Remedies for Reneged Plea Bargains in California

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INTRODUCTION

In recent years there has been growing recognition and approval of the use of the plea bargain in the disposition of criminal cases. Indeed, plea bargaining has become an essential element in the fair administration of justice. The overwhelming majority of criminal defendants are convicted and sentenced as a result of negotiations between the prosecutor and the defendant.\(^2\)

Disposition of charges by plea bargain offers advantages for all parties involved. Benefits to the defendant include reduced penalties,\(^3\) sparing of the notoriety which attends trial,\(^4\) and shortening of the time between the charge and disposition, thereby maximizing the rehabilitative prospects of the guilty defendant when he is ultimately imprisoned.\(^5\) The chief benefit to the state is prompt disposition of criminal cases,\(^6\) which relieves clogged court calendars, reduces costs of trial, and increases efficiency and flexibility of the criminal process.\(^7\) In addition, plea bargaining allows the court to treat each defen-

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5. 404 U.S. at 261; see Brady v. United States, 397 U.S. 742, 752 (1970). Prospects for rehabilitation are enhanced by prompt, final disposition of most criminal cases, thereby allowing the correctional processes to begin immediately. 397 U.S. at 752. Avoidance of the corrosive impact of forced idleness during pretrial confinement of those who are denied release pending trial may have a rehabilitative effect. 404 U.S. at 261.

6. 404 U.S. at 261.

7. 3 Cal. 3d at 604, 477 P.2d at 413, 91 Cal. Rptr. at 389.
dant as an individual in adapting the degree and character of punishment to the facts of the particular offense.  

Both the United States and the California Supreme Courts have given express approval to the use of the plea bargain. In addition, the California Legislature has enacted Penal Code section 1192.5, which provides statutory recogni-

8. Id. at 605, 477 P.2d at 413, 91 Cal. Rptr. at 390. It must be noted that approval of the use of the plea bargain is far from universal. Many commentators on the subject concede that the procedure potentially or in fact poses serious problems. One author maintains that the complexity of the criminal justice system and administrative pressures within prosecutors' offices combine to create the need for speed and efficiency in handling criminal cases. The result is that "[t]he scrutiny of the criminal trial process is lost. Indeed, the primary purpose of plea bargaining is to assure that the jury trial system established by the Constitution is seldom utilized." Note, The Unconstitutionality of Plea Bargaining, 83 Harv. L. Rev. 1387, 1388-89 (1970). Another author contends that the practice of plea bargaining has created a sense of unease and suspicion, such that the quality of criminal justice has become suspect. Comment, Prosecutorial Discretion—A Re-evaluation Of The Prosecutor's Unbridled Discretion And Its Potential For Abuse, 21 De Paul L. Rev. 485, 514 (1971).

Despite these criticisms, the courts have recognized that without the practice, every criminal charge would be subjected to a full-scale trial, thereby creating the need for many times more court facilities and judges than presently exist. Santobello v. New York, 404 U.S. 257, 260 (1971).

It is beyond the purview of this comment to examine the general problems relating to plea bargains. There is a plethora of materials on the subject in addition to those previously mentioned. See Wheatley, Plea Bargaining—A Case For Its Continuance, 59 Mass. L.Q. 31 (1974); Comment, Plea Bargain In Historical Perspective, 23 Buffalo L. Rev. 499 (1974); Comment, Judicial Supervision Over California Plea Bargaining: Regulating the Trade, 59 Calif. L. Rev. 962 (1971); Note, Plea Bargaining, 60 Calif. L. Rev. 894 (1972).

9. 404 U.S. 257, 261 (1971). See also Brady v. United States, 397 U.S. 742, 753 (1970), in which the Court upheld the constitutionality of a guilty plea obtained by means of a plea bargain:

[W]e cannot hold that it is unconstitutional for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the State and who demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary.

10. 3 Cal. 3d 595, 477 P.2d 409, 91 Cal. Rptr. 385. The court confirmed the legality of the plea bargain and recognized its useful and necessary function in the administration of justice:

In a day when courts strive to simplify trial procedures and to achieve speedier dispatch of litigation, we believe that the recognition of the legal status of the plea bargain will serve as a salutary timesaver as well as a means to dispel the procedural obscurantism that now enshrouds it. The grant of legal status to the plea bargain should enable the court in each case to reach a frank, open and realistic appraisal of its propriety.

