

## PLEA BARGAINS, PROSECUTORIAL BREACH, AND THE CURIOUS RIGHT TO CURE

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### Abstract

When the prosecutor breaches a plea bargain—e.g., by recommending prison instead of the agreed-upon probation—the defendant is entitled to a remedy: either sentencing in front of a different judge or plea withdrawal. However, if defense counsel objects to the breach, the prosecutor may halfheartedly change the recommendation to probation. Most courts have held that to be an effective “cure”—even when the judge then sentences the defendant to prison, as the prosecutor originally recommended.

The right to cure, which was intended for commercial sales contracts, fails miserably in the plea-bargain context. In the above example, the attempted cure is too late, it fails to un-ring the bell of the earlier prison recommendation, and it violates the defendant’s reasonable expectations under the plea deal. Further, when the judge dutifully sends the defendant to prison as the prosecutor originally recommended, it reeks of collusion and destroys the appearance of fairness.

Most significantly, the cure doctrine creates a dilemma for the defense lawyer. If defense counsel does *not* object to the breach, the prosecutor will not be able to cure; therefore, if the judge sentences the defendant to prison, the defendant *will* receive a remedy on appeal—thanks to defense counsel’s “ineffectiveness” in not objecting. Conversely, if defense counsel *objects* and the prosecutor “cures,” the judge may still sentence the defendant to prison; however, the defendant will *not* receive a remedy—paradoxically, thanks to defense counsel’s “effectiveness” in objecting.

This raises the question: Is ineffective the new effective? Perhaps, but intentional ineffectiveness carries risks for both defense counsel and the client. Therefore, this Article develops an alternative response to prosecutorial breach that protects both the defense lawyer and the defendant, is highly efficient, and is undeniably fair—even to the breaching party that created the problem in the first place.

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**Table of Contents**

INTRODUCTION ..... 2

I. PLEA BARGAINS AS CONTRACTS ..... 4

II. BREACH, REMEDY, AND CURE ..... 7

III. WHY THE CURE DOCTRINE FAILS ..... 10

    A. *Too Little, and Especially Too Late* ..... 11

    B. *Ringin Bells and Escaped Cats* ..... 12

    C. *Reasonable Expectations* ..... 15

    D. *The Appearance of Collusion* ..... 16

    E. *(In)Efficiency and (Dis)Incentives* ..... 18

IV. PROPER USES OF THE CURE DOCTRINE ..... 20

    A. *Correctly Defining Cure* ..... 20

    B. *Finishing the Job* ..... 22

    C. *Judicial Cure* ..... 23

V. TRADITIONAL RESPONSES TO PROSECUTORIAL BREACH ..... 24

    A. *The Passive Approach* ..... 24

    B. *The Moderate Approach* ..... 25

    C. *The Aggressive Approach* ..... 26

VI. THE DEFENSE LAWYER’S DILEMMA ..... 27

    A. *Is the Best Offense a Bad Defense?* ..... 27

    B. *The Deferred Remedy Approach* ..... 30

CONCLUSION ..... 33

INTRODUCTION

Between 95 and 99 percent of criminal cases will resolve by plea bargain instead of jury trial.<sup>1</sup> A plea bargain is simply a contract between the defendant and the state; therefore, if the prosecutor breaches it, the court will look to contract law principles to determine the defendant’s remedy.<sup>2</sup> For example, assume the prosecutor induces the defendant to plead guilty in exchange for a probation recommendation. If, at the time of sentencing, the prosecutor instead recommends *prison*, he or she has breached the plea bargain.<sup>3</sup> If the judge then sentences the defendant to prison, the appellate court would likely award the defendant a remedy: either re-sentencing in front of a different judge who is unaffected by the breach, or plea withdrawal.<sup>4</sup>

However, to slightly modify the above example, a different result occurs if the defense lawyer is effective and competent, and promptly objects to the prosecutor’s breach. The prosecutor may then respond by halfheartedly saying, “That’s correct, judge, I actually recommend probation,” or words to that effect. In that case, the prosecutor has “cured” the breach, and the defendant likely would not be entitled to a remedy—even if the judge sentences the defendant to *prison*, as the prosecutor first requested.<sup>5</sup>

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<sup>1</sup> See *infra* Part I.  
<sup>2</sup> See *infra* Part I.  
<sup>3</sup> See *infra* Part II.  
<sup>4</sup> See *infra* Part II.  
<sup>5</sup> See *infra* Part III.

The right to cure—a doctrine that was actually intended for commercial sales contracts<sup>6</sup>—fails both theoretically and practically to cure most prosecutorial breaches.<sup>7</sup> In the above example, not only did the attempted cure come too late,<sup>8</sup> but it failed to unring the bell of the prosecutor’s earlier request for “prison”—a word that was still ringing in the judge’s ears when the prosecutor eventually asked for “probation.”<sup>9</sup> In addition, the prosecutor’s doublespeak combined with the judge’s prison sentence violates the defendant’s reasonable expectations under the plea bargain,<sup>10</sup> and the outcome reeks of collusion between the prosecutor and judge.<sup>11</sup>

These problems stem from the courts’ fundamental misunderstanding of the right to cure.<sup>12</sup> And given the way courts improperly define cure, there are very few situations where the doctrine could be effective in the plea-bargain arena.<sup>13</sup> With an understanding of these nuances, the defense lawyer can then begin to address this question: Under the current state of the law, what can defense counsel do, at the time of sentencing, when confronted with a prosecutorial breach of the plea deal?

Unfortunately, because there are so many legal and factual variables in every case, formulating a response to prosecutorial breach defies a uniform approach.<sup>14</sup> Depending on the situation, some breaches may allow for a passive approach without even objecting;<sup>15</sup> others will call for a moderate approach of objecting, but then accepting the prosecutor’s attempted cure;<sup>16</sup> and yet others may require the more aggressive approach of objecting and also seeking a formal remedy from the judge.<sup>17</sup>

In other situations, however, the cure doctrine creates a dilemma for the defense lawyer. If the prosecutor breaches by recommending prison, the defense lawyer does *not* object, and the judge sentences the defendant to prison, defense counsel will be deemed ineffective; however, the defendant would probably receive a remedy on appeal—thanks to defense counsel’s ineffectiveness in not objecting.<sup>18</sup> On the other hand, if the defense lawyer *objects*, the prosecutor cures, and the judge sends the defendant to prison despite the so-called cure, defense counsel will be deemed effective; however, the defendant likely would not receive any remedy on appeal—paradoxically, thanks to defense counsel’s effectiveness in objecting.<sup>19</sup>

At least one court has recognized the paradox: being ineffective (by not objecting) could be the new effective.<sup>20</sup> However, defense lawyers who travel down this intentionally ineffective path put themselves and their clients at great risk of a bad

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<sup>6</sup> See *infra* Part III.A.

<sup>7</sup> See *infra* Part III.

<sup>8</sup> See *infra* Part III.A.

<sup>9</sup> See *infra* Part III.B.

<sup>10</sup> See *infra* Part III.C.

<sup>11</sup> See *infra* Part III.D.

<sup>12</sup> See *infra* Part IV.A.

<sup>13</sup> See *infra* Parts IV.B. and IV.C.

<sup>14</sup> See *infra* Part V.

<sup>15</sup> See *infra* Part V.A.

<sup>16</sup> See *infra* Part V.B.

<sup>17</sup> See *infra* Part V.C.

<sup>18</sup> See *infra* Part VI.A.

<sup>19</sup> See *infra* Part VI.A.

<sup>20</sup> See *infra* Parts III.E. and VI.A.

outcome.<sup>21</sup> Therefore, this Article proposes a fourth response to prosecutorial breaches: the deferred remedy approach.<sup>22</sup> Under this approach, defense counsel would object to the prosecutor’s breach but specifically ask the trial court to defer its decision on the remedy, if any, until after it decides whether it will adopt the parties’ plea agreement despite the breach.<sup>23</sup>

The deferred remedy approach protects both defense counsel and the defendant from a perilous situation that was created by the prosecutor’s intentional misconduct or incompetence, e.g., by recommending prison instead of probation.<sup>24</sup> Further, deferring the remedy promotes efficiency, as it avoids transferring the case to a different judge or having the defendant withdraw his or her plea unless and until it is necessary.<sup>25</sup>

This approach is also fair to all involved, including the breaching party. If the judge adopts the plea deal (e.g., for probation) despite the prosecutor’s breach, then no remedy is needed as the parties received the disposition they jointly requested.<sup>26</sup> Conversely, if the court does not wish to adopt the plea deal, it could transfer the case to a different court so the defendant can be sentenced by a judge who is unaffected by the breach—precisely what the defendant bargained for, and nothing more.<sup>27</sup> Finally, because it was the prosecutor’s misconduct or incompetence that created this problem in the first place, the defendant should also be allowed to withdraw his or her plea, in which case both parties would be returned to their pre-plea bargain positions.<sup>28</sup>

## I. PLEA BARGAINS AS CONTRACTS

The vast majority of criminal cases resolve by plea bargain instead of jury trial.<sup>29</sup> In fact, one would be hard-pressed to find an estimate lower than 95 percent of all cases resolving by plea.<sup>30</sup> In some jurisdictions, the estimates are as high as 99 percent.<sup>31</sup> In at least one venue, 100 percent of cases resolved by plea, as that county went through calendar year 2011 and beyond without a single jury trial.<sup>32</sup> The gist of these statistics is

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<sup>21</sup> See *infra* Part VI.A.

<sup>22</sup> See *infra* Part VI.B.

<sup>23</sup> See *infra* Part VI.B.

<sup>24</sup> See *infra* Part VI.B.

<sup>25</sup> See *infra* Parts III.E. and VI.B.

<sup>26</sup> See *infra* Part VI.B.

<sup>27</sup> See *infra* Part VI.B.

<sup>28</sup> See *infra* Part VI.B.

<sup>29</sup> For a historical view of plea bargaining displacing the trial, see John H. Langbein, *On the Myth of Written Constitutions: The Disappearance of Criminal Jury Trial*, 15 HARV. J. L. & PUB. POL’Y 119 (1992).

<sup>30</sup> See Julian A. Cook, III, *All Aboard! The Supreme Court, Guilty Pleas, and the Railroad of Criminal Defendants*, 75 U. COLO. L. REV. 863, 866 (2004) (“Department of Justice estimates indicate that in excess of 95 percent of all federal convictions are resolved via a guilty plea.”).

<sup>31</sup> See Darryl K. Brown, Response, *What’s the Matter with Kansas—and Utah?: Explaining Judicial Interventions in Plea Bargaining*, 95 TEX. L. REV. 47, 62 (2017) (“All this has allowed state and federal courts to reach guilty plea rates of 96 to 99 percent.”); John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 9 (1978) (“[A]s many as 99 percent of all felony convictions are by plea.”).

<sup>32</sup> See, e.g., Cynthia Alkon, *Hard Bargaining in Plea Bargaining: When do Prosecutors Cross the Line?*, 17 NEV. L.J. 401, 402 (2017) (citing a news source that reported no criminal trials in Santa Cruz County, Arizona, for more than one calendar year).

that, for the most part, plea bargaining “is not some adjunct to the criminal justice system; it is the criminal justice system.”<sup>33</sup>

Plea bargaining can be a very creative endeavor, and therefore is broadly defined as “any agreement between the prosecutor and the defendant whereby a defendant agrees to perform some act or service in exchange for more lenient treatment by the prosecutor.”<sup>34</sup> But in most cases, the plea agreement will be straightforward and consist of a charge concession, a sentence concession, or both in exchange for the defendant’s plea to one or more crimes.<sup>35</sup> For example, in a complaint with two criminal charges, the prosecutor may offer to dismiss count two (a charge concession) and jointly recommend probation with the defense (a sentence concession), provided the defendant pleads to count one.

Once a judge accepts the defendant’s plea, the charge concession is relatively straightforward and rarely creates any controversy.<sup>36</sup> Therefore, the focus of this Article is on the sentence concession. Trial judges might not be bound by sentence concessions. Rather, depending on the jurisdiction or the particular label attached to the plea bargain, judges may be free to jump an agreed-upon sentence and impose whatever sentence they wish.<sup>37</sup> Continuing with the above example, instead of following the parties’ joint recommendation of probation, the judge could sentence the defendant to jail or, if count one is a felony, prison.

When the judge jumps a plea deal, the defendant might be able to withdraw his or her plea—once again, it depends on the jurisdiction or the type of plea bargain.<sup>38</sup> In other cases, the defendant is simply stuck with the judge’s harsher sentence and has no recourse whatsoever.<sup>39</sup> But regardless of the rights afforded the defendant post-sentencing, the term “sentence concession” is somewhat of a misnomer. In reality, the defendant is probably bargaining for the prosecutor to make, or refrain from making, a sentence *recommendation*.

Because the defendant might not be guaranteed that the judge will actually impose the bargained-for sentence, the manner in which the prosecutor makes the recommendation is of the utmost importance. The defendant isn’t looking for the prosecutor’s hollow utterance of certain words; rather, the defendant is counting on the prosecutor’s ability and best efforts to obtain the agreed-upon sentence.<sup>40</sup> And when

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<sup>33</sup> Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992).

<sup>34</sup> *State v. Thompson*, 426 A.2d 14, 15 n.1 (Md. Ct. Spec. App. 1981).

<sup>35</sup> *See People v. Killebrew*, 330 N.W.2d 834, 836 (Mich. 1983) (discussing “charge bargaining” and “sentence bargaining” as two components of plea bargaining).

<sup>36</sup> After accepting a defendant’s plea to one or more counts, it would be rare for a trial judge to try to sandbag the defendant by refusing to dismiss the remaining counts. *See, e.g., Zinn v. State*, 35 S.W.3d 283 (Tex. Ct. App. 2000) (reversing the judge’s attempt to sandbag the defendant on charges).

