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## Preliminary-Hearing Waivers and the Contract to Negotiate

Michael D. Cicchini

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# Preliminary-Hearing Waivers and the Contract to Negotiate

Michael D. Cicchini\*

## *Abstract*

*Plea bargaining often begins very early in a criminal case—sometimes before the preliminary hearing, or “prelim,” is held. Because of the time, effort, and risk involved in holding a prelim, the prosecutor may make the defendant a prelim waiver offer. That is, if the defendant agrees to waive the prelim, the prosecutor will hold a particular plea offer open for the defendant’s future consideration. Such prelim waiver offers may be skeletal, at best, but will often include the promise of “future negotiations” to fill in the details.*

*When the prosecutor obtains the defendant’s prelim waiver for the promise of future negotiations, the parties have entered into a legally binding agreement known as a “contract to negotiate.” Despite this, after a prosecutor induces the defendant to waive the prelim, the prosecutor may then refuse to negotiate in good faith—or at all. This is a breach of the contract to negotiate, and the defendant is entitled to a remedy.*

*Defense lawyers may mistakenly overlook a prosecutor’s breach in this situation, as the two classic remedies for a plea-bargain breach—i.e., plea withdrawal and re-sentencing—don’t fit in these circumstances. Instead, the failure to negotiate is akin to a failure to prosecute, and*

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\* Criminal Defense Lawyer, Cicchini Law Office LLC, Kenosha, Wisconsin. J.D., *summa cum laude*, Marquette University Law School (1999); C.P.A., University of Illinois Board of Examiners (1997); M.B.A., Marquette University Graduate School (1994); B.S., University of Wisconsin—Parkside (1990). Visit [www.CicchiniLaw.com](http://www.CicchiniLaw.com) for more information.

*numerous sources of law provide a variety of remedies. These include dismissal of the case with or without prejudice, dismissal of felony charges, or at least a remand for a preliminary hearing. This Article discusses these remedies and provides a model motion seeking relief from the prosecutor's breach.*

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## I. PLEA BARGAINING BASICS

For a variety of reasons—including charge-stacking<sup>1</sup> and the greatly feared trial penalty<sup>2</sup>—most criminal defendants will accept a plea deal instead of going to trial.<sup>3</sup> Their reasoning is simple: when facing multiple charges with lengthy potential penalties for each, the state’s promise to dismiss some of the counts and to limit the sentence on the remaining count or counts is very appealing.<sup>4</sup>

In other words, a plea bargain allows the defendant to obtain some level of certainty rather than taking a chance at jury trial—an ordeal which has been analogized to “a plunge from an unknown height.”<sup>5</sup> This free-fall analogy is especially apt in states that do not provide the defense with meaningful pretrial discovery procedures.<sup>6</sup> When prosecutors are allowed to keep defendants in the dark, even a bad plea deal can look better than the alternative of flying blind at trial.

Some sources indicate that ninety-nine percent of all cases within a given jurisdiction resolve by plea bargain instead of jury trial.<sup>7</sup> Shockingly, at least

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1. See Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303, 1313 (2018) (discussing the prosecutorial tactic of “*piling on* overlapping, largely duplicative offenses” (emphasis original)).

2. Whether the trial penalty actually exists is up for debate. Compare Michael M. O’Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 419 (2008) (“[I]t is well recognized that judges routinely impose substantial penalties at sentencing on those defendants with the temerity to go to trial, sometimes doubling the punishment, or worse.”) with David S. Abrams, *Putting the Trial Penalty on Trial*, 51 DUQ. L. REV. 777, 778 (2013) (“[N]ot only is there no evidence for a trial penalty, there appears to be a trial discount!”).

3. See O’Hear, *supra* note 2, at 409 (“Plea bargaining now dominates the day-to-day operation of the American criminal justice system”).

4. See Daniel S. McConkie, *Judges as Framers of Plea Bargaining*, 26 STAN. L. & POL’Y REV. 61, 63 (2015) (“Put simply, defendants decide to plead guilty out of fear.”).

5. Albert W. Alschuler, *The Trial Judge’s Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1080–81 (1976) (quoting Oakland Public Defender John D. Nunes).

6. See, e.g., Michael D. Cicchini, *Improvident Prosecutions*, 12 DREXEL L. REV. 465, 499–506 (2018) (explaining how Wisconsin has stripped the preliminary hearing of its discovery function to create an “assembly-line approach” for criminal convictions); *People v. Hodge*, 423 N.E.2d 1060, 1063 (N.Y. Ct. App. 1981) (observing that “discovery and deposition, by and large, are not available in criminal cases”).

7. See Darryl K. Brown, Response, *What’s the Matter with Kansas—and Utah?: Explaining Judicial Interventions in Plea Bargaining*, 95 TEX. L. REV. 47, 62 (2017) (“All this has allowed state

one venue had zero criminal trials for the entire calendar year of 2011 and beyond.<sup>8</sup> And even adopting the more conservative estimate of a ninety-five percent plea-bargain rate,<sup>9</sup> it is undeniable that plea bargaining “is not some adjunct to the criminal justice system; it *is* the criminal justice system.”<sup>10</sup>

While charge and sentence concessions are the most common forms of plea bargains,<sup>11</sup> a plea bargain can be much broader and may not even involve an actual plea; instead, it is “any agreement between the prosecutor and the defendant whereby a defendant agrees to perform some act or service in exchange for more lenient treatment by the prosecutor.”<sup>12</sup> This definition includes the preliminary-hearing waiver offer, wherein the defendant waives the preliminary hearing in exchange for the prosecutor’s promise of future negotiations.<sup>13</sup>

Given the high prevalence of plea bargaining, it is not surprising that criminal litigation often involves plea bargain disputes between the state and the defense. As the next Part explains, when the parties disagree about their rights or obligations under a plea bargain, courts turn to contract law principles to resolve those disputes.

