

# DEAL JUMPERS

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*Fundamental fairness dictates that when a criminal defendant enters a plea in exchange for the prosecutor's sentence concession, the defendant should actually receive the sentence for which he or she bargained. Surprisingly, however, many states permit the judicial practice of deal jumping: the judge can accept the defendant's plea, disregard the sentence concession that induced the plea in the first place, and then sandbag the defendant with any punishment the judge wishes to impose. Worse yet, the hapless defendant is left without recourse, unable to withdraw his or her plea.*

*Deal jumping is fundamentally unfair to defendants and harmful to the criminal justice system—a system that relies on plea bargains for more than 95 percent of its convictions. To ensure fairness, transparency, and integrity in plea bargaining, state legislatures should eliminate deal jumping and require judges to approve or reject sentence concessions at the same time they approve or reject charge concessions: before accepting the defendant's plea. Alternatively, if a judge accepts the defendant's plea but then decides to exceed the agreed-upon sentence, the defendant should be allowed to withdraw his or her plea and proceed to trial.*

*Legal reform to eliminate deal jumping is simple to implement and has garnered broad-based support; nonetheless, state legislatures often resist change, clinging blindly to the status quo. Therefore, this Article also provides defense lawyers with a practical plea-bargaining strategy to protect their clients. Defense counsel should consider invoking little-known but effective legal rules—rules which exist in many states—to constrain judicial abuse, provide greater certainty at sentencing, and even ensure the defendant receives the actual benefit for which he or she bargained.*

INTRODUCTION .....	2
I. PLEA BARGAINING: THE ART OF THE DEAL .....	3
II. THE PROBLEMS WITH DEAL JUMPING .....	7
A. <i>Fundamental Unfairness</i> .....	8
B. <i>Harm to the Innocent, Risk-Averse Defendant</i> .....	9
C. <i>Perverse Incentives for Prosecutors</i> .....	10
1. Undercutting the Recommendation .....	11
2. Pulling an End-Around .....	13
3. Breaching the Agreement .....	16
III. A SIMPLE PLAN FOR LEGISLATIVE REFORM .....	18

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IV. CRITIC'S CORNER: ARGUMENTS AGAINST REFORM .....	20
A. <i>Judicial Discretion</i> .....	21
B. <i>Judicial Independence</i> .....	24
C. <i>Fair Warning</i> .....	26
D. <i>The Benefit of the Bargain</i> .....	27
V. AN INTERIM PLEA BARGAINING STRATEGY .....	28
CONCLUSION .....	33

## INTRODUCTION

The vast majority of criminal cases resolve by plea bargain.<sup>1</sup> Typically, a plea bargain involves the defendant agreeing to plead to one or more counts in exchange for charge and sentence concessions from the prosecutor.<sup>2</sup> For example, the defendant may agree to plead to one count in the criminal complaint; in exchange, the prosecutor will dismiss the other count (a charge concession) and recommend a fine instead of probation, jail, or prison (a sentence concession).

In many jurisdictions, when the defendant self-convicts by pleading guilty or no contest, he or she is entitled to the benefit of the bargain: in the above example, a fine.<sup>3</sup> However, other jurisdictions allow the judge to completely disregard the agreed-upon sentence and impose whatever punishment the judge wishes.<sup>4</sup> To continue with the above example, after accepting the defendant's plea, the judge could disregard the fine recommendation and impose probation, jail, or even prison—up to the maximum allowed by law. Worse yet, the defendant would be stuck without any recourse, unable to withdraw his or her plea.<sup>5</sup>

This insidious, sandbagging practice is colloquially known as *deal jumping*, and the judges who engage in it as *deal jumpers*. Deal jumping is problematic in many ways. To begin, it is fundamentally unfair, as the defendant is induced to give up valuable constitutional rights—thus saving the prosecutor the time, cost, effort, and risk of trying to win a conviction at trial—for what turns out to be an illusory bargain.<sup>6</sup> Further, deal jumping impacts innocent but risk-averse defendants (who enter into plea agreements to avoid the great uncertainty of a jury trial) most severely.<sup>7</sup>

In addition to these fundamental flaws, deal jumping also creates perverse incentives for prosecutors. Because prosecutors know they can induce a defendant to plead in exchange for a sentence concession the judge can later disregard, prosecutors have developed several sentencing strategies that *technically* comply with their plea-bargain obligations, yet also convey to the judge that a greater sentence should be imposed than that ostensibly recommended in the plea deal.<sup>8</sup> Such tactics not only clog

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<sup>1</sup> See Part I (discussing state and federal plea bargain statistics).

<sup>2</sup> See id. (discussing the forms of plea bargains).

<sup>3</sup> See id. (discussing examples from courts in Texas and California).

<sup>4</sup> See id. (discussing examples from Federal courts and courts in Wisconsin, New York, and Florida).

<sup>5</sup> See id.

<sup>6</sup> See Part II.A. (discussing the reasoning of a Pennsylvania court).

<sup>7</sup> See Part II.B. (discussing why innocent defendants plead and why deal-jumping judges are more likely to jump those plea deals).

<sup>8</sup> See Part II.C. (discussing prosecutorial tactics used to induce defendants to plead and then convince judges to exceed the bargained-for sentence).

up the courts with time-consuming and costly post-conviction motions and appeals, but they also damage the integrity of the justice system<sup>9</sup>—a system that relies on plea bargaining for more than 95 percent of its criminal convictions.<sup>10</sup>

Fortunately, it is incredibly easy to eliminate deal jumping without infringing upon judicial discretion.<sup>11</sup> Several states already prohibit the practice by requiring judges to approve or reject sentence concessions at the same time they approve or reject charge concessions: *before* the defendant enters a plea.<sup>12</sup> Similarly, other states allow judges to exceed the parties' agreed-upon sentence, but if a judge decides to do so, he or she must give the defendant the opportunity to withdraw the plea and proceed to trial instead of being sandbagged.<sup>13</sup> Both of these alternative systems preserve the judge's discretion to reject those agreements deemed not in the public's interest, yet also ensure fairness, integrity, and transparency in the plea bargaining process.<sup>14</sup>

Unfortunately, several states still allow deal jumping; however, the arguments in support of this practice are at best unpersuasive, and at worst are contrary to facts, logic, and legal theory.<sup>15</sup> That is why proposed legal reform has garnered broad-based support, as several prominent legal organizations and even some prosecutors would abolish deal jumping.<sup>16</sup>

Although such legal reform is relatively uncontroversial and badly needed, legislatures can still be very slow to act. Therefore, while this Article does advocate for legal reform, it also acknowledges a painful reality: law reviews are filled with great ideas that, no matter how easily they could be implemented, will never impact the law in any way.<sup>17</sup> For that reason, this Article also makes a more useful contribution by providing defense lawyers with a practical strategy for protecting their clients from deal jumpers.<sup>18</sup>

More specifically, even in states that allow judges to jump sentence agreements and sandbag defendants on plea deals, there are often little-known or limited exceptions that can be used to protect defendants' rights.<sup>19</sup> This Article demonstrates how counsel may, depending upon the particular state's law, use such legal nuances to ensure that the prosecutor's sentence recommendation is not illusory and the defendant actually receives the benefit for which he or she bargained.<sup>20</sup>

## I. PLEA BARGAINING: THE ART OF THE DEAL

It would be an understatement to say that “the majority” of criminal cases resolve by plea deal. More accurately, “The criminal justice system now disposes of virtually all

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<sup>9</sup> See Part II (discussing the negative impact of deal jumping).

<sup>10</sup> See Part I.

<sup>11</sup> See Part IV.A. (discussing how the elimination of deal jumping would, *at most*, move the judge's exercise of discretion to an earlier stage of the proceedings).

<sup>12</sup> See Part III (discussing the statute in Massachusetts).

<sup>13</sup> See id. (discussing statutes in Kentucky, California, and North Carolina).

<sup>14</sup> See Parts II.A. and II.B.

<sup>15</sup> See Parts IV.A.–IV.D. (debunking four common arguments in favor of deal jumping).

<sup>16</sup> See Part II.A. (discussing the Wisconsin DOJ's support for the elimination of deal jumping).

<sup>17</sup> See Part V (discussing the futility of most legal reform initiatives).

<sup>18</sup> See id. (discussing a strategy to constrain judicial abuse).

<sup>19</sup> See id. (discussing little-known case law and statutes in Wisconsin, Kansas, and Utah).

<sup>20</sup> See id. (providing a sample motion for possible use in court).

cases of serious crime through plea bargaining.”<sup>21</sup> In some jurisdictions “as many as 99 percent of all felony convictions are by plea.”<sup>22</sup> Even conservative estimates put the overall figure, for felonies and misdemeanors, at 95 percent or higher.<sup>23</sup> And in misdemeanor cases, defendants are routinely ground-up in the plea bargaining apparatus with fewer constitutional safeguards than in felony cases.<sup>24</sup> In other words, plea bargaining “is not some adjunct to the criminal justice system; it *is* the criminal justice system.”<sup>25</sup>

Broadly defined, a plea bargain is “any agreement between the prosecutor and the defendant whereby a defendant agrees to perform some act or service (usually but not always the entry of a plea) in exchange for more lenient treatment by the prosecutor.”<sup>26</sup> As this definition suggests, plea deals come in many shapes and forms.<sup>27</sup> This Article will focus on the simplest and most common type of plea deal: the defendant agrees to plead to one or more charges in exchange for charge and sentence concessions from the prosecutor.<sup>28</sup>

To illustrate, suppose a defendant is charged with two counts: (1) possession of marijuana,<sup>29</sup> and (2) possession of drug paraphernalia.<sup>30</sup> In exchange for the defendant’s plea to count one, the state may offer to dismiss count two (a charge concession). Further, with regard to count one, the crime of conviction, the state may offer a fine instead of incarceration or probation (a sentence concession). These two components of plea bargaining are appropriately called “charge bargaining” and “sentence bargaining.”<sup>31</sup>

In many jurisdictions, a defendant who enters into the above plea deal would be entitled to the sentence for which he or she bargained: a fine. The United States Supreme Court has even held that “when a plea rests in any significant degree on a promise or agreement of the prosecutor . . . such promise must be fulfilled.”<sup>32</sup> Many courts, including at least some of those in Texas, read this mandate to apply not only to the

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<sup>21</sup> John H. Langbein, *Torture & Plea Bargaining*, 46 U. CHI. L. REV. 3, 9 (1978).

<sup>22</sup> Id.

<sup>23</sup> See Darryl K. Brown, Response, *What’s the Matter with Kansas—and Utah?: Explaining Judicial Interventions in Plea Bargaining*, 95 TEX. L. REV. SEE ALSO 47, 62 (2017) (“All this has allowed state and federal courts to reach guilty plea rates of 96 to 99 percent.”) (citing recent U.S. Sentencing Commission and Virginia Criminal Sentencing Commission statistics).

<sup>24</sup> See Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 101, 104 (2012) (“Misdemeanants routinely plead to low-level crimes for which there is little or no evidence, without assistance of counsel or any other meaningful adversarial process.”).

<sup>25</sup> Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992).

<sup>26</sup> State v. Thompson, 426 A.2d 14, 15 n.1 (Md. Ct. Spec. App. 1981) (parenthetical added).

<sup>27</sup> See Michael D. Cicchini, *Broken Government Promises: A Contract-Based Approach to Enforcing Plea Bargains*, 38 N.M. L. REV. 159, 160-61 (2008) (providing several examples of plea bargains).

<sup>28</sup> See People v. Killebrew, 330 N.W.2d 834, 838 (Mich. 1983) (“In essence, the practice [of plea bargaining] involves the act of self-conviction by the defendant in exchange for various official concessions.”).

<sup>29</sup> Not only is possession of marijuana still illegal in many states, but even so-called “simple possession” of a small amount for personal use can be a felony. See, e.g., WIS. STATS. § 961.41 (3g) (e) (2017-18) (“If a person possesses or attempts to possess tetrahydrocannabinols . . . the person may be fined not more than \$1,000 or imprisoned for not more than 6 months or both upon a first conviction and *is guilty of a Class I felony for a 2nd or subsequent offense.*”) (emphasis added).

<sup>30</sup> See, e.g., WIS. STATS. § 961.573 (2017-18).

<sup>31</sup> Killebrew, 330 N.W.2d at 836.

<sup>32</sup> Santobello v. New York, 404 U.S. 257, 262 (1971).

prosecutor's obligation to recommend the bargained-for sentence, but also the judge's obligation to impose it.<sup>33</sup> "[W]hen a plea bargain agreement is reached, *it must be enforced* as agreed to, or the defendant must be given an opportunity to withdraw his plea."<sup>34</sup>

Similarly, some California courts have held that, while the judge is free to reject a plea deal upfront, once he or she accepts the defendant's plea "the defendant cannot be sentenced . . . to a punishment more severe than that specified" in the plea deal.<sup>35</sup> Conversely stated, "A sentence that imposes a punishment more severe . . . violates not only [the California statute] but also implicates due process concerns and raises a constitutional right to some remedy."<sup>36</sup> Many other states—as of the year 2000, "a small majority of states"<sup>37</sup>—generally agree with these Texas and California courts, though sometimes with subtle but important nuances.<sup>38</sup>

In other 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. Rather than imposing the bargained-for sentence, judges in some states are free to completely disregard it and instead impose *whatever sentence they wish*.