<sup>37</sup> *See Michael D. Cicchini, Deal Jumpers*, 2021 U. ILL. L. REV. 1325, 1329 (2021) (“In [deal jumping] states, however, the defendant may be in for quite a shock after giving up the valuable right to trial by pleading guilty or no contest.”).

<sup>38</sup> *See id.* at 1331 (discussing the “subtle distinction[s]” in law and in the facts of a given case that can dramatically affect a defendant’s rights when a judge jumps a plea deal).

<sup>39</sup> *See id.* at 1330 (discussing several cases from several states where the judge jumped the plea deal and the defendant was left without recourse).

<sup>40</sup> *See Killebrew*, 330 N.W.2d at 842 (“[T]he truth is that most defendants rely on the prosecutor’s ability to secure the sentence” for which they bargained). The defendant relies on the prosecutor regardless of whether (a) the judge, upon approving the deal, is bound by the sentence recommendation, (b) the judge is

disputes arise about whether the prosecutor has lived up to the government’s end of the plea bargain, courts often turn to contract law principles to resolve those disputes.

“A plea bargain *is a contract*, the terms of which necessarily must be interpreted in light of the parties’ reasonable expectations.”<sup>41</sup> In theory, contract law is supposed to provide a bare minimum protection that applies at all stages of the plea bargaining process.<sup>42</sup> After the defendant enters a plea, the stronger, constitutional protections are supposedly invoked as well: “A plea bargain standing alone is without constitutional significance. . . . It is the ensuing guilty plea that implicates the Constitution.”<sup>43</sup> In unusual situations, or in some jurisdictions, the constitutional protections may even be invoked during the plea bargaining phase, before the defendant enters a plea.<sup>44</sup>

The reality, however, is that although contract law principles apply throughout the entire process—i.e., plea bargaining through the entry of the plea and sentencing—courts rarely provide defendants with even those basic contractual rights, let alone the loftier constitutional protections. “On the one hand . . . plea agreements are construed as contracts; on the other hand, contractual principles are blatantly suspended if they are deemed antagonistic to the interests of the judiciary.”<sup>45</sup> Even worse is the courts’ “contorted and, at times disingenuous, contractual construction” of basic contract law doctrines for the benefit of the state.<sup>46</sup>

One such example, which is the focus of this Article, is the courts’ rather curious use of the cure doctrine after a prosecutor breaches a plea agreement.<sup>47</sup> As this Article explains, courts use the doctrine to save the prosecutor from his or her own misconduct or

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*not* bound by the sentence recommendation but the defendant may withdraw the plea if the judge jumps the deal, or (c) the judge is *not* bound by the sentence recommendation and the defendant is left without recourse if the judge jumps the deal. In all three situations the defendant wants the agreed-upon sentence and depends on the prosecutor to (a) get the judge to approve the deal, (b) get the judge to follow the sentence recommendation so the defendant doesn’t have to withdraw the plea, or (c) get the judge to follow the sentence recommendation so the defendant doesn’t get sandbagged with a harsher sentence.

<sup>41</sup> *United States v. Fields*, 766 F.2d 1161, 1168 (7th Cir. 1985) (internal quotes marks and citation omitted) (emphasis added); *see also* *United States v. Ballis*, 28 F.3d 1399, 1409 (5th Cir. 1994) (“Plea bargain agreements are contractual in nature, and are to be construed accordingly.”); *United States v. Hembree*, 754 F.2d 314, 317 (10th Cir. 1985) (holding that the parties’ plea agreement “was simply a contract.”).

<sup>42</sup> *See* Daniel F. Kaplan, 52 U. CHIC. L. REV. 751, 752 (1985) (“interpreting the scope of disputed plea bargains only begins, but does not end, with the application of contract-law principles”).

<sup>43</sup> *Mabry v. Johnson*, 467 U.S. 504, 507-08 (1984); *see also* *United States v. Papaleo*, 853 F.2d 16, 18-19 (1st Cir. 1988) (“when the court approves a plea of guilty pursuant to a plea agreement, thus depriving a defendant of his or her liberty without a trial, the constitution is implicated.”).

<sup>44</sup> *Papaleo*, 853 F.2d at 18 (“Due process concerns may also arise prior to the entry of a guilty plea when the defendant detrimentally relies upon the government’s promise.”). For an example of constitutional protections arising even earlier, *see* *Cooper v. United States*, 594 F.2d 12, 19 (4th Cir. 1979).

<sup>45</sup> Cook, *supra* note 30, at 889 (internal citations omitted). Even the most fundamental contract law principle of all—that a binding contract is formed upon offer and acceptance—is often disregarded, as prosecutors are typically allowed “to withdraw from the agreement prior to the trial court’s acceptance of the plea.” Kevin Arns, *Not All Plea Breaches are Equal: Examining Heredia’s Extension of Implicit Breach Analysis*, 110 NW. U. L. REV. 617, 625 (2016) (citing *Mabry v. Johnson*, 467 U.S. 504, 506-08 (1984)).

<sup>46</sup> Cook, *supra* note 30, at 913. For examples of how criminal courts misapply and twist basic contract law principles, *see* Michael D. Cicchini, *Broken Government Promises: A Contract-Based Approach to Enforcing Plea Bargains*, 38 N.M. L. REV. 159, 174-85 (2008).

<sup>47</sup> For an excellent discussion of the doctrine, including its underlying principles and origin, *see* William H. Lawrence, *Cure after Breach of Contract under the Restatement (Second) of Contracts: An Analytical Comparison with the Uniform Commercial Code*, 70 MINN. L. REV. 713 (1986).

incompetence; however, using the right to cure in this situation is like trying to ram a square peg into a round hole.

## II. BREACH, REMEDY, AND CURE

To understand the right to cure, it is necessary to first review the concepts of breach and remedy. To demonstrate these contract law principles, this Part will restate and then build upon the earlier plea bargain example: In a two-count complaint, the prosecutor offers to dismiss count two and, further, to jointly recommend probation with the defense. In exchange, the defendant must plead guilty to count one, thereby relieving the prosecutor of the state's burden to prove guilt beyond a reasonable doubt at jury trial.<sup>48</sup> Assume that count one is a felony and carries a maximum possible penalty of up to ten years in prison.

Further assume that when presented with the plea deal, the judge accepts the defendant's plea to count one, finds the defendant guilty, dismisses count two, orders a pre-sentence investigation (PSI),<sup>49</sup> and schedules the matter for a future sentencing date. When the time for sentencing arrives, the prosecutor begins the state's sentencing argument by discussing the PSI and pointing out some relevant facts about the case and the defendant. But then, instead of making the agreed-upon recommendation for probation, the prosecutor concludes by recommending the maximum possible penalty: a ten year prison term. The defense objects, citing breach of the plea bargain.<sup>50</sup>

When responding to such an objection, a prosecutor is constrained only by his or her creativity and boldness. On the bland, unimaginative end of the spectrum, some prosecutors have simply doubled down on their contract-breaching recommendation. For example, one prosecutor recommended the maximum penalty instead of making "no sentence recommendation" as required under the parties' plea agreement.<sup>51</sup> When the defense objected, the prosecutor stuck to the maximum-sentence recommendation and simply denied the existence of the plea agreement.<sup>52</sup>

Far more creatively, other prosecutors have hedged by half-correcting their breach. For example, one prosecutor was obligated to recommend a sentence on the low end of a

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<sup>48</sup> If prosecutors couldn't induce guilty pleas through plea bargaining, "every case [would entail] a full-scale trial, state and federal courts would be flooded, and court facilities as well as personnel would have to be multiplied many times over to handle the increased burden." *State v. Brockman*, 357 A.2d 376, 380 (Md. 1976).

<sup>49</sup> A pre-sentence investigation, or PSI, is a government-written report that includes its own sentencing recommendation. Most defense lawyers are skeptical of PSIs. In cases where the prosecutor and the defense have already agreed to jointly recommend a sentence, a different recommendation in the PSI can wreak havoc on the plea deal. And in cases where the prosecutor has agreed to make no specific sentence recommendation, the PSI gives the prosecutor an end-around the plea bargain by working behind the scenes to influence the PSI. *See State v. Howland*, 663 N.W.2d 340, 348 (Wis. Ct. App. 2003) ("On no less than three occasions . . . the [prosecutor's office] contacted the Division of Community Corrections to express its displeasure with the agent's [PSI] recommendation[,] even calling it "inappropriate.").

<sup>50</sup> Sometimes defense lawyers fail to object. As explained in Part VI., this would previously have been ineffective assistance of counsel per se; in at least some jurisdictions, however, it might now, rather paradoxically, be considered good strategy.

<sup>51</sup> *Santobello v. New York*, 494 U.S. 257, 259 (1971).

<sup>52</sup> *Id.* However, the prosecutor was wrong, and "in subsequent proceedings, [did] not contest[] that such a promise was made." *Id.*

sentencing range, i.e., 18 months, but instead recommended the high end, i.e., 24 months.<sup>53</sup> When the defense objected, the prosecutor acknowledged the breach but then walked a line between the two recommendations: “[W]e’d ask the Court to impose that low end of the guideline range . . . I suppose a larger sentence could be appropriate, but [18 months] is the least amount that is necessary.”<sup>54</sup> The problem with that response, however, is that instead of recommending an 18-month sentence, the prosecutor set 18 months as the floor of an acceptable sentencing range.<sup>55</sup> This was not what the defendant had bargained for, and it “was a serious breach of the plea agreement[.]”<sup>56</sup>

On the far end of the spectrum, other prosecutors are truly imaginative—and highly entertaining. After recommending the maximum prison sentence when the plea agreement called for no specific recommendation, one offending prosecutor responded to the defense objection by telling the judge, presumably with a straight face, that his (the prosecutor’s) “recommendation here is a *non-recommendation*.”<sup>57</sup> Feeling emboldened, he also attacked defense counsel, “suggesting the defense [had] unduly prolong[ed] the proceedings” by objecting in the first place.<sup>58</sup> To cap things off in grand fashion, the prosecutor then took a personal shot at the defendant, calling him “a sick individual.”<sup>59</sup> Putting aside the prosecutor’s mudslinging, as entertaining as it is, the problem with his disingenuous “non-recommendation” is that “labeling the recommendation a ‘non-recommendation’ does nothing to change the nature of the statement itself.”<sup>60</sup>

In all three of the above cases, the appellate courts’ decisions were easy: they held that the prosecutor breached the plea deal.<sup>61</sup> “If a prosecutor makes a different recommendation than the one agreed to, or fails to make a recommendation at all [when one is required], it is clear that the prosecutor has explicitly breached the agreement.”<sup>62</sup> In other words, “when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such a

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<sup>53</sup> United States v. Diaz-Jimenez, 622 F.3d 692, 693 (7th Cir. 2010).

<sup>54</sup> Id. In this case, unlike *Santobello*, there was not a switch in prosecutors; the same prosecutor appeared at both the plea and sentencing hearings. Instead, the prosecutor simply “may have failed to review the plea agreement before the hearing.” Id.

<sup>55</sup> Id. at 696.

<sup>56</sup> Id.

<sup>57</sup> State v. Locke, App. No. 2012AP2029-CR, ¶ 3 (Wis. Ct. App. 2012) (emphasis added). More precisely, the prosecutor’s recommendation under the plea bargain was tied to the PSI recommendation; the PSI declined to make a recommendation, thus obligating the prosecutor to make no specific recommendation as well. Id. at ¶ 2-3. To say that the prosecutor instead recommended the maximum sentence is being too kind to the prosecutor; he actually recommended a sentence not only beyond what he was allowed to do under the plea agreement, but also beyond *what was permitted by law*. Id. at ¶ 3. Nonetheless, the appellate court gently decided that “the most reasonable interpretation” of the prosecutor’s sentence recommendation was that he was asking for the maximum penalty. Id. at ¶ 3, n. 2.

<sup>58</sup> Id. at ¶ 7.

<sup>59</sup> Id.

<sup>60</sup> Id. at ¶ 6.

<sup>61</sup> *Santobello v. New York*, 494 U.S. 257, 263 (1971) (vacating the judgment due to the prosecutor’s breach and remanding the case for a determination of the remedy); United States v. Diaz-Jimenez, 622 F.3d 692, 696 (7th Cir. 2010) (reversing due to the prosecutor’s breach and remanding the case so the defendant can “be resentenced by a different judge.”); *Locke*, App. No. 2012AP2029-CR at ¶ 9 (reversing due to the prosecutor’s breach and remanding for “resentencing before a different judge.”).

<sup>62</sup> Arns, *supra* note 45, at 627. As Arns explains, breaches can also be *implicit* when the prosecutor pays lip service to the plea agreement but then contradicts the government’s recommendation. See id. at 628-33.



promise must be fulfilled.”<sup>63</sup> It doesn’t matter if the breach is inadvertent,<sup>64</sup> or even if the judge *says* that his or her sentence is unaffected by the prosecutor’s breach.<sup>65</sup> As long as the breach is material,<sup>66</sup> the defendant is entitled to a remedy:

[T]he interests of justice and appropriate recognition of the duties of the prosecution in relation to promises made in [plea bargaining] will be best served by remanding the case . . . to decide [1] whether . . . [the defendant] should be resentenced by a different judge or [2] whether . . . the circumstances require . . . the opportunity to withdraw his plea of guilty.<sup>67</sup>

But what if, unlike the three scenarios discussed above, the prosecutor had responded to the defense objection by acknowledging the breach and then correcting it? Returning to the earlier example—where the prosecutor asked for prison and the defense objected, noting the state’s obligation under the plea deal to ask for probation—suppose the prosecutor responded as follows. “And, Judge, now that—I wish defense counsel would have mentioned that. And that’s an accurate statement, Judge.”<sup>68</sup> The prosecutor then “corrected the State’s recommendation in conformance with the plea agreement”<sup>69</sup>—in our example, by recommending probation.

