trial court's acceptance of that recommendation in holding that plea withdrawal is the most appropriate remedy.[66]

C. DISSENT

While the majority opinion relied heavily on *Johnson*, the dissent found it distinguishable on several grounds. First, Calloway did not misrepresent himself to the court as did Johnson.[67] When the court became aware of Johnson's misrepresentations, it withdrew its prior approval of the plea bargain.

Second, Calloway, unlike Johnson, had agreed to submit to a section 1203.03 study in reliance on the court's promise, thereby giving up his freedom prior to sentencing. Since Calloway was at liberty on his own recognizance prior to the bargain, his submission to the section 1203.03 study involved a change in the status quo. This element of detrimental reliance is not normally present in plea bargains, which usually involve no change in custody status between entry of plea and actual sentencing and, consequently, plea withdrawal is inadequate to return the defendant to the status quo ante.

Furthermore, Johnson did not argue that due process and fundamental fairness required specific enforcement; "[e]ven if he had, his own misrepresentations to the court to obtain the plea bargain undercut any equitable claim he might have had to the enforcement of the bargain."[68] Finally, the main issue in *Johnson* was whether defendant would be allowed to withdraw his plea, not whether he was entitled to specific enforcement.[69]

The dissent relied on *Santobello*[70] in arguing that due pro-

66. 29 Cal. 3d at 673, 631 P.2d at 33, 175 Cal. Rptr. at 599.

67. *See* People v. Johnson, 10 Cal. 3d at 870-71, 519 P.2d at 605, 112 Cal. Rptr. at 557.

68. 29 Cal. 3d at 678, 631 P.2d at 36, 175 Cal. Rptr. at 602.

69. The specific performance issue was brought up at oral argument but was not briefed, which hampered the court's adjudication of possible remedies for broken plea bargains. *Id.* at n.2, 631 P.2d at 36 n.2, 175 Cal. Rptr. at 602 n.2.

70. 404 U.S. 257 (1971). There has been some dispute over the *Santobello* decision. It is not clear whether the Court considered the choice of remedies in a broken plea bargain to be a matter of the state law or of constitutional grounds. *See generally* Westen & Westin, *A Constitutional Law of Remedies for Broken Plea Bargains*, 66 CALIF. L. REV. 471 (1978); Note, *The Legitimation of Plea Bargaining: Remedies for Broken*

cess required specific performance. The *Santobello* court noted that due process considerations govern the remedy when a plea bargain is breached and the variations in plea bargain violations are such that no absolute rule can be formulated that will fit every case.[71]

People v. Kaanehe also illustrated the proposition that a remedy for a broken plea bargain depends on the case. As the court stated: "Specific performance of a plea bargain agreement is actually a broad term covering several different types of relief. The remedy differs depending upon the nature of the breach and the party which is seeking specific enforcement."[72]

IV. ANALYSIS AND ALTERNATIVES

Many of the California cases dealing with the question of remedies available to a criminal defendant when the court breaks a plea bargained agreement mention specific enforcement as an alternative to plea withdrawal. Some courts recognize that for fairness reasons plea withdrawal is not always the most appropriate.[73] The issue the cases rarely address is when a defendant is entitled to choose his remedy. The only guideline offered by the courts on this question is the "very special circumstances" criteria mentioned in *Kaanehe*.[74] Although the courts, so far, have declined to elaborate on what factors may constitute "very special circumstances," perhaps it is those factors which would deprive a defendant of his due proces rights if the defendant is not afforded his choice of remedy for a broken plea bargain. Because section 1192.5 allows plea withdrawal in the event of a broken plea agreement, the "very special circumstances" guideline will only apply in situations where a defendant seeks specific enforcement.

Promises, 11 AM. CRIM. L. REV. 771, 792-94 (1973).

71. *See* 404 U.S. 257, 262-63; *id.* at 267 (Douglas J. concurring); *id.* at 267-68 (Marshall, J., concurring and dissenting).

72. 19 Cal. 3d at 13, 559 P.2d at 1036, 136 Cal. Rptr. at 417.

73. *See, e.g.*, James v. Smith, 445 F.2d 502 (5th Cir. 1972); United States v. Carter, 454 F.2d 426 (4th Cir. 1972), *cert. denied*, 417 U.S. 933 (1973); People v. Eck, 39 Mich. App. 176, 197 N.W.2d 289 (1972). *See also* Fischer, *Beyond* Santobello—*Remedies for Reneged Plea Bargains*, 2 SAN FERN. V.L. REV. 121 (1973). For a discussion of two different theories upon which relief is granted to defendants whose bargains have been broken, see Comment, *Remedies for Reneged Plea Bargains in California*, 16 SANTA CLARA L. REV. 103 (1975).