For example, "In Wisconsin, a trial court is *not* bound by the state's sentence recommendation under a plea agreement."<sup>39</sup> More significantly, "Under this procedure, failure to receive sentence concessions contemplated by a plea agreement is *not* a basis for withdrawing a guilty plea[.]"<sup>40</sup> Applying this procedure to the earlier marijuana plea bargain example, this means that, even though the defendant entered a plea of guilty in exchange for the prosecutor's sentence concession of a *fine*, the judge is free to ignore the parties' agreement and send the defendant *to prison* instead.<sup>41</sup>

Many states freely permit—or have permitted, or at least permit under certain circumstances—this insidious, sandbagging practice. For example, in a New York case, the defendant pled to several charges in exchange for the prosecutor's recommendation of "six years of confinement."<sup>42</sup> After accepting the defendant's guilty pleas, however, the

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<sup>33</sup> See Zinn v. State, 35 S.W. 3d 283 (Tex. Ct. App. 2000).

<sup>34</sup> Id. at 285 (emphasis added).

<sup>35</sup> People v. Brown, 54 Cal. Rptr. 3d 887, 893 (Ct. App. 2007) (citing the applicable California statute) (emphasis and ellipses omitted).

<sup>36</sup> Id.

<sup>37</sup> State v. Williams, 236 Wis. 2d 293, 311 (2000).

<sup>38</sup> See Annotation, *Right to Withdraw Guilty Plea in State Criminal Proceeding Where Court Refuses to Grant Concession Contemplated by Plea Bargain*, 66 A.L.R. 3d 902 (supp. 1999). See also Commonwealth v. White, 787 A.2d 1088, 1092 (Penn. Sup. Ct. 2001) (defendant may withdraw plea if court jumps plea deal *unless* the deal "includes specific language that the defendant knowingly waives his right to withdraw his plea if the trial judge should not concur in the recommended sentence"); People v. Killebrew, 330 N.W.2d 834, 841-42 (Mich. 1983) (developing different procedural rules for plea bargains with a "sentence agreement" versus a "sentence recommendation").

<sup>39</sup> Williams, 236 Wis. 2d at 295-96 (emphasis added).

<sup>40</sup> Id. (emphasis added); see also WIS. FORM CR-227, *Plea Questionnaire / Waiver of Rights* ("I understand that the judge is not bound by any plea agreement or recommendations and may impose the maximum penalty."), at <https://www.wicourts.gov/forms/CR-227.PDF>.

<sup>41</sup> In Wisconsin, the simple possession of marijuana as a second or subsequent offense is a Class I felony. See *supra* note 29; see also WIS. STATS. § 939.50 (3) (i) (2017-18) ("Penalties for felonies are as follows: . . . For a Class I felony, a fine not to exceed \$10,000 or imprisonment not to exceed 3 years and 6 months, or both.").

<sup>42</sup> People v. Bunce, 45 A.D. 3d 982, 983 (N.Y. App. Div. 2007).

judge decided that six years was “inappropriate,” and instead “imposed an aggregate prison sentence . . . of 12 to 18 years.”<sup>43</sup> Because the sentencing court “never expressly agreed to bind itself to the sentence recommendation,” the judge was free to jump the deal and sandbag the defendant with up to triple the bargained-for sentence, leaving him without a remedy.<sup>44</sup>

Similarly, in a Florida case, the court held that when a prosecutor makes a sentence recommendation to induce the defendant to plead guilty, the trial judge “is not bound by the prosecutor’s recommendation.”<sup>45</sup> Therefore, when the parties resolved the case for probation and the judge sentenced the defendant to three years in prison instead, the defendant could not “withdraw his guilty plea merely because the sentence did not conform to what he hoped it might be.”<sup>46</sup>

Before proceeding, a few words of caution are warranted. First, many different labels are used to describe plea agreements. A bargained-for sentence might be called a recommendation, a joint recommendation, an agreement, a negotiated plea, or a stipulated sentence, among other things.<sup>47</sup> These labels often lack clear definitions, are used in confusing combination with each other, are applied inconsistently across and even within states, and usually don’t mean anything to the person who matters. “To most defendants, the distinction between a sentence agreement and a sentence recommendation,” for example, “is little more than a variation in nomenclature.”<sup>48</sup>

Nonetheless, the particular label used to describe a plea agreement might dramatically impact the defendant’s rights. In Illinois, for example, the defendant’s rights may turn on the subtle distinction of whether, within the negotiated plea, the prosecutor agreed to the sentence or merely promised to recommend the sentence.<sup>49</sup> Likewise, in Federal court, a defendant’s rights may turn on whether the parties entered into a Type B or Type C plea bargain, as these labels create a similar distinction.<sup>50</sup>

Second, a close reading of the cases cited in this Article will reveal that nuanced factual differences can sometimes invoke different rules with regard to plea bargaining

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<sup>43</sup> Id.

<sup>44</sup> Id. at 984.

<sup>45</sup> Brown v. State, 245 So. 2d 41, 43 (Fla. 1971). In this particular case, the defendant was actually permitted to withdraw his plea, but not because the judge jumped the plea deal. Rather, the court found that “the plea was based on a failure of communication or misunderstanding of the facts.” Id. at 44.

<sup>46</sup> Id. at 43. This case seems to conflict with subsequent Florida case law, perhaps due to the enactment or amendment of a statute or possibly the subtle factual differences between the cases. See Thomas v. State, 327 So. 2d 63, 64 (Fla. Ct. App. 1976) (defendant was *allowed* to withdraw the plea when the judge jumped a probation recommendation and sent the defendant to prison).

<sup>47</sup> For an example of this linguistic chaos, *see discussion at supra*, note 227.

<sup>48</sup> People v. Killebrew, 330 N.W.2d 834, 842 (Mich. 1983).

<sup>49</sup> See People v. Whitfield, 840 N.E.2d 658, 668 (Ill. 2005) (“Distinguishing *Baker* and *Ferris* from the situation in *McCoy*, we held that *Baker* and *Ferris* differed in that the defendants’ negotiated plea agreements in those cases had been, not just for a sentencing *recommendation*, but for the promise of a particular . . . sentence.”) (emphasis original).

<sup>50</sup> See FED. R. CRIM. PRO., R. 11. In a so-called type B sentence bargain agreement, the prosecutor is merely making a sentence *recommendation*; the judge is free to disregard it and impose a harsher sentence. Conversely, in a so-called type C sentence bargain agreement, the prosecutor will actually *agree* to a particular sentence; if the judge disregards it and imposes a more severe sentence, the defendant may withdraw his or her plea. See Shayna M. Sigman, Comment, *An Analysis of Rule 11 Plea Bargain Options*, 66 U. CHI. L. REV. 1317, 1317-18 (1999). Some judges, however, do not want to relinquish their power to sandbag defendants, and therefore “are reluctant to consider type C agreements.” *Id.* at 1319.

and sentencing. Further, because new statutes or statutory amendments can override older case law, it is imperative for defense counsel to identify on-point, up-to-date, jurisdiction-specific law that governs plea bargaining in the relevant federal jurisdiction, state, county, or even individual court.<sup>51</sup>

Third, to complicate matters even further, I have received anecdotal reports from attorneys in Florida and Wisconsin that some counties, or at least some judges within those counties, have developed practices that stray from clearly-established state law and procedure. Therefore, an attorney representing a client in unfamiliar territory must not only study the law that is “on the books,” but must also consult with an attorney familiar with the unwritten, and sometimes even unspoken, law of the land.

As the above examples illustrate, plea bargaining is very much like the Wild West. Given these tremendous variations between and even within jurisdictions, it is beyond the scope of this Article to categorize jurisdictions as either permitting or prohibiting deal jumping.<sup>52</sup> Instead, the point of this Article is simple: Any plea bargain in which the judge accepts a defendant’s plea, but then retains the power to jump the bargained-for sentence while binding the defendant to the rejected deal, is fundamentally unfair and causes serious problems for our criminal justice system.

## II. THE PROBLEMS WITH DEAL JUMPING

On a practical level, deal jumpers impose a tremendous financial burden on taxpayers, as sandbagged defendants understandably rush to challenge their sentences. This clogs up the justice system with costly post-conviction motions and appeals. The means by which a wronged defendant may challenge his or her sentence include attacks on both the judge and the prosecutor.

For example, when a defendant expects to receive a fine or probation and instead receives jail or prison, he or she may argue on post-conviction motion or appeal that the judge predetermined the sentence before even listening to the parties’ arguments, failed to conduct a proper plea colloquy, abused his or her discretion in imposing the sentence, failed to apply the required factors in determining the proper sentence, relied upon inaccurate or ex parte information at the sentencing hearing, or otherwise violated due process.<sup>53</sup> Similarly, defendants often argue that the prosecutor violated the plea bargain by undercutting his or her own sentence recommendation or otherwise breaching the parties’ agreement.<sup>54</sup>

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<sup>51</sup> As discussed in this Article, different localities and even individual courts within those localities may develop their own practices. The rules may often be unwritten, or even unspoken; other times, they may appear in local court rules or in an individual court’s scheduling order.

<sup>52</sup> With regard to other aspects of plea bargaining, such as judicial participation in the process, the law can be equally unclear. See, e.g., Brown, *supra* note 23, at 54 (discussing “rules on judicial intervention in plea bargaining” and concluding that “characterizing the law on this point can be tricky in some states.”) (citing Rishi Raj Batra, *Judicial Participation in Plea Bargaining: A Dispute Resolution Perspective*, 76 OHIO ST. L.J. 565 (2015)).

<sup>53</sup> For the summaries of 852 cases that raise a variety of such challenges, see Archive: Sentencing, ON POINT BLOG (accessed Dec. 21, 2019), at <http://www.wisconsinappeals.net/archive-2/>.

<sup>54</sup> See Part II.C. Although this Article focuses on only one abusive practice—deal jumping—there is yet another such practice lurking nearby. When defendants challenge their sentences on post-conviction motion or appeal based on judicial or prosecutorial misconduct, the appellate lawyers often blame *defense counsel* (under the “ineffective assistance of counsel” doctrine) for failing to monitor, prevent, or correct

Such post-conviction motions and appeals obviously consume vast resources, including taxpayer-funded court reporters, prosecutors, judges, law enforcement agents (to transport incarcerated defendants to and from post-conviction hearings), and, in the case of indigent defendants, public defender appellate lawyers. And deal-jumping judges are directly responsible for all of it. If, instead of jumping deals, judges would simply impose the agreed-upon sentence, defendants would have no basis for, or even a reason to raise, such post-conviction challenges.<sup>55</sup>

Worse yet, in addition to this staggering financial burden, deal jumpers create far more serious problems for the criminal justice system. Three such problems are discussed in the sections below.

#### A. Fundamental Unfairness

Allowing a judge to accept a defendant's plea, only to disregard the bargained-for sentence that induced the defendant to enter that plea, will strike nearly everyone as fundamentally unfair. Even one state's Department of Justice (a group of prosecutors),<sup>56</sup> advocated for the elimination of deal jumping "to assure that the plea agreement process is uniform across the state, *fair to all parties* and deserving of public confidence."<sup>57</sup> Or, as one of the state's supreme court justices wrote in agreement:

[F]undamental fairness requires that an accused not be entrapped into a plea agreement. A full understanding of the consequences of a plea is impossible when [defendants] . . . are bound by an act of self-conviction, while the circuit court is free to impose any sentence within the statutory range.<sup>58</sup>

Put another way, as a Pennsylvania court stated, both "fundamental fairness and the considerations underlying the plea bargaining process" are at odds with the judicial tactic of deal jumping.<sup>59</sup> "After all, when a criminal defendant pleads guilty to an offense

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the judge's or prosecutor's conduct. For a discussion of this harmful practice, see Michael D. Cicchini, *Constraining Strickland*, 7 TEX. A&M L. REV. 351 (2020).

<sup>55</sup> Eliminating deal jumping would not eliminate *all* plea-related post-conviction challenges. A defendant might still claim, for example, that he or she received the ineffective assistance of counsel and never should have entered into a plea bargain in the first place. However, if judges were required to honor sentence concessions—or reject them *before* taking the defendant's plea or at least allow the defendant to *withdraw* his or her plea—nearly all of the above-described legal challenges would necessarily disappear, freeing vast resources and saving great sums of taxpayer money.

<sup>56</sup> As an aside, prosecutors have very craftily commandeered the word "justice" for themselves, thus leaving defense lawyers holding the title of obfuscators of justice by default. Prosecutors have employed such wordplay in other contexts as well, including in burden of proof jury instructions. See Michael D. Cicchini, *Spin Doctors: Prosecutor Sophistry and the Burden of Proof*, 87 U. CIN. L. REV. 489, 516-17 (2018) (prosecutors anoint themselves as seekers of "truth," paint defense lawyers as obfuscators of truth, and portray "the reasonable doubt standard as a defense tool for hiding the truth.").

<sup>57</sup> In Re Amendment of Rules, 383 N.W.2d 496, 499 (Wis. 1986) (Abrahamson, J., dissenting) (quoting the Wisconsin Department of Justice) (emphasis added).

<sup>58</sup> State v. Williams, 236 Wis. 2d 293, 313 (Wis. 2000) (Abrahamson, J., dissenting) (citing State v. Thomas, 294 A.2d 57, 61 (N.J. 1972) and State v. Killebrew, 330 N.W.2d 834, 843 (Mich. 1984)).