## II. PLEA BARGAINS AS CONTRACTS

It is generally true that “[a] plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty

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and federal courts to reach guilty plea rates of 96 to 99 percent.”); John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 9 (1978) (“[A]s many as 99 percent of all felony convictions are by plea.”).

8. See Cynthia Alkon, *Hard Bargaining in Plea Bargaining: When do Prosecutors Cross the Line?*, 17 NEV. L.J. 401, 403 (2017) (citing a news source reporting no criminal trials for an Arizona county in 2011).

9. See O’Hear, *supra* note 2, at 409 (“[A]bout ninety-five percent of convictions are obtained by way of a guilty plea.”).

10. Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992).

11. See *People v. Killebrew*, 330 N.W.2d 834, 836 (Mich. 1982) (discussing “charge bargaining” and “sentence bargaining”).

12. *State v. Thompson*, 426 A.2d 14, 15 n.1 (Md. Ct. Spec. App. 1981).

13. See *infra* Part III.

or any other constitutionally protected interest.”<sup>14</sup> In other words, “It is the ensuing guilty plea that implicates the Constitution.”<sup>15</sup>

But the Constitution is not the defendant’s only source of rights, and disputes that arise *before* the defendant enters a plea will usually be governed by contract law principles.<sup>16</sup> A contract, of course, is a “set of promises, for breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.”<sup>17</sup> Even more simply, a contract is nothing more than “a legally enforceable agreement.”<sup>18</sup> Given these commonly accepted definitions, it is settled law that “[a] *plea bargain is a contract*, the terms of which necessarily must be interpreted in light of the parties’ reasonable expectations.”<sup>19</sup>

There certainly can be differences between a plea bargain and the typical commercial contract, but those differences do not remove plea deals from the realm of contract law. For example, after agreeing to a plea bargain but before entering the plea in open court, the defendant is typically allowed to withdraw from the agreement and demand a jury trial<sup>20</sup>—despite analogous commercial

14. *Mabry v. Johnson*, 467 U.S. 504, 507 (1984). However, it is possible that, in limited situations, the U.S. Constitution or a state’s constitution could be implicated *before* the defendant enters a plea. *See, e.g., United States v. Papaleo*, 853 F.2d 16, 18 (1st Cir. 1988) (“Due process concerns may also arise prior to the entry of a guilty plea when the defendant detrimentally relies upon the government’s promise.”); *Cooper v. United States*, 594 F.2d 12, 19 (4th Cir. 1979) (stating that the Constitution is implicated when the state’s reason for withdrawal from a plea deal “had nothing to do with extenuating circumstances affecting the government’s or any public interest that were [sic] unknown when the proposal was extended.”).

15. *Mabry*, 467 U.S. at 507–08.

16. *See State v. Scott*, 230 Wis. 2d 643, 654–55 (Ct. App. 1999) (“[W]e also look to contract-law principles to determine a criminal defendant’s rights.”). In fact, even though *Scott* involved a post-plea breach that implicated the Constitution, the court still employed contract law terminology throughout the case. *See id.* at 655 (“Every contract entails an implied obligation of good faith and fair dealing.”).

17. Joseph M. Perillo, *CALAMARI & PERILLO ON CONTRACTS* § 1.1 (5th ed. West 2003) (quoting Williston, *CONTRACTS* § 1.1 (4th ed. Lord 1990)).

18. *Id.*

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

20. Before convicting a defendant pursuant to a plea bargain, the trial judge must ensure that the defendant’s “decision to plead guilty [is] knowing, voluntary and intelligent.” *Davis v. State*, 675 N.E.2d 1097, 1102 (Ind. 1996) (citing *Boykin v. Alabama*, 395 U.S. 238, 242–44 (1969)). This cannot

contract law principles to the contrary.<sup>21</sup> As another example, in criminal law, the judge may reject the parties' plea bargain and, therefore, the parties would not be bound by it.<sup>22</sup> This, too, contradicts the principles that underlie the typical commercial contract, wherein the parties are largely free to enter into, and be bound by, agreements as they alone see fit.<sup>23</sup>

However, these characteristics, while not typical of commercial contracts, also exist in the commercial world. Much like the criminal defendant withdrawing from a plea agreement, minors may enter into, and then avoid at their option, certain contracts in the commercial setting.<sup>24</sup> Similarly, just as judicial approval is required for plea bargains, third parties must sometimes approve certain contracts, such as those for the sale of real estate subject to a mortgage, before they are binding.<sup>25</sup> Nonetheless, the minor's purchase agreement, the sale of real property, and the criminal defendant's plea bargain *are still contracts*.

Therefore, when disputes arise during the plea bargaining process, courts apply "contract-law principles to determine a criminal defendant's rights thereunder."<sup>26</sup> And as the next Part demonstrates, this plea bargaining process often begins very early in a criminal case—sometimes even before the preliminary hearing.

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be done until the judge personally addresses the defendant in open court. *See, e.g.,* WIS. J.I. CRIM. SM-32 (2021) (this guide helps the judge "establish[] the voluntariness of the plea" and "determin[e] the defendant's understanding of the crime charged," among other things).

21. Typically, an offer and acceptance, supported by consideration, would create a binding contract in the commercial setting which would require the parties to act in good faith to fulfill their contractual obligations. *See* Perillo, *supra* note 17, at § 11.38 (discussing the implied requirement of good faith).

22. *See, e.g.,* MASS. R. CRIM. P. 12(d)(4) ("The judge [may] . . . reject the plea agreement"); *State v. Conger*, 797 N.W.2d 341, 344 (Wis. 2010) (the trial court "may, if it appropriately exercises its discretion, reject any plea agreement").

23. *See* Perillo, *supra* note 17, at § 1.3 (discussing the freedom to contract).

24. *See id.* at § 8.4 ("[T]he general rule is that an infant's contract is voidable by the infant. The exercise of this power of avoidance is often called disaffirmance."). The term "infant" means "minor." *Id.* at § 8.2.