Id. at 599, 477 P.2d at 410, 91 Cal. Rptr. at 386.


Upon a plea of guilty or nolo contendere to an accusatory pleading
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tion of the plea bargain and specifies the rights of a defendant who bargains for leniency.

Recent California cases have focused on the remedies available to defendants whose bargains have been breached either by prosecutors or judges, and to defendants who attempt to rescind their bargains after becoming apprehensive of or disappointed in their sentences. This comment will examine the remedies which courts in California have been granting and refusing to such defendants. Brief examination will be given to the types of breaches which commonly occur after bargains are made, and the theories upon which relief (if any) is granted. A more extensive analysis of the actual relief which California courts have afforded defendants will serve as a foundation for a prediction of what defendants whose bargains have been breached may expect in the future.

THEORIES OF RELIEF

There are basically two theories upon which relief is granted to defendants whose bargains have been breached. The first is the approach federal and California courts have taken

charging a felony, the plea may specify the punishment to the same extent as it may be specified by the jury on a plea of not guilty or fixed by the court on a plea of guilty, nolo contendere, or not guilty, and may specify the exercise by the court thereafter of other powers legally available to it.

Where such plea is accepted by the prosecuting attorney in open court and is approved by the court, the defendant, except as otherwise provided in this section, cannot be sentenced on such plea to a punishment more severe than that specified in the plea and the court may not proceed as to such 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 such case, the defendant shall be permitted to withdraw his plea if he desires to do so. The court shall also cause an inquiry to be made of the defendant to satisfy itself that the plea is freely and voluntarily made, and that there is a factual basis for such plea.

If such plea is not accepted by the prosecuting attorney and approved by the court, the plea shall be deemed withdrawn and the defendant may then enter such plea or pleas as would otherwise have been available.

If such plea is withdrawn or deemed withdrawn, it may not be received in evidence in any criminal, civil, or special action or proceeding of any nature, including proceedings before agencies, commissions, boards, and tribunals.
when examining frustrated plea bargains and is called "volun-
tariness."

The voluntariness theory provides that while the practice
of plea bargaining does not in and of itself render a guilty
plea involuntary . . . the subsequent realization that the
promises have been misrepresented to the defendant or
will not be fulfilled will cause the plea to be viewed invol-
untary.12

The second theory upon which relief is granted—called
"fair play"—has ostensibly been adopted by fewer courts. This
theory focuses not on the effects of the plea bargaining pro-
derule on the defendant's free will, but "upon either the equities
involved in the methods and procedures adopted in obtaining
a negotiated guilty plea, or the actual result of the bargain to
the defendant."13

An examination of major federal and California case au-
thorities in the area of plea bargaining reveals that there has
been an emphasis on the voluntariness theory. However, the
fair play analysis commonly appears as a supplement to the
voluntariness approach.14 Thus, it appears that these two theo-
ries are in effect merged to form an overall standard of fairness
and voluntariness which must be observed in order to render a
plea bargain valid.

The United States Supreme Court in Brady v. United
States15 relied heavily on the voluntariness theory in affirming
the validity of the plea bargain. The Court first determined
that in order to be valid a guilty plea must be "voluntary" and
"intelligent."16

Waivers of constitutional rights not only must be volun-
tary but must be knowing, intelligent acts done with suffi-
cient awareness of the relevant circumstances and likely
consequences.17

This would appear to mean that the circumstances surround-
ing the making of the plea, including actual or threatened

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12. Note, The Legitimation of Plea Bargaining: Remedies For Broken Promises,
13. Id. at 790.
16. Id. at 747; see Boykin v. Alabama, 395 U.S. 238, 242 (1969), and note 23
infra.
17. 397 U.S. at 748.
physical or mental coercion of the bargaining defendant, must be examined to determine voluntariness.\textsuperscript{18}

The Court again endorsed the voluntariness theory in \textit{Santobello v. New York}.\textsuperscript{19} It stated that “[t]he [guilty] pleas must be voluntary and knowing . . . .”\textsuperscript{20} In addition, the Court emphasized the importance of fairness to the defendant in the bargaining process: “[H]owever, all of these [beneficial] considerations [which are fostered by the plea bargaining process] presuppose fairness in securing agreement between an accused and a prosecutor.”\textsuperscript{21}

The \textit{Santobello} decision reflects the Supreme Court’s recognition that both theories support a remedy for a defendant whose bargain has been breached. The California courts have followed a similar course.