74. 19 Cal. 3d at 13, 559 P.2d at 1036, 136 Cal. Rptr. at 417.

The degree to which a defendant's due process rights may be violated by the preclusion of specific enforcement as a remedy for a broken plea agreement appears to depend, at present, on how one reads the *Santobello* decision. Because the Supreme Court remanded the case to the New York State courts to determine whether plea withdrawal or specific enforcement of the state's promise was the appropriate remedy, the Supreme Court avoided deciding which form of relief was constitutionally required. This could be interpreted as a recognition that the choice of remedies is entirely a matter of state law, since, in his opinion for the Court, Chief Justice Burger left the choice of remedy "to the discretion of the state court."[75] However, he also said that in exercising its discretion, the state court should decide whether the circumstances of the case "requires" specific enforcement or recession,[76] implying that the state court's discretion is subject to constitutional constraints and ultimate review by the Supreme Court. Apparently, this was Justice Douglas' interpretation since he concurred in the decision, although he clearly considered the choice of remedies to be a matter of constitutional law.[77]

Regardless of whether a specific remedy is constitutionally required, there is another, albeit less compelling, reason for granting specific enforcement of a plea bargained agreement: In some circumstances, specific enforcement may be the only incentive for a defendant to agree to enter the plea bargaining process.

Plea bargaining is highly desirable to the criminal justice system because it benefits both the state and the defendant. As one court noted, "[t]he advantages to the state and society . . . are that prompt punishment attains society's objectives of punishment more effectively than belated punishment; bargaining results in saving judicial and prosecutorial resources so that more time can be conserved for cases that involve substantive issues of a defendant's guilt; a defendant who pleads guilty is more remorseful and more likely to be succesfully rehabilitated."[78] Furthermore, the defendant is able to enjoy the fruits

75. 404 U.S. at 263.
76. *Id.*
77. *Id.* at 267.
78. People v. Barnett, 113 Cal. App. 3d 563, 571, 170 Cal. Rptr. 255, 259 (1980). *See*

of his negotiations and can avoid the uncertainties and possible embarrassment accompanying trial.[79]

For plea bargaining to function effectively, judges and prosecutors should be mindful of the goals which the plea bargaining process attains and recognize that a defendant's willingness to waive his constitutional rights is the essential factor upon which the process hinges. The willingness of a defendant to enter into a plea agreement is largely dependent upon the capacity of the available remedy, in the event of breach, to return him to his original position. Where a defendant offers only to plead guilty in exchange for a lighter sentence or a lesser charge, plea withdrawal will return the defendant to the original status quo. However, in other plea bargained agreements this is not always possible. In some instances, the defendant may provide the prosecution with assistance[80] or information[81] involving significant risks and inconvenience, or as in *Calloway*, a changed position in reliance on the bargain, so that the pre-plea bargained status quo cannot be restored by plea withdrawal.

In cases where plea withdrawal does not restore the defendant to his original position, the court is depriving defendant of most, if not all, the benefits which the defendant seeks in entering plea bargaining negotiations. It is in these situations that the appellate courts need guidelines to aid them is determining just how far a trial judge can go in rejecting a plea bargain after receiving the benefits of it. The *Calloway* case would have been an appropriate vehicle for an elaboration of the "very special circumstances" guideline set forth in *Kaanehe*. The determination is best done on a case-by-case basis because of the numerous

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also Blackledge v. Allison, 431 U.S. 63, 71-72 (1977).

79. 113 Cal. App. 3d at 571, 170 Cal. Rptr. at 259. When the original charge carries repugnant stigma, such as a sex crime, the defendant may avoid publicity, by pleading to a less repugnant offense. *E.g.*, State v. Ashby, 43 N.J. 273, 204 A.2d 1 (1964) (defendant pleaded guilty to five indictments for disorderly conduct in return for dismissal of five indictments for open lewdness).

80. *See, e.g.*, United States v. Paiva, 294 F. Supp. 742 (D.D.C. 1969) (identification of forged bonds); People v. Wadkins, 63 Cal. 2d 110, 403 P.2d 429, 45 Cal. Rptr. 173 (1965) (defendant's risky acquisition of weapons used in robbery); Commonwealth v. Todd, 186 Pa. Super. 272, 142 A.2d 174(1958) (defendant assisted in apprehension and conviction of narcotics violators by testifying before ground jury and trial court).