In this situation, the prosecutor certainly breached the plea agreement, but is the defendant entitled to one of the above remedies, i.e., sentencing in front of a different judge or plea withdrawal? Or to any remedy? Most courts hold that the defendant is not.<sup>70</sup> Their reasoning: the prosecutor has “cured” the original breach by subsequently recommending the agreed-upon sentence.<sup>71</sup>

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<sup>63</sup> *Santobello*, 494 U.S. at 262.

<sup>64</sup> *Id.* (“That the breach of agreement was inadvertent does not lessen its impact.”).

<sup>65</sup> *Id.* at 259 (When overruling the defense objection to the prosecutor’s breach, the sentencing judge said, “I am not at all influenced by what the District Attorney says . . . It doesn’t make a particle of difference what the District Attorney says he will do, or what he doesn’t do.”).

<sup>66</sup> *Id.* at 262 (“the prosecution is *not* in a good position to argue that its . . . breach of the agreement is immaterial.”) Other courts are more explicit regarding materiality. *See, e.g.*, *State v. Smith*, 558 N.W.2d 379 (Wis. 1997) (“Such a breach must deprive the defendant of a material and substantial benefit for which he or she bargained.”); *State v. Williams*, 637 N.W.2d 733 (Wis. 2002) (“A material and substantial breach is a violation of the terms of the agreement that defeats the benefit for which the accused bargained.”). Unfortunately, appellate courts will often find the prosecutorial breaches immaterial and insubstantial, despite their obvious materiality and substantiality. *See Cicchini, supra* note 37, at 1341-42.

<sup>67</sup> *Santobello v. New York*, 494 U.S. 257, 262-63 (1971) (numbered brackets added). Further, “a 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.” *Id.* at 267 (Douglas, J., concurring). Stated another way, “[t]he second alternative, rescission of the plea agreement, is not adequate if the defendant doesn’t want to withdraw his plea and gamble on negotiating a better agreement.” *United States v. Diaz-Jimenez*, 622 F.3d 692, 694 (7th Cir. 2010). The first alternative, re-sentencing before a different judge, is often called “specific performance.” *Id.*

<sup>68</sup> *State v. Nietzold*, 2023 WI 22, ¶ 4.

<sup>69</sup> *Id.*

<sup>70</sup> *Diaz-Jimenez*, 622 F.3d at 694-95 (“most courts, including our own, have not taken the extreme position that *any* violation of a promise to recommend a lighter sentence . . . automatically requires reversal—that it can never be deemed minor or curable.”) (emphasis original).

<sup>71</sup> *See, e.g.*, *United States v. Amico*, 416 F.3d 163, 165 (2nd Cir. 2005) (due to the prosecutor’s “rapid retraction” of the statement that breached the plea agreement, “the temporary breach was adequately cured.”); *United States v. Purser*, 747 F.3d 284, 294 (5th Cir. 2014) (“the Government cured its breach by

The right to cure is indeed a recognized contract law principle, and is probably best defined in the criminal law context by contrasting it with the harmless error doctrine. “Cure, unlike harmless error, is the *removal* of legal defect or *correction* of legal error; that is, *performance* of the contract. Simply put, with a cure of breach, the government abides by the plea agreement, while harmless error excuses a lapse of government performance.”<sup>72</sup>

Perhaps courts rely on the cure doctrine because the harmless error doctrine cannot, strictly speaking, be used to save a prosecutor who breaches a plea deal.<sup>73</sup> But regardless of the reason, not all breaches can be cured.<sup>74</sup> And as explained in the next Part, when the prosecutor first recommends a more severe sentence and then tries to walk-back that recommendation to technically comply with plea agreement, the cure doctrine fails miserably.

### III. WHY THE CURE DOCTRINE FAILS

In our ongoing example thus far, the prosecutor wrapped-up the state’s sentencing remarks by recommending prison instead of the agreed-upon probation; the defense objected and cited the prosecutor’s breach; the prosecutor corrected the recommendation by asking for probation; the judge then overruled the defense objection, finding that the prosecutor had cured the breach.

When the prosecutor breaches the plea deal this way and then corrects it, has the breach really been cured? If the judge goes on to impose probation consistent with the plea bargain, the answer would be yes—or, at the very least, the defendant simply would no longer care about the prosecutorial breach; it would become a moot point.<sup>75</sup> As a practical matter, then, the issues of breach, remedy, and cure only arise when the court does *not* impose the plea bargain’s agreed-upon sentence (or, in plea bargains where the

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withdrawing its objection and urging the application of the lesser enhancement”); *Nietzold*, 2023 WI 22 at ¶ 14 (“the prosecutor’s immediate and unequivocal retraction of his error . . . constitute a sufficient cure, transforming the material and substantial breach into a nonmaterial breach”).

<sup>72</sup> *Purser*, 747 F.3d at 293-94 (emphasis added).

<sup>73</sup> See *Santobello v. New York*, 494 U.S. 257, 262 (1971) (refusing to consider whether the judge was actually impacted by the prosecutor’s improper recommendation); *Purser*, 747 F.3d at 293 (“We cannot agree that harmlessness plays any role in the inquiry where . . . there has been a breach of the plea agreement and the objection to that breach was properly preserved.”). Recall, however, that the breach must be material, which perhaps provides courts with an end-around the harmless error doctrine. See *supra* note 66. As one court candidly confessed, “We can’t see the difference between calling a breach of the plea agreement a harmless error and calling it immaterial.” *United States v. Diaz-Jimenez*, 622 F.3d 692, 695 (7th Cir. 2010). The *Diaz-Jimenez* court therefore split the hair to pronounce that “the Supreme Court in *Santobello* didn’t say that the doctrine of harmless error is inapplicable to breach of a plea agreement; it said . . . that the judge’s saying he hadn’t been influenced by the prosecutor’s error was . . . not a cure.” *Id.* That, however, is highly questionable, as *Santobello* never used the word cure or even the word contract. See *Santobello*, 494 U.S. at 257.

<sup>74</sup> *Puckett v. United States*, 556 U.S. 129, 140 (2009) (stating that “*some* breaches may be curable upon timely objection”) (emphasis original).

<sup>75</sup> Breach, remedy, and cure are still issues at a theoretical level, even when the defendant has no practical interest in litigating them. See *Puckett v. United States*, 556 U.S. at 145 (Souter, J., dissenting) (“[T]he Fifth Amendment’s due process guarantee of fundamental fairness . . . does not vanish if a convicted defendant turns out to get a light sentence.”).

prosecutor was to make no specific recommendation but makes one anyway, when the court does *not* impose the sentence requested by the defense).

Therefore, let's build upon this Article's ongoing example even further. Assume that, after the judge rules that the prosecutor has cured the breach, *instead of imposing the agreed-upon probation the judge sentences the defendant to prison, as the prosecutor originally requested.*<sup>76</sup> In that situation, was the breach really cured?

For the reasons discussed below, the prosecutor's supposed cure has failed, both theoretically and practically, to cure anything. Consequently, the defense should receive its requested remedy, whether that is re-sentencing in front of a different judge or plea withdrawal.

#### A. *Too Little, and Especially Too Late*

Under the common law, “principles of performance and breach of contract shape the rights and remedies of the parties without regard to the concept of cure.”<sup>77</sup> Therefore, “every breach of contract gives rise to an immediate remedy.”<sup>78</sup> And the materiality of the breach dictates the remedy.<sup>79</sup> In other words, “[i]n the absence of a contractual provision allowing a party to cure, most courts traditionally did not acknowledge such a right.”<sup>80</sup>

In this Article's plea bargain example, the only question under the common law would be whether the defendant is entitled to specific performance, i.e., re-sentencing in front of a different judge where the prosecutor must recommend probation, or release from the plea bargain entirely, i.e., plea withdrawal.<sup>81</sup> And these basic contract law principles of breach and remedy work very well in the plea-bargain arena. By contrast, cure does not.

In fact, “[t]he first extensive adoption of the cure concept came in Article 2 of the Uniform Commercial Code (U.C.C).”<sup>82</sup> Although, theoretically, any contract law principle could be applicable to plea bargains, it is rather curious that courts would abandon workable common law concepts in favor of a law intended for the sale of commercial goods.<sup>83</sup> Nonetheless, U.C.C. Article 2 has a two-pronged provision allowing cure in two different circumstances:

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<sup>76</sup> Once again, this problem is not limited to joint sentence recommendations, but includes the agreement not to make any specific recommendation at all. For this closely analogous situation, *see, e.g.*, *State v. Nietzold*, 2023 WI 22 (the prosecutor, who was to refrain from recommending the length of the prison term, recommended 12 years of initial confinement; the defense objected and the prosecutor “cured”; the defense then asked for two to three years; the trial court judge imposed 15 years).

<sup>77</sup> Lawrence, *supra* note 47, at 714.

<sup>78</sup> *Id.* at 714-15.

<sup>79</sup> *Id.* at 716 (“All breaches are not of equal importance, however, so the legal effect varies depending on whether the breach is material or nonmaterial.”).

<sup>80</sup> *Id.* at 717.

<sup>81</sup> *See Santobello v. New York*, 494 U.S. 257, 262-63 (1971) (discussing the remedies of specific performance, i.e., sentencing or re-sentencing in front of a different judge, or plea withdrawal).

<sup>82</sup> Lawrence, *supra* note 47, at 718 (parenthetical added).

<sup>83</sup> *See Joseph Perillo, CALAMARI & PERILLO ON CONTRACTS § 11.20 (a)* (West 2003) (in addition to the sale of goods under the U.C.C., “[t]he UN Sales Convention and UNIDROIT Principles of International Commercial Contracts heavily emphasize cure”).

(1) Where any tender or delivery by the seller is rejected because non-conforming *and the time for performance has not yet expired*, the seller may seasonably notify the buyer of his intention to cure and may then *within the contract time* make a conforming delivery.

(2) Where the buyer rejects a non-conforming tender which *the seller had reasonable grounds to believe would be acceptable* with or without money allowance the seller may if he seasonably notifies the buyer have a *further reasonable time* to substitute a conforming tender.<sup>84</sup>

Due to the temporal component, neither of these cure options would apply to the prosecutor’s breach of the plea bargain in the earlier example. Most significantly, with regard to the first U.C.C. prong, the seller may cure *before* the “time for performance” has “expired.”<sup>85</sup> In our example, the prosecutor’s time for performance had passed: he or she concluded the government’s sentencing remarks with a prison recommendation, and the defense lawyer then took the floor. The prosecutor’s attempt to cure at that point, only because the defense lawyer objected, was untimely.

Nor does the second U.C.C. prong apply. While this second prong can extend the time for performance by giving the prosecutor “further reasonable time,” it first requires that the prosecutor had “reasonable grounds to believe” that the prison recommendation, rather than the agreed-upon probation recommendation, “would be acceptable” to the defense.<sup>86</sup> That obviously is not the case. While the prosecutor might be able to argue that he or she was merely negligent in recommending prison, that does not come close to the requisite “reasonable grounds to believe” that prison would satisfy the defense.<sup>87</sup> Quite to the contrary, negligence in performing contractual obligations is not an excuse.<sup>88</sup> Therefore, once again, the prosecutor’s attempt to cure would be much too late given the theory and policy underpinnings of the cure doctrine.

Timing, however, is actually the least of the problems. As explained below, unlike the situation where a seller eventually delivers conforming goods under a sales contract, the correction of a contract-breaching sentence recommendation does not cure the breach in any meaningful way.

### B. *Ringling Bells and Escaped Cats*

Temporal issues aside, the delivery of a physical product is not comparable to making a sentence recommendation. If I own a manufacturing company and enter into a purchase agreement with a supplier to bring me a truckload of widgets by Friday, I don’t

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<sup>84</sup> U.C.C. § 2-508 (emphasis added). The U.C.C. is often adopted by the states under a different numbering system. *See, e.g.*, OHIO REV. CODE § 1302.52 (2022) (adopting U.C.C. § 2-508 verbatim).

<sup>85</sup> U.C.C. § 2-508 (1).

<sup>86</sup> U.C.C. § 2-508 (2).

<sup>87</sup> *Id.*

<sup>88</sup> Rather, every contract requires parties to act in “good faith.” Perillo, *supra* note 83 at § 11.38 (b). The way that term is defined “makes negligence irrelevant to good faith.” *Id.* “A complete catalogue of types of *bad faith* is impossible, but the following types are among those which have been recognized in judicial decisions: . . . *lack of diligence and slacking off* . . .” *Id.* (emphasis added).

care that the supplier regrets making the deal, complains that prices have since gone up, and delivers the widgets begrudgingly—as long as I get the widgets.<sup>89</sup>

But this reasoning doesn't apply to sentence recommendations. In a plea deal, the defendant is not bargaining for the prosecutor merely to utter certain words, such as “I recommend probation”; rather, the defendant is bargaining for the prosecutor's ability and best efforts to actually obtain that outcome.<sup>90</sup> The prosecutor's level of enthusiasm or sincerity when recommending the sentence is therefore critical.<sup>91</sup> And the failure to recommend the sentence with sufficient feeling may, in itself, constitute an implicit breach of the plea bargain.<sup>92</sup>

But more to the point, the requisite enthusiasm, sincerity, or feeling could rarely if ever be satisfied when the prosecutor recommends prison and then, after the defense lawyer complains, ostensibly tries to comply with the plea bargain by changing that recommendation to probation. There are at least two reasons for this. First, from an appellate standpoint, assessing whether the prosecutor sufficiently corrected the recommendation is truly a fool's errand. This is due to the “inability of the appellate court to fairly assess a prosecutor's level of advocacy from a transcript.”<sup>93</sup>

And second, returning to live action in the courtroom, by the time the prosecutor eventually says “probation,” the cat is out of the bag. Put another way, the prosecutor cannot un-ring the bell of the earlier prison recommendation. One court rejected this analogy on principle, opining that a “mistake” when making a sentence recommendation “is not a bell.”<sup>94</sup> That is true, but neither is the prosecutor's original prison recommendation “a cat.” The ringing bell and the escaped cat are both analogies, i.e., “a comparison between two things, typically for the purpose of explanation or clarification” or to show a “resemblance in some particulars between things *otherwise unlike*.”<sup>95</sup> And both analogies work well.