25. *See, e.g., Ex parte Yarber*, 437 So. 2d 1330, 1334 (Ala. 1983) (discussing the requirement of third-party approval for realty transactions involving a mortgage).

26. *State v. Scott*, 230 Wis. 2d 643, 654–55 (Ct. App. 1999).



## III. PRELIM WAIVERS AND THE CONTRACT TO NEGOTIATE

Procedurally, the preliminary hearing—or simply “prelim”—varies dramatically by state.<sup>27</sup> But generally speaking, the prelim is a pretrial, adversarial hearing at which the state must present evidence, subject to cross-examination, to establish probable cause that the defendant committed a felony.<sup>28</sup> If the prosecutor establishes probable cause, the case will be bound over for trial; if the prosecutor fails to do so, the felony charges in the complaint could be amended to misdemeanors or even dismissed.<sup>29</sup>

Given the commonly accepted purposes underlying the prelim, a hearing delayed is, in effect, a hearing denied.<sup>30</sup> The longer it takes to hold the prelim, the less effective it is in fulfilling most of its numerous, overlapping objectives, which are:

[T]o prevent hasty, malicious, improvident and oppressive prosecutions, to protect the person charged from open and public accusations of crime, to avoid both for the defendant and the public the expense of a public trial, . . . to save the defendant from the humiliation and anxiety involved in public prosecution, and to discover whether or not there are substantial grounds upon which a prosecution may be based.<sup>31</sup>

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27. See *People v. Lewis*, 903 N.W.2d 816, 819 (Mich. 2017) (because preliminary hearings are created by state statute, “there are variations in each state’s preliminary-examination procedures”).

28. See Paul G. Cassell & Thomas E. Goodwin, *Protecting Taxpayers and Crime Victims: The Case for Restricting Utah’s Preliminary Hearings to Felony Offenses*, 4 UTAH L. REV. 1377, 1382–83 (2011). As the title of that article indicates, Utah provides (or at least provided) prelims for both misdemeanor and felony defendants. However, that is rare; most if not all other states provide prelims only for felony defendants. For a collection of state statutes on prelims, see *id.* at 1395–1402.

29. See, e.g., WIS. STAT. § 970.03(8) (“If the court finds that it is probable that only a misdemeanor has been committed by the defendant, it shall amend the complaint to conform to the evidence.”); *id.* at (10) (“[T]he court shall order dismissed any count for which it finds there is no probable cause. The facts arising out of any count ordered dismissed shall not be the basis for a count in any information filed.”). Unfortunately, Wisconsin courts have created a doctrine called the “transactional relation” test to bypass—and, in fact, directly contradict—the plain language of the statute. See Cicchini, *supra* note 6, at 506–09.

30. See William H. Theis, *Preliminary Hearings in Homicide Cases: A Hearing Delayed Is a Hearing Denied*, 62 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 17 (1971).

31. *State v. Williams*, 544 N.W.2d 400, 404 (Wis. 1996) (quoting *State v. Richer*, 496 N.W.2d 66, 68–69 (Wis. 1993)).

Because time is of the essence, the magistrate is often required to hold the prelim rather quickly—sometimes within ten days of the defendant’s initial appearance or some other event.<sup>32</sup> Given the prosecutorial resources needed to prepare for and hold the hearing, the risk that the defense could discover the state’s strategy or theory of the case,<sup>33</sup> and the risk (however small) of not winning bind-over,<sup>34</sup> prosecutors would rather not have prelims. Consequently, prosecutors often give defendants early plea offers, called prelim waiver offers, to induce them to waive their hearings.<sup>35</sup>

Like a regular plea offer, a prelim waiver offer may include a charge concession, a sentence concession, or both.<sup>36</sup> The primary difference, as its label indicates, is that the prelim waiver offer is tied to the defendant’s waiver of the prelim. For example, a prosecutor may say: “If the defendant waives the prelim, the state would make the following plea offer, which would expire at the final pretrial hearing: plead to count one, the state would recommend probation and dismiss all remaining counts.”

The prelim waiver offer is an option contract: by waiving the prelim, the defendant has *the option* to accept the plea offer at a later date.<sup>37</sup> However, the defendant is not bound to do so; rather, he or she is waiving the prelim merely to *preserve* the offer.<sup>38</sup> The defendant can then decide at a future

32. See, e.g., CAL. PENAL CODE § 895b (absent a waiver by both parties or good cause, the prelim “shall be held within 10 court days of the date the defendant is arraigned or pleads, whichever occurs later”).

33. See *State v. Essman*, 403 P.2d 540, 542 (Ariz. 1965) (“Although the formal purpose of the preliminary examination is to establish probable cause to hold the defendant for trial, its principal purpose in practice is to afford defense counsel an opportunity to learn the nature of the prosecutor’s case.” (internal quotations omitted)).

34. See *supra* text accompanying note 29 (explaining the requirements to win bind-over.)

35. See, e.g., *People v. Macrander*, 756 P.2d 356, 358 (Colo. 1988) (“The agreement is that Mr. Macrander has agreed to waive his preliminary hearing here today. In return, the district attorney is agreeing to make the following offer to Mr. Macrander. That is that they are willing to drop all charges against Mr. Macrander, except for one Class 4 felony, to which Mr. Macrander would plead guilty.”).

36. See, e.g., *People v. Killebrew*, 330 N.W.2d 834, 836 (Mich. 1982) (discussing “charge bargaining” and “sentence bargaining”).

37. See Michael D. Cicchini, *Broken Government Promises: A Contract-Based Approach to Enforcing Plea Bargains*, 38 N.M. L. REV. 159, 189–91 (2008) (discussing the prelim waiver offer as an “option contract” that binds the state once the defendant begins performance by waiving the prelim).

38. See *id.*

date—after the defense has obtained the discovery,<sup>39</sup> investigated the allegations, and evaluated possible defenses—whether to accept the offer.

