0335–0001, for example, is simply: "provided that . . . the administrative justice of said Boston municipal court department shall serve as the administrative justice of the housing court." The wording of the other two provisions is nearly identical. Contrast this language with "subject, however, to the condition that," used in the provision considered in *Opinion of the Justices*, 294 Mass. 616, 619, 2 N.E.2d 789 (1936), and "no funds authorized under this item shall be allowed to pay for," used in the provision considered in *Opinion of the Justices*, 373 Mass. 911, 912, 370 N.E.2d 1350 (1977). This contrast in wording further buttresses our conclusion that the provisions were not conditions or restrictions on the appropriations involved.

We conclude that the provisions in line items 0335–0001, 0336–0100, and 0336–0200 disapproved by the Governor are separable provisions which the Governor properly treated as separate items and disapproved under § 5 of art. 63 of the Amendments to the Massachusetts Constitution.

2. The second reported question asks whether the defendant lacks authority to hold the office of Administrative Justice of the Housing Court Department because another Trial Court justice continues to hold and to exercise the duties of the office. Because the answer given to the first reported question is dispositive of the case, we need not answer the second.

We note, however, that the Attorney General and amici curiae raise the difficult issue whether the constitutionally protected tenure of the incumbent Administrative Justice of the Housing Court Department is impermissibly affected because the language at issue is an isolated instance of legislative alteration of a particular judicial office. They argue that the contested provisions are an unconstitutional legislative appointment of a judicial officer. Compare *Opinion of the Justices*, 372 Mass. 883, 902–905, 363 N.E.2d 652 (1977). Further, the assertion is that the legislative language is an implied repeal of § 332 of the Court Reorganization Act (St.1978, c. 478), but they question whether an appropriation act could effect any change beyond the related fiscal year. These arguments raise significant constitutional questions which need not be addressed here.

The case is remanded to the county court where an order is to be entered consistent with this opinion and consistent with our conclusions that the Governor lawfully disapproved the legislative provisions here in issue, that the Administrative Justice of the Boston Municipal Court Department does not validly hold title to the additional position of Administrative Justice of the Housing Court Department, and that the general appropriation bill (St.1981, c. 351) as disapproved in part by the Governor has had no effect upon the standing of E. George Daher as Administrative Justice of the Housing Court Department of the Trial Court.

So ordered.

COMMONWEALTH

v.

Hubert Lee SMITH, Jr.

Supreme Judicial Court of Massachusetts, Suffolk.

Argued Sept. 15, 1981.

Decided Oct. 29, 1981.

Defendant was convicted in the Superior Court, Suffolk County, McGuire, J., of murder in the first degree, he appealed, following denial of his motion for new trial. The Supreme Judicial Court, Wilkins, J., held that no enforceable agreement was made when defendant attempted to accept prosecutor's offer, which was made before trial and renewed during early portion of trial, after jury had retired and had come back to ask certain questions which implied that a verdict of guilty of murder in the

first degree would be returned against defendant since the plea bargain offer was not in effect when jury returned with questions; furthermore, even if offer had been outstanding at time jury returned, defendant made no showing that he relied on prosecutor's promise to his detriment.

Affirmed.

1. **Criminal Law** ⇐273.1(2)

The Supreme Judicial Court will enforce a prosecutor's promise where defendant has reasonably relied on that promise to his detriment.

2. **Criminal Law** ⇐273.1(2)

Where defendant has accepted a prosecutor's offer in circumstances in which, on principles of contract law, there would be an enforceable contract, defendant may obtain relief if he has been harmed by his reliance on a promise on which prosecutor has reneged.

3. **Criminal Law** ⇐273.1(2)

Court will go beyond contract principles to order specific performance of a prosecutor's promise even where no contract may have existed, if, on principles of fundamental fairness encompassed within notions of due process of law, the promise should be enforced. U.S.C.A.Const.Amend. 14.

4. **Criminal Law** ⇐273.1(2)

Test as to whether there was an enforceable plea bargain is whether defendant had reasonable grounds for assuming his interpretation of the bargain and whether he relied on that interpretation to his detriment; prosecutor's own view of his promise to defendant is irrelevant.