The case of \textit{In re Tahl}\textsuperscript{22} expounded the procedures relating to defendants who plead guilty, as set forth by the United States Supreme Court in the landmark decision of \textit{Boykin v. Alabama}.\textsuperscript{23} The petitioner in \textit{Tahl} had pleaded guilty to two counts of murder and one count each of attempted robbery, grand theft and rape. In a habeas corpus proceeding he contended that his guilty plea was not made voluntarily and with

\textsuperscript{18} The Court did say that defendant's motives in negotiating a plea do not render the bargain invalid:

\begin{quote}
We decline to hold, however, that a guilty plea is compelled and invalid under the Fifth Amendment whenever motivated by the defendant's desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged.
\end{quote}

\textit{Id.} at 751.

\textsuperscript{19} 404 U.S. 257 (1971). \textit{Santobello} involved a plea of guilty to a lesser included offense by the defendant in exchange for a promise by the prosecutor not to make recommendation as to sentence. \textit{Id.} at 258-59. The prosecutor failed to abide by the terms of the agreement, and the Court held that this invalidated the plea bargain. \textit{Id.} at 262.

\textsuperscript{20} \textit{Id.} at 261.

\textsuperscript{21} \textit{Id.}

\textsuperscript{22} 1 Cal. 3d 122, 460 P.2d 449, 81 Cal. Rptr. 577 (1969).

\textsuperscript{23} 395 U.S. 238 (1969). In this case petitioner pleaded guilty to five counts of robbery, and a jury sentenced him to death. The petitioner did not address the court and the judge asked him no questions concerning his plea. The Supreme Court reversed the conviction because the record did not disclose that the defendant voluntarily and understandably entered his plea of guilty. The Court stated that in order for a plea of guilty to be voluntary, it must appear \textit{in the record} that defendant has knowledge and a voluntary understanding that by pleading guilty he is waiving the privilege against self-incrimination, the right to trial by jury, and the right to confront his accusers. \textit{Id.} at 243-44. See also Note, \textit{Withdrawal Of Negotiated Guilty Pleas: Quid Pro Quo From Defendants}, 5 Sw. U.L. Rev. 215-16 (1973).
full understanding of its consequences.\textsuperscript{24}

In examining the petitioner's entry of his guilty plea, the California Supreme Court concluded that in order for a guilty plea to be valid the record must indicate a free and intelligent waiver of those constitutional rights which are abandoned by a guilty plea.\textsuperscript{25} The \textit{Tahl} court ruled that those rights include the right to a jury trial, the right to confront one's accusers, and the privilege against compulsory self-incrimination.\textsuperscript{26} It specifically stated that "in California such a waiver must be expressed \textit{in words by the defendant} and cannot be implied from the defendant's conduct."\textsuperscript{27} This language indicates an emphasis on the effects of the guilty plea procedure on defendants' free will (voluntariness); in addition, the requirement that the record must indicate a valid waiver evidences concern for the methods and procedures involved in the making of that plea (fair play).

The court reaffirmed \textit{Tahl} in a subsequent case, \textit{In re Sutherland},\textsuperscript{28} in which the defendant pleaded guilty to one