Other courts have even recognized the inability to un-ring the bell, or put the cat back in the bag, when *the defendant* attempts to cure a mistake—or, to continue with figurative language, when the shoe is on the other foot. For example, one plea bargain required that, “not later than the time of the sentencing hearing, the defendant truthfully provides to the Government all information and evidence that the defendant has

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<sup>89</sup> After all, “parties are routinely bound by agreements they wish they had not made.” *Puckett v. United States*, 556 U.S. 129, 145 (2009) (Souter, J., dissenting).

<sup>90</sup> *See People v. Killebrew*, 330 N.W.2d 834, 842 (Mich. 1983) (“[T]he truth is that most defendants rely on the prosecutor's ability to secure the sentence” for which they bargained).

<sup>91</sup> The prosecutor's level of enthusiasm in making the recommendation is important regardless of whether the defendant has the post-sentencing remedy of plea withdrawal if the judge jumps the prosecutor's sentence recommendation. *See supra* note 40 for further discussion.

<sup>92</sup> *See Arns, supra* note 45, at 628 (discussing some courts' requirements that the prosecutor must make a “forceful and intelligent” recommendation, and even an “enthusiastic” recommendation, in order to comply with a plea bargain). As Arns explains, however, the level of feeling required to comply with a plea bargain varies depending on the federal circuit or state. *See id.* at 628-33.

<sup>93</sup> *Id.* at 629 (discussing *United States v. Benchimol*, 471 U.S. 453, 456 (1985)).

<sup>94</sup> *United States v. Diaz-Jimenez*, 622 F.3d 692, 696 (7th Cir. 2010). This court, however, ruled for the defendant, even though it rejected the defendant's ringing bell analogy. *See id.* (“So there was a serious breach of the plea agreement, and so the defendant is entitled to be resentenced by a different judge.”).

<sup>95</sup> MERRIAM-WEBSTER DICTIONARY, *Analogy* (emphasis added) (accessed May 27, 2023), at <https://www.merriam-webster.com/dictionary/analogy>.

concerning the offense . . .”<sup>96</sup> One such piece of information was the amount of money the defendant was paid for his role in the crime; he said “he had been paid between \$1,000 and \$2,000 for his services.”<sup>97</sup> When testifying for the government at a different defendant’s trial, however, he said that he had “been paid \$500.”<sup>98</sup> He corrected this by testifying “that his earlier testimony [\$500] had been different because this was the first time testifying and he was nervous.”<sup>99</sup> Then, in response to cross-examination questions, he discussed “additional details of the [crime] not revealed during his debriefings or on direct examination.”<sup>100</sup>

When the defendant was to be sentenced, however, the prosecutor reneged on the plea deal, citing the defendant’s conflicting testimony as to payment and the new information he provided during cross-examination.<sup>101</sup> When attempting to enforce the plea deal, the defendant conceded that he initially misstated the amount of the payment and also “added information he had not previously disclosed to the government.”<sup>102</sup> But, the defendant argued, he “cured” those defects in a timely manner.<sup>103</sup> That is, “he gave a truthful and complete account to the government by the close of his testimony and before the commencement of the sentencing hearing” as required by his plea agreement.<sup>104</sup>

Nonetheless, the court let the prosecutor out of the deal.<sup>105</sup> Why? Because, the court believed, the defendant’s initial error as to the dollar amount and his two-tiered disclosure of information, while literally complying with the plea bargain’s timeframe for performance, meant that “his credibility was so shaky that no version [of the crime] could be taken as true and complete.”<sup>106</sup> Thus, the defendant could not prove that he complied with the plea agreement.<sup>107</sup> The trial judge said, “at the end of all of this, I don’t know what happened in this [criminal] transaction.”<sup>108</sup>

Of course, even if the defendant had not first misstated (and then corrected) the amount of payment he received—and even if he had anticipated every possible question he would later be asked on cross-examination and preemptively disclosed that information during direct examination—the trial judge still would not “know” what really happened with regard to the underlying crime.<sup>109</sup>

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<sup>96</sup> United States v. Bermudez, 407 F.3d 536, 539 (1st Cir. 2005).

<sup>97</sup> Id. at 540.

<sup>98</sup> Id.

<sup>99</sup> Id.

<sup>100</sup> Id. at 541.

<sup>101</sup> Id.

<sup>102</sup> Id.

<sup>103</sup> Id. at 543 (arguing that any defect “at an earlier stage was cured by full disclosure later on.”).

<sup>104</sup> Id.

<sup>105</sup> Id. at 539 (“the district court concluded that, under the terms of the . . . plea agreement, the government was not obligated to file a substantial assistance motion” and “further held that Bermudez was ineligible for the safety valve reduction.”).

<sup>106</sup> Id. at 543.

<sup>107</sup> Id. For some reason, under these facts or the controlling federal authority, it was the defendant’s “burden to establish” that he had complied with the plea agreement, rather than the prosecutor’s burden to establish that he had breached the plea agreement. Id. (citations omitted).

<sup>108</sup> Id. at 843-44.

<sup>109</sup> That is perhaps why defense lawyers cynically believe that information provided by the defendant to the prosecutor, pursuant to a plea agreement, will be deemed “truthful” if it pleases the prosecutor or, in cases where the defendant testifies at another defendant’s trial, if the prosecutor wins a conviction.

But that aside, why shouldn't the same, stringent standard apply to the prosecutor who first makes a prison recommendation and then, after the time to perform has passed and defense counsel objects, changes the recommendation to probation? To put the shoe back on the original foot, and to paraphrase the judge who denied the above defendant the right to cure, isn't it true that, *at the end of the conflicting recommendations, the judge simply wouldn't know what sentence the prosecutor really wanted?*

After first recommending probation, the prosecutor cannot un-ring the bell or put the cat back in the bag. Attempting to correct the prison recommendation is simply not an adequate cure.

### C. Reasonable Expectations

Another problem with using the cure doctrine to save prosecutors from their own blunders is that it violates the defendant's reasonable expectations under the plea deal. Returning momentarily to the civil law context, although "a seller may cure defects, the right to cure is not a limitless one to be controlled by the will of the seller."<sup>110</sup> Rather, an effective cure must "more closely approximate the expectations of both parties."<sup>111</sup> And the non-breaching party's expectations must be considered in the criminal context as well: the ultimate issue is "whether the Government's conduct was consistent with the defendant's reasonable understanding of the [plea] agreement."<sup>112</sup>

When a prosecutor recommends prison and then, after the defense objects, walks-back that recommendation by asking for probation, does the prosecutor's contradictory doubletalk meet the defendant's reasonable expectations? Given that the defendant has not bargained for the mere utterance of words, but rather for the prosecutor's "ability to secure" the sentence<sup>113</sup> and "best efforts" in attempting to do so,<sup>114</sup> a very workable, commonsense test is this: "Ultimately, whether an attempted cure was effective turns on whether the prosecutor's statements, including those before and after the attempted cure, imply that the State would make a different sentencing recommendation *but for the [plea] agreement*."<sup>115</sup>

In this Article's ongoing example, it is obvious that the prosecutor only changed the state's recommendation after the defense objected and for the sole purpose of complying with the state's plea-bargain obligation. In other words, "but for the [plea] agreement"<sup>116</sup> the prosecutor would have asked for prison instead of probation. We know

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<sup>110</sup> Oberg v. Phillips, 615 P.2d 1022, 1026 (Okla. Civ. App. 1980) (upholding jury's verdict because the seller failed to cure the defects in accordance with the buyer's reasonable expectations).

<sup>111</sup> Id.; see also Lawrence, *supra* note 47, at 724-35 (discussing the protection of the non-breaching party's expectations as one of the rationales for the cure doctrine).

<sup>112</sup> United States v. Purser, 747 F.3d 284, 290 (5th Cir. 2014) (internal quote marks and citation omitted) (finding that "this breach was sufficiently cured by the [prosecutor's] withdrawal [the improper remarks] and the actions of the district court.").

<sup>113</sup> People v. Killebrew, 330 N.W.2d 834, 842 (Mich. 1983).

<sup>114</sup> State v. Wills, 523 N.W.2d 569, 572 (Wis. Ct. App. 1994) (applying commercial contract law principles to plea bargains).

<sup>115</sup> Ellen Henak, *Nonparty Brief of Wisconsin Association of Criminal Defense Lawyers*, App. No. 2021AP21-CR, at 7 (July 6, 2022) (emphasis added) (filed in State v. Nietzold, 2023 WI 22), at <https://acefiling.wicourts.gov/document/eFiled/2021AP000021/544257>.

<sup>116</sup> Id.

this because the prosecutor *did* ask for prison *despite* the plea agreement to the contrary. Therefore, the prosecutor has failed to cure the breach.

The previous section discussed putting the shoe on the other foot, i.e., considering whether a defendant cured a breach under reversed circumstances. That exercise is also useful when deciding whether reasonable expectations were met. Recall that the real-life defendant discussed earlier was obligated to provide, before sentencing, truthful information.<sup>117</sup> He testified that he received a \$500 payment for his role, but then—much like the prosecutor who changes a prison recommendation to probation—corrected that testimony while still under direct examination.<sup>118</sup> As he had told government agents earlier, he testified that he actually received a higher payment.<sup>119</sup> He first misstated the amount because “he was nervous,” as he had never testified before.<sup>120</sup>

Did that testimony meet the government’s reasonable expectations? It should have. Unlike the prosecutor who changes or withdraws a statement about his or her desired sentence out of a legal obligation to do so, this defendant seemed to be correcting a statement that contained a factual error about an arguably irrelevant matter.

Nonetheless, when the prosecutor subsequently reneged due to the defendant’s misstatement, “the court found *this instance alone* enough to relieve the Government of any obligation it had . . . under the terms of the plea agreement.”<sup>121</sup> When the defendant later argued that his correction of the dollar amount cured the breach, the court dismissed his argument as merely “his theory,” as though it was a novel one, and stated that the right cure was a “generous standard,” implying that it was too generous for the defendant.<sup>122</sup> The court therefore rejected the defendant’s attempted cure, and so too should courts reject the state’s attempted cure when the situation is reversed.

Put another way—and at the risk of going overboard with figurative language—what’s good for the goose is good for the gander. If the government’s reasonable expectation is not met when the defendant corrects a factual error about how much he was paid for his role in a crime, then neither is the defendant’s reasonable expectation met when the prosecutor first recommends prison before ostensibly correcting that contract-breaching statement.

#### D. *The Appearance of Collusion*

When an appellate court analyzes cure in hindsight, the question of whether the state effectively cured cannot be answered in the affirmative based on the trial judge’s assertion that he or she was not affected by the breach.<sup>123</sup> But as a practical matter, it is the judge’s sentence that determines whether the defendant will ever pursue the issue on appeal.<sup>124</sup> Further, it is the judge’s sentence that is visible to the legal community and the

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<sup>117</sup> United States v. Bermudez, 407 F.3d 536, 540 (1st Cir. 2005).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 541 (emphasis added) (internal quote marks omitted).

<sup>122</sup> *Id.* at 543.

<sup>123</sup> See Santobello v. New York, 494 U.S. 257, 262 (1971) (refusing to consider “the question of whether the sentencing judge would or would not have been influenced” by “the prosecutor’s recommendation”).

<sup>124</sup> Continuing with the example developed in this Article, if the prosecutor breaches by recommending prison instead of the agreed-upon joint recommendation for probation, the defendant does not care that the



general public, which highlights yet another pitfall in applying the cure doctrine to prosecutorial breaches: it destroys the appearance of fairness.

In the criminal justice system, the appearance of fairness is as important as actual fairness. This is true, of course, for jury trials, but it is also true for plea bargaining—the means by which the government obtains more than 95 percent of its convictions.<sup>125</sup> “At stake is the honor of the government [and] public confidence in the fair administration of justice . . .”<sup>126</sup> And when the prosecutor promises to recommend or refrain from recommending a particular sentence, such a promise “is a pledge of the public faith and is not to be lightly disregarded. The public justifiably expects the State, above all others, to keep its bond.”<sup>127</sup> Finally, “the Supreme Court has made repeated references to the importance of preserving public confidence in this arena. The import of this objective should not be discounted, for it is critical to the effective functioning of the system that its processes be fair in fact, *as well as in appearance*.”<sup>128</sup>

To demonstrate the importance of appearances, consider a case where the defendant “bargained for a recommended sentence” of county jail and, at the sentencing hearing, the prosecutor said: “He has lived up to his end of the bargain and we recommend a county sentence”—as opposed to a lengthier sentence in state prison.<sup>129</sup> The defense lawyer also recommended “a sentence involving county time.”<sup>130</sup> In other words, both parties lived up to their end of the deal. However, because the judge was not bound by the parties’ sentence recommendations, he rejected county jail and instead imposed a “sentence of four to eight years” in prison.<sup>131</sup>

Even though the prosecutor did not commit an explicit or even implied breach of the plea bargain, the appellate court reversed and remanded the case for the defendant to withdraw the plea.<sup>132</sup> The reason was to preserve the appearance of fairness, as leaving the defendant high and dry, without recourse, would create the appearance of collusion.