<sup>59</sup> Commonwealth v. White, 787 A.2d 1088, 1093 (Penn. Sup. Ct. 2001).

he surrenders valuable rights.”<sup>60</sup> And while the court is, and arguably should be, free to reject a proposed plea agreement, its refusal to then release the defendant from his or her end of that rejected agreement “clearly defeats the defendant’s expectations and destroys the *quid pro quo* of the arrangement.”<sup>61</sup>

Plea-and-sentencing procedures that permit deal jumping are best summarized as follows: they induce a defendant to plead in exchange for the prosecutor’s “illusory promise” which is “subject to the unpredictable assessment and approval of the sentencing court.”<sup>62</sup> And then, if the court rejects the sentence concession, “the defendant is stuck with his plea, the anticipated sentence merely another [broken] promise on his way to jail.”<sup>63</sup> The problem, quite obviously, is “[t]his is not the ideal way to foster a sense of justice and fairness in the criminal justice system.”<sup>64</sup>

### B. Harm to the Innocent, Risk-Averse Defendant

Though perhaps counter-intuitively, deal jumping harms innocent defendants the most. This claim requires some elaboration. To begin, many judges are greatly bothered by the idea that an innocent defendant might plea bargain and then appear before them for sentencing. This is why some judges refuse to accept “no contest” pleas and instead insist on guilty pleas.<sup>65</sup> Or, as one judge proclaimed to me off the record, judges are not in the business of sentencing innocent people.

This mindset may allow judges to deceive themselves into thinking they only sentence the guilty, which may, in turn, allow the judges to sleep better at night.<sup>66</sup> However, making a defendant plead guilty instead of no contest doesn’t actually make the defendant guilty. It just means that, in some cases, the defendant is so risk-averse that he or she is not only willing to take a plea deal, but is also willing to lie to the court (by pleading guilty instead of no contest) to avoid the dangers of trial.<sup>67</sup> These dangers include the risk of conviction on a greater number of counts<sup>68</sup> and, especially, the risk of receiving the greatly-feared and costly “trial penalty.”<sup>69</sup>

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<sup>60</sup> Id.

<sup>61</sup> Id.

<sup>62</sup> Id.

<sup>63</sup> Id.

<sup>64</sup> Id.

<sup>65</sup> See Christine M. Wiseman & Michael Tobin, WISCONSIN PRACTICE SERIES: CRIMINAL PRACTICE & PROCEDURE, § 23:4 (West 2d ed., 2008) (“The trial court has the discretion to accept or refuse a no contest plea, and the defendant is not entitled to enter such a plea as a matter of right.”).

<sup>66</sup> It is amazing that judges continue to think this (or pretend to think this) given the dramatic rise in bail jumping charges, a prosecutorial weapon used specifically to extort pleas from defendants who have asserted their innocence and are prepared to go to trial. See Amy Johnson, *The Use of Wisconsin’s Bail Jumping Statute: A Legal and Quantitative Analysis*, 2018 WIS. L. REV. 619, 619 (2018) (“The data also suggests that an underlying purpose for filing bail jumping charges may be to create leverage against defendants to induce them to plead to their original charge rather than to punish them for violating their bond conditions. While not conclusive as to causation, the correlation between bail jumping charge dismissals and pleas to other charges cannot be ignored.”) (emphasis added).

<sup>67</sup> See Scott & Stuntz, *supra* note 25, at 1948 (discussing risk aversion among innocent defendants); Sigman, *supra* note 49, at 1334-36 (discussing risk aversion among defendants in general).

<sup>68</sup> Due to the prosecutorial practice of “charge stacking,” or charging multiple, different crimes for the same alleged act, jury trials are especially risky for many defendants. See Mark Godsey, *Prosecutors, Charge Stacking, and Plea Deals*, WRONGFUL CONVICTIONS BLOG (June 12, 2015) (“This has become absolutely

Once judges are willing to acknowledge that innocent defendants do, in fact, plead guilty, judges will understand how their practice of deal jumping actually hurts those innocent defendants the most.

The current regime basically invites judges to revise bargained-for sentencing recommendations upward when recommended sentences seem unusually low. Yet if the prosecutor and defense counsel agree to recommend an unusually low sentence, that recommendation may reflect the parties' estimation of the probability of conviction (and perhaps the possibility of *the defendant's innocence*) should the case proceed to trial. . . . The judge who overturns bargains that seem too favorable to the defense risks punishing precisely those defendants who least deserve it[.]<sup>70</sup>

In other words, when innocent, but risk-averse, defendants plead guilty to avoid the numerous risks of a jury trial,<sup>71</sup> the practice of deal jumping actually compounds the very problem (punishment of the innocent) that judges like to pretend doesn't even exist.

### C. Perverse Incentives for Prosecutors

The mere *possibility* that a judge could jump a plea deal creates incentives for prosecutors to act unethically. For example, because prosecutors work in a single county within a state—and often in a single courtroom within that county—they are familiar with the sentence a judge is likely to impose for a particular type of case.<sup>72</sup> Given this, some prosecutors will induce defendants to plead guilty by offering a favorable sentence recommendation, knowing the judge will likely jump the deal and impose a more severe sentence.<sup>73</sup> This allows the prosecutor to obtain a conviction *and* the desired sentence without having to go through a risky and time-consuming jury trial.

This tactic is successful because most prosecutors have an information advantage over most defense lawyers who typically spend their time in multiple courtrooms, if not multiple counties, and therefore are less familiar with a given judge's sentencing

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standard practice. The prosecutor will ‘stack’ charges to build such a scary potential sentence, that even actually innocent people will be intimidated into pleading guilty” to some charges in exchange for dismissal of others), at <https://wrongfulconvictionsblog.org/2015/06/12/prosecutors-charge-stacking-and-plea-deals/>.

<sup>69</sup> See NACDL, THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT (2018), at <https://www.nacdl.org/trialpenaltyreport>; Albert W. Alschuler, *The Trial Judge’s Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1080 (1976) (“For all of their decorum and dignity, the federal courts penalize a defendant for standing trial, and they do so more severely than the state courts. It is only because everyone knows the score that the river of guilty pleas stays at flood proportions.”) (quoting Benjamin M. Davis).

<sup>70</sup> See Scott & Stuntz, *supra* note 25, at 1954 (parenthetical original) (emphasis added).

<sup>71</sup> See Alschuler, *supra* note 69, at 1081 (analogizing a jury trial with “a plunge from an unknown height.”) (quoting John D. Nunes).

<sup>72</sup> See State v. Williams, 236 Wis. 2d 293, 308 (2000).

<sup>73</sup> See Rick L. Ediger, *Withdrawal of Pleas in Nebraska: The Rejected Plea Bargain*, 56 NEB. L. REV. 193, 202 (1975) (Deal jumping “can easily lead to the prosecutorial tactic of making promises in the knowledge that the judge will not approve the terms of the bargain.”).

practices.<sup>74</sup> Consequently, defendants will sometimes unknowingly plead guilty to obtain what is really an illusory bargain: the prosecutor’s sentence recommendation that the judge is not going to follow.

But using an informational advantage over poorly-informed defense lawyers is the least deceitful of prosecutorial ploys. These government agents have also developed far more devious strategies to induce a defendant to plead guilty and then persuade the judge to impose a harsher sentence than that ostensibly recommended in the plea deal. The following examples, conveniently drawn from a single state, demonstrate the great lengths to which prosecutors will go to encourage deal jumping for their own gain.

### 1. Undercutting the Recommendation

When a prosecutor knows the judge is not bound by a plea agreement, he or she may induce the defendant to plead guilty in exchange for a sentence recommendation, and then immediately go to work to undercut the very recommendation that was used to induce the plea. The prosecutor does this by subtly conveying to the judge that the prosecutor really wants a sentence more severe than the one he or she officially recommended in the formal plea bargain.

For example, in one case a prosecutor induced the defendant to plead by agreeing to “cap [the state’s] sentencing recommendation at ten years.”<sup>75</sup> At the sentencing hearing the prosecutor then said, “Judge, there was a plea agreement in this case; I stand by the plea agreement.”<sup>76</sup> Immediately upon uttering those words, however, she undercut the agreement: “*Having said that*, this is an extremely violent case.”<sup>77</sup> She then presented the defendant in the worst possible light, calling him “a clear and present danger . . . to the community at large.”<sup>78</sup> The prosecutor then “urge[d] the Court to consider all of the information that has been presented” when imposing sentence.<sup>79</sup> The judge complied, sentencing the defendant to fifteen years—the maximum possible sentence and five years more than what prosecutor was allowed to recommend under the plea deal.<sup>80</sup>

The prosecutor’s argument undercut the agreement in two ways. First, as the appellate court acknowledged, she never even made the recommendation that the defendant had bargained for, but instead merely made a general reference to the “plea agreement.”<sup>81</sup> Nonetheless, the court chalked this up to a mere oversight. “In the legal laboratory and in [a] perfect world,” the court wrote, the prosecutor would have made the agreed-upon recommendation.<sup>82</sup> “However,” the court continued, “the law is a craft, not a science.”<sup>83</sup>

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<sup>74</sup> See *Williams*, 236 Wis. 2d at 308 (arguing that “it is more difficult for defense attorneys to know whether a particular court is likely to adhere to a particular recommendation.”).

<sup>75</sup> *State v. Hanson*, 232 Wis. 2d 291, 293 (Ct. App. 1999).

<sup>76</sup> *Id.* at 296.

<sup>77</sup> *Id.* (emphasis added). The introductory phrase “having said that,” or the similarly annoying “that said,” is a cue that the speaker is about to contradict him or herself.

<sup>78</sup> *Id.* at 296.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 297.

<sup>81</sup> *Id.* at 299.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

There is certainly some truth to that characterization, but the analogy misses the point. The sole issue in the case is whether the prosecutor fulfilled her obligations under the plea agreement—a question that invokes criminal procedure and contract law,<sup>84</sup> not a debate about whether the practice of law is more akin to art or science.

Second, the prosecutor also “covertly convey[ed] to the trial court that a more severe sentence is warranted than that recommended”—or, in this case, that was supposed to be recommended.<sup>85</sup> Nonetheless, the court tolerated this ploy because, after verbally bashing the defendant, the prosecutor finished “by asking the trial court to impose a sentence which was ‘fair to the Defendant and fair to the victim.’”<sup>86</sup> Based on these magic words, the court blessed the prosecutor’s tactic of undercutting her own recommendation, and the defendant had to serve his “fair” sentence of the maximum penalty which greatly exceeded the sentence for which he bargained.<sup>87</sup>

In this instance, the court’s analysis doesn’t merely miss the point; rather, it is simply wrong. Far from fulfilling her obligation under the agreement, the prosecutor’s use of the word “fair” actually breached the deal. A party to a contract (here, the defendant in a plea bargain) is entitled to that for which he or she bargained (here, the prosecutor’s recommendation for a ten year sentence). This bargained-for entitlement may, and often does, greatly exceed what the opposing party to the contract (here, the prosecutor) subsequently decides is fair.<sup>88</sup>

In a more extreme example of undercutting, another prosecutor induced a defendant to plead to multiple counts in exchange for a recommendation of “three to four years of initial confinement” on one count, plus consecutive “probation” on the other counts.<sup>89</sup> In accordance with the agreement, and unlike the prosecutor in the previous example, this prosecutor *did* explicitly recommend the agreed-upon sentence.<sup>90</sup> However, very much like the other prosecutor, he quickly went to work to undercut his own recommendation.

The prosecutor began his sentencing argument by reminding the judge of the maximum penalties for each of the charged crimes, and then said: “I think the felony classifications obviously indicate the extreme seriousness of these offenses that night. But to be honest, I don’t think they really do them justice in terms of how serious *this* was.”<sup>91</sup> The prosecutor then argued that the crime victim wanted, and had the right, to “live fearlessly while [her] son is growing up and in school.”<sup>92</sup> Given that her son was only eleven years old, the judge didn’t have to be a mathematician to deduce what the prosecutor really wanted: a “seven-year initial confinement period.”<sup>93</sup>

The judge complied with the prosecutor’s thinly veiled request. Instead of the four years ostensibly recommended in the plea deal, the judge imposed seven-and-one-

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<sup>84</sup> See Cicchini, *supra* note 27, at 173-74 (discussing plea bargains as contracts).

<sup>85</sup> *Hanson*, 232 Wis. 2d at 301.

<sup>86</sup> Id. at 302.

<sup>87</sup> Id.

<sup>88</sup> See Cicchini, *supra* note 27, at 174-85 (discussing courts’ misapplication of contract law principles in multiple contexts and in great variety).

<sup>89</sup> *State v. Bokenyi*, 848 N.W.2d 759, 764 (Wis. 2014).

<sup>90</sup> Id. at 766.

<sup>91</sup> Id. at 765 (emphasis added).

<sup>92</sup> Id. (emphasis added).