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\item \textsuperscript{24} 1 Cal. 3d at 124, 460 P.2d at 450, 81 Cal. Rptr. at 578. The opinion does not specify what consequences the defendant claimed to be unaware of.
\item \textsuperscript{25} Id. at 132, 460 P.2d at 456, 81 Cal. Rptr. at 584. The court emphasized the importance of leaving an adequate record of the proceedings:
\begin{quote}
[The record must contain \textit{on its face} direct evidence that the accused was aware, or made aware, of his right to confrontation to a jury trial, and against self-incrimination, as well as the nature of the charge and the consequences of his plea.]
\end{quote}
\item \textsuperscript{26} Id. at 130, 460 P.2d at 455, 81 Cal. Rptr. at 583. \textit{See also In re Johnson}, 62 Cal. 2d 325, 398 P.2d 429, 42 Cal. Rptr. 228 (1965). There is recent California authority which indicates that failure to advise the defendant of certain consequences "collateral" to entering a plea of guilty constitutes reversible error. An analysis of that authority is beyond the scope of this comment. For a brief discussion of the problem \textit{see Comment, Lawful Impermanent Residence: Deportation Without Warning For Minor Drug Offenses}, 26 Hastings L.J. 1299, 1319-22 (1975), and the cases cited therein.
\item \textsuperscript{27} 1 Cal. 3d at 131, 460 P.2d at 455, 81 Cal. Rptr. at 583. The \textit{Boykin-Tahl} standards have been applied to misdemeanor prosecutions as well as to felonies. Mills v. Municipal Court, 10 Cal. 3d 288, 301-02, 515 P.2d 273, 282-83, 110 Cal. Rptr. 329, 338-39 (1973); \textit{see In re Gannon}, 26 Cal. App. 3d 731, 103 Cal. Rptr. 224 (1972). In \textit{Mills} the court also addressed the issue of whether the standards apply to pleas of \textit{nolo contendere}:
\begin{quote}
In the \textit{Mills} case, the challenged conviction was based on a plea of \textit{nolo contendere}, rather than a plea of guilty, but the People make no contention—nor could they properly do so—that the distinction is relevant to the applicability of the \textit{Boykin-Tahl} safeguards. While there is some difference between a "\textit{nolo}" plea and a guilty plea in terms of the collateral use of such a plea, for purposes of the \textit{Boykin-Tahl} doctrine the two are functional equivalents.
\end{quote}
\item \textsuperscript{28} 6 Cal. 3d 666, 493 P.2d 857, 100 Cal. Rptr. 129 (1972).
\end{itemize}
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count of possession of drugs in exchange for dismissal of four remaining counts. The court found the plea defective because there was no indication from the record that the defendant had expressly waived his right to confront his accusers or his privilege against self-incrimination.29

_Tahl_ involved a simple guilty plea, rather than an actual bargain. Nevertheless, since a plea of guilty or _nolo contendere_ is included within the terms of a plea bargain, the same rights are waived upon entering a bargained plea. Therefore, as _Sutherland_ demonstrates,31 the record must indicate a voluntary and knowing waiver by incorporating the terms of the agreement into the record.

In 1970, the court undertook a review of the status and validity of plea bargaining in California in _People v. West._32 This case confirmed that a plea of guilty or _nolo contendere_ is not rendered involuntary merely because it is the product of plea bargaining between the defendant and the state.33 However, the court emphasized that fairness to the defendant must be insured in the bargaining procedures. The court stated:

>T]he plea bargain can be viable only if it is candidly disclosed to the trial court and incorporated in the record of the case. Through that procedure the murky fog of subterfuge that now suffuses the plea bargain can be swept away.34

In the recent case of _People v. Johnson_,35 the California Supreme Court again underscored the importance of insuring that the procedures outlined in Penal Code section 1192.536 are complied with:

The section requires that the court’s acceptance of a guilty plea and defendant’s accompanying waiver of his constitu-

29. _Id._ at 668, 493 P.2d at 858, 100 Cal. Rptr. at 130; accord, _People v. Rizer_, 5 Cal. 3d 35, 484 P.2d 1367, 95 Cal. Rptr. 23 (1971); see Note, _Plea Bargaining_, 60 CALIF. L. REV. 894 (1972).
30. _See note 27 supra._
31. 6 Cal. 3d at 669-70, 493 P.2d at 859, 100 Cal. Rptr. at 131.
32. 3 Cal. 3d 595, 477 P.2d 409, 91 Cal. Rptr. 385 (1970).
33. _Id._ at 604, 477 P.2d at 413, 91 Cal. Rptr. at 389.
34. _Id._ at 613-14, 477 P.2d at 421, 91 Cal. Rptr. at 397; c.f. _Fischer, Beyond Santobello—Remedies for Reneged Plea Bargains_, 2 SAN FERNANDO VALLEY L. REV. 121, 126 (1973) [hereinafter cited as _Fischer_].
35. 10 Cal. 3d 868, 519 P.2d 604, 112 Cal. Rptr. 556 (1974).
36. _See note 11 supra._ Section 1192.5 and the California Supreme Court’s recent interpretation of it are discussed in detail in text accompanying notes 82-96 and in notes 94-95 _infra._
tional rights be viewed only "in the strong light of full disclosure" [citing People v. West] to the defendant of his rights.\textsuperscript{37}