5. **Criminal Law** ⇐273.1(2)

No enforceable agreement was made when defendant attempted to accept prosecutor's offer, which was made before trial and renewed during early portion of trial, after jury had retired and had come back to ask certain questions which implied that a verdict of guilty of murder in the first degree would be returned against defendant since the plea bargain offer was not in effect when jury returned with questions; furthermore, even if offer had been outstanding at time jury returned, defendant made no showing that he relied on prosecutor's promise to his detriment.

6. **Criminal Law** ⇐1014

In general practice, to avoid piecemeal appellate consideration of case, a defendant's appeal from his conviction should, when possible, be combined for review with his appeal from denial of any motion for new trial.

7. **Criminal Law** ⇐1134(1)

The Supreme Judicial Court's duty under statute governing review of capital cases, to consider entire case in determining whether, in interest of justice, relief should be granted does not depend on defendant's making particular contentions before Court. M.G.L.A. c. 278, § 33E.

Brian M. McMahon, Boston (Calvin J. Wier, Roxbury, with him), for defendant.

Thomas J. Mundy, Jr., Asst. Dist. Atty., for the Commonwealth.

Before HENNESSEY, C. J., and WILKINS, LIACOS, ABRAMS, NOLAN and LYNCH, JJ.

WILKINS, Justice.

The defendant challenges his conviction for murder in the first degree. He raises the issue of how long an offer made by the prosecutor during plea bargain negotiations remained open, when, as here, there was no detrimental reliance on the offer. The defendant claims that the prosecutor's offer permitted him to plead guilty to murder in the second degree even after the jury had retired and had come back to ask certain questions which implied that a verdict of guilty of murder in the first degree would be returned against the defendant. We agree with the trial judge, who denied the defendant's motion for a new trial, that no enforceable agreement was made when the defendant attempted to accept the prosecutor's offer made before trial and renewed during the early portion of the trial. The

defendant's appeal from his conviction is also before us, although no separate argument is made on the appeal. We see no reason pursuant to G. L. c. 278, § 33E, to disturb the jury's verdict.[1]

1. The defendant, then twenty-one years old, and one Hill, then fifteen years old, were charged with committing murder on February 10, 1978. The evidence indicated that the defendant, and not Hill, had used the murder weapon. They were tried together in October, 1978. Before trial and during trial, counsel for the defendant indicated that his client was anxious to plead guilty to murder in the second degree. The prosecutor said that he would take such a plea from the defendant only if Hill also pleaded guilty to murder in the second degree.[2] Counsel for Hill indicated that Hill would not enter into any plea negotiations, and Hill maintained this position throughout the trial. The case was submitted to the jury. In the course of their deliberations the jury sent three questions to the judge. These questions, which are quoted in the margin,[3] indicated that the jury were likely to find the defendant (who was the older of the two and who allegedly fired the fatal shot) guilty of murder in the first degree and Hill guilty either of murder in the first degree or murder in the second degree.[4]

After considerable discussion and consideration of the likely effect of the questions, Hill pleaded guilty to murder in the second degree. The prosecutor did not object to the reception of such a plea. Hill's plea was accepted, and he was sentenced. Counsel for the defendant urged that the same plea be accepted from his client, but the prosecutor opposed it. He said that the defendant was the more culpable of the two and that he regarded all plea negotiations to have ended when the jury received the case. The judge rejected the tendered plea and answered the questions. The jury, now only concerned with the defendant, returned a verdict of guilty of murder in the first degree.

In passing on the defendant's motion for a new trial, the judge found that there had been no agreement at the time the jury received the case. We construe this to mean that the prosecutor's conditional plea bargain offer was no longer outstanding at that time. He further found that all negotiations had terminated when the case went to the jury. He also found that the defendant had not shown that he had relied to his substantial detriment on the prosecutor's agreement and that the defendant's position was not prejudiced by reliance on any promise by the prosecutor.

[1, 2] We will enforce a prosecutor's promise where the defendant has reasonably relied on that promise to his detriment. *Commonwealth v. Benton*, 356 Mass. 447,

1. The defendant was also convicted of assault with intent to rob while armed and of unlawfully carrying a firearm. The defendant does not challenge these convictions before us, and we consider them as not being properly here on appeal.