<sup>93</sup> Id. at 773.

half years of initial confinement.<sup>94</sup> The judge was also influenced, apparently, by the prosecutor's argument that the maximum penalties for the charged crimes were not serious enough for this particular defendant's conduct. Instead of probation on the other counts, the judge ordered an additional six years of initial confinement for good measure.<sup>95</sup> In sum, the defendant received over thirteen years of initial confinement<sup>96</sup> which was more than triple the "three to four years" the prosecutor was obligated to recommend.<sup>97</sup>

On appeal, the court approved the prosecutor's strategy of undercutting his official recommendation. The court initially paid lip service to the applicable rule of law: "The state may not accomplish by indirect means what it promised not to do directly."<sup>98</sup> But then, with regard to the prosecutor's veiled request for seven years of initial confinement instead of four—a request based on the victim's desire to be worry free as long as her eleven-year-old child was "in school"<sup>99</sup>—the court held that "restating the victim's wishes without augmenting them in some fashion, without increasing them in some way[,] was proper."<sup>100</sup>

The court also excused the prosecutor's reference to the maximum penalties and his argument that the felony classifications did not capture the seriousness of *this* defendant's actions.<sup>101</sup> The dissenting opinion, however, saw through the prosecutor's ploy: "Here, when the prosecutor listed the maximum terms of imprisonment and then immediately stated that the felony classifications do not sufficiently indicate the seriousness of the offenses, *he implied that [the defendant] deserved longer sentences*" than those stated in the plea bargain and even those permitted by law.<sup>102</sup> As the dissent reasonably (but unsuccessfully) asserted, prosecutorial undercutting of the sentence recommendation in this manner was improper.<sup>103</sup>

## 2. Pulling an End-Around

As demonstrated above, a prosecutor must be crafty and subtle when undercutting his or her official sentence recommendation. But when a prosecutor attempts an end-around the plea deal, some advanced planning may be required. Once again, the mere possibility that the judge could jump the prosecutor's official sentence recommendation is what motivates this deceitful ploy.

With an end-around, the prosecutor must rely upon (and sometimes recruit or even bully) a third person to recommend the sentence the prosecutor really wants, but cannot ask for directly. This third person is often the complaining witness. Even though the state, represented by the prosecutor, is the party to a criminal action, state legislatures have found it politically beneficial to treat complaining witnesses as though *they* are the

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<sup>94</sup> Id. at 766.

<sup>95</sup> Id.

<sup>96</sup> Id.

<sup>97</sup> Id. at 764.

<sup>98</sup> Id. at 769.

<sup>99</sup> Id. at 765.

<sup>100</sup> Id. at 773 (internal quotations omitted).

<sup>101</sup> Id. at 770-71.

<sup>102</sup> Id. at 782 (Prosser, J. dissenting) (emphasis added).

<sup>103</sup> Id.

party to the action. In so doing, legislatures presume the defendant's guilt and anoint complaining witnesses as "victims" long before the defendant is convicted.<sup>104</sup> Prosecutors, in turn, leverage this pro-victim climate to make end-runs around their plea-bargain obligations.

For example, in one case a prosecutor agreed to recommend a ten year sentence, which was well under the maximum penalty.<sup>105</sup> Before sentencing, however, the prosecutor obtained a written "victim impact statement in which the victim sought the 'maximum sentence allowed.'"<sup>106</sup> The prosecutor then filed the document and forwarded it to the sentencing judge, thus using the victim's statement to convey to the judge the sentence the prosecutor *really* wanted.<sup>107</sup> Over the defendant's objection, the court approved of the prosecutor's end-around the plea agreement; further, at sentencing, the court jumped the plea deal by imposing the maximum sentence.<sup>108</sup>

In a more extreme example, another prosecutor agreed to make a sentence recommendation of four years, but then obtained a victim impact statement asking for a sentence nearly twice as long.<sup>109</sup> This time, instead of merely filing the victim's statement with the judge, this prosecutor actually read it aloud at the sentencing hearing.<sup>110</sup> As expected, the judge imposed a longer sentence than what the prosecutor ostensibly recommended in the plea deal, but conceded "that the better practice would have been to have someone other than the prosecutor read the victim's letter aloud[.]"<sup>111</sup>

The best practice, of course, would be to tell the crime victim to submit the letter directly to the court so that the judge can read it for him or herself. Why anyone—whether the prosecutor or a designated mouthpiece—should be permitted a dramatic rendering in court when the crime victim decided to write a letter to the judge is baffling. Nonetheless, the court permitted the prosecutor's end-run around the deal. Why? Because "Wisconsin has a tradition of putting great emphasis on victim's rights" and "there's [sic] penalties if we violate victim's rights."<sup>112</sup>

As is typical in these poorly-reasoned decisions, the court's trite observation badly misses the point. The question is not whether a victim is allowed to write a letter to the judge; rather, the question is whether a prosecutor commits an end-around the plea deal by reading that letter aloud during his or her sentencing argument. As the dissenting opinion explained, "end runs around a plea agreement are prohibited"<sup>113</sup> and, therefore, the prosecutor's action of "endorsing the victim's statement" breached the deal.<sup>114</sup> But

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<sup>104</sup> See Michael D. Cicchini, *Reversing Wisconsin's "Victim" Culture*, THE LEGAL WATCHDOG (Nov. 24, 2018), at <http://thelegalwatchdog.blogspot.com/2018/11/reversing-wisconsins-victim-culture.html>; Melanie Conklin, *Voting in the Dark on Victims' Rights?*, WISCONSIN EXAMINER (Dec. 23, 2019), at <https://wisconsinexaminer.com/2019/12/23/voting-in-the-dark-on-victims-rights/>; Gretchen Schultdt, *WJI Sues to Block Marcy's Law Ballot Question*, WISCONSIN JUSTICE INITIATIVE (Dec. 19, 2019), at <https://www.wjiinc.org/blog/wji-sues-to-block-marsys-law-ballot-question>.

<sup>105</sup> State v. Hanson, 232 Wis. 2d 291, 293 (Ct. App. 1999).

<sup>106</sup> Id. at 294.

<sup>107</sup> Id.

<sup>108</sup> Id. at 295.

<sup>109</sup> State v. Bokenyi, 848 N.W.2d 759, 764-65 (Wis. 2014).

<sup>110</sup> Id. at 765.

<sup>111</sup> Id. at 767-68.

<sup>112</sup> Id. at 768 (internal punctuation omitted).

<sup>113</sup> Id. at 769.

<sup>114</sup> Id. at 782 (Prosser, J., dissenting).

once again, this argument fell on deaf ears, as the majority of the court blessed the prosecutor's end-around strategy.<sup>115</sup>

Prosecutors employ this victim end-around strategy in numerous forms. Another prosecutor induced a defendant to plead in exchange for a sentence recommendation of "fifteen years of initial confinement."<sup>116</sup> Then, at the sentencing hearing, two police officers appeared—one of them was actually named "Officer Justus"—and "told the court that they wanted [the defendant] to be sentenced to the maximum[.]"<sup>117</sup> The judge admitted being "struck by" the officers' statements, jumped the deal, and sentenced the defendant to twenty-five years of initial confinement—ten years longer than the prosecutor's official recommendation.<sup>118</sup>

The defense argued that the prosecutor's end-around breached the deal.<sup>119</sup> After the officers spoke at the hearing, the prosecutor even commented, "I like the way Officer Justus puts it."<sup>120</sup> The appellate court, however, held that the prosecutor's praise "was not a ratification of Officer Justus's sentencing recommendation. It merely reinforced an aggravating factor" relevant to the case.<sup>121</sup> And while the court conceded that "an investigative officer is the investigating arm of the prosecutor's office" and is therefore bound "to the prosecutor's bargain[.]" this case was different.<sup>122</sup> Why? Because even though the officers' only involvement in this case occurred during the course of their investigative duties, they "were not speaking to the court as investigating officers, but as victims of a crime, which they have a right to do."<sup>123</sup>

The victim-centered approach is the most common form of the end-around; however, prosecutors have developed other variations on the ploy. In one example, a prosecutor wanted the defendant to go to prison, but agreed, pursuant to a plea deal, not to make such a recommendation.<sup>124</sup> The prosecutor likely agreed to exercise such verbal restraint because she was banking on the presentence investigation (PSI) to recommend prison in the prosecutor's stead. However, when the PSI ultimately recommended probation,<sup>125</sup> the prosecutor's office wasted no time in making an end-run around the plea deal.<sup>126</sup> "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>127</sup> To nobody's surprise, the agent then changed the PSI recommendation from probation to "five to seven years"

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<sup>115</sup> Id.

<sup>116</sup> State v. Stewart, 836 N.W.2d 456, 457 (Wis. Ct. App. 2013).

<sup>117</sup> Id. at 458.

<sup>118</sup> Id.

<sup>119</sup> Id.

<sup>120</sup> Id. at 460.

<sup>121</sup> Id.

<sup>122</sup> Id. at 459.

<sup>123</sup> Id. at 460.

<sup>124</sup> State v. Howland, 264 Wis. 2d 279, 283 (Ct. App. 2003).

<sup>125</sup> Id. at 286.

<sup>126</sup> Id. at 294 (on different occasions, District Attorney Jambois, Deputy District Attorney Karaskiewicz, and Assistant District Attorney Rusch were involved).

<sup>127</sup> Id. (parenthetical omitted).

incarceration.”<sup>128</sup> The judge complied and sentenced the defendant to a lengthy prison term.<sup>129</sup>

When the defendant appealed the sentence, the prosecutor’s office amazingly argued that its three-person intervention “did not seek to achieve any change in the PSI” recommendation and, therefore, was not a breach the plea agreement.<sup>130</sup> But this was one of the rare cases where an appellate court found that the prosecutor had crossed the line. After a post-conviction motion and appeal, the appellate court described the prosecutor’s interference with the PSI as “inappropriate” and “border[ing] on ex parte communications.”<sup>131</sup> And when the prosecutors urged the PSI writer to change the PSI recommendation to prison, they committed a “material and substantial breach of the plea agreement.”<sup>132</sup> In sum, the multi-prosecutor attack of the PSI writer’s recommendation “constituted an ‘end run’ around the plea agreement.”<sup>133</sup>

### 3. Breaching the Agreement

While undercutting a recommendation requires some subtlety, and pulling an end-around may require some advanced planning, a prosecutor’s outright breach of a plea bargain requires nothing more than pure boldness—something that many prosecutors proudly exhibit. Just as with undercutting and the end-around, however, prosecutors would have *zero* incentive to breach plea agreements if not for the possibility that the judge could jump the deal.

For example, in one case a prosecutor induced the defendant to plead in exchange for a sentence recommendation of “2 years initial confinement.”<sup>134</sup> At sentencing, however, the prosecutor asked for two-and-one-half years.<sup>135</sup> After the defense pointed out the breach, the prosecutor corrected the recommendation, agreeing that it should have been for only two years.<sup>136</sup> The judge, however, jumped the plea deal *and* the illegal recommendation, sentencing the defendant to three years.<sup>137</sup>

On appeal, the court acknowledged that when the state makes a different recommendation at sentencing than that which was bargained for, “it is irrelevant whether the trial court was influenced by the State’s alleged breach or chose to ignore the State’s recommendation.”<sup>138</sup> Despite that concession, the court instead applied a second legal standard: whether the breach was “material and substantial[.]”<sup>139</sup> Conversely stated, a breach may be immaterial and insubstantial when it is “momentary and inadvertent,” the prosecutor “quickly” and “earnest[ly]” corrected it, and the trial judge “reflect[ed]” and “commented” on the prosecutor’s correction.<sup>140</sup>

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<sup>128</sup> Id.

<sup>129</sup> Id. at 290.

<sup>130</sup> Id. at 295.

<sup>131</sup> Id.

<sup>132</sup> Id. at 297.

<sup>133</sup> Id. at 295.

<sup>134</sup> *State v. Bowers*, 280 Wis. 2d 534, 538 (Ct. App. 2005).

<sup>135</sup> Id. at 538-39.

<sup>136</sup> Id. at 539.

<sup>137</sup> Id.

<sup>138</sup> Id. at 541-42 (citing *U.S. v. Clark*, 55 F.3d 9, 13 (1st Cir. 1995)).

<sup>139</sup> Id. at 542.

<sup>140</sup> Id. at 544 (discussing its holding in *State v. Knox*, 213 Wis. 2d 318, 322-23 (Ct. App. 1997)).

It is not clear why the court even bothered to invoke this second standard. After applying it to the facts of the case, the court was forced to quickly disregard it (as it did with the first standard) in order to reach its desired and predetermined outcome:

While the State did *not* correct itself with tremendous enthusiasm and zeal and while the trial court did *not* reflect upon the State's [correction], such is not required for us to find a perceived breach immaterial and insubstantial. There is no requirement that the state correct a misstated sentence recommendation forcefully or enthusiastically. . . . We therefore hold that the State did not materially and substantially breach the plea agreement when it misspoke as to the length of initial incarceration.<sup>141</sup>

Interestingly, the court would not even conclude that the state breached the agreement, and instead called the prosecutor's recommendation a "perceived breach." In any case, simple mathematics renders it difficult to see how a 25 percent increase in the sentence recommendation (two-and-one-half years instead of two), or a 50 percent increase in the actual sentence (three years instead of two) could be considered immaterial and insubstantial. Nonetheless, the defendant did not get that for which he bargained—either in form (the recommendation) or in substance (the actual sentence)—yet he was left without a remedy and had to serve the harsher sentence.<sup>142</sup>

In perhaps the most outrageous example of a plea-bargain breach, one prosecutor induced a defendant to plead guilty to two felonies in exchange for a limited sentence recommendation.<sup>143</sup> But then, at the sentencing hearing, the prosecutor inexplicably recommended the *maximum* penalty: amused with what he thought to be his clever play on words, he asked the court to "lock Mr. Locke—lock Mr. Locke—up for 50 years[.]".<sup>144</sup> The judge told the prosecutor that this recommendation breached the plea deal, to which the prosecutor strangely responded, "Right that's what I'm saying."<sup>145</sup> Over defense counsel's objection, the court proceeded to sentence the defendant anyway.<sup>146</sup>

On appeal, the state tried to justify the prosecutor's recommendation for the 50-year maximum penalty by pointing out that he had actually labeled his recommendation a "non-recommendation."<sup>147</sup> That is, he preceded his request to "lock Mr. Locke up" for the maximum penalty by saying, "So the recommendation here is a *non-recommendation* as far as what I can say[.]".<sup>148</sup> The state further argued that the prosecutor's "non-recommendation" for the maximum penalty "did not constitute a breach because the statement was ambiguous and not an explicit sentencing recommendation."<sup>149</sup>

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<sup>141</sup> Id.