It is clear from the foregoing cases that the California courts employ a combined voluntariness-fair play theory upon which relief, if any, is granted for breaches of plea bargains. The emphasis, to be sure, is on preserving the defendant's ability to exercise his free will; in addition, there appears to be concern that the procedures for entering a plea of guilty be fair and equitable.

**Types of Breach and Available Remedies**

*Introduction*

There are commonly three situations in which bargaining defendants seek judicial relief from their pleas, and the availability of a particular remedy may depend upon the defect in the bargain. The first situation has been called "cold feet."\textsuperscript{38} Typically, the defendant suffers from apprehension as the date on which he must begin serving a bargained-for sentence approaches. There is no claim that the terms of the bargain have been breached. Included in this category are those cases in which a defendant later feels his bargain was unfair, and therefore seeks judicial relief from the plea. Where there is no allegation that the bargain has been breached, the remedies theoretically available to a defendant include a motion under Penal Code section \textsuperscript{101811} to change his plea of guilty, a motion to vacate judgment in the form of a petition for a writ of error coram nobis,\textsuperscript{40} or an appeal from the judgment under Penal Code section 1237.5.\textsuperscript{41}

The second and third categories, with which this comment

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\textsuperscript{37} 10 Cal. 3d at 871, 519 P.2d at 606, 112 Cal. Rptr. at 558. For a detailed discussion of the decision see text accompanying notes 88-98 and notes 94-95 infra.

\textsuperscript{38} Fischer, supra note 34, at 126. "Cold feet" is the phrase coined by that author for situations in which no claim of a breached bargain is made by the defense.

\textsuperscript{39} Cal. Pen. Code \textsuperscript{1018} (West Supp. 1975) provides in part:

On application of the defendant at any time before judgment the court may . . . for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted.

"Such relief, if good cause is shown, is available even if the plea was entered pursuant to a plea bargain." In re Brown, 9 Cal. 3d 679, 685 n.8, 511 P.2d 1153, 1157 n.8, 108 Cal. Rptr. 801, 805 n.8 (1973).

\textsuperscript{40} See notes 67-72 and accompanying text infra.

\textsuperscript{41} See note 74 infra.
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is chiefly concerned, involve actual breach of a plea bargain by either the prosecutor or the court itself. In the former case, the defendant usually claims that he has suffered prejudice as a result of the prosecutor's failure to abide by the bargain. The latter situation, breach by the court, ordinarily occurs when the trial judge fails to advise the defendant of his rights, or when a sentence is imposed which does not conform to the terms of the agreement.

There are theoretically two alternate forms of relief available to a defendant whose bargain has been frustrated by the prosecutor or the court. First, the defendant may be allowed to withdraw his plea of guilty. Indeed, the California Supreme Court in a recent case stated that if the trial court initially rejects defendant's offer to plead guilty in exchange for a specification of punishment under Penal Code section 1192.5, the defendant's plea of guilty is deemed withdrawn. The effect of withdrawal is to nullify the guilty plea and allow reinstatement of the original charges.

The alternate form of relief available is a grant of specific performance of the terms of the agreement. This remedy has seldom been granted by courts in broken bargain cases. Moreover, a recent case appears to have foreclosed the availability of specific performance in almost all broken bargain factual settings. Thus, realistically there remains only one remedy available to a defendant whose bargain has been frustrated by the prosecutor or the court: withdrawal of the plea of guilty.

Cold Feet

There has been much litigation in the plea bargain area where the defendant does not claim that the terms of his bargain have been violated but simply suffers from cold feet as he faces a jail term. Defendant's primary remedy in this type of situation is to move to withdraw his plea of guilty in the trial

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42. See Fischer, supra note 34, at 128-31, 133-37.
43. See id. at 131-33, 138-41.
48. See notes 96-104 and accompanying text infra.
court and enter a new plea. It has long been the established rule in California that the court has the discretion to allow a defendant to withdraw a plea of guilty and enter a new plea, but the defendant may not withdraw his plea simply because he is disappointed with or apprehensive about the sentence, or decides later that his chances of acquittal are improved. There must be good cause shown in order for a plea to be withdrawn.