2. The defendant does not challenge the "package deal," which required pleas from each defendant as a condition of the bargain. Such an arrangement has survived challenge. See *United States v. Bambulas*, 571 F.2d 525, 526–527 (10th Cir. 1978); *People v. Barnett*, 113 Cal. App.3d 563, 573, 170 Cal.Rptr. 255 (1980). Cf. *Commonwealth v. Balliro*, 370 Mass. 585, 589–590, 350 N.E.2d 702 (1976).

3. "1. Does a vote of guilty of committing armed robbery which resulted in a murder require the jury to vote guilty of first degree murder or do we have a choice between first and second degree?

"2. If we do have the option of finding the defendant guilty of murder two, can you give us an example of how this situation might occur?

"3. Can we find one defendant guilty of murder one and the other of murder two, or does the law preclude this possibility if both are guilty of a felony-murder?"

4. The questions were particularly perceptive in asking about a jury's authority to return a verdict of murder in the second degree when a murder has occurred in the commission or attempted commission of a crime punishable by life imprisonment. See *Commonwealth v. Dickerson*, 372 Mass. 783, 795–796, 364 N.E.2d 1052 (1977); *id.* at 802, 364 N.E.2d 1052 (Quirico, J., concurring); *id.* at 812–813, 364 N.E.2d 1052 (Braucher, J., concurring).

448, 252 N.E.2d 891 (1969). See *Commonwealth v. Spann*, —— Mass. ——, ——, Mass. Adv.Sh. (1981) 681, 684, 418 N.E.2d 328; *Commonwealth v. Tirrell*, —— Mass. ——, ——, Mass.Adv.Sh. (1981) 334, 344, 416 N.E.2d 1357. Certainly, where a defendant has accepted a prosecutor's offer in circumstances in which, on principles of contract law, there would be an enforceable contract, the defendant may obtain relief if he has been harmed by his reliance on a promise on which the prosecutor has reneged. See *Santobello v. New York*, 404 U.S. 257, 262, 92 S.Ct. 495, 499, 30 L.Ed.2d 427 (1971).

[3] We would go beyond contract principles to order specific performance of a prosecutor's promise even where no contract may have existed, if, on principles of fundamental fairness encompassed within notions of due process of law, the promise should be enforced. Although some would take the view that a prosecutor's promise made in the course of plea bargaining should be enforced even where the defendant did not reasonably rely on that promise to his detriment, at least where no intervening, extenuating circumstances exist (see *Commonwealth v. Tirrell, supra* —— Mass. at ——, ——, at 345–346, 416 N.E.2d 1357 [Kaplan, J., dissenting]; *Cooper v. United States*, 594 F.2d 12, 18–19 [4th Cir. 1979]), we have not gone that far. See *Commonwealth v. Tirrell, supra* —— Mass. at ——, at 344, 416 N.E.2d 1357; *Blaikie v. District Attorney for the Suffolk Dist.*, 375 Mass. 613, 618, 378 N.E.2d 1368 (1978). Where there is no detrimental reliance and a prosecutor's offer to accept a plea is withdrawn, the defendant is left with the adequate remedy of having a trial. See *Government of the Virgin Islands v. Scotland*, 614 F.2d 360, 365 (3rd Cir. 1980); *People v. Barnett*, 113 Cal. App.3d 563, 574, 170 Cal.Rptr. 255 (1980). The defendant is in no worse position than he would have been if the prosecutor had made no plea bargain offer at all. *Id.* A defendant has no right to insist that the prosecutor participate in plea bargaining. *Weatherford v. Bursey*, 429 U.S. 545, 561, 97 S.Ct. 837, 846, 51 L.Ed.2d 30 (1977).