<sup>142</sup> Id. at 545.

<sup>143</sup> *State v. Locke*, 837 N.W. 2d 178, ¶ 6 (Wis. Ct. App. 2013). The prosecutor's sentence recommendation was constrained by the PSI's recommendation; however, this nuance does not matter for our purposes, as both the judge and prosecutor conceded that the prosecutor's actual recommendation did, in fact, breach the plea deal.

<sup>144</sup> Id. at ¶ 3.

<sup>145</sup> Id.

<sup>146</sup> Id. The published decision does not reveal the actual sentence, but it was obviously severe enough to prompt the defendant's appeal.

<sup>147</sup> Id. at ¶ 9.

<sup>148</sup> Id. at ¶ 3 (emphasis added).

<sup>149</sup> Id. at ¶ 8.

Amazingly, the appellate-level prosecutor—a so-called “minister of justice” who, along with the trial-level prosecutor, has special ethical obligations to the defendant<sup>150</sup>—literally argued that the request to “Lock Mr. Locke up for 50 years” was somehow “ambiguous” and, in any event, didn’t matter because such a recommendation was really a “non-recommendation.”

Perhaps it was this “non-recommendation recommendation” argument that was too much for the appellate court to stomach.<sup>151</sup> Far too politely, the court wrote: “This interpretation is unreasonable.”<sup>152</sup> While this gentle characterization of the government’s argument is a colossal understatement, and although the court failed to condemn the trial-level prosecutor for breaching the plea bargain or the appellate-level prosecutor for making frivolous arguments, the court did order a new sentencing hearing.<sup>153</sup>

### III. A SIMPLE PLAN FOR LEGISLATIVE REFORM

Prosecutors engage in the devious strategies described above because such strategies usually work. But regardless of whether prosecutors ultimately “get away with it,” the larger point is this: the mere *possibility* of judges jumping plea deals is enough incentive for prosecutors to behave unethically. And such behavior harms not only the individual defendants, but also integrity of the plea bargaining system.

On the other hand, when judges are bound by negotiated sentence concessions, prosecutors have no incentive to undercut their recommendations, perform end-runs around their agreements, or otherwise breach their plea deals. To engage in such disingenuous tricks without the possibility of a payoff—that is, a more severe punishment than that ostensibly recommend in the plea deal—would be nonsensical.

Legislative reform is one way to eliminate these perverse incentives, restore fundamental fairness and transparency to the plea bargaining system, and save taxpayers the expense of voluminous and unnecessary post-conviction motions and appeals.<sup>154</sup> Fortunately, such change is incredibly simple to implement. Legislatures interested in this money-saving and integrity-restoring legal reform need not recreate the wheel, as many states already have statutes that can be adopted verbatim or with minor modification.<sup>155</sup> Massachusetts’ statute, for example, reads in relevant part:

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<sup>150</sup> Wisconsin’s ethics rule on the special responsibilities of the prosecutor anoints him or her as “minister of justice,” a title that “carries with it specific obligations to see that the defendant is accorded procedural justice[.]” Wis. S.C.R. 20:3.8, ABA cmt. 1.

<sup>151</sup> See Michael D. Cicchini, *The Non-Recommendation Recommendation (and Other Government Bullshit)*, THE LEGAL WATCHDOG (Aug. 17, 2013), at <http://thelegalwatchdog.blogspot.com/2013/08/the-non-recommendation-recommendation.html>.

<sup>152</sup> State v. Locke, 837 N.W. 2d 178, ¶ 8 (Wis. Ct. App. 2013).

<sup>153</sup> Id. at ¶ 9 (“Locke is entitled to resentencing before a different judge” where the prosecutor must follow the plea bargain that induced the defendant to plead in the first place).

<sup>154</sup> See Part II. See also People v. Killebrew, 330 N.W.2d 834, 843 (Mich. 1983) (“[T]he greater certainty infused in the guilty-plea proceedings by bringing sentencing bargaining out into the open should reduce appeals for post conviction relief on the basis of the bargaining.”)

<sup>155</sup> Change through the courts, rather than the legislature, is also possible. See id.; see also James Michael Payne, *Criminal Procedure: Withdrawal of Plea as a Matter of Right When Plea Agreement Is Rejected*, 44 MO. L. REV. (1979) (“[T]he Missouri Supreme Court reversed and . . . overruled past Missouri precedent by holding that when there is a plea agreement which contemplates a recommendation by the prosecutor for a reduced sentence and the judge decides that he cannot follow this recommended sentence concession, the

The judge must accept or reject the plea agreement *before* the judge accepts a guilty plea or admission. The judge should not accept a plea agreement without considering whether the proposed disposition is just. At any time prior to the acceptance or rejection of the plea agreement, the judge may continue the plea hearing on the judge's own motion to ensure that the judge has been provided with, and has had an opportunity to consider, all of the facts pertinent to a determination whether the plea agreement provides for a just disposition in the case.<sup>156</sup>

This Massachusetts' statute then continues, "If the judge accepts the plea agreement, the judge shall inform the defendant that *the judge will impose the sentence, including the length of any term of probation, provided in the plea agreement.*"<sup>157</sup> On the other hand, "If the judge rejects the plea agreement, the judge . . . may indicate to the parties what sentence the judge would impose or what additional information the judge will require before the judge may make this determination[.]"<sup>158</sup>

Other state statutes essentially operate the same way, but instead of requiring the judge to make a decision before accepting the defendant's plea, the judge is free to defer that decision. However, if the judge ultimately decides to impose a sentence greater than that provided for in the plea agreement, the defendant is entitled to a remedy. Kentucky's statute, for example, reads in relevant part:

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.<sup>159</sup>

Similarly, California's statute reads in relevant part:

Where the plea is accepted by the prosecuting attorney in open court and is approved by the court, the defendant . . . *cannot be sentenced on the plea to a punishment more severe than that specified* in the plea and the court may not proceed as to the plea other than as specified in the plea.

If the court approves of the plea, it shall inform the defendant prior to the making of the plea that (1) its approval is not binding, (2) it may, at the time set for the hearing on the application for probation or pronouncement of judgment, withdraw its approval in the light of further consideration of the matter, and (3) in that case, *the defendant shall be permitted to withdraw his or her plea if he or she desires to do so.*<sup>160</sup>

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trial court is required to allow the defendant to withdraw his guilty plea. In addition the supreme court established a process to be followed in any guilty plea proceeding.").

<sup>156</sup> MASS. CRIM. PRO., R. 12(4) (emphasis added).

<sup>157</sup> Id., R. 12(4)(A) (emphasis added).

<sup>158</sup> Id., R. 12(4)(B).

<sup>159</sup> KY. R. CRIM. PRO., R. 8.10 (emphasis added).

<sup>160</sup> CALIF. PEN. CODE § 1192.5 (emphasis added).

As another example, North Carolina's statute is direct and to the point: "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.*"<sup>161</sup>

All of these statutes allow the judge to reject a plea bargain if the judge does not agree with the sentence concession. However, when the judge does reject an agreement, he or she is not permitted to then sandbag the defendant with a more severe sentence than what is contemplated by the plea bargain. Rather, the judge must either (1) reject the defendant's plea upfront, sending the parties back to the drawing board or allowing the defendant to proceed to trial, or (2) inform the defendant that the judge will not adopt the sentence concession after all, and then allow the defendant the opportunity to withdraw the plea, either to negotiate a new deal or proceed to trial.<sup>162</sup>

#### IV. CRITIC'S CORNER: ARGUMENTS AGAINST REFORM

Those courts in favor of deal jumping have developed several arguments in support of the insidious practice. One of the most poorly-reasoned defenses is as follows: "there is to be no courtroom counterpart of the fixed prize-fight in which the participants waltz through a prearranged script to a predetermined outcome."<sup>163</sup>

This analogy may be "the worst analogy in the long and storied history of analogies."<sup>164</sup> It is true that a *jury trial* has many similarities to a boxing match, or "prize-fight," in that the parties are doing battle and the outcome is often far from certain. However, to compare a plea agreement to a prize-fight is pure nonsense. The very purpose of a plea agreement, after all, is to resolve the case without a trial and its accompanying uncertainties.

One of the commodities that the representatives of the state "sell" during pretrial negotiations is *certainty*. During the period between arrest and trial, most defendants experience a great and understandable anxiety about what will happen to them. The promise that a prosecutor or trial judge

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<sup>161</sup> N.C. GEN. STAT. § 15A-1024 (emphasis added).

<sup>162</sup> Plea withdrawal will not be an adequate remedy in all cases, including those where the plea agreement included other terms and the defendant already performed his or her end of the bargain. See Alschuler, *supra* note 69, at 1071-72 ("In the Cook County case, for example, the defendant had already testified against his alleged accomplices at the time that his guilty plea was offered [to the court]. It was too late to restore the defendant to the position that he occupied before the plea agreement was entered"). Similarly, plea withdrawal may be inadequate when the defendant served the bargained-for sentence before the appeal is decided. See Baker v. Finkbeiner, 551 F.2d 180, 184 (7th Cir. 1977) ("Under the Circumstances of this case it would be unjust to simply vacate the guilty plea, which theoretically would allow the state to reindict Baker."). Alternative remedies include specific performance; however, the topic of remedies is beyond the scope of this Article.

<sup>163</sup> Young v. State, 182 N.W.2d 262, 265 (Wis. 1971).

<sup>164</sup> Joe Patrice, *Law School Dean Thinks Law School is Important*, ABOVE THE LAW (Aug. 1, 2014), at <https://abovethelaw.com/2014/08/law-school-dean-thinks-law-school-is-important/>. I borrowed the catchy quote from Patrice's article, which criticized a law school dean's analogy that law professors are like surgeons who were trained in medical school and learned surgery under the supervision of practicing doctors as opposed to, say, philosophers of biology.

offers in a bargaining session usually provides the first authoritative answer to that question that a defendant can secure. A trial, by contrast, represents what Oakland Public Defender John D. Nunes called “a plunge from an unknown height.”<sup>165</sup>

Second, in the rigged prize-fight scenario, the fighters and the referee are conspiring to perpetrate a fraud upon the public (or at least upon the gambling members thereof). In a plea bargain, it is the defendant who is forced to operate in “a seriously flawed bargaining structure” and, therefore, must seek protection from a cheating prosecutor and a sandbagging sentencing judge.<sup>166</sup>

Third, to the extent the prize-fight analogy implies that the referee is the dupe, such is not the case with the sentencing judge—the person who reviews the agreement, retains the right to reject it, and may even change his or her mind after accepting it and before imposing sentence. If this constitutes the prosecutor and defense counsel “waltz[ing] through a prearranged script to a predetermined outcome[,]” then every settlement of every dispute (including civil suits), and even the formation of most types of contracts, should be barred. Such a primitive view of dispute resolution and contract law would send us back to the highly inefficient, pre-industrial age, to be sure.<sup>167</sup>

Other arguments in defense of deal jumping are at least somewhat credible on their face and may even have a limited, superficial appeal. As discussed below, however, even these more serious arguments are easily debunked. The first two arguments approach the practice of deal jumping from the judge’s perspective, while the last two approach it from the defendant’s point of view.

#### A. Judicial Discretion

The most common of the semiserious arguments in favor of deal jumping is this: to require judges to follow plea agreements would infringe upon judicial discretion. This is a rather odd argument, as the law frequently infringes upon judicial discretion at sentencing in many different ways, including legislatively-imposed mandatory-minimum prison sentences for even nonviolent crimes<sup>168</sup> and procedural statutes that irrationally constrain judicial discretion in the expunction of even minor convictions.<sup>169</sup>

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<sup>165</sup> Alschuler, *supra* note 69, at 1080-81 (emphasis added).

<sup>166</sup> Scott & Stuntz, *supra* note 25, at 1910 (“Albert Alschuler argued that [plea bargaining] is contractually deficient in a host of ways: many of the bargains are unconscionable; defendants accept prosecutors’ offers under duress; the poor and ignorant suffer disproportionately; the bargains are the product of irrationality and mistake.”).

<sup>167</sup> See *id.* at 1914 (discussing the benefits and efficiencies of contract law as applied to plea bargains).

<sup>168</sup> For example, merely *looking* at an illegal image (without physically possessing it or even possessing it digitally on a hard-drive) could result in conviction and a mandatory minimum prison sentence. For the meaning of “possession” for purposes of one state’s criminal prosecutions, *see Admin., Child Pornography: Knowing Possession–Viewing Digital Image on Computer*, ON POINT BLOG (Mar. 31, 2010), at <http://www.wisconsinappeals.net/on-point-by-the-wisconsin-state-public-defender/state-v-benjamin-w-mercier-2008ap1763-cr-district-ii-3312010/>. For the corresponding mandatory minimum prison sentence, *see WIS. STATS. § 939.617* (2018-19).