Given the timing of the prelim, a prelim waiver offer necessarily is made very early in the case. Final plea agreements, however, are usually formed in the same manner as commercial contracts: over a period time, after ongoing negotiations and the exchange of information.<sup>40</sup> Most final plea agreements are therefore reached closer to the plea-bargain deadline; if no deadline is imposed, plea deals are sometimes reached minutes before trial, on the proverbial courthouse steps.<sup>41</sup> One reason for this is that prosecutors are cautious not to make too lenient of a prelim waiver offer before they have had a chance to consult with the complaining witness<sup>42</sup>—and, quite frankly, test the defendant's and defense counsel's willingness to go to trial.<sup>43</sup>

Consequently, at this early, pre-preliminary hearing stage of the criminal process, a prelim waiver offer might be incomplete and may include only a charge concession. The prosecutor may say, for example: "If the defendant waives the prelim, the state would make the following plea offer which would

39. In some states, defendants are not entitled to discovery materials until after the prelim is held or waived. *See, e.g.*, *State v. Benson*, 661 P.2d 908, 909 (Okla. Crim. App. 1983) ("A motion for disclosure of any exculpatory evidence in possession of the prosecution should be filed as soon as the defendant has been arraigned, *after having been bound over for trial.*" (emphasis added)).

40. *See* *Copeland v. Baskin Robbins*, 117 Cal. Rptr. 2d 875, 885 (Ct. App. 2002) (contracts "result from a gradual flow of information between the parties followed by a series of compromises and tentative agreements on major points which are finally refined into contract terms"). However, for a variety of reasons, not all defense attorneys diligently pursue plea bargaining. *See* O'Hear, *supra* note 2, at 415 ("In routine case processing, cases are resolved quickly, with little or no haggling, shortly before or during a routine, preliminary court appearance by the defendant, such as arraignment.").

41. Some judges will accept plea deals at any time, including in the middle of trial; others impose firm plea bargain deadlines. *See* Michael D. Cicchini, *Under the Gun: Plea Bargains and the Arbitrary Deadline*, 93 TEMPLE L. REV. 89, 89 (2020).

42. A relatively recent law in Wisconsin called "Marsy's Law," which was opposed by many prosecutors, imposes onerous requirements on prosecutors to cater to complaining witnesses. Under the new law, complaining witnesses have been anointed as "victims" upon making an accusation and long before any adjudication of guilt. *See* Marsy's Flaws, WISCONSIN JUSTICE INITIATIVE, at <http://www.wjiinc.org/marsys-flaws.html> (last visited Sept. 24, 2023).

43. *See* Molly J. Walker Wilson, *Defense Attorney Bias and the Rush to the Plea*, 65 U. KAN. L. REV. 271 (2016) ("[P]ublic defenders . . . depend upon defendants taking deals and staying out of court."). Anecdotally, one prosecutor has told me that some defense lawyers are known to avoid trial; therefore, prosecutors do not make favorable plea offers to the clients of those lawyers because prosecutors know those lawyers will eventually talk their clients into accepting whatever the prosecutor offers.

expire at the final pretrial hearing: plead to count one, the state would dismiss the remaining counts. This offer is subject to *further negotiations*.” In other situations, often due to prosecutorial procrastination or pure laziness, the prosecutor may make the following prelim waiver offer: “waive the prelim in exchange for *future negotiations*.” This Article will refer to both of those scenarios—the promise of further and future negotiations—simply as “future negotiations.”

The promise of future negotiations has legal meaning: it is a contract in and of itself, and it is called a contract to negotiate. For example, in a frequently-cited case involving a dispute in the ice cream industry, one Mr. Copeland entered into an agreement to negotiate the purchase of property from Baskin Robbins, subject to the parties’ ability to also negotiate a co-packing agreement wherein Copeland would use the property to produce ice cream that Baskin Robbins would then buy from him.<sup>44</sup> When Baskin Robbins terminated negotiations—the idea of a co-packing agreement suddenly conflicted with its newly-adopted corporate strategy—Copeland sued for breach.<sup>45</sup> Baskin Robbins defended by asserting that an agreement to negotiate is not enforceable.<sup>46</sup> The court, however, recognized the agreement as a binding contract:

[W]e see no reason why in principle the parties could not enter into a valid, enforceable *contract to negotiate* the terms of a co-packing agreement. A contract, after all, is “an agreement to do or not to do a certain thing.” Persons are free to contract to do just about anything that is not illegal or immoral. Conducting negotiations to buy and sell ice cream is neither.<sup>47</sup>

Consequently, the court held, “a contract to negotiate an agreement . . . can be formed and breached just like any other contract.”<sup>48</sup> Or, as a different

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44. Copeland v. Baskin Robbins, 117 Cal. Rptr. 2d 875, 878 (Ct. App. 2002).

45. *Id.*

46. *Id.* at 879.

47. *Id.* at 880 (emphasis added).

48. *Id.* at 877.

court explained, also in the commercial law context, “agreements entered into by willing parties, which do not offend public policy, are generally enforceable”—and these include “contracts to negotiate.”<sup>49</sup>

In the criminal law context, the parties’ agreement to negotiate a plea bargain in the future is not “illegal or immoral,”<sup>50</sup> nor does it “offend public policy.”<sup>51</sup> Plea bargaining is the typical—even the exclusive or near-exclusive—method of resolving criminal cases.<sup>52</sup> In fact, it would offend public policy if prosecutors were *not* required to keep the promises they made to induce preliminary waivers.<sup>53</sup> Consequently, the “contract to negotiate [a plea] agreement can be formed and breached just like any other contract.”<sup>54</sup>

However, as explained in the next Part, after reaping the benefits of a defendant’s waiver of the preliminary hearing, prosecutors often have strong incentives to breach the contract to negotiate.