[4] While we will protect a defendant's reasonable expectations where he has been harmed by his reliance on a prosecutor's promise, we should not unnecessarily restrict the plea bargaining process. By a careful phrasing of his plea bargain agreement, a prosecutor, of course, can control the duration and scope of his offer. The rule we have adopted gives prosecutors substantial freedom to exercise their discretion in plea bargaining, while protecting defendants' reasonable expectations. The test as to whether there was an enforceable promise is "whether the defendant had reasonable grounds for assuming his interpretation of the bargain" (*Blaikie v. District Attorney for the Suffolk Dist., supra* at 616 n.2, 378 N.E.2d 1368) and whether he relied on that interpretation to his detriment. The prosecutor's own view of his promise to the defendant is irrelevant. *Id.*

[5] Turning to the circumstances of the case before us, we conclude that the plea bargain offer was not in effect when the jury returned with questions for the judge. In the normal course of events, in the absence of an explicit agreement to the contrary, we would expect no defendant reasonably to believe that a plea bargain offer was outstanding after the case was submitted to the jury. Certainly, the defendant here had no reasonable basis to assume the offer was viable at the time the jury asked questions strongly indicating that the defendant was likely to be found guilty of murder in the first degree. The reasons for the prosecutor to accept a plea bargain had ceased to exist. The trial had been held, and, thus, the motivation to conserve prosecutorial and judicial resources no longer prevailed. The risk that the evidence would not support the charges was gone. And, because of the implication of the jury's questions, the possibility that the jury might return a verdict less than that sought by the prosecution was substantially reduced.

We note that, even if the offer had been outstanding at the time the jury returned with their questions, the defendant has made no showing that he relied on the prosecutor's promise to his detriment. His

trial tactics were not affected in any respect. Nor should they have been, because it was clear, until the jury asked their questions, that the defendant Hill was not going to plead guilty to murder in the second degree, and, hence, the condition of the prosecutor's promise was not going to arise.

[6] 2. Although there is an assignment of errors in the record before us, the defendant has not argued any assignment of error, except the issue which is also raised by his motion for a new trial. Consistent with his principal contention before us, the defendant argues only that we should exercise our authority under G. L. c. 278, § 33E, to order the entry of a verdict of guilty of murder in the second degree. Thus the defendant advances no argument that any other error of law in the course of the trial warrants a new trial or the entry of a verdict of guilt of a lesser offense. In general practice, to avoid piecemeal appellate consideration of a case, a defendant's appeal from his conviction should, when possible, be combined for review with his appeal from the denial of any motion for a new trial.

[7] Our duty under G. L. c. 278, § 33E, to consider the entire case and determine whether, in the interests of justice, relief should be granted does not depend on the defendant's making particular contentions before this court. *Commonwealth v. Brown*, 376 Mass. 156, 166–168, 380 N.E.2d 113 (1978). In this case, the absence of focused argument under G. L. c. 278, § 33E (beyond the one issue advanced), makes our task more difficult and may suggest that defense counsel does not regard any other possible argument as meritorious. In any event, we have fulfilled our obligation and see no reason to order a new trial or the entry of a verdict of a lesser degree of guilt.

Order denying the motion for a new trial affirmed.

Judgment on the murder indictment affirmed.

DISTRICT ATTORNEY FOR the HAMPDEN DISTRICT

v.

Charles T. GRUCCI.

Supreme Judicial Court of Massachusetts, Hampden.

Argued Sept. 17, 1981.

Decided Oct. 29, 1981.

District attorney brought action for declaratory judgment concerning duties and obligations of member of board of selectmen in relation to conflict of interest law under circumstances under which board licensed and regulated sellers of alcoholic beverages and under which such member was sales manager for wholesale liquor company. The Superior Court, Hampden County, Cross, J., reported the case to Appeals Court. After granting district attorney's request for direct appellate review, the Supreme Judicial Court, Wilkins, J., held that granting declaratory relief would not be appropriate, in light of fact that the member was no longer a selectman and that Court did not have sufficient facts before it to reach meaningful conclusion concerning his possible violation of conflict of interest law's provision relating to required standards of conduct.

Complaint dismissed.

1. Declaratory Judgment ⇐61

Actual controversy is essential to the granting of declaratory relief, and the mere assertion of possibilities does not present a dispute between the parties. M.G.L.A. c. 231A, § 1.

2. Towns ⇐37

Other members of town board of selectmen are appropriate parties to invoke, against another member of board, the con-