[It would] create an impression that the Commonwealth’s side of the bargain is mostly an illusory promise . . . Worse still, if the sentencing court exercises its discretion to reject the recommendation often enough, it could destroy the sense of an independent judiciary and *create the impression that the court and the prosecutor are working in conjunction to deprive defendants of valuable rights*. Once a plea is secured by the promise of a kind sentence recommendation, the criminal defendant would proceed only to find an unwilling jurist, yet the defendant is stuck with his plea, the anticipated sentence merely another unkept promise on his way

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prosecutor’s attempted cure is ineffective, or even that the prosecutor refuses to attempt to cure, if the court imposes probation. It is only when the judge jumps the joint recommendation that the defendant would even consider appealing based on the prosecutor’s breach.

<sup>125</sup> See *supra* Part I.

<sup>126</sup> *State v. Kuchenreuther*, 218 N.W.2d 621, 624 (Iowa 1974) (quoting *United States v. Carter*, 454 F.2d 426, 428 (4th Cir. 1972)).

<sup>127</sup> *Bowers v. State*, 500 N.E.2d 203, 204 (Ind. 1986).

<sup>128</sup> See *Cook*, *supra* note 30, at 917-18 (emphasis added).

<sup>129</sup> *Commonwealth v. White*, 787 A.2d 1088, 1090 (Pa. Super. Ct. 2001).

<sup>130</sup> *Id.* at 1089.

<sup>131</sup> *Id.* at 1090 (parenthetical numbers omitted).

<sup>132</sup> *Id.* at 1095.

to [prison]. This is not the ideal way to foster a sense of justice and fairness in the criminal justice system.<sup>133</sup>

Or, as the concurrence wrote: “The integrity of the entire guilty plea process is at risk if we fail to invalidate pleas like the one in this case.”<sup>134</sup> All of the foregoing statements are true. And such statements regarding the appearance of fairness and the impression of collusion are even more applicable in cases where the prosecutor first breaches the agreement before the judge imposes the harsher sentence.

For example, changing the facts of the above case only slightly to more closely align with this Article’s ongoing example, assume that instead of honoring the plea bargain by recommending county jail, the prosecutor instead recommended lengthy prison time. Assume the defense lawyer objected, citing breach of the plea bargain, and the prosecutor responded with a metaphorical wink to the court: “That’s right, judge, the state actually recommends county time.” Finally, assume that the judge, as he did in the real-life case, then imposed the four to eight years of prison instead of county jail.

In this modified situation, the prosecutor’s breach and unsuccessful attempt to cure would dramatically heighten the appellate court’s legitimate concern about “the impression that the [trial] court and the prosecutor are working in conjunction to deprive defendants of valuable rights.”<sup>135</sup> If the appearance of collusion between the prosecutor and judge exists even when the prosecutor *complies* with the plea deal, the problem is magnified exponentially if the prosecutor first *breaches* the deal by recommending a more severe sentence right before the trial judge dutifully imposes it.

#### E. *(In)Efficiency and (Dis)Incentives*

The justification for the right to cure, in the commercial context, centers on efficiency. “The concept of cure is grounded in the belief ‘that protecting expectations while avoiding waste is, or should be, a primary goal of contract damages.’”<sup>136</sup> And waste is avoided when, instead of terminating the contract, the law “keep[s] the contract intact if at all feasible” by allowing the breaching party to cure.<sup>137</sup>

In what appears at first to be consistent with the civil law’s goal of efficiency, the criminal law requires the defense lawyer to promptly object to a prosecutorial breach: “the contemporaneous-objection rule prevents [the defendant] from sandbagging the court—remaining silent about his objection and belatedly raising the [breach] only if the case does not conclude in his favor.”<sup>138</sup> Further, “a timely objection may induce the

<sup>133</sup> Id. at 1093 (emphasis added).

<sup>134</sup> Id. at 1094 (Beck, J., concurring).

<sup>135</sup> Id. at 1093; *see also* *People v. Navaroli*, 521 N.E.2d 891, 897 (Ill. 1988) (“If a defendant cannot place his faith in the State’s promise, this important component [plea bargaining] is destroyed.”) (Clark, J., dissenting) (quoting *People v. Starks*, 478 N.E.2d 350 (Ill. 1985)); *Ex parte Yarber*, 437 So. 2d 1330, 1335 (Ala. 1983) (“If we allow the state to dishonor at will the agreements it enters into, the result could only serve to weaken the plea negotiating system.”).

<sup>136</sup> Lawrence, *supra* note 47, at 726-27 (quoting Robert Hillman, *Keeping the Deal Together After Material Breach—Common Law Mitigation Rules, the UCC, and the Restatement (Second) of Contracts*, 47 U. COLO. L. REV. 553, 555 (1976)).

<sup>137</sup> Perillo, *supra* note 83, at § 11.20 (a).

<sup>138</sup> *Puckett v. United States*, 556 U.S. 129, 134 (2009) (internal quotation omitted).

prosecution to take action” and “cur[e] the alleged breach.”<sup>139</sup> And if the prosecutor is unable to do so, “the trial court then has the ability to grant an immediate remedy . . . and thus avoid the delay and expense of a full appeal.”<sup>140</sup>

Paradoxically, far from avoiding waste, delay, and expense, the prosecutor’s right to cure a contract-breaching prison recommendation actually provides strong incentives to *create* waste, delay, and expense. In fact, in the plea-bargain context, the entire efficiency-based justification for the right to cure simply implodes.

More specifically, when the prosecutor breaches the plea deal by recommending prison, the defense lawyer has two options: (1) object and ask for a remedy, e.g., sentencing in front of a different judge; or (2) don’t object. If the defense lawyer objects (option 1) and the prosecutor halfheartedly corrects the recommendation, the judge may sentence the defendant to prison anyway and, because the breach was supposedly cured, the defendant is stuck with that sentence.<sup>141</sup> On the other hand, if the defense lawyer does *not* object (option 2) and the judge sentences the defendant to prison as the prosecutor requested, the appellate court will eventually reverse and remand to a different judge for re-sentencing or for plea withdrawal.<sup>142</sup> In other words, the prosecutor’s right to cure incentivizes the defense to create waste, delay, and expense in order to protect the defendant’s rights.

How can this be? While this analysis may not hold in every jurisdiction,<sup>143</sup> defense counsel’s ineffectiveness in failing to object means that the prosecutor never had the chance to cure the breach, and therefore *didn’t cure the breach*.<sup>144</sup> Consequently, the defendant would be entitled to a remedy “if the case does not conclude in his favor.”<sup>145</sup> In addition to creating this inefficiency—the very thing the cure doctrine is supposed to prevent—the courts’ use of the doctrine also has another unintended consequence: the defendant could be better off with an ineffective defense lawyer than a conscientious one.

A lack of judicial foresight and the judiciary’s strong desire to protect the prosecutor often conspire to create such paradoxes.<sup>146</sup> And in this situation, the paradox

<sup>139</sup> Arns, *supra* note 45, at 626.

<sup>140</sup> *Id.* (internal quotation omitted).

<sup>141</sup> *See, e.g.*, United States v. Amico, 416 F.3d 163, 165 (2nd Cir. 2005) (“the temporary breach was adequately cured”); United States v. Purser, 747 F.3d 284, 294 (5th Cir. 2014) (“the Government cured its breach”); State v. Nietzold, 2023 WI 22, ¶ 14 (“the prosecutor’s immediate and unequivocal retraction of his error . . . constitute a sufficient cure”).

<sup>142</sup> *See, e.g.*, State v. Smith, 558 N.W.2d 379, 389 (Wis. 1997) (“We conclude that Smith was automatically prejudiced when the prosecutor materially and substantially breached the plea agreement” and his counsel failed to object). This is the same end result as when defense counsel *does* object, but the prosecutor refuses or fails to adequately cure. *See, e.g.*, Santobello v. New York, 494 U.S. 257, 263 (1971) (reversing because, after the defense objected, the prosecutor refused even to acknowledge the breach); United States v. Diaz-Jimenez, 622 F.3d 692, 696 (7th Cir. 2010) (reversing because, after the defense objected, the prosecutor failed to *adequately* correct the breach).

<sup>143</sup> Possible differences among jurisdictions are due, at least in part, to the legal standard applied by the appellate court, such as plain error or ineffective assistance of defense counsel. This is discussed more fully in Part VI.A.

<sup>144</sup> *See Smith*, 558 N.W.2d at 385 (“Further, the breach was not remedied, because Smith’s counsel failed to object to the breach.”).

<sup>145</sup> Puckett v. United States, 556 U.S. 129, 134 (2009).

<sup>146</sup> As another example of this phenomenon, the Supreme Court of Wisconsin’s desire to serve prosecutors led to a series of decisions that turned Wisconsin’s preliminary hearing from a meaningful protection against “improvident prosecutions” in felony cases into a prosecutorial weapon. *See* Michael D. Cicchini,

creates a potential dilemma for the defense lawyer: Is it now *effective* for counsel to intentionally be *ineffective*? This will be discussed in greater detail in Part VI. But as the next Part explains, this conundrum was created in the first place because courts not only use the cure doctrine where it doesn't fit, they also fail even to understand it.

#### IV. PROPER USES OF THE CURE DOCTRINE

Courts have fundamentally misunderstood the concept of cure. If courts were to correctly define cure, the doctrine could have a much bigger role in the plea-bargain arena. As courts presently define it, however, the doctrine has very few legitimate uses.

##### A. *Correctly Defining Cure*

The entire justification for the right to cure is to avoid the inefficiency and waste that comes with terminating a contract.<sup>147</sup> Allowing the breaching party to cure promotes efficiency by “keeping the contract intact if at all feasible.”<sup>148</sup> Cure “preclude[es] the injured party from canceling the contract. Cure thus affords the breaching party a second chance at contract performance, subject to the damages occasioned by the initial breach.”<sup>149</sup> Therefore, when a prosecutor breaches a plea deal by recommending prison instead of probation, and the defense lawyer objects and asks the judge to transfer the case to a different judge for sentencing, that proposed course of action *is* the cure.

Consistent with the theory and philosophy underlying cure, the assignment to another judge “precludes the injured party”—here, the defendant—“from canceling the contract,” i.e., withdrawing his or her plea and blowing up the plea deal.<sup>150</sup> Instead, it “keep[s] the contract”—in this case, the plea agreement—“intact.”<sup>151</sup> It also “affords the breaching party”—here, the state via the prosecutor—“a second chance at contract performance,” e.g., making a clean probation recommendation to a judge who doesn't know that the prosecutor really wants prison.<sup>152</sup> This course of action is also efficient because it “avoids the delay and expense of a full appeal.”<sup>153</sup> And the transfer to a different judge for sentencing, *if that is what the defense requests*, would not constitute the canceling of the contract, as the judge is not a party to the plea bargain.<sup>154</sup>

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*Improvident Prosecutions*, 12 DREXEL L. REV. 465, 508 (2020) (“because of the any-felony rule and the transactional-relation test, defendants in felony cases often have to stand trial on charges for which there was no probable cause in the complaint and no evidence adduced at the preliminary hearing. The conundrum is this: misdemeanor defendants have greater protection against improvident prosecutions than do felony defendants.”).

<sup>147</sup> See *supra* Part III.E.

<sup>148</sup> Perillo, *supra* note 83, at § 11.20 (a) (discussing the policy behind the right to cure in the “UN Sales Convention and the UNIDROIT Principles of International Commercial Contracts”).

<sup>149</sup> Lawrence, *supra* note 47, at 714.

<sup>150</sup> *Id.*

<sup>151</sup> Perillo, *supra* note 83, at § 11.20 (a).

<sup>152</sup> Lawrence, *supra* note 47, at 714.

<sup>153</sup> Puckett v. United States, 556 U.S. 129, 140 (2009).

<sup>154</sup> See, e.g., Ex parte Yarber, 437 So. 2d 1330, 1334 (Ala. 1983) (discussing how a plea agreement “is subject to the trial court’s approval,” i.e., “the approval of a *third-party*”) (emphasis added); Christine M. Wiseman et al., CRIMINAL PRACTICE AND PROCEDURE § 23.12, at 742 (1996) (“The trial judge, on the other hand, may be neither a party to a plea agreement nor a part of the plea agreement process.”) (citation

Granted, transferring the case to a different judge for sentencing is still untimely in that it comes after the prosecutor’s time for performance has expired.<sup>155</sup> However, in another sense, the hands of the metaphorical clock have been turned back, as the sentencing hearing starts anew in front of a different judge. The prosecutor gets a do-over of his or her entire sentencing argument, including the sentence recommendation. And, more significantly, the pre-sentencing transfer to a different judge satisfies all of the other, more important prerequisites for an effective cure.<sup>156</sup>

Courts fail to grasp that this course of action *is* a form of cure and it should be awarded more freely. Courts erroneously treat this pre-sentencing transfer to a different judge for *sentencing*, which is a cure *of* the breach, as the equivalent of an appellate-court remand to a different judge for *re-sentencing*, which is a remedy *for* the breach. Even the United States Supreme Court has committed this error by discussing how, “if the breach is established but cannot be cured, the [trial] court can grant an immediate remedy” such as the “withdrawal of the plea or resentencing before a different judge.”<sup>157</sup> This statement erroneously equates sentencing with re-sentencing, when in fact *sentencing* (albeit in front of a different judge than the one originally assigned) is a cure that avoids a costly appeal, whereas an appellate court’s remand for *re-sentencing* in front of a different judge is a costly, post-appeal remedy.