The California courts have upheld this rule in recent years. In People v. Fratianno the defendant was charged by amended information with conspiracy to commit grand theft, grand theft, and a misdemeanor violation of the Public Utilities Code. Defendant pleaded not guilty, but later changed his plea to guilty after negotiating a bargain with the prosecutor in which the charge was reduced to conspiracy to commit petty theft. The prosecutor explicitly stated that sentencing was solely up to the judge, and that he could not guarantee that defendant would be granted probation.

At the sentencing hearing the defendant made a plea for probation. The court denied it; the defendant then moved to withdraw his plea of guilty. The motion was denied and the court sentenced the defendant to prison.

The appellate court upheld the trial court's decision. It recognized that a plea of guilty may be withdrawn pursuant to


In Francis the court stated that "the withdrawal of such a plea rests in the sound discretion of the trial court and a denial may not be disturbed unless the trial court has abused its discretion." 42 Cal. 2d at 338, 267 P.2d at 9.


52. CAL. PEN. CODE § 1018 (West Supp. 1975), supra note 39. It is not clear what test should be employed to satisfy the "good cause" requirement of section 1018. It is clear, however, that more is required than disappointment in or apprehension about the sentence. See id., supra note 39 and note 54 infra. An illustrative sampling of appropriate grounds for withdrawal of a guilty plea includes the following: People v. Campos, 3 Cal. 2d 15, 43 P.2d 274 (1935) (fraud or duress resulted in a denial of a trial on the merits); People v. Mitchell, 134 Cal. App. 2d 912, 286 P.2d 1016 (1965) (mistake, ignorance, or inadvertence overcame the defendant's free will). These cases appear to emphasize the importance of entering a plea freely and voluntarily in an atmosphere of fairness to the defendant.


54. Id. at 216, 85 Cal. Rptr. at 757.

55. Id. at 219, 85 Cal. Rptr. at 759.
Penal Code section 1018 if it can be shown that the defendant’s exercise of free judgment was impaired, but grounds for relief must be established by clear and convincing evidence. It followed the established case authority in holding that a defendant’s disappointment in the sentence presents no ground for the exercise of judicial discretion to permit the plea of guilty to be withdrawn. The court also pointed out that disappointment is not the only ground insufficient to invoke the exercise of judicial discretion:

[T]he fact that after plea but before sentence the defendant has become apprehensive regarding the anticipated sentence is not sufficient to compel the exercise of judicial discretion so as to permit the plea of guilty to be withdrawn. Nor may the defendant enter a plea of guilty confident that if by some fortuitous circumstance his chances of an acquittal are substantially improved, he may thereafter withdraw his guilty plea as of right.

The court had little trouble rejecting defendant’s appeal. He had not satisfied his burden of establishing good cause to withdraw his plea of guilty.

The California Supreme Court recently concurred with this reasoning in In re Brown. In that case, Maxine Brown was
charged by information with armed robbery. She initially entered a plea of not guilty. Later, she pleaded guilty to second degree robbery pursuant to a bargain in which she would receive six months in the county jail and a grant of probation. At the probation hearing the defendant moved to withdraw her guilty plea under Penal Code section 1018. The trial court denied her motion. She had changed her mind as to the most appropriate course to follow, presumably because of apprehension about serving six months in jail, or because of disappointment in the terms of the bargain. The Supreme Court of California upheld the trial court's denial of her motion, "in view of the almost total lack of substantive grounds asserted in support of the motion." It found no abuse of discretion in the trial court's refusal to permit withdrawal:

It is not enough that a defendant assert that she has changed her mind as to the most expeditious course to follow. When, as here, the trial court denies a motion to withdraw a plea on such bare assertion, no abuse of discretion appears.

These decisions reflect a reluctance on the part of the courts to grant the available remedy of plea withdrawal in the trial court when defendants suffer from cold feet.