<sup>169</sup> One state’s statute dictates the timing of the exercise of judicial discretion in deciding whether to expunge a record of conviction. It does this by prohibiting judges from waiting to see how a defendant performs on probation, for example, before deciding whether expunction is appropriate. Instead, judges

In addition to those sentencing examples, the law also already infringes on judicial discretion specifically within the context of plea bargaining. To illustrate, recall that most plea bargains consist of a charge concession *and* a sentence concession.<sup>170</sup> Assume, for example, that a defendant is charged with two counts, both of which carry a one-year maximum sentence. Further assume that the plea bargain is this: in exchange for a plea to count one, the state would move to dismiss count two (a charge concession) and would recommend a nine-month jail sentence on count one, the crime of conviction (a sentence concession).

In this example, the charge concession—the dismissal of count two—is more important to the defendant than the sentence concession. Why? Because if the judge accepts the defendant’s plea but then sandbags him on the sentence concession, the judge could only impose an *extra three months* in jail beyond the plea deal. However, if the judge accepts the defendant’s plea but then sandbags him on the charge concession (by denying the prosecutor’s motion to dismiss count two and instead setting it for trial),<sup>171</sup> the judge puts the defendant at risk of a second conviction and an *extra year* in jail.

Of course, sandbagging the defendant on the charges is not permitted.<sup>172</sup> Even in Wisconsin, which freely permits the most egregious forms of deal jumping when it comes to the sentence, “Once the trial court has accepted a plea agreement, that court is bound by the terms of the agreement *regarding the reduction of or dismissal of charges*. ”<sup>173</sup> This raises the obvious rhetorical question: If the law prohibits sandbagging by “limiting”

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must make the decision with the limited information they have at the time of sentencing. See Admin., *Court Must Decide At the Time of Sentencing Whether a Conviction May be Expunged Under § 973.015(1)(a)*, ON POINT BLOG (Apr. 30, 2013), at <http://www.wisconsinappeals.net/on-point-by-the-wisconsin-state-public-defender/court-must-decide-at-the-time-of-sentencing-whether-a-conviction-may-be-expunged-under-%C2%A7-973-0151a/>.

<sup>170</sup> See Part I.

<sup>171</sup> See, e.g., Zinn v. State, 35 S.W.2d 283, 284 (Tex. Ct. App. 2000) (reversing the trial judge who accepted the defendant’s plea and then refused to dismiss certain charges that were to be dismissed as part of the plea bargain, setting them on for trial instead).

<sup>172</sup> Id. at 285 (“If the court chooses to accept the agreement, it is bound to carry out the terms of the agreement.”). A similar rule exists in Federal court. See FED. R. CRIM. PRO. R. 11 (c) (4).

<sup>173</sup> Wiseman & Tobin, *supra* note 65, at § 23:11 (emphasis added). The authors do not cite any source in support of their claim. And while I am not personally aware of any Wisconsin judge ever sandbagging a defendant on a *charge* concession, at least one case leaves the door slightly cracked for such a possibility. In *State v. Johnson*, 811 N.W.2d 441 (Wis. Ct. App. 2012), the defendant agreed to plead to one count in exchange for the state’s motion to dismiss the other. *Id.* at 445. For reasons that are unimportant here, the defendant later tried to withdraw his plea, arguing that the court failed to inform him “that it was not bound by the plea agreement.” *Id.* Instead of simply pointing out the obvious—that the judge *was* bound by the agreement and, in fact, *did* follow it by actually dismissing the other count—the appellate court stated that the trial court’s failure to inform the defendant that it was not bound by the agreement was harmless error because the judge decided to accept the state’s recommendation to dismiss the second count, *thus implying that the judge could have done otherwise*. *Id.* I strongly suspect, however, that Wiseman and Tobin’s claim is correct, i.e., judges cannot accept the defendant’s plea and then sandbag him by refusing to adopt the agreed-upon *charge* concession (usually the dismissal of other charges). I further suspect that the court in *Johnson* was attempting to deny the defendant’s appeal with the least amount of effort and simply failed to grasp this nuance, thus leading to its sloppy reasoning. Finally, though not directly on point, *State v. Terrill*, 625 N.W.2d 353 (Wis. Ct. App. 2001) seems to protect the defendant with regard to *charge* concessions, thus offering support for Wiseman & Tobin’s claim.

judicial discretion with regard to charges, which it rightly does, then why shouldn't the law also "limit" judicial discretion with regard to sentence?<sup>174</sup>

The words "limiting" and "limit" were placed in quotes, as forcing a judge to abide by a charge concession that he or she has already reviewed and approved doesn't actually "limit" the judge's discretion, as the judge was not obligated to approve it in the first place. However, if the judge decides to reject a charge concession, then he or she must do so *before* accepting the defendant's plea. This rule, therefore, does not limit judicial discretion; it merely shifts it to an earlier stage of the process—something the legislature has done in other contexts as well.<sup>175</sup>

The same should hold true for sentence concessions. Under the reform proposed in this Article, the judge's discretion to reject a sentence concession would remain intact, but would be merged with the decision regarding charge concessions.<sup>176</sup> This is not controversial. It is well established that "[i]f the court is concerned that the agreement might not consider the public's best interest, that inquiry must occur *before* the circuit court accepts the agreement and not after."<sup>177</sup> And because a plea agreement has two parts—a charge concession and a sentence concession<sup>178</sup>—"if the court chooses to reject the agreement, either in whole *or in part*,"<sup>179</sup> it must do so before accepting the defendant's plea. Under this procedure, then, while its timing has shifted "the judge's sentencing discretion is unhampered."<sup>180</sup>

But in order to eliminate deal jumping, legal reform doesn't even have to go *that* far. That is, legal reform doesn't even have to shift the timing of the judge's discretion to be effective. As demonstrated earlier, in many states that already prohibit deal jumping, judges do not have to reject the sentence concession before accepting the defendant's plea.<sup>181</sup> Rather, they can still reject agreed-upon sentences even after accepting the plea, listening to the parties' sentencing comments, and reviewing the PSI report; however, if

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<sup>174</sup> As an aside, one might respond that while sentencing is within the purview of judges, charging is within the purview of prosecutors, and, therefore, judges are bound by charge concession for *that* reason. But to continue with the above Wisconsin example, that is simply not true. In fact, after a prosecutor issues charges, the judge has the discretion to grant or deny the prosecutor's subsequent motion to dismiss or amend those charges. *See State v. Dums*, 440 N.W.2d 814, 816 (Wis. Ct. App. 1989) ("After prosecution is commenced, the trial court under its own power may *refuse a prosecutor's motion to dismiss or amend the charge* if it determines the motion was not in the public interest.") (internal citations omitted) (emphasis added).

<sup>175</sup> As discussed earlier, the expunction statute allows judges to use their discretion in deciding whether to order a conviction expunged; however, the judge must do so *at the time of sentencing*, not at a later time, even though it makes perfect sense to defer the expunction decision to see whether the defendant has performed well on probation, for example. *See supra* note 169.

<sup>176</sup> *See, e.g.*, *Killebrew v. People*, 330 N.W.2d 834, 841-43 (Mich. 1983) (discussing the different timing of the judge's exercise of discretion with in the context of sentence "agreements" as opposed to sentence "recommendations").

<sup>177</sup> *Wiseman & Tobin, supra* note 65, at § 23:11 (emphasis added).

<sup>178</sup> *See Alschuler, supra* note 69, at 1074 ("From the defendant's perspective, the primary significance of the charge-reduction process plainly lies in its effect on the sentence that he will receive. The basic commodity that prosecutors offer defendants in exchange for their pleas remains the same in a system of charge-reduction bargaining as in a system of sentence recommendation bargaining.").

<sup>179</sup> *Zinn v. State*, 35 S.W.2d 283, 287 (Tex. Ct. App. 2000) (emphasis added).

<sup>180</sup> *Killebrew*, 330 N.W.2d at 843.

<sup>181</sup> *See Part III.*

they do so, they must allow the defendant to withdraw the plea, if he or she wishes.<sup>182</sup> This alternative approach to legal reform not only leaves the judge's discretion intact, but also leaves the *timing* of the exercise of that discretion intact.

Importantly, the point of both reform measures is this: *the judge will have some skin in the game*. Instead of being able to jump the agreed-upon resolution and slam the hapless defendant with a far more severe sentence, the judge must give the defendant the option of going to trial instead. What would this do to the number of judges who jump plea deals? The prediction is easy to make: with the prospect of a time-consuming jury trial looming, most judges who would otherwise jump a given sentence recommendation, ostensibly because it wasn't in the public's interest, would now find that it *is* in the public's interest after all, and therefore would accept it.

Put another way, giving defendants the option of withdrawing their plea if the judge jumps the deal would quickly separate those judges who are truly concerned with the public's interest from the sadists who enjoy sandbagging defendants simply because they have the power to do so.

### B. Judicial Independence

A related and equally baffling defense of deal jumping is the need for an independent judiciary which, proponents assert, requires that judges have the authority to jump sentence concessions.<sup>183</sup> In other words, the argument goes, if “the [plea] agreement is to be presented to the judge for approval or rejection” before the defendant enters a plea, “in effect the judge would become a part of the agreement procedure[.]”<sup>184</sup> This, in turn, would allegedly violate “the rule or policy . . . against participation by judges in . . . plea bargains.”<sup>185</sup> For many reasons, this defense of deal jumping falls flat.

First, it is well-settled that when a judge approves or rejects a plea bargain before the defendant pleads, the judge is not participating in the bargaining process.<sup>186</sup> Rather, *it is the act of deal jumping*, or imposing a sentence greater than the agreed-upon sentence, that interjects the judge into the process. In deal-jumping jurisdictions:

The judge sets the price. To put it differently, in contract terms the bargain is not really between the defendant and the prosecutor, since the prosecutor can make only token commitments. *The true contracting parties are the defendant and the judge.* The prosecutor acts as the

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<sup>182</sup> See, e.g., *Otinger v. State*, 493 So.2d 1362, 1363-64 (Ala. 1986) (“[I]f the trial court decides not to carry out the agreement . . . the accused must be afforded the opportunity to withdraw this guilty plea”); *Covington v. Commonwealth*, 295 S.W. 3d 814, 817 (Ky. 2009) (“[T]he trial court must afford [the defendant] the opportunity to withdraw the plea before imposing a sentence that deviated from the punishment he had bargained for”); *Zinn*, 35 S.W.2d at 287 (“If the court chooses to reject the agreement, either in whole or in part, it must permit the defendant to withdraw his plea.”); *People v. Walker*, 46 P.3d 495, 497 (Colo. Ct. 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”).

<sup>183</sup> See *In re Amendment of Rules*, 383 N.W.2d 496 (Wis. 1986).

<sup>184</sup> Id. at 498.

<sup>185</sup> Id. at 499 (internal punctuation omitted) (citing *State v. Erickson*, 192 N.W.2d 872 (Wis. 1972)).

<sup>186</sup> See *Ediger, supra* note 73, at 200 (“It is essential that the judge maintain this independence, but that does not preclude him from informing the defendant that the agreement is not satisfactory, and from allowing the defendant a chance to reconsider his position.”).

judge's negotiating agent, but the judge retains the authority to accept or reject his agent's work.<sup>187</sup>

But even assuming, for the sake of argument, that judicial approval of the bargain before entry of the plea somehow amounts to participation in plea bargaining, there is simply nothing wrong with that. "In Oregon and North Carolina," for example, "judges take active roles [in plea bargaining] where statutes clearly encourage them" to do so.<sup>188</sup> And there are many benefits to such participation:

Judges lead the parties, especially prosecutors, to disclose more evidence earlier than they would do on their own. Judges contribute valuable new information to the parties' negotiations. The much-feared practice of judges pressuring defendants to plead guilty rarely occurs; more often, judges moderate prosecutors' demands and push outcomes in a more lenient direction.<sup>189</sup>

Second, states that protect the judiciary's deal jumping power for *sentence* concessions still prohibit the practice for *charge* concessions.<sup>190</sup> The earlier question then reemerges: Why is it okay to require a judge to approve or reject the charge concession before accepting the defendant's plea, but it is not okay to require a judge to approve or reject the sentence concession at the same time? As one appellate court lamented, "We have difficulty reconciling" these inconsistent positions.<sup>191</sup> It simply makes no sense to claim that judicial pre-approval of a sentence concession constitutes participation in bargaining, but judicial pre-approval a charge concession does not.

Third, and more directly, requiring a judge to approve or reject the entire plea deal—both charge and sentence concessions—before accepting the defendant's plea does not compromise the independence of the judiciary. In fact, and once again, the opposite is true. It is the deal jumpers who actually destroy judicial independence, or at least the perception of it. As a Pennsylvania court observed, "[I]f the sentencing court exercises its discretion to reject the recommendation often enough," and instead sentences the defendant to a harsher penalty, "*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."<sup>192</sup>

This mere "impression" of prosecutorial-judicial collusion is harmful enough, but, as demonstrated in Part II.C., the problem is actually a real one. When prosecutors know

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<sup>187</sup> Scott & Stuntz, *supra* note 25, at 1954-55 (emphasis added).

<sup>188</sup> Brown, *supra* note 23, at 56 (discussing Nancy J. King & Ronald F. Wright, *The Invisible Revolution in Plea Bargaining: Managerial Judging and Judicial Participation in Negotiations*, 95 TEX. L. REV. 325, 328 (2016)).

<sup>189</sup> Id. at 48-49. See also Alschuler, *supra* note 69, at 1060 ("From my perspective, judicial bargaining, in an appropriately limited form, is no more coercive than prosecutorial bargaining, and I believe that the bargaining process can operate in a fairer, more straightforward manner when judges do take an active part."). For a survey of the arguments *against* judicial participation in plea bargaining, see id. at 1103-22.