Likewise, it is also a mistake to treat a transfer for sentencing in front of a different judge and plea withdrawal as comparable outcomes. In fact, they are dramatically different. As explained above, having a different judge preside over the initial sentencing hearing meets a requirement of cure in that it preserves the contract. Conversely, “withdrawal of the plea”<sup>158</sup> is a remedy in the broader sense and would not qualify as a cure: plea withdrawal, which is the defendant’s “canceling [of] the contract,” does not “afford[] the breaching party a second chance at contract performance”<sup>159</sup>—instead, the prosecutor would have to start plea negotiations from scratch or, possibly, go to trial.

If courts were to properly understand the concept of cure, prosecutorial breaches could, in many cases, be cured. And recognizing judicial transfer before sentencing as a form of cure would also promote responsible behavior by the prosecutor. Even putting aside the cases of bad prosecutorial intent,<sup>160</sup> which everyone would agree should be deterred, our system has developed into one of widespread, thoughtless charging and an assembly-line approach to churning out convictions. To help correct this, even negligent

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omitted); Cicchini, *supra* note 46, at 184 (“The parties [to a plea agreement] are the government, represented by the prosecutor as its agent, and the defendant. While the plea agreement may be subject to the court’s approval, this in no way makes the court a party.”). *But see* Cook, *supra* note 30, at 885. Cook argues that the judge is a party and actually “accepts” the plea offer made jointly by the defendant and the prosecutor. *Id.* More accurately, though, the judge *approves* the plea agreement and then *accepts* the defendant’s plea after ensuring that it is a knowing, intelligent, and voluntary plea. This should not make the judge a part to the plea agreement.

<sup>155</sup> *See supra* Part III.A.

<sup>156</sup> *See supra* Parts III.B.-E.

<sup>157</sup> *Puckett v. United States*, 556 U.S. 129, 140 (2009). Of course, if the defendant has yet to be sentenced, the case would be transferred to another judge for sentencing, not for “resentencing.”

<sup>158</sup> *Id.*

<sup>159</sup> Lawrence, *supra* note 47, at 714.

<sup>160</sup> *See, e.g., State v. Locke*, App. No. 2012AP2029-CR (Wis. Ct. App. 2012) (intentionally breaching the agreement and then defending the improper recommendation by calling it a “non-recommendation”).

prosecutorial breaches—e.g., where “[t]he prosecutor may have failed to review the plea agreement before the hearing”<sup>161</sup>—should be deterred. And office mismanagement should also be deterred. This includes cases where a subsequently assigned prosecutor, “apparently ignorant of his colleague’s [earlier] commitment,” breaches the agreement,<sup>162</sup> as well as other circumstances where “an unfortunate lapse in orderly prosecutorial procedures” produces chaos in the courtroom.<sup>163</sup>

### B. *Finishing the Job*

Can the cure doctrine, as it is currently misunderstood by the courts, ever be used effectively? Yes, in limited circumstances, one of which was discussed by the United States Supreme Court: “*some* breaches may be curable upon timely objection—for example, where the prosecution simply forgot its commitment and is willing to adhere to the agreement.”<sup>164</sup>

To demonstrate this, consider a modified version of this Article’s earlier example. Assume, once again, that the prosecutor induces the defendant to plead by offering to jointly recommend probation. At sentencing, the prosecutor speaks at length about several factors, including the defendant’s limited criminal record, the mitigating aspects of the crime, and other things that would typically support a probation disposition. But then, the prosecutor simply forgets to actually recommend probation.<sup>165</sup> The defense objects—or, more likely, simply takes a moment off the record to remind the prosecutor of his or her obligation to explicitly recommend probation. The prosecutor then says to the court: “To conclude my sentencing remarks, judge, given all of the facts I’ve discussed, the parties’ joint recommendation here is the appropriate outcome, and I ask that you adopt it and order probation.”

In this scenario, the prosecutor’s cure works for two reasons, both of which must exist or the cure would not have been effective. First, “the prosecution simply forgot its commitment” and then “adhere[d] to the agreement.”<sup>166</sup> Unlike this Article’s previous example, in this scenario the prosecutor did not first recommend prison, thus leaving that metaphorical bell ringing in the judge’s ears while the prosecutor corrects the recommendation by half-heartedly uttering the word probation. And second, the prosecutor did not first subtly undercut the probation recommendation, which would have been an implicit breach of the plea deal.<sup>167</sup> Instead, everything the prosecutor said before neglecting to explicitly recommend probation was consistent with the eventual probation recommendation. The prosecutor simply forgot to finish the job, but then did so when reminded by defense counsel.

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<sup>161</sup> United States v. Diaz-Jimenez, 622 F.3d 692, 693 (7th Cir. 2010).

<sup>162</sup> Santobello v. New York, 404 U.S. 257, 259 (1971).

<sup>163</sup> Id. at 260.

<sup>164</sup> Puckett v. United States, 556 U.S. 129, 140 (2009) (emphasis original).

<sup>165</sup> For a more aggravated example where the prosecutor not only failed to explicitly make the agreed-upon recommendation but also undercut that recommendation with other sentencing remarks, see State v. Hanson, 606 N.W.2d 278, 282 (Wis. Ct. App. 1999).

<sup>166</sup> Puckett, 566 U.S. at 140.

<sup>167</sup> See Arns, *supra* note 45, at 627-33 (discussing implicit breaches of plea bargains).

In this scenario, then, without first making the contradictory prison recommendation or subtly undercutting the agreed-upon, and eventual, probation recommendation, the prosecutor has likely cured the breach.

### C. *Judicial Cure*

The cure doctrine, as courts currently define it, can also be effective in yet another situation. Recall that when the defendant bargains for a recommendation, he or she is not bargaining for the prosecutor merely to utter certain words; rather, defendants want “to secure the sentence” for which they bargained.<sup>168</sup> With that in mind, let us return to this Article’s earlier example, where the prosecutor first recommended prison (the breach) but then changed it to jointly recommend probation with the defense.

In that situation, it can be said with certainty that, if the judge were to follow the plea agreement—i.e., follow the joint recommendation of probation despite the prosecutor’s initial breach—then the breach has been cured, albeit by the prosecutor *and the judge*. In other words, trial court judges have the power to ensure that the breach is cured by following the plea agreement.

The judge’s role in the cure of a prosecutor’s breach is already recognized, at least implicitly, by some courts. In one federal case that is analogous to this Article’s ongoing example, the defense bargained for the prosecutor’s joint recommendation for something called a “4-level increase” to the sentence, as there were four crime victims.<sup>169</sup> However, after entering into that agreement, “the Government initially objected [to the 4-level increase] and argued that a 6-level increase . . . should have applied.”<sup>170</sup> Eventually, the “Government withdrew its objection,” but the defense argued that the prosecutor’s correction failed to adequately cure the breach.<sup>171</sup>

At sentencing, the trial court wisely and pragmatically sentenced as follows: “I think that in order to be absolutely careful, the increase for the number of victims will be plus four instead of plus six. That should eliminate any possible objection that the Government has breached the plea agreement by [initially] urging a greater number of victims.”<sup>172</sup> The trial court then “applied the 4-level adjustment . . . not the 6-level adjustment.”<sup>173</sup> Consequently, the prosecutor’s “breach was sufficiently cured by the withdrawal [of the prosecutor’s objection] *and the actions of the [trial] court*.”<sup>174</sup>

This demonstrates that it often takes the trial judge, along with the prosecutor, to effectively cure a prosecutorial breach.<sup>175</sup> And a strong argument can be made—in fact,

<sup>168</sup> *People v. Killebrew*, 330 N.W.2d 834, 842 (Mich. 1983).

<sup>169</sup> *United States v. Purser*, 747 F.2d 284, 290 (5th Cir. 2014).

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 288.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 294 (emphasis added).

<sup>175</sup> In *Purser*, the appellate court also recognized that a prosecutor’s breach could have far-ranging impact. This makes the trial judge’s decision to follow the joint recommendation even more important in ensuring that the breach was cured. More specifically, the prosecutor’s initial recommendation for a 6-level increase, which breached the plea agreement, may have influenced the PSI writer’s recommendation. *See id.* at 288 (“the probation officer acknowledged that the Government withdrew its objection [to the 4-level increase], but noted that the plea agreement only bound the Government and Purser. As a result, she recommended a 6-level increase anyway”).

it is not just an argument but the law in many states—that the judge must follow the parties’ sentence agreement even *absent* a prosecutorial breach; if the judge does not, then he or she must give the defendant the opportunity to withdraw the plea.<sup>176</sup> The only difference in the breach scenario is that, because the prosecutor breached the agreement and therefore created the problem in the first place, the defendant should be given the option of withdrawing the plea or, in the alternative, having the matter reassigned to a different judge for sentencing.<sup>177</sup>

## V. TRADITIONAL RESPONSES TO PROSECUTORIAL BREACH

Understanding why the cure doctrine fails (Part III) and knowing the limited circumstances in which it could be effective (Part IV) are important for the criminal defense lawyer when faced with this very practical question: What can defense counsel do, at the sentencing hearing, when confronted with a prosecutor’s breach of the plea agreement?

If defense counsel makes the wrong move at sentencing, it could later work to the defendant’s detriment, absolve the prosecutor of his or her misconduct, and even shift blame from the prosecutor to defense counsel.<sup>178</sup> Equally unfortunate, there are so many legal and factual variables at play in every case that they prevent the use of a uniform response to prosecutorial breaches. Nonetheless, some breaches are more easily resolved than others and may lend themselves to one of three traditional approaches.

### A. *The Passive Approach*

There are some instances of prosecutorial breach where defense counsel should take a passive approach and not even object. For example, a scenario was discussed

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<sup>176</sup> See, e.g., N.C. GEN. STAT. § 15A-1024 (“If at the time of sentencing, the judge for any reason determines to impose a sentence other than provided for in a plea arrangement between the parties, the judge must inform the defendant of that fact and inform the defendant *that he may withdraw his plea.*”) (emphasis added); CAL. PENAL CODE § 1192.5 (if the court decides not to follow a sentence concession in a plea bargain, “the defendant shall be permitted to withdraw his or her plea if he or she desires to do so.”); KY. R. CRIM. P. 8.10 (“If the court rejects the plea agreement, the court shall . . . afford the defendant the opportunity to then withdraw the plea, and advise the defendant that if the defendant persists in that guilty plea the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.”); *People v. Walker*, 46 P.3d 495, 497 (Colo. App. 2002) (“[A] defendant retains the right to withdraw the plea at or before the sentencing hearing if the court determines that it will not follow the sentence concessions”); and *Commonwealth v. White*, 787 A.2d 1088, 1093 (Pa. Super Ct. 2001) (the court may reject a sentence concession, but its refusal to then release the defendant from the rejected plea bargain “clearly defeats the defendant’s expectations and destroys the quid pro quo of the arrangement.”).

<sup>177</sup> *Santobello v. New York* 404 U.S. 257, 267 (1971) (Douglas, J., concurring) (“In choosing a remedy, however, a 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 the State.”).

<sup>178</sup> This is true when responding to most cases of prosecutorial or judicial misconduct, and a prosecutor’s plea bargain breach is no exception. Generally speaking, “[i]n addition to advocating for the client, defense counsel must also monitor the prosecutor and simultaneously perform the role of trial judge. Essentially, the defense lawyer must perform three jobs in one.” Michael D. Cicchini, *Constraining Strickland*, 7 TEXAS A&M L. REV. 351, 353 (2020) (discussing how appellate courts often hold defense lawyers accountable for not properly reacting to prosecutorial and judicial misconduct).



earlier in which the prosecutor made several points in the state’s sentencing comments that supported the parties’ joint recommendation of probation, but then failed to formally finish the job.<sup>179</sup> That is, the prosecutor neglected to explicitly say, “I recommend probation,” or words to that effect.

Under those circumstances, the prosecutor has arguably fulfilled the state’s end of the bargain in substance, if not in form. More importantly, there doesn’t seem to be any indication that the prosecutor is trying to breach the plea bargain. Therefore, unless defense counsel has reason to believe the judge is inclined to jump the joint recommendation, a prompt, mid-hearing, off-the-record reminder to the prosecutor to explicitly ask the court to impose the agreed-upon probation would probably produce an effective cure.

### B. *The Moderate Approach*

There are other situations where defense counsel should object to the prosecutor’s breach, but then simply accept the prosecutor’s attempted cure instead of asking for a remedy. This moderate, middle-of-the-road approach heeds the classic warning to be careful what you wish (or ask) for.

This approach may work in many circumstances. For example, when, in response to defense counsel’s objection, the prosecutor changes an erroneous jail recommendation to probation, he or she may offer a genuine excuse demonstrating an honest mistake rather than an underhanded attempt to obtain a more severe sentence than that agreed to in the plea bargain. Depending on the prosecutor’s apparent sincerity and perhaps the judge’s reaction—things only the defense lawyer at the hearing would be able to evaluate<sup>180</sup>—defense counsel may simply want to accept the attempted cure. And when making this snap judgment, other factors will probably come into play, including the judge’s reputation and the specifics of the plea agreement.

With regard to the judge’s reputation, he or she might be defense counsel’s ideal judge for the particular crime of conviction. For a given crime, the experienced defense lawyer may know that some judges nearly always impose probation, whereas others nearly always impose jail.<sup>181</sup> If the assigned judge is one who nearly always imposes probation, the defense would *not* request sentencing by a different judge. Instead, the defense would accept the prosecutor’s attempted cure.

With regard to the plea agreement, it is possible that the defendant’s benefit of the bargain in the case lies primarily in the charge concessions rather than the sentence concession.<sup>182</sup> For example, the defense may have obtained the dismissal of multiple felonies in exchange for the defendant’s plea to a single, low-end misdemeanor plus a favorable sentence recommendation. If there is a prosecutorial breach of the sentence recommendation in that situation, the defense probably would *not* seek the remedy of plea withdrawal. If it did, the defendant would lose nearly all of the benefit of the

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<sup>179</sup> See *supra* Part IV.B.