There are two alternatives available to defendants whose motions to withdraw their guilty pleas are denied by the trial court, or who fail to make such motions before judgment. The first is a petition for a writ of error coram nobis. Successful procurement of a writ results in vacation of the earlier judgment. However, the writ will be granted only upon a showing that a fact existed which was not presented to the trial court

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62. Id. at 680-81, 511 P.2d at 1154, 108 Cal. Rptr. at 802.
64. See People v. Caruso, 174 Cal. App. 2d 624, 642, 345 P.2d 282, 293 (1959), where, on similar facts, the court of appeal decided that a defendant may not withdraw his plea if he is disappointed with the sentence, or decides later that his chances of acquittal by a jury are improved, or becomes apprehensive at the prospect of jail.
65. 9 Cal. 3d at 686, 511 P.2d at 1157, 108 Cal. Rptr. at 805.
66. Id. at 686, 511 P.2d at 1157, 108 Cal. Rptr. at 805.
67. CAL. PEN. CODE § 1265 (West 1970) provides that the petition must be filed in the court which rendered judgment unless an appeal was taken from the judgment, in which case the petition must be filed in the appellate court which affirmed the judgment. See Kallay, Faith Without Illusion: The Petition For a Writ of Error Coram Nobis, 47 L.A. BAR BULL. 21 (1971).
and which, if presented, would have prevented rendition of judgment; that the fact does not go to the merits of issues tried; and that the fact was unknown to the defendant and could not have been discovered by him prior to the motion for the writ. 69

The requirements for granting the writ are such that fact situations giving rise to a petition for the writ do not include instances in which the defendant suffers from cold feet. In People v. Lockridge 70 the defendants moved the trial court to stay execution of sentence on the ground that they had entered their pleas of guilty on advice of counsel, who could have established their innocence at trial. 71 Implicit in the basis for the motion was the defendants' belief that their chances of acquittal had substantially improved after the pleas were entered. The court found that since defendants were aware of all relevant facts prior to entering their pleas, the legal requirements for a writ of error coram nobis were not met. 72

Defendants who attempt to withdraw their pleas solely because they suffer from cold feet as they face jail terms will not be afforded relief by way of coram nobis. Their claims are based not upon facts that have come to light after entry of their pleas, but on apprehension about or disappointment in their sentences.

A defendant's alternative to petitioning for a writ of error coram nobis is a direct appeal from the judgment of conviction. 73 The procedure for perfecting an appeal from a judgment based on a plea of guilty or nolo contendere is contained in Penal Code section 1237.5, 74 which requires that an appellant set forth grounds that go to the legality of the proceedings. It must be noted that an order before judgment denying a motion

70. 233 Cal. App. 2d 743, 43 Cal. Rptr. 925 (1965).
71. Id. at 744, 43 Cal. Rptr. at 926. The court accepted the appellants' motion as a writ of error coram nobis. Id. at 745, 43 Cal. Rptr. at 927.
72. Id. at 746, 43 Cal. Rptr. at 927.
74. Cal. Pen. Code § 1237.5 (West 1970) provides:

No appeal shall be taken by defendant from a judgment of conviction upon a plea of guilty or nolo contendere, except where:

(a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings; and

(b) The trial court has executed and filed a certificate of probable cause for such appeal with the county clerk.
to withdraw a plea of guilty is not appealable. Nevertheless, it may be reviewed on appeal from the judgment.\textsuperscript{75}

It is clear from the foregoing authority that the courts are hesitant to grant the available remedy of withdrawal of the guilty plea, absent a showing that there existed some factor which served to override the defendant's exercise of free will. A retreat from this position would encourage specious pleas and sentence-shopping by defendants. There is no indication that future California courts will more readily allow a defendant to rescind his bargain, unless he can make a clear showing that the agreement was not entered into freely and voluntarily.

\textbf{Bargain Breached by Prosecutor}

Many plea bargains include a promise on the part of the prosecutor to recommend a light sentence, to move to dismiss certain charges, or to remain silent at the time of sentencing. California courts have been more generous in granting relief to defendants whose bargains have been breached by prosecutors. They have followed the rule that "one who has pleaded guilty in reliance on the unkept promises of reliable public officials should be allowed to withdraw that plea, even after judgment has been pronounced."\textsuperscript{76} This illustrates the emphasis California courts have placed on the remedy of withdrawal of