<sup>190</sup> See Part IV.A.

<sup>191</sup> State v. Martinez, 756 N.W.2d 570, 573 n. 2 (Wis. Ct. App. 2008) (discussing the inconsistent treatment of sentence concessions and charge concessions).

<sup>192</sup> Commonwealth v. White, 787 A.2d 1088, 1093 (Penn. Sup. Ct. 2001) (emphasis added).

that judges are not bound by sentence agreements, they have developed many tactics that pay lip service to the official, bargained-for recommendation while surreptitiously asking the judge to impose a more severe sentence.<sup>193</sup> Such disingenuous tactics—also known as cheating—violate the good faith requirement of every contract, including plea bargains.<sup>194</sup> Judges then become a party to the misconduct by “working in conjunction” with prosecutors to sandbag defendants with harsher penalties.

Fourth, states that use the independent-judiciary defense of deal jumping may actually permit judges to do the very thing that supposedly infringes on their independence: judges *may*, but are not obligated to, tell defendants they intend to jump the deal and then give them the chance to withdraw their plea.<sup>195</sup> For example, one judge accepted a defendant’s plea in a case where the parties made “a joint sentencing recommendation of a \$100 fine.”<sup>196</sup> Then, during the sentencing hearing, the judge changed her mind and told the defendant “that she intended to exceed the plea agreement recommendation and do something substantially different.”<sup>197</sup> However, instead of immediately imposing the harsher sentence, “The judge offered [the defendant] the opportunity to withdraw his plea[,]”<sup>198</sup> and he did.<sup>199</sup>

The prosecutor appealed, arguing that judges may not “approve or disapprove of a particular sentence recommendation prior to sentencing[.]”<sup>200</sup> The appellate court disagreed, as “the [state] supreme court . . . did not expressly prohibit [trial] courts from employing the procedure that it declined to mandate.”<sup>201</sup> In plain language, when a judge decides not to follow a sentence recommendation, the judge may, but is not required to, allow the defendant to withdraw his or her plea.

This is an important distinction, and one that will be revisited later in Part V. The point for now is that this court’s decision defeats its own independent-judiciary argument in support of deal jumping. The logic is simple. It is axiomatic that the judge must be independent; therefore, if judicial pre-approval of a sentence concession violated such independence, the court would have outright prohibited the practice, rather than merely refusing to mandate it.

### C. Fair Warning

Other courts, viewing sentence concessions from the perspective of the defendant rather than the judge, have defended the practice of deal jumping this way: Because defendants receive “fair warning that a trial court may exceed the sentence

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<sup>193</sup> See Part II.C.

<sup>194</sup> See Cicchini, *supra* note 27, at 182 (“Courts have specifically held that the duty of good faith extends to parties in the plea bargaining context as well. For example, in *State v. Scott*, the court acknowledged that ‘[e]very contract entails an implied obligation of good faith and fair dealing.’ Likewise, in *State v. Wills*, the court discussed the prosecutor’s duty to act in good faith and use his ‘best efforts’ in the fulfillment of the government’s obligations under the plea bargain.”).

<sup>195</sup> *State v. Martinez*, 756 N.W.2d 570 (Wis. Ct. App. 2008).

<sup>196</sup> *Id.* at 571.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 572.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 573.

recommendation by the prosecutor[,]” the judge is free to jump the deal and impose any sentence within the statutory range.<sup>202</sup>

The big issue in these fair-warning cases is whether the pre-plea warning is enough to transform an illusory bargain into an “intelligent and voluntary” plea.<sup>203</sup> A Wisconsin court, for example, presumed the warning was sufficient to render the plea voluntary, provided the judge also notified the defendant of “the potential punishment if convicted.”<sup>204</sup> But in reality, “It is hard to believe that any of this care in phraseology would have affected the quality of the defendant’s expectations in a significant way.”<sup>205</sup> Therefore, as a Colorado court stated, “when a trial court rejects a plea agreement, it removes the basis upon which a guilty plea was entered and draws into question the voluntariness of the plea.”<sup>206</sup>

The real issue, then, turns on the related question of *why* the defendant entered his or her plea in the first place—a topic addressed in the next section. However, aside from the voluntariness of the plea, the Wisconsin court’s reliance on the pre-plea warning (that the judge is not bound by the sentence concession) is misplaced and unwarranted for yet another reason: “[U]nderstanding that the sentencing court is not bound by the terms of a plea agreement is one thing, while understanding that the court’s rejection of the sentencing recommendation will leave the defendant without recourse is another.”<sup>207</sup>

#### D. The Benefit of the Bargain

A final argument in support of deal jumping is that, when the prosecutor recommends the agreed-upon sentence—and, additionally, when he or she manages to refrain from undercutting that recommendation<sup>208</sup> or running an end-around the plea deal<sup>209</sup>—the defendant got exactly what he or she bargained for: the prosecutor’s *recommendation*.

While this might be true in a hyper-technical sense, this argument fails a simple substance-over-form analysis. “Even where the only ‘promise’ is a prosecutorial recommendation for a lighter sentence, ‘there nevertheless remains at least the taint of false inducement.’”<sup>210</sup> More bluntly, “To say in these circumstances that all which was bargained for and agreed to was fulfilled by the prosecutor’s mere act of recommending [the agreed-upon sentence] would reduce the bargain to a trap[.]”<sup>211</sup> Real-life cases illuminate this “trap” problem:

In Houston, for example, despite the courts’ usual deference to prosecutorial sentence recommendations, a defendant who pleaded guilty

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<sup>202</sup> State v. Williams, 236 Wis. 2d 293, 304 (Wis. 2000).

<sup>203</sup> Id.

<sup>204</sup> Id.

<sup>205</sup> Alschuler, *supra* note 69, at 1068.

<sup>206</sup> People v. Walker, 46 P.3d 495, 497 (Colo. 2002).

<sup>207</sup> Commonwealth v. White, 787 A.2d 1088, 1093 (Penn. Sup. Ct. 2001).

<sup>208</sup> See Part II.C.1.

<sup>209</sup> See Part II.C.2.

<sup>210</sup> People v. Wright, 573 P.2d 551, 553 (Colo. 1978) (quoting ABA, STANDARDS RELATING TO THE FUNCTION OF THE TRIAL JUDGE, Cmt., 34.1(c)).

<sup>211</sup> Thomas v. State, 327 So. 2d 63, 64 (Fla. Ct. App. 1976).

in exchange for the recommendation of a *ten-year sentence* is currently serving a *fifty-year term*, and in a federal court, a defendant who was induced to plead guilty by a promise to recommend his *immediate release* from custody was sentenced to *two consecutive five-year terms*. Although the prosecutors in these cases did make the promised recommendations, the defendants probably concluded that the plea negotiation process had cheated them of years of their lives.<sup>212</sup>

When bargaining for a prosecutor's sentence concession, defendants aren't merely bargaining for the prosecutor to utter some magic words; rather, "the truth is that most defendants rely on the prosecutor's ability to secure the sentence" that was bargained for.<sup>213</sup> From the defendant's perspective, then, those "disclaimers that the court is not bound are often viewed as ceremonial incantations."<sup>214</sup>

Finally, merely putting a different label on the sentence concession, such as calling it a joint recommendation rather than an agreement, would also fail to solve the problem. Once again, "To most defendants, the distinction between a sentence agreement and a sentence recommendation[,] and between similar labels, "is little more than a variation in nomenclature."<sup>215</sup>

## V. AN INTERIM PLEA BARGAINING STRATEGY

The legal reform measure proposed in this Article would be easy to implement,<sup>216</sup> is already used in many states,<sup>217</sup> is supported by some prosecutors,<sup>218</sup> and is consistent with "the recommendations of the American Bar Association, the National Conference of Commissioners on Uniform State Laws, and the American Law Institute."<sup>219</sup> Such reform is badly needed in states that currently permit deal jumping. It would bring fairness and transparency to the plea-and-sentencing process, increase respect for and confidence in the system, and dramatically reduce the number of costly appeals and post-conviction motions currently clogging-up the courts.<sup>220</sup>

But even when legal reform is uncontroversial, legislatures can still be highly resistant to change.<sup>221</sup> Therefore, unless and until such change is implemented, defense counsel should consider taking steps to protect clients from deal-jumping judges and the

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<sup>212</sup> Alschuler, *supra* note 69, at 1069-70 (emphasis added).

<sup>213</sup> People v. Killebrew, 330 N.W.2d 834, 842 (Mich. 1983).

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> See Part III.

<sup>217</sup> See Annotation, *Right to Withdraw Guilty Plea in State Criminal Proceeding Where Court Refuses to Grant Concession Contemplated by Plea Bargain*, 66 A.L.R. 3d 902 (supp. 1999).

<sup>218</sup> See In Re Amendment of Rules, 383 N.W.2d 496, 499 (Wis. 1986) (Abrahamson, J., dissenting) ("For the reasons set forth by the Department of Justice, I would adopt the rules.").

<sup>219</sup> *Id.*

<sup>220</sup> See Part III.

<sup>221</sup> See Brown, *supra* note 23, at 47 ("Scholars know their proposals rarely are put into action, at least directly. Reform ideas developed in settings with closer ties to policymakers, such as committees under the auspices of bar associations, state courts, or professional organizations likewise frequently fail to persuade"); Scott & Stuntz, *supra* note 25, at 1910 ("The many academic arguments for abolishing [or at least severely restricting] plea bargaining have thus been largely ignored.").

prosecutors who collude with them. Most significantly, when different forms of plea agreements are permitted in a given state (or in a given county or court within that state), counsel should seek to enter into those forms that offer the defendant the most protection. This may be as simple, for example, as branding the state’s sentence concession an “agreement” rather than a “recommendation.”<sup>222</sup>

But this simple fix may not always be possible. Perhaps the particular jurisdiction does not recognize such linguistic distinctions or, even if it does, perhaps the prosecutor or the judge will not agree to defense counsel’s proposed terminology or form of plea agreement. In those situations, counsel should consider other preemptive strategies that may be available, depending upon the particular state’s law, to head-off problems before they materialize.

For example, the well-settled law in Wisconsin is that a judge is not bound by sentence concessions and, further, does not have to allow the defendant to withdraw his or her plea if the judge jumps the deal.<sup>223</sup> But in a recent Wisconsin case, a sentencing judge decided not to follow the parties’ joint sentence recommendation; yet, instead of sandbagging the defendant, the judge *did* give him the opportunity to withdraw his plea.<sup>224</sup> The appellate court upheld the judge’s authority to do so, as “[t]he [state] supreme court . . . did not expressly prohibit . . . the procedure it declined to mandate.”<sup>225</sup>

Similarly, in Kansas, the case law provides judges with “thin authority” to bless or reject a “negotiated agreement” in a plea bargain *before* the defendant even enters a plea.<sup>226</sup> This type of hidden—or at least off-the-beaten-path—exception may take statutory form as well. Utah, for example, appears to provide a limited statutory exception that permits judges to approve or reject at least one type of sentence concession—a “stipulated sentence”—before the defendant enters a plea:

Utah’s Rule 11 says “[t]he judge shall not participate in plea discussions prior to any plea agreement being made by the prosecuting attorney.” King and Wright nonetheless conclude that Utah permits a judicial role because an exception for proposed deals with stipulated sentences permits judges to “indicate to the prosecuting attorney and defense counsel whether the proposed disposition will be approved.”<sup>227</sup>

In deal-jumping states, therefore, when a judge decides not to follow a sentence concession, he or she may still have the discretion, but not the obligation, to (1) reject the plea bargain *before* taking the defendant’s plea or (2) reject it afterwards but then give the

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<sup>222</sup> See *supra* notes 49 and 50 for the significance of such labels in some jurisdictions.

<sup>223</sup> See *In re Amendment of Rules*, 383 N.W.2d 496 (Wis. 1986).

<sup>224</sup> *State v. Martinez*, 756 N.W.2d 570, 571 (Wis. Ct. App. 2008).

<sup>225</sup> *Id.*

<sup>226</sup> *Brown*, *supra* note 23, at 55 (citing *State v. Schow*, 197 P.3d 825, 836-37 (Kan. 2008)).

<sup>227</sup> *Id.* at 54 (citing Utah R. Crim. P. 11(i)(1)-(2); King & Wright, *supra* note 188, at 335 n.54). The Utah statute seems to distinguish between “recommendations” and “agreements,” without making reference to “stipulated sentences,” once again proving that a minor change in labels can have dramatic effects on a defendant’s rights. *See Utah R. Crim. P. 11* (2019). Further, there is no way for an outsider to determine from the statute whether both types of plea bargains are commonly used in a given Utah criminal court, or whether a trial judge would interpret a proffer of a “stipulated sentence” (a term used in the literature) as an “agreement” or merely a “joint recommendation.”

defendant the opportunity to *withdraw* the plea. In light of such state-specific nuances, defense counsel may, in certain states and in certain cases, decide to bring a motion asking the judge to exercise his or her discretion in such a manner.

For example, suppose a defendant is charged in a single-count complaint for which there is a strong defense, and the prosecutor offers a sentence recommendation of a fine in exchange for the defendant's plea. The defendant would like to resolve the case for a fine, but the state's law gives the judge the authority to jump the deal. However, if the judge won't impose the agreed-upon sentence, the defendant would rather have a jury trial.