<sup>180</sup> See *supra* Part III.B.

<sup>181</sup> Where I practice, for example, one judge routinely imposes jail for operating a motor vehicle without a valid license, but routinely imposes a fine for drug possession crimes. Other judges routinely do the inverse, i.e., a fine for the traffic crime and probation or even jail for a drug crime.

<sup>182</sup> See *supra* Part I for a discussion of charge and sentence bargaining, and the resulting charge and sentence concessions.

bargain (the charge concessions). The defense would therefore likely accept the prosecutor’s attempted cure of the breach.<sup>183</sup>

### C. *The Aggressive Approach*

There are some situations where the defense may want to object to, and also seek a remedy for, the prosecutor’s breach. If, for example, the defense objects but the prosecutor refuses even to attempt a cure,<sup>184</sup> or does so inadequately,<sup>185</sup> the defense should strongly consider requesting a remedy. Once again, the assigned judge and the nature of the plea bargain itself would likely be important factors to consider.

And even if the prosecutor acknowledges the breach and makes a decent attempt to cure, if defense counsel does *not* like the particular sentencing judge for the crime of conviction, or if the defendant’s benefit of the bargain *does* lie in the sentence concession rather than in charge concessions, the defense may decide to move for a new sentencing judge or for the withdrawal of the defendant’s plea, respectively.

Importantly, defense counsel may be obligated to seek an adjournment of the sentencing hearing—or at least a brief delay for an off-the-record consultation—to explain these options to the defendant. Such a consultation is probably even legally required for all but the most insignificant of prosecutorial breaches, particularly if plea withdrawal is a possibility.

The reason for involving the client is this: the initial decision to accept a plea bargain and enter a guilty plea is the defendant’s, not the defense lawyer’s,<sup>186</sup> and the decision must be a “knowing, voluntary, and intelligent” one.<sup>187</sup> It is only logical, and probably is even legally required, that the subsequent decision to terminate the plea bargain and withdraw the guilty plea is made by the same person, i.e., the defendant rather than the defense lawyer, and under the same circumstances, i.e., after full consultation with the defense lawyer to ensure that the decision is fully informed and voluntarily made.<sup>188</sup>

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<sup>183</sup> To what extent defense counsel would have to first consult with the client, before accepting the prosecutor’s attempted cure, is a matter discussed in the next section.

<sup>184</sup> See, e.g., *State v. Locke*, App. No. 2012AP2029-CR (Wis. Ct. App. 2012) (intentionally breaching the agreement and then not only denying having done so but also blaming the defense for objecting to the breach).

<sup>185</sup> See, e.g., *United States v. Diaz-Jimenez*, 622 F.3d 692, 696 (7th Cir. 2010) (after the defense objected, the prosecutor did not “make the kind of unequivocal retraction” needed to correct his initial breach; instead, his subsequent “equivocation undermined his endorsement of the recommendation in the plea agreement.”).

<sup>186</sup> See *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (at the trial court level, “the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to *whether to plead guilty*, waive a jury, [and] testify in his or her own behalf”) (emphasis added); MODEL RULES OF PROF’L CONDUCT r. 1.2(a) (AM. BAR ASS’N 2011) (“In a criminal case, the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to a *plea to be entered*, whether to waive jury trial and whether the client will testify.”) (emphasis added).

<sup>187</sup> *Davis v. State*, 675 N.E.2d 1097, 1102 (Ind. 1996) (citing *Boykin v. Alabama*, 395 U.S. 238, 242-44 (1969)).

<sup>188</sup> See, e.g., *People v. Walker*, 46 P.3d 495, 497 (Colo. Ct. App. 2002) (permitting plea withdrawal when the judge’s sentence “removes the basis upon which a guilty plea was entered and draws into question the *voluntariness* of the plea.”) (emphasis added); *Commonwealth v. White*, 787 A.2d 1088, 1093 (Pa. Super. Ct. 2001) (permitting plea withdrawal under similar circumstances).

## VI. THE DEFENSE LAWYER'S DILEMMA

Unfortunately, when responding to a prosecutorial breach, the path is not always as clear-cut as the above examples indicate. Instead, courts have muddied the waters for the conscientious defense lawyer. As briefly discussed earlier,<sup>189</sup> given the current legal definition of cure it is certainly conceivable, rather paradoxically, that the defendant could be better off if defense counsel is ineffective by failing to object.

A. *Is the Best Offense a Bad Defense?*

In order to preserve the issue of prosecutorial breach for appeal, the defense lawyer must generally object near contemporaneously with the breach.<sup>190</sup> This prevents defense counsel from gaming the system on behalf of the client and “sandbagging” the court by “belatedly raising the error only if the case does not conclude in his [client’s] favor.”<sup>191</sup> Therefore, at least in federal cases, if the defense lawyer fails to object, the issue of breach could be deemed forfeited and the defendant’s only chance on appeal could be under the very difficult-to-satisfy “plain-error review.”<sup>192</sup>

But what about the vast majority of criminal cases, i.e., state-court cases, where the standard of review could be the easier-to-satisfy ineffective assistance of counsel (IAC) rather than plain error?<sup>193</sup> This may, at least in theory, create a dilemma for the defense lawyer. To illustrate, consider a recent case where the plea deal barred the prosecutor from recommending a specific sentence length,<sup>194</sup> and the prosecutor breached the deal by asking for 12 years in prison.<sup>195</sup> The defense objected, and the prosecutor “cured” by withdrawing the recommendation.<sup>196</sup> The defense then recommended “two to three years” in prison.<sup>197</sup> The judge then sentenced the defendant to 15 years in prison.<sup>198</sup> One commentator explained the defense lawyer’s conundrum this way:

As a practice note, during oral argument [on appeal] multiple justices appeared to recognize that the position taken by the state [i.e., that the prosecutor has the right to cure] might force defense attorneys to weigh *whether it is actually in their client’s best interest to object to a breach of the plea agreement at sentencing*. While failing to object forces the defendant to [later] raise the claim through the lens of ineffective assistance of counsel [IAC], and raises the specter [of] “gamesmanship,” objecting to a breach provides the prosecutor with an opportunity to

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<sup>189</sup> See *supra* Part III.E.

<sup>190</sup> See *Puckett v. United States* 556 U.S. 129, 134 (2009).

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 135.

<sup>193</sup> For the IAC test, see *Strickland v. Washington*, 466 U.S. 668 (1984).

<sup>194</sup> *State v. Nietzold*, 2023 WI 22, ¶ 4 (“[T]he State had agreed not to ‘make any recommendation with respect to any period of time.’”).

<sup>195</sup> *Id.* at ¶ 2 (in Wisconsin, the in-custody portion of a prison sentence is called “initial confinement”).

<sup>196</sup> *Id.* at ¶ 4-5.

<sup>197</sup> *Id.* at ¶ 4.

<sup>198</sup> *Id.* at ¶ 5.

“cure” the breach in a way that the defense may not believe actually remedies the breach. Consider this exchange between Justice Dallet and the assistant attorney general [AAG] representing the state at oral argument: “So, counsel, you do agree that if the defense attorney here had not said anything at all, this defendant would have received either a new sentencing or been able to withdraw his plea?” AAG: “Yep, that’s right.”<sup>199</sup>

Despite this recognition, the above justice joined in the court’s unanimous decision to dutifully rule for the state: the defense lawyer’s objection and the prosecutor’s response cured the breach, and the defendant was therefore not entitled to any remedy.<sup>200</sup> Paradoxically, had the defense lawyer been ineffective and failed to object, the defendant *would be* entitled to a remedy.<sup>201</sup>

Given this counterintuitive reality, when faced with a prosecutorial breach at sentencing should defense counsel *ever* object?<sup>202</sup> Or is defense counsel’s best offense now a bad defense? In other words, should the defense lawyer always lie in the weeds, do nothing, and remain silent? Is being ineffective (by not objecting) the new effective? Or would an appellate court deem that to be mere “gamesmanship”?<sup>203</sup> And if so, would that mean that counsel’s new effectiveness not only cost the defendant the opportunity to have the breach cured at sentencing, but also left the defendant without a remedy on appeal?

Unfortunately, the consequences of choosing the wrong course of action are borne by the defense rather than by the culpable, trouble-making prosecutor. And any defense lawyer who accepts the above court’s apparent invitation to intentionally be ineffective (by failing to object), with the goal of getting the defendant a future remedy, should be aware of at least two potential pitfalls.

First, if the defendant’s appellate counsel later raises an IAC claim based on the failure to object, defense counsel may have to testify, after the fact, about his or her decision.<sup>204</sup> The court could then decide that the defense lawyer’s *attempted* IAC was, by definition, a strategic choice and therefore does not constitute *actual* IAC.<sup>205</sup>

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<sup>199</sup> Admin, *Unanimous SCOW holds that state ‘cured’ plea breach and reversed COA order for resentencing*, ON POINT: WISCONSIN STATE PUBLIC DEFENDER (April 6, 2023) (discussing *State v. Nietzold*, 2023 WI 22) (emphasis added), at <https://www.wisconsinappeals.net/on-point-by-the-wisconsin-state-public-defender/unanimous-scow-holds-that-state-cured-plea-breach-and-reverses-coa-order-for-resentencing/>.

<sup>200</sup> Id.

<sup>201</sup> Id.

<sup>202</sup> Id. (allowing the prosecutor to cure a breach under these circumstances “might force defense attorneys to weigh whether it is actually in their client’s best interest to object to a breach of the plea agreement at sentencing.”).

<sup>203</sup> Id. (not objecting “raises the specter [of] gamesmanship”).

<sup>204</sup> See Richard Van Rheenen, *Inequitable Treatment of Ineffective Assistance Litigants*, 19 INDIANA L. REV. 159, 160 (1986) (“Obtaining an evidentiary hearing is critical to the success of most ineffective assistance claims.”). In some states or under some circumstances, the defense lawyer’s testimony could even be legally required before a defendant can prevail at such a hearing.

<sup>205</sup> See *Strickland v. Washington*, 466 U.S. 668 (1984) (finding that the defendant’s IAC claim failed on appeal because defense counsel’s “strategy choice was well within the range of professionally reasonable judgments”) (emphasis added).

Second, if the court *does* find IAC, as defense counsel was planning, being found ineffective could have repercussions. It may mean, for example, that the lawyer also committed an ethics violation by being incompetent.<sup>206</sup> An IAC finding and an ethics violation, individually or in combination, could have serious consequences for the defense lawyer.<sup>207</sup> And as far as the defendant is concerned, this could even create a paradox within a paradox. The following case, albeit involving different underlying defense-attorney conduct, captures the essence of this second-level conundrum:

Cooper [the defendant] moved for pre-sentencing plea withdrawal and filed an OLR [Office of Lawyer Regulation] grievance because . . . [d]ays before trial, his unprepared lawyer . . . rushed him into a plea. The circuit court denied Cooper’s motion [for plea withdrawal], but OLR later concluded that the lawyer committed . . . misconduct . . . directly relating to Cooper’s plea. Consequently, SCOW [the Supreme Court of Wisconsin] suspended his license. Now, in a 4-3 decision SCOW holds that the lawyer’s professional misconduct does *not* satisfy the requirements for an ineffective assistance of counsel [IAC] claim.

Cooper argued that SCOW’s decision [that the lawyer committed misconduct] . . . established that he [also] received ineffective assistance of counsel [IAC]. The majority says “no.” Drawing a hair-splitting distinction, the majority claims that its disciplinary decision did not accept OLR’s “findings of fact,” just its “conclusions of law.”<sup>208</sup>

In other words, based on nonsensical distinctions, an appellate court might find that the defense attorney was incompetent but not too incompetent. The defense attorney was incompetent enough for an ethics violation and a license suspension (which is disastrous for the defense lawyer), but paradoxically was not incompetent enough for an IAC finding or a remedy (which is disastrous for the defendant). To use yet another figure of speech, a pro-prosecutor appellate court may find a way to have its cake and eat it too, which would be a lose-lose outcome for the defense.

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<sup>206</sup> See, e.g., WIS. SUP. CT. R. 20:1.1 (“Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”); WIS. SUP. CT. R. 20:1.3 (“A lawyer shall act with reasonable diligence and promptness in representing a client.”).

<sup>207</sup> For example, the defense lawyer will have to prepare for the IAC hearing or respond to the ethics complaint; the defense lawyer may be named publicly in the defendant’s appellate decision or the ethics disciplinary matter; merely being the subject of an IAC claim or ethics complaint could impact the attorney’s ability to get work; and the attorney could be subjected to financial liability. See Cicchini, *supra* note 178, at 368-70 (discussing several of the direct and indirect costs to the defense lawyer for rendering IAC or violating the ethics rule requiring competence).

<sup>208</sup> Admin, *SCOW: professional misconduct warranting suspension does not constitute ineffective assistance of counsel*, ON POINT: WISCONSIN STATE PUBLIC DEFENDER (June 24, 2019) (discussing *State v. Cooper*, 2016AP375-CR (Wis. Ct. App. 2018) (per curiam)), at <https://www.wisconsinappeals.net/on-point-by-the-wisconsin-state-public-defender/scow-professional-misconduct-warranting-suspension-does-demonstrate-ineffective-assistance-of-counsel/>.

### B. *The Deferred Remedy Approach*

Given the risks to both defense counsel and the defendant if counsel is intentionally ineffective in the hope of getting the defendant a future remedy, the best defense in cases of prosecutorial breach may be a fourth type of response: objecting, but requesting that the court defer its ruling on remedies.