#### IV. PROSECUTORIAL BREACH

In the world of criminal law, underhanded delay tactics are typically associated with defense lawyers, not prosecutors.<sup>55</sup> But prosecutors often seek to delay cases as well, and one way prosecutors can stall is to breach the

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49. *Butler v. Balolia*, 736 F.3d 609, 613 (1st Cir. 2013); *see also City of Tacoma v. United States*, 31 F.3d 1130, 1132 (Fed. Cir. 1994) (recognizing the enforceability of “a contract term which allows for future negotiation”); *Channel Home Ctrs. v. Grossman*, 795 F.2d 291, 292 (3d Cir. 1986) (recognizing the enforceability of “an agreement to negotiate”); *Venture Associates v. Zenith*, 987 F.2d 429, 432 (7th Cir. 1993) (“Illinois law recognizes the prerogative to agree to further negotiations”); *Am. Broad. v. Wolf*, 52 N.Y. 2d 363, 397 (1981) (recognizing the enforceability of a “good faith negotiation provision”).

50. *Copeland v. Baskin Robbins*, 117 Cal. Rptr. 2d 875, 880 (Ct. App. 2002).

51. *Butler*, 736 F.3d at 613.

52. *See supra* Part I.

53. *State v. Kuchenreuther*, 218 N.W.2d 621, 624 (Iowa 1974) (quoting *United States v. Carter*, 454 F.2d 426, 428 (4th Cir. 1972) (“At stake is the honor of the government [and] public confidence in the fair administration of justice.”); *Bowers v. State*, 500 N.E.2d 203, 204 (Ind. 1986) (a prosecutor’s promise “is a pledge of the public faith and is not to be lightly disregarded. The public justifiably expects the State, above all others, to keep its bond.”).

54. *Copeland*, 117 Cal. Rptr. 2d at 877.

55. *See* Laura Banfield & C. David Anderson, *Continuances in the Cook County Criminal Courts*, 35 U. CHI. L. REV. 259, 259 (1968) (discussing the commonly held view “that defendants use continuances to defeat or delay prosecution”).

contract to negotiate by failing to negotiate in good faith—or even at all. When prosecutors won’t play ball with the defense, criminal cases end up moving at a pace “somewhat faster than a tree grows but a lot slower than ketchup coming out of a bottle.”<sup>56</sup> And there are several ways in which a proverbial snail’s pace could benefit the state.

First, if the defendant cannot post bail, the prosecutor will be in no rush to reach a plea deal as the defendant is effectively serving his or her sentence *before*—and if the state’s case is weak, potentially *without*—a conviction.<sup>57</sup> If nothing else, the longer the defendant is confined before trial, the more likely he or she will eventually accept a plea deal with bad charge concessions, as long as the sentence concession provides some hope for a plea and release.<sup>58</sup>

Second, if the state’s case is weak and the defendant has posted bail, the defense will be negotiating from a position of strength. Instead of engaging, the prosecutor would rather delay. The longer the case drags on, the greater the chance the defendant will violate a non-monetary condition of bond,<sup>59</sup> which allows the prosecutor to file a “bail jumping” charge.<sup>60</sup> The prosecutor can use this new charge as leverage: by offering to dismiss it, the prosecutor can extort a plea to the original, underlying charge.<sup>61</sup> Once again, delay

56. Matthew Stewart, *THE MANAGEMENT MYTH: DEBUNKING MODERN BUSINESS PHILOSOPHY* 241 (W.W. Norton & Co. 2009) (describing his personal experience in the legal system, albeit in the civil rather than criminal context).

57. In other words, the defendant may eventually get to trial and win an acquittal after having spent several months or even years in custody.

58. See O’Hear, *supra* note 2, at 418–19 (“For those who cannot make bail, the unpleasantness of pretrial detention may be a very effective deterrent to trial.”).

59. In addition to bail, courts impose non-monetary conditions of bond that can be onerous and nonsensical. Such non-monetary conditions often order the defendant to have “no contact” with certain individuals, including family members and friends, even if there is no reason to believe that the defendant would harm or intimidate the person. In addition, “no alcohol” and similar conditions are very common. See, e.g., WIS. STAT. § 969.01(4) (“Conditions of release, other than monetary conditions, may be imposed for the purpose of protecting members of the community from serious harm, or preventing intimidation of witnesses.”). Many defendants are incapable of complying with even the simplest bond conditions, and they often accumulate numerous bail jumping charges before their original case can be resolved.

60. “Bail jumping” is a misnomer; it should instead be called “bond jumping,” as the defendant is actually charged with violating non-monetary conditions of bond. For an example of a “bail jumping” statute, see, e.g., WIS. STAT. § 946.49(1) (criminalizing the defendant’s intentional failure “to comply with the terms of his or her bond”).

61. Defense lawyers routinely experience this; at least one researcher demonstrated it empirically.

benefits the state.

Third and finally—and perhaps most commonly—simple neglect or pure laziness may explain why the prosecutor fails to respond to, or refuses to negotiate in good faith with, the defense.<sup>62</sup> From the procrastinator’s perspective, it is always easier to put off to tomorrow that which would require effort to resolve today.

For these and other reasons, after inducing the defendant to waive the prelim for the promise of future negotiations, prosecutors often fail to make any offer. Rather, it is the defense which makes the first plea offer to the state—only to be ignored by the prosecutor. The prosecutor may even request adjournments, ostensibly to consider the defendant’s offer, in order to delay the case even further. In other cases, the prosecutor may respond to the defendant’s plea offer, but the response may arguably fall short of the prosecutor’s contractual obligation to negotiate in good faith.<sup>63</sup> For example:

[Prosecutorial] tactics include “exploding offers”—when a prosecutor threatens that the deal is good “today only” or for some other restricted time period (such as until the case is called in court). Another standard hard bargaining tactic is

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See Amy Johnson, Comment, *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.”).

62. Prosecutorial neglect and laziness are hallmarks of the plea-bargaining system, and they are often cited as the reasons prosecutors breach plea agreements in other ways, such as failing to make agreed-upon sentence recommendations. See, e.g., *United States v. Diaz-Jimenez*, 622 F.3d 692, 693 (7th Cir. 2010) (prosecutor breached the plea agreement because he “may have failed to review the plea agreement before the hearing”); *Santobello v. New York*, 404 U.S. 257, 260 (1971) (prosecutor breached the plea agreement due to “an unfortunate lapse in orderly prosecutorial procedures”).