81. *See, e.g.*, United States v. Carter, 454 F.2d 426 (4th Cir. 1972), *cert. denied*, 417 U.S. 933 (1973); Ward v. United States, 116 F.2d 135 (6th Cir. 1940); United States v. Paiva, 294 F. Supp. 742 (D.D.C. 1969).

forms plea bargains can take and the many situations to which they may lead.

It is urged by the dissent in *Calloway* and endorsed by this author that the "competing interests of the defendant and the state should be weighted in deciding the appropriate remedy for a broken plea bargain."[82] Factors favoring the prosecution's or court's choice of remedy are: (1) fraud by the defendant in obtaining the plea bargain; (2) additional damaging information about the defendant that is later developed; and (3) changed circumstances occurring between entry of plea and time of sentencing which place the defendant in a less favorable light. Factors favoring the defendant's choice of remedy are: (1) full performance by defendant of his part of the bargain, especially if he has begun a term of imprisonment; and (2) a willful and deliberate breach of a plea bargain by a prosecutor or the court.[83]

The majority in *Calloway* relied on basically three factors in determining that plea withdrawal was the appropriate remedy. First, the court is reluctant to interfere with the broad discretion afforded the trial judge by section 1192.5 to withdraw his approval of a negotiated plea.[84] While this factor is important, it is present in every case where a plea bargain is breached and, in a sense, creates a presumption favoring the trial court's disposition of the case. Other than this presumption, however, the trial court's discretion should carry no weight.

Second, the majority noted: "In light of defendant's inadequate performance on probation, fairness demands no more than that he be permitted an opportunity to withdraw his admission of probation violation and plead anew to that charge."[85]

Third, the court appeared impressed with the unanimous recommendation of the diagnostic staff favoring imposition of a prison sentence.[86]

As to the second and third factors, although Calloway's pa-

82. 29 Cal. 3d at 678-79 n.3, 631 P.2d at 37 n.3, 175 Cal. Rptr. at 603 n.3.
83. *Id.*
84. *Id.* at 673, 631 P.2d at 33, 175 Cal. Rptr. at 599.
85. *Id.* at 672, 631 P.2d at 33, 175 Cal. Rptr. at 599.
86. *Id.* at 673, 631 P.2d at 33, 175 Cal. Rptr. at 599.

role performance was grossly inadequate, the probation reports were before the trial court at the time the bargain was struck,[87] and, as such, do not constitute additional information later developed as in the *Johnson* case.[88]

V. CONCLUSION

California courts have not readily agreed with criminal defendants' contentions that they should be allowed the option of specific enforcement of a plea bargained agreement when broken by the court. While recognizing the possible availability of specific enforcement in this context under "very special circumstances,"[89] the courts do not attempt to explain what type of circumstances may lead to this remedy. The factors present in *Calloway* seem to be a persuasive case for this type of remedy.

Admittedly, the courts are constrained by the legislative remedies imposed by Penal Code section 1192.5, which does not mention specific enforcement as an alternative remedy. Yet there must be a limit to the lengths a court will go in assuming that plea withdrawal will, in all cases, restore the status quo. At some point, due process may require specific enforcement of a broken plea bargain.[90] Until that time arrives, the structure of the plea bargaining system should not be undermined by preclusion of the specific enforcement remedy when fairness requires it.

For defendants to be willing to enter into the process, they need some guarantee that their plea bargains will be honored or, at least, that they can return unharmed to their pre-plea bargained positions. Even in cases where the status quo can be restored by plea withdrawal, a defendant must start again at square one of the judicial process after, in many cases, considerable time and money are spent in an attempt to plea bargain. In the long run, this tends to frustrate one of the main purposes for

87. *Id.* at 676, 631 P.2d at 35, 175 Cal. Rptr. at 601.

88. 10 Cal. 3d at 870, 519 P.2d at 605, 112 Cal. Rptr. at 557.

89. People v. Kaanehe, 19 Cal. 3d at 13, 559 P.2d at 1036, 136 Cal. Rptr. at 417.

90. People v. Calloway, 29 Cal. 3d at 680, 631 P.2d at 38, 175 Cal. Rptr. at 604 (Bird, C. J., dissenting); *See generally*, Westen & Westin, *supra* note 70.

which the plea bargaining process was created—to decrease the already overcrowded court dockets.

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