As discussed earlier, courts typically react to prosecutorial breaches with hand-wringing and fretting about how *the defense* might somehow “sandbag” the court and turn the breach to its advantage.<sup>209</sup> This reaction provides tremendous insight into the judicial mind: instead of blaming *the prosecutor*—the government agent who either intentionally breached the plea agreement or lacked the basic competence to comply with it—courts immediately attribute sinister motives *to the defense lawyer*.

But in reality, what the courts call “sandbagging” is nothing more than defense counsel protecting the client from prosecutorial misconduct or incompetence. In this regard, a prosecutorial breach at the sentencing hearing is closely analogous to prosecutorial misconduct in closing argument at jury trial. Such misconduct creates a similar dilemma for defense counsel: whether to move for a mistrial. The dilemma turns on a timing issue. More specifically:

[W]hen must the court rule on the motion [for mistrial]? In some states “a trial court may declare a mistrial up to the point the jury’s verdict is accepted. A jury’s verdict is not accepted until it is received in open court, the results announced, the jury polled, if requested, and the judgment entered.” Such timing would be ideal for the defendant. If [the] jury verdict is “not guilty,” defense counsel simply withdraws the mistrial motion and instead moves for judgment on the verdict. This timing *removes the risks associated with asking for a mistrial*.

While this may seem like an unfair advantage for the defendant, it is actually the only fair way to proceed. After all, *it was the prosecutor’s misconduct . . . that provoked the mistrial motion in the first place. Why should the prosecutor’s improper behavior force the defendant to choose between two unattractive alternatives: a tainted verdict or a costly retrial?* Fairness and efficiency require that the jury be allowed to return its verdict before any determination is made as to whether a mistrial and potential retrial are even necessary.

The question then becomes whether defense counsel has any influence over the timing of the court’s ruling. *Counsel may consider coupling a mistrial motion with the request that the court defer its ruling until after the jury returns its verdict*, stressing the fairness- and efficiency-based arguments set forth above. . . .<sup>210</sup>

<sup>209</sup> See *Puckett v. United States* 556 U.S. 129, 134 (2009) (discussing how the contemporaneous objection rule protects the courts from a defense lawyer’s “sandbagging”).

<sup>210</sup> Michael D. Cicchini, *Combating Prosecutorial Misconduct in Closing Arguments*, 70 OKLA. L. REV. 887, 929-30 (2018) (internal citations omitted) (emphasis added).

Similarly, in the case of prosecutorial breach of the plea bargain, even though defense counsel must promptly object, shouldn't counsel also "request that the court defer its ruling until after" it decides whether it will follow the plea agreement?<sup>211</sup> "Why should the prosecutor's improper behavior"—in this case, the breach—"force the defendant to choose between two unattractive alternatives"—in this case, staying quiet in the hope of a future remedy on appeal or objecting with the risk getting a hollow cure *en route* to a prison cell?<sup>212</sup> Put another way, because the prosecutor "provoked [the objection] in the first place," shouldn't the judge "remove[] the risks associated with" objecting to the prosecutor's breach?<sup>213</sup>

Deferring the issue of the remedy *guarantees* a fair outcome, including for the breaching party—which, strangely, is the only party the appellate courts seem to be concerned about. If the trial judge decides to adopt the terms of the plea agreement—e.g., by imposing probation instead of the deal-breaching prison recommendation—then the prosecutor's breach would be "sufficiently cured by . . . the actions of the [trial] court."<sup>214</sup> Both parties would have received exactly what they jointly recommended—probation—and there would be no need for a remedy.

On the other hand, if the trial judge decides not to adopt the terms of the plea agreement—and, therefore, the prosecutor's breach is not effectively cured—the judge could then address the issue of remedies. This would include the transfer of the case to another judge for sentencing (which is an option that would more accurately be classified as an alternative cure rather than a remedy).<sup>215</sup> This would ensure that the defendant receives precisely that for which he or she bargained—i.e., sentencing in front of a judge who has not been exposed to the prosecutor's breach—and nothing more. Once again, the breaching party is not harmed in any way.

In addition, the defendant should also be given the option to withdraw the plea, if that is what he or she wants to do.<sup>216</sup> This merely returns the parties to their pre-contract, pre-breach positions—something that the state could hardly complain about given that it was the prosecutor's incompetence or intentional misconduct (the breach) that created this situation in the first place. And once again, the breaching party is not harmed in any way.

To summarize, just as when a court defers its ruling on the remedy for prosecutorial misconduct at trial (until after the jury returns its verdict), deferring its ruling on the remedy for prosecutorial breach (until after it decides whether it will follow the plea deal) protects the defendant and does not harm the state. This deferred remedy approach ensures the defendant will receive, *at most*, that for which he or she bargained: either (1) an actual sentence we know for certain to be unaffected by the breach, thanks to

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<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *See, e.g., United States v. Purser*, 747 F.3d 284, 294 (5th Cir. 2014) (curing the prosecutor's breach by imposing the 4-level sentence increase agreed to in the plea bargain, despite the prosecutor's improper request for a 6-level increase).

<sup>215</sup> *See surpa* Part IV.A.

<sup>216</sup> *Santobello v. New York* 404 U.S. 257, 267 (1971) (Douglas, J., concurring) ("In choosing a remedy, however, a 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 the State.").

the judge's role in curing the breach, or (2) a sentencing hearing in front of a different judge who has not been exposed to the breach.

How could this deferred remedy approach be accomplished in practice? When the prosecutor breaches the plea agreement, defense counsel could begin his or her sentencing remarks by (1) objecting, (2) citing the prosecutor's improper sentence recommendation, and (3) restating the relevant terms of the plea agreement for the record. Assuming the prosecutor responds by changing the state's recommendation to conform to the plea agreement, defense counsel could then (4) request that the court preserve the defendant's objection, (5) ask to proceed with defense counsel's own sentencing argument, and (6) request that the court then announce, at that time, whether it intends to follow the terms of the plea agreement or, instead, provide a remedy.

And if defense counsel feels, for any number of reasons, that the breach cannot be adequately cured, he or she need not wait for the prosecutor's response. Instead, defense counsel could simply proceed from step three to step four (above), rather than giving the prosecutor the chance to attempt a half-hearted or even disingenuous cure.

Trial courts should be eager to adopt the deferred remedy approach when dealing with prosecutorial breaches. This approach not only solves the defense lawyer's dilemma,<sup>217</sup> but it is also very efficient, which is the primary justification for the cure doctrine in the first place.<sup>218</sup> That is, the case would not be transferred to another judge, nor would the defendant be allowed to withdraw the plea, unless and until it was necessary. And of course, the deferred remedy approach eliminates the greatest inefficiency of all: a costly and time-consuming appeal.

The deferred remedy approach would also solve the other problems discussed in this Article: it would prevent the "ringing bell" of the earlier prison recommendation from infecting the plea deal;<sup>219</sup> it would protect the defendant's reasonable expectations under the plea deal;<sup>220</sup> it would preserve the integrity of the system by ensuring the appearance of fairness and preventing the appearance of prosecutorial-judicial collusion;<sup>221</sup> and finally, it would not reward or encourage defense lawyer "ineffectiveness" when representing defendants at sentencing.<sup>222</sup>

Returning a final time to the issue of fairness, if the sentencing judge is concerned that this deferred remedy approach is somehow unfair to the state, defense counsel should reiterate, as explained above, that the best outcome the defendant could receive is the benefit for which he or she bargained, and nothing more. Equally important with regard to fairness, this course of action is already consistent with well-established law, or at least is already within the judge's discretion.

More specifically, in most states, even when the prosecutor *complies* with the plea deal, the defendant would be entitled to a remedy if the judge decides not to follow the

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<sup>217</sup> See *supra* Part VI.A.

<sup>218</sup> See Lawrence, *supra* note 47, at 726-27 ("The concept of cure is grounded in the belief that protecting expectations while avoiding waste is, or should be, a primary goal of contract damages.") (internal quote marks and citation omitted).

<sup>219</sup> See *supra* Part III.B.

<sup>220</sup> See *supra* Part III.C.

<sup>221</sup> See *supra* Part III.D.

<sup>222</sup> See *supra* Part III.D.



sentence concession contained in the agreement.<sup>223</sup> And even in states that do not grant a remedy as a matter of right, the judge likely has the discretion to award a remedy.<sup>224</sup> Because this authority exists even absent a prosecutorial breach, it must surely exist, and is most certainly justified, when the defendant's request (whether sentencing by a different judge or plea withdrawal) has been triggered by the prosecutor's breach of the plea bargain—the very plea bargain that induced the defendant to plead guilty in the first place.

## CONCLUSION

Plea bargains are contracts and are governed, at a minimum, by contract law principles.<sup>225</sup> Therefore, when a prosecutor breaches a plea bargain—e.g., by recommending prison instead of the agreed-upon joint recommendation for probation—the defendant is entitled to a remedy: either sentencing in front of a different judge who is unaffected by the breach, or plea withdrawal, in which case the prosecutor will have to strike a new plea deal or go to trial.<sup>226</sup>

However, instead of giving the defendant a remedy, many courts have curiously awarded the prosecutor the right to cure the breach—e.g., by walking-back the original prison request and eventually recommending the agreed-upon probation.<sup>227</sup> Further, appellate courts will deem the original breach to be cured even if the sentencing judge ignored the prosecutor's corrective recommendation and sentenced the defendant to prison, as the prosecutor originally requested.<sup>228</sup>

The right to cure does not work well in the plea-bargain arena.<sup>229</sup> Continuing with the above example, the attempted cure of the earlier prison recommendation comes too late, after the time for the prosecutor's performance has passed.<sup>230</sup> And as a practical matter, it is also impossible to un-ring the bell of the earlier recommendation; by the time the prosecutor asks for probation, the cat is out of the bag and the judge knows that the prosecutor really wants prison.<sup>231</sup>

When the prosecutor recommends prison before eventually recommending probation, he or she also violates the defendant's reasonable expectations, as the defendant did not bargain for the prosecutor's self-contradictory, mixed message.<sup>232</sup> Further, when the prosecutor improperly recommends prison and the judge dutifully

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<sup>223</sup> See *supra* footnote 176 citing statutes and cases from several states which provide the defendant a remedy under these circumstances.

<sup>224</sup> See, e.g., WIS. J.I. CRIM. SM-32 (2021) (Although not required to do so, “[s]ome Wisconsin judges prefer the practice of letting the defendant know if a plea agreement recommends a disposition that the judge finds to be unacceptable and afford the defendant the opportunity to withdraw the guilty plea at that point. . . . This is similar to the practice recognized by the ABA Standards for Criminal Justice, which allows the parties to give advance notice of the plea agreement to the judge and allows the judge to indicate whether he or she would concur in the agreement”).

<sup>225</sup> See *supra* Part I.

<sup>226</sup> See *supra* Part II.

<sup>227</sup> See *supra* Part II.

<sup>228</sup> See *supra* Part III.

<sup>229</sup> See *supra* Part III.

<sup>230</sup> See *supra* Part III.A.

<sup>231</sup> See *supra* Part III.B.

<sup>232</sup> See *supra* Part III.C.

imposes it, that sequence of events gives the impression of collusion between the prosecutor and judge, diminishing if not destroying the ever-important appearance of fairness.<sup>233</sup>

Perhaps most importantly, by misapplying the right to cure, courts create a dilemma for the defense lawyer who must decide how to respond to a prosecutor's breach: (1) *don't object*, the prosecutor will therefore not be able to cure, and if the judge imposes a prison sentence the defendant will likely get a remedy on appeal as defense counsel was "ineffective" in not objecting; or (2) *object*, the prosecutor may halfheartedly cure, and if the judge imposes a prison sentence anyway the defendant will not get a remedy because the breach was supposedly cured before sentencing—paradoxically, thanks to the defense lawyer's "effectiveness" in objecting.<sup>234</sup>

The multiple legal and factual variables in any given case conspire against the development of a uniform response to prosecutorial breach.<sup>235</sup> Therefore, this Article discusses three possible responsive approaches for the defense lawyer: a passive approach,<sup>236</sup> a moderate approach,<sup>237</sup> and an aggressive approach.<sup>238</sup> Further, in an effort to solve the above defense-lawyer paradox, this Article proposes a fourth response: the deferred remedy approach.<sup>239</sup>

More specifically, defense counsel should object to the prosecutor's breach and ask the court to defer its ruling on remedies until after it hears defense counsel's sentencing remarks and decides whether it will adopt the plea bargain, despite the earlier breach.<sup>240</sup> Continuing with the above example, if the court adopts the plea bargain and imposes probation, then there is no need for a remedy; on the other hand, if the court rejects the plea bargain and would instead impose a different sentence, the court could award a remedy at that time.<sup>241</sup>

This deferred remedy approach corrects all of the problems caused by the courts' misapplication of the right to cure.<sup>242</sup> Most importantly, this approach is fair, as it was the prosecutor who breached the plea deal and created the problem in the first place; nonetheless, this approach protects not only the defendant, but also the breaching party.<sup>243</sup> That is, if the court follows this approach, the defendant could receive *only* the benefit for which he or she bargained—i.e., an actual sentence we know to be unaffected by the breach, or a sentencing hearing in front of a different judge who was not even exposed to the breach—and nothing more.<sup>244</sup>

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<sup>233</sup> See *supra* Part III.D.

<sup>234</sup> See *supra* Parts III.E and VI.A.

<sup>235</sup> See *supra* Parts V and VI.

<sup>236</sup> See *supra* Part V.A.

<sup>237</sup> See *supra* Part V.B.

<sup>238</sup> See *supra* Part V.C.

<sup>239</sup> See *supra* Part VI.B.

<sup>240</sup> See *supra* Part VI.B.

<sup>241</sup> See *supra* part VI.B.

<sup>242</sup> See *supra* Parts III.A.-III.E.

<sup>243</sup> See *supra* Part VI.B.

<sup>244</sup> See *supra* Part VI.B.