63. See Perillo, *supra* note 17, at § 11.38 (discussing the implied requirement of “good faith” in fulfilling contractual obligations). Good faith is often defined in terms of “bad faith.” “A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: . . . lack of diligence and slacking off . . .” *Id.* This good faith requirement applies in criminal law as well. See *State v. Scott*, 230 Wis. 2d 643, 655 (Ct. App. 1999) (“Every contract entails an implied obligation of good faith and fair dealing.”); see also Alkon, *supra* note 8, at 417–20 (discussing good faith in the plea bargaining context by analogizing to labor law negotiations).

for the prosecutor to threaten to add an enhancement, such as the use of a gun, which adds mandatory minimum jail time. A third hard bargaining tactic is to threaten to add additional charges that carry additional time, sometimes also as a mandatory minimum. A fourth hard bargaining tactic is to phrase the offer as a “take-it-or-leave-it” offer and refuse any further negotiation. Last, a fifth hard bargaining tactic is when prosecutors threaten to proceed with the case as a death penalty case unless the defendant takes the deal. . . . [P]rosecutors often use more than one hard bargaining tactic in the same case.<sup>64</sup>

When the prosecutor refuses to negotiate in good faith, or at all, defense counsel may simply write off the prosecutor’s earlier promise of “future negotiations” in the prelim waiver offer as hollow rhetoric to be forgotten the second the words fell out of the prosecutor’s mouth. That may have been the prosecutor’s intent; nonetheless, such stonewalling is a breach of the contract to negotiate. And as explained in the next Part, under contract law, the non-breaching party is entitled to a remedy.

## V. THE DEFENDANT’S REMEDIES

When a prosecutor breaches a plea agreement, the defendant is entitled to a remedy.<sup>65</sup> One reason defense counsel may inadvertently overlook the breach of a contract to negotiate is that the traditional, well-established remedies are not applicable. That is, the United States Supreme Court has recognized plea withdrawal and re-sentencing in front of a different judge as remedies for the prosecutor’s breach of a plea agreement.<sup>66</sup> However, neither of

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64. Alkon, *supra* note 8, at 407 (also arguing for “restrictions and better rules” to prevent these bad-faith prosecutorial tactics in plea bargaining).

65. See *Santobello*, 404 U.S. at 262 (“[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such a promise must be fulfilled.”). State law is in accord. See, e.g., *State v. Williams*, 249 Wis. 2d 492, 517 (2002) (“A material and substantial breach is a violation of the terms of the agreement that defeats the benefit for which the accused bargained.”).

66. *Santobello*, 404 U.S. at 262–63 (remanding “to decide [1] whether . . . [the defendant] should



these remedies applies when the prosecutor breaches a contract to negotiate, as the defendant has yet to enter a plea or to be sentenced—precisely *because* the prosecutor refuses to negotiate.

Instead, the prosecutor's breach in this regard is the equivalent of a *failure to prosecute*. Normally, the prosecutor has no duty to negotiate, as the defendant has “no constitutional right to plea bargain.”<sup>67</sup> However, that changes when the prosecutor initiates plea bargaining by inducing the defendant to waive the preliminary hearing for the promise of future negotiations. An argument can be made that this requires the prosecutor to make the first plea offer. But at a minimum, the prosecutor certainly must respond to the defendant's plea offer and negotiate in good faith.<sup>68</sup> Failure to do so is a failure to prosecute; it is analogous to failing to file a witness list,<sup>69</sup> failing to respond to a discovery demand or order,<sup>70</sup> or failing to do anything else that a prosecutor is obligated to do in prosecuting a case, such as being ready for jury trial.<sup>71</sup>

Remedies for the failure to prosecute are found in case law,<sup>72</sup> criminal procedure statutes,<sup>73</sup> civil procedure statutes that are often applied to criminal

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be resentenced by a different judge or [2] whether . . . the circumstances require . . . the opportunity to withdraw his plea of guilty”).

67. *Weatherford v. Bursey*, 429 U.S. 545, 561 (1977); *see also* Alkon, *supra* note 8, at 419 n.126 (“Thus far no court has found that a defendant has a right to a plea bargain.”).

68. *See supra* note 63 for sources discussing what constitutes “good faith.”

69. *See, e.g.*, *State v. Prieto*, 2016 WI App. 15, ¶ 19 (Hagedorn, J., concurring) (citing WIS. STAT. § 805.03, also known as the “failure to prosecute” statute, as the basis for imposing a sanction against prosecutor for repeatedly failing to file a witness list despite extended deadlines).

70. *See, e.g.*, *United States v. Apex Distrib. Co.*, 270 F.2d 747, 759 (9th Cir. 1959) (dismissing criminal case because the prosecutor refused to provide discovery materials to the defense).

71. *See, e.g.*, *United States v. Pack*, 247 F.2d 168 (3d Cir. 1957) (dismissing criminal case because the prosecutor was unable to be ready for trial).

72. *See, e.g.*, *Ex parte Altman*, 34 F. Supp. 106, 108 (S.D. Cal. 1940) (“[T]he Court, in the exercise of its jurisdiction, has the inherent power to order dismissal for *failure to prosecute*.” (emphasis added)).

73. *See, e.g.*, FED. R. CRIM. PRO. R. 48 (“The court may dismiss an indictment, information, or complaint if *unnecessary delay* occurs . . .” (emphasis added)).

cases,<sup>74</sup> and in trial court scheduling orders.<sup>75</sup> The applicable sources of law will vary by jurisdiction, venue, and court.

As nearly all of the sources indicate, courts are given broad discretion to accomplish vague objectives, such as doing justice;<sup>76</sup> therefore, counsel's request for a remedy need not be limited to those explicitly identified in the legal authorities. Nonetheless, authorized remedies for failure to prosecute include: (1) dismissal of the case with prejudice, (2) dismissal of the felony charges, (3) remand to a magistrate to hold the preliminary hearing that was previously waived, and (4) dismissal of the case without prejudice.<sup>77</sup>

A few words of caution: defense counsel should be careful what he or she asks for. For example, while dismissal with prejudice would always be favorable, dismissal without prejudice might not be, particularly if the assigned judge is predisposed to the defense and dismissal without prejudice would likely result in re-filing of the case with the possible assignment to a different, less favorable judge. Similarly, while dismissal of felony charges would always be favorable, remanding for a preliminary hearing may offer little to no value, and add only extra work, depending on numerous case- and jurisdiction-specific factors. Counsel should therefore request only those remedies that would actually benefit the defense.

## VI. A MODEL MOTION

The following model motion seeks a remedy for the prosecutor's breach of the contract to negotiate in failing even to respond to defense counsel's plea offer. As a practical matter, if the trial court did not impose a plea bargain deadline, and if the prosecutor's refusal to respond to defense counsel's offer

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74. See, e.g., WIS. STAT. § 805.03 (2023) ("For failure of any claimant to prosecute . . . the court in which the action is pending may make such orders in regard to the failure as are just . . . Any dismissal under this section operates as an adjudication on the merits unless the court in its order for dismissal otherwise specifies for good cause shown recited in the order.") (emphasis added). For the statute's applicability to criminal cases, see *Anderson v. Circuit Court for Milwaukee Cty.*, 578 N.W.2d 633, 636 (Wis. 1998).

75. See, e.g., *State v. Prieto*, 2016 WI App. 15, ¶ 19 (Hagedorn, J., concurring) (observing that the state supreme court has "grant[ed] broad authority to circuit [trial] courts to impose sanctions [on prosecutors] 'as are just' for violation of a criminal *pretrial scheduling order*" (emphasis added)).

76. See, e.g., *id.*

77. A source for each of these remedies will be provided in the model motion *infra* Part VI.

was due to mere negligence, the prosecutor may simply remedy the breach by responding to the motion with a plea offer. Consequently, this type of motion will be much more effective in cases where (1) the judge set a plea bargain deadline which has passed, or (2) the prosecutor has explicitly refused to plea bargain despite his or her obligation to do so under the contract to negotiate. If neither of those situations applies, then defense counsel should probably consider asking—repeatedly, if necessary—for the prosecutor’s response to the defense’s offer before filing a motion.

The model motion requests the remedy of dismissal of the case with prejudice; the first alternative remedy is dismissal of all felony charges; the second alternative remedy is remand of the case for a preliminary hearing; the third alternative remedy is the dismissal of the case without prejudice. The motion should, of course, be adapted to suit the situation in any given case, as the defense may not want some of those requested remedies, such as remand for a preliminary hearing or dismissal without prejudice.

This particular model motion, which relies heavily on Wisconsin law, is merely an example or starting point. Defense counsel must carefully consider the facts of each case, the law of the relevant jurisdiction, and court-specific practices and policies when deciding on the content, form, and timing of any motion. To the extent counsel decides to use any portion of the document below, counsel must ensure that all sources cited therein are accurate, are applicable to the jurisdiction and the facts, and have not been explicitly overruled—or even merely superseded—by more recent law.

[STATE] AND [COUNTY]

[STATE OR PEOPLE OR COMMONWEALTH] V. [DEFENDANT]

[CASE NUMBER]

**DEFENDANT’S MOTION FOR REMEDY FOR PROSECUTOR’S BREACH OF  
CONTRACT TO NEGOTIATE**

The defendant, appearing specially by [his/her] attorney and reserving the right to challenge the Court’s jurisdiction, hereby moves the Court for the relief requested below. In support, the defendant asserts:

1. At the preliminary hearing (“prelim”) in this case, the state elected not to present a specific plea offer to the defendant. Instead, the state induced [him/her] to waive the prelim in exchange for the promise of “future negotiations.”
2. Generally, a defendant is not entitled to a plea bargain. However, when the state induces the defendant’s waiver of the prelim with the promise of future negotiations, the state has entered into a contractual obligation recognized under criminal law. More specifically:
  - a. With regard to plea bargaining in general: “A plea bargain is a contract, the terms of which necessarily must be interpreted in light of the parties’ reasonable expectations.” *United States v. Fields*, 766 F.2d 1161, 1168 (7th Cir. 1985). State law is in agreement: In addition to constitutional protections, “we also look to contract-law principles to determine a criminal defendant’s rights” within the plea-bargaining context. *State v. Scott*, 230 Wis. 2d 643, 654–55 (Ct. App. 1999).
  - b. In our case, by inducing the defendant to waive the prelim for the promise of future negotiations, the state entered into a “contract to negotiate.” *See, e.g., Copeland v. Baskin Robbins U.S.A.*, 117 Cal. Rptr. 875, 876 (Ct. App. 2002) (“A contract to

negotiate an agreement . . . can be formed and breached just like any other contract.”). Wisconsin law also recognizes that, by waiving the prelim, the defendant has detrimentally relied on the state’s promise to negotiate and is entitled to what was promised: good-faith plea negotiations. *See Scott*, 230 Wis. 2d at 653, n.6 (before entering a guilty or no contest plea, “the defendant may seek enforcement of the agreement [by] demonstrating detrimental reliance.”); *id.* at 655 (“The law of contracts imposes a duty to deal in good faith and a duty to use best efforts.”).

3. The concept of “good faith” is fact-dependent and raises numerous potential questions. In this case, however, the Court need not decide what activities by the state constitute “good faith.” The reason is that, in this case, the state has clearly breached its “contract to negotiate” by refusing to negotiate at all. More specifically: *[provide applicable facts and dates, including the terms of the prelim waiver offer, the date the prelim was waived, the date the defense made its offer to the state, any delays requested by the state to consider the offer, the court’s plea bargain deadline, and any other relevant facts and dates.]*
4. The state’s breach of its promise of future negotiations, after it induced the defendant to waive [his or her] prelim, constitutes a failure to prosecute the case. The defendant therefore moves the Court for the following remedy, or one of the alternative remedies:
  - a. Dismissal with prejudice. Wisconsin’s “failure to prosecute” statute, which is specifically incorporated into the Court’s scheduling order, addresses a plaintiff’s failure to prosecute its case. “For failure of any claimant to prosecute . . . the court in which the action is pending may make such orders in regard to the failure as are just, including but not limited to orders authorized under section 804.12(2)(a). *Any dismissal under this section operates as an adjudication on the merits* unless the court in its order for dismissal otherwise specifies for good cause shown recited in the order.” WIS. STAT. § 805.03 (emphasis

added). “The Wisconsin Supreme Court has held that these statutes apply to criminal cases and grant broad authority to circuit courts to impose sanctions ‘as are just’ for violation of a criminal pretrial scheduling order.” *State v. Prieto*, 876 N.W.2d 154, 159 (Wis. Ct. App. 2015) (Hagedorn, J., concurring); *see also State v. Heyer*, 496 N.W.2d 779 (Wis. Ct. App. 1993) (applying section 805.03 to criminal cases).

- b. Dismissal of felony charge(s). *In the alternative*, the defendant moves to dismiss the felony charge(s) in the complaint. Before a defendant may be tried on a felony, the state must obtain bind-over at a preliminary hearing. WIS. STAT. § 970.03. No preliminary hearing was held in this case, and the waiver thereof was invalid as the state breached the promise that induced the defendant’s waiver. The defendant therefore moves the Court to dismiss the felony charge(s), which would render the preliminary hearing a moot point. In other words, dismissal of the felony charge(s) would cure the state’s breach. This, too, is well within the Court’s authority under section 805.03, which incorporates section 804.12(2)(a), which in turn states that, upon a plaintiff’s failure to prosecute, the Court may issue an “order . . . dismissing the action or proceeding *or any part thereof*, or rendering a judgment by default against the disobedient party.” *Id.* (emphasis added).
- c. Reinstatement of preliminary hearing. *In the alternative*, the defendant moves the Court to conduct a preliminary hearing. *See State v. Beckes*, 300 N.W.2d 871 (Wis. Ct. App. 1980) (restoring defendant to his pre-breach position by remanding for a prelim). It is true that, in order to fulfill its objective of “sav[ing] the defendant from the humiliation and anxiety involved in public prosecution,” the prelim must be held within its statutory time limits, which passed long ago. *State v. Williams*, 544 N.W.2d 400, 404 (Wis. 1996); WIS. STAT. § 970.03(2). However, the defense can still benefit from the hearing by calling its own witnesses. WIS. STAT. § 970.03(5)

(defendant “may call witnesses on the defendant’s own behalf”). This will allow the defense to test the witness’s *motive* in accusing the defendant. *State v. Berby*, 260 N.W.2d 798, 803 (Wis. 1978) (at the prelim, “evidence of motive is relevant . . . Motive is an evidentiary circumstance which may be given as much weight as the fact finder deems it is entitled to.”). It will also allow the defense to demonstrate the *unreliability* of the state’s hearsay, as “[i]t remains the duty of the trial court to consider the apparent *reliability* of the State’s evidence” when deciding whether to grant bind-over. *State v. O’Brien*, 850 N.W.2d 8, 22 (Wis. 2014) (emphasis added).

- d. Dismissal without prejudice. *In the alternative*, if the Court finds that, after the state induced the defendant to waive [his or her] prelim, the state had “good cause” for not even responding to the defendant’s plea offer, the Court should dismiss the case without prejudice. WIS. STAT. § 805.03 (allowing for dismissal without prejudice upon “good cause shown”).
5. Each of these remedies is justified given the state’s conduct in this case. The state induced the defendant to waive the prelim for the promise to engage in plea negotiations. Instead of exercising good faith, the state has completely breached its promise for future negotiations by refusing to negotiate at all. Granting the defendant a remedy would also have a deterrent effect on the state. In future cases, the state would have an incentive to (a) actually *hold* the preliminary hearing, (b) make a *specific* waiver offer to the defendant, or (c) simply do what it promises to do when inducing a waiver for future negotiations: *negotiate*.

Therefore, based on the foregoing facts and legal authorities, the defendant moves the Court for the remedy, or one of the alternative remedies, requested above.

[DATE]

[DEFENSE COUNSEL’S SIGNATURE BLOCK]

## VII. THE VERDICT

When the state induces the defendant to waive a preliminary hearing for the promise of future negotiations, the state has created a legally binding contract to negotiate.<sup>78</sup> If the defendant wishes to resolve the case by plea bargain, the defendant is entitled to that for which he or she bargained: good faith plea negotiations.<sup>79</sup>

Unfortunately, prosecutors often have strong incentives to breach the contract to negotiate by failing to negotiate in good faith—or at all.<sup>80</sup> Defense lawyers may inadvertently overlook such breaches because the traditional remedies for breach of plea bargain do not fit this situation.<sup>81</sup> However, when the prosecutor's breach of the contract to negotiate is viewed as a failure to prosecute, which is what it is, numerous sources of law provide a variety of potential remedies.<sup>82</sup>

For cases in which (1) the court has set a plea bargain deadline and that deadline has passed, or (2) the prosecutor has expressly refused to plea bargain despite the state's obligation to do so, this Article provides a model motion that defense counsel can adapt to the relevant law and facts.<sup>83</sup> This motion seeks the remedy of dismissal with prejudice, or one of several alternative remedies, for the state's breach of the contract to negotiate.<sup>84</sup>

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78. *See supra* Part III.

79. *See supra* Part III.

80. *See supra* Part IV.

81. *See supra* Part V.

82. *See supra* Part V.

83. *See supra* Part VI.

84. *See supra* Part VI.