In this situation, when the agreement hinges entirely on a sentence concession as opposed to a charge concession, and when the defendant is willing—or, better yet, *wants*—to go to trial if he or she cannot receive an assurance on the actual sentence, the defense may seek the judge's pre-approval of the sentence concession.<sup>228</sup> A possible change-of-plea motion, seeking such pre-approval, might take the following form:

[State] and [County]

[People or State or Commonwealth] v. [Defendant]

[Case No.]

DEFENDANT'S NOTICE OF MOTION AND MOTION  
FOR A CHANGE-OF-PLEA HEARING

Notice of Motion

[Date, time, and place of hearing]

Motion

The Defendant, appearing specially by [his/her] attorney and reserving the right to challenge the Court's jurisdiction, moves the Court to permit [his/her] change of plea, *pursuant to the plea bargain and the conditions described below*.

The prosecutor has offered a plea bargain in which the defendant would plead guilty or no contest to [charge and statute] and, in exchange, the prosecutor would recommend [proposed disposition] as the sentence. (The plea bargain will be set forth in its entirety in the plea form to be submitted to the Court.)

It is well-settled law that the trial judge is not bound by the state's sentence concession or even the parties' joint sentencing recommendation. *See State v. Williams*, 613 N.W.2d 132 (Wis. 2000). Therefore, upon reviewing the proffered plea bargain, the trial court "may, if it appropriately exercises its discretion, reject any plea agreement" *before*

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<sup>228</sup> To use this strategy, it is important that the defendant has the courage to walk away from the plea bargain and go to trial, as the judge may deny the motion hoping that the defendant will still plead guilty and the court will retain the power to jump the deal. *See Ediger, supra* note 73 at 194 ("[D]efendant's counsel requested that the plea be entered with leave to withdraw it if the court chose not to honor the county attorney's recommendation. *The request was denied*, and the court advised Evans that it would not be bound by any recommendations and that any plea made would be binding.") (emphasis added).

accepting the plea. *State v. Conger*, 797 N.W.2d 341, 344 (Wis. 2010). More specifically, in *Conger*, the proposed plea agreement included both charge and sentence concessions in exchange for the defendant's plea. *Id.* at 348. Before allowing the defendant to enter a plea, however, the trial judge considered several factors and rejected the plea bargain as it was not in the public's interest. *Id.* at 347. The appellate court upheld the trial judge's decision as a proper exercise of discretion. *Id.* at 357.

Further, if *after* accepting a defendant's plea the Court decides not to adopt the agreed-upon sentence, it may give the defendant the opportunity to withdraw the plea. *State v. Martinez*, 756 N.W.2d 570 (Wis. Ct. App. 2008). More specifically, in *Martinez*, the judge accepted the defendant's plea to the charge in exchange for the parties' "joint sentencing recommendation of a \$100 fine." *Id.* at 571. However, after learning new information at the sentencing hearing, the judge "informed Martinez that she intended to exceed the plea agreement recommendation and 'do something substantially different.'" *Id.* Instead of jumping the agreed-upon sentence, the judge "offered Martinez the opportunity to withdraw his plea." *Id.* The appellate court affirmed, noting that while the practice of "informing a defendant of the judge's intent to exceed a sentencing recommendation and allowing such defendant the opportunity of plea withdrawal" is not required, "*trial judges may employ this practice.*" *Id.* (emphasis added).

Therefore, the Defendant moves this Court as follows: (1) pursuant to *Conger*, for an advance ruling, pre-plea, on whether it will accept the plea agreement in its entirety and therefore will not exceed the state's sentence recommendation; or (2) in the alternative, pursuant to *Martinez*, to accept the plea agreement on the condition that, if the Court decides to exceed the state's recommendation, the defendant be permitted to withdraw the plea under sec. 971.08(3), Wis. Stats., and proceed to jury trial.<sup>229</sup>

[Date]

[Signature Block]

Defense counsel should consider filing this type of motion where such practices—the pre-approval of sentence concessions or, in the alternative, the subsequent withdrawal of the plea—are not standard procedure but are permitted or, at least, not expressly prohibited. And even in those states, counsel should consider such a motion only under certain circumstances.

For example, depending on the particular judge, the nature of the allegations, and the defendant's lack of criminal history or other personal characteristics, counsel may anticipate that the judge is highly likely to follow the parties' joint recommendation to begin with. In this scenario, the above motion could be unnecessary, may create unwanted complications, and probably should not be filed.

As another example, consider the situation where the defendant is charged with three counts: felony reckless endangerment, felony battery, and simple disorderly conduct. Assume the defendant has been awaiting trial while in custody and has accumulated

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<sup>229</sup> In this sample motion, I used Wisconsin's applicable statute and case law. I also worded the agreement so that the sentencing judge agrees "not [to] exceed the state's sentence recommendation[.]" Such language could be useful when the parties do *not* have a joint recommendation, as the language establishes the state's recommendation as an upper limit on the sentence the judge may impose. See, e.g., *People v. Johnson*, 129 N.E.3d 1239, 1241 (Ill. 2019) ("The state recommended that the court impose a 13-year sentence . . . Defendant sought a six-year sentence . . . The court imposed concurrent prison terms of 11 years—2 years below the maximum agreed-upon sentencing cap.").

sentence credit toward any future sentence. Further assume the prosecutor realizes a weakness in the state's case—such as a viable self-defense claim—and offers to dismiss the two felonies in exchange for a plea to the disorderly conduct for which the prosecutor would recommend a fine.

In this situation, assuming there is at least some basis on which the state could prevail if the case is tried, the charge concession would be far more valuable to the defendant than the sentence concession. Even if the judge jumps the agreed-upon sentence, the defendant will have dramatically reduced his or her exposure through dismissal of the two felonies; also, the maximum possible sentence on the disorderly conduct charge would be minimal (relative to the dismissed charges), and would be reduced even further by the sentence credit to which the defendant would be entitled.

In a case such as that, even if defense counsel anticipates the judge will jump the sentence concession, counsel should probably not file the above motion. Why not? Because the defendant "wins" the case merely by accepting the deal and obtains the full (or nearly full) benefit of the bargain by getting the two felonies dismissed. Because the sentence concession has little if any value, counsel probably does not want to risk the deal or otherwise muddy the waters with a creative motion.

On the other hand, in cases where the sentence concession *is* very important, and where the defendant *is* willing to try the case to a jury if he cannot secure the judge's assurance in advance, then the above motion may accomplish defendant's goal: He wants "concessions aimed at sentence reduction and certainty. He wants to know in advance what will happen to him" after he enters his plea.<sup>230</sup>

But what if, after granting the defendant's request to follow the procedures set forth in the above motion, the judge accepts the defendant's plea and jumps the deal anyway? First, such judicial sandbagging would constitute new heights in trickery, putting even the prosecutorial tactics discussed in Part II.C. to shame. Second, the judge's initial agreement to impose the agreed-upon sentence, or at least to let the defendant withdraw the plea if the judge changes his or her mind, should render the plea unknowing and involuntary and, therefore, subject to withdrawal anyway.

To continue with the state-specific theme developed in this Part of the Article, when a defendant follows the standard plea-and-sentencing procedure (without filing the above motion) and enters a plea in exchange for the prosecutor's sentence recommendation, the sentencing judge "must advise the defendant personally that the recommendations of the prosecuting attorney are not binding on the court."<sup>231</sup> If the judge fails to do so, the defendant's plea is unknowing and involuntary and the defendant may withdraw it if the judge jumps the deal.<sup>232</sup>

Moving along the continuum of conduct, if the judge goes beyond the mere failure to warn the defendant that a recommendation is not binding and instead actually agrees in advance to follow the recommendation—or, in the alternative, to let the

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<sup>230</sup> People v. Killebrew, 330 N.W.2d 834, 835 (Mich. 1983).

<sup>231</sup> State v. Hampton, 274 Wis. 2d. 379, 399 (2004) (quoting State ex rel. White v. Gray, 203 N.W.2d 638, 642 (Wis. 1973)).

<sup>232</sup> Id. On the other hand, if the judge follows the recommendation, then the defendant probably would not be entitled to withdraw the plea as he or she actually received the benefit of the bargain, thus rendering the warning irrelevant. See State v. Johnson, 811 N.W.2d 441, 446 (Wis. Ct. App. 2012) (holding that the sentencing court's failure to warn the defendant that it was not bound by the plea agreement was harmless given that the judge actually followed the agreement).

defendant withdraw the plea—the defendant’s argument that the plea was unknowing and involuntary would be even stronger than in the failure-to-warn cases.<sup>233</sup> Consequently, such a judicial attempt to entrap the defendant in a rejected plea deal should be dead on arrival—or, at least, dead on appeal.

## CONCLUSION

When a criminal defendant pleads in exchange for the prosecutor’s sentence concession, the defendant should be entitled to the benefit for which he or she bargained: the sentence concession.<sup>234</sup> Nonetheless, some states permit, at least under some circumstances, the judicial practice of deal jumping: the judge is allowed to take the defendant’s plea, disregard the bargained-for sentence that induced the defendant to plead in the first place, and then sentence the defendant to the maximum penalty allowed by law.<sup>235</sup>

Deal jumping is fundamentally unfair to defendants,<sup>236</sup> and, to compound this problem, it impacts innocent but risk-averse defendants (who decide to plead rather than go to trial) most harshly.<sup>237</sup> Deal jumping also gives prosecutors perverse incentives to cheat during the plea bargaining process.<sup>238</sup> When a prosecutor knows he or she can induce the defendant to plead in exchange for a sentence recommendation the judge can later disregard, the prosecutor often makes sentencing arguments that *technically* comply with his or her obligations under the plea agreement, but at the same time persuade the judge to impose a more severe punishment than that stated in the plea deal.<sup>239</sup> This subterfuge damages the integrity of the plea bargaining system—a system on which prosecutors rely to obtain more than 95 percent of criminal convictions.<sup>240</sup>

Legal reform is badly needed and simple to implement. Instead of allowing judges to accept a plea of guilty or no contest only to then jump the deal and sandbag the defendant, judges should be required to approve or reject sentence concessions at the same time they are already required to approve or reject charge concessions: *before* the defendant enters a plea.<sup>241</sup> Alternatively, if a judge decides to impose a sentence greater than that set forth in the plea bargain, the judge should be required to give the defendant the opportunity to withdraw his or her plea and proceed to trial instead.<sup>242</sup>

Such legal reform would not infringe upon judicial discretion; at most, it would shift the exercise of that discretion to an earlier stage of the process.<sup>243</sup> However, even

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<sup>233</sup> See Annotation, *Right to Withdraw Guilty Plea in State Criminal Proceeding Where Court Refuses to Grant Concession Contemplated by Plea Bargain*, 66 A.L.R. 3d 902, 938-39 (supp. 1999) (discussing Florida and New York cases where defendants were allowed to withdraw their plea based on the trial judge’s assurance that they would be allowed to do so if the judge declined to impose the agreed-upon sentence).

<sup>234</sup> See Part I.

<sup>235</sup> See id.

<sup>236</sup> See Part II.A.

<sup>237</sup> See Part II.B.

<sup>238</sup> See Part II.C.

<sup>239</sup> See id.

<sup>240</sup> See Part I.

<sup>241</sup> See Part III.

<sup>242</sup> See id.

<sup>243</sup> See Part IV.A.

though the other arguments in favor of deal jumping are frivolous,<sup>244</sup> and even though support for abolishing deal jumping is broad-based,<sup>245</sup> legislatures can still be slow to act. Therefore, unless and until the law is reformed, defense counsel practicing in deal-jumping jurisdictions should consider legal strategies to protect clients from the deal jumper—that is, the judge who would lay in the weeds, accept a plea that saves him or her from having to hold a time-consuming trial, and then sandbag the defendant with a harsher sentence than was agreed upon.<sup>246</sup>

More specifically, many states that *permit* judges to jump plea deals do not necessarily *require* them to do so. In other words, when judges in these states decide not to approve a sentence concession, they may have the discretion to so notify the parties before accepting the defendant's plea; alternatively, if after accepting the defendant's plea a judge decides to sentence more harshly than the prosecutor recommends or the parties have agreed, the judge may have the discretion to allow the defendant to withdraw his or her plea and proceed to trial instead.<sup>247</sup>

In states that have adopted—or, in some instances, perhaps inadvertently developed—these or similar legal nuances, defense counsel should consider filing a motion with the sentencing court requesting that it follow such alternative procedures. That is, counsel may move the court to decide, before the client enters a plea, whether it will adopt the sentence concession; alternatively, the motion may ask the court to accept the defendant's plea contingent upon his or her right to withdraw it if the judge later decides to exceed the prosecutor's recommendation or reject the parties' joint agreement.<sup>248</sup>

When faced with the prospect of a time-consuming jury trial—whether because of legal reform that abolishes deal jumping or an individual defendant's refusal to plead without the judge's assurance as to the actual sentence that will be imposed—many judges who would otherwise jump a plea deal to sandbag the defendant will now, unsurprisingly, follow the prosecutor's sentencing recommendation or adopt the parties' agreement. Such a judge, realizing that deal jumping now comes at the high price of a time-consuming jury trial that may even end in acquittal, will eagerly grant the defendant's motion, accept the defendant's plea, and adopt the prosecutor's sentence concession.<sup>249</sup>

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<sup>244</sup> See Part IV.B.–IV.D.

<sup>245</sup> See Part II.A.

<sup>246</sup> See Part V.

<sup>247</sup> See *id.*

<sup>248</sup> See *id.*

<sup>249</sup> See Part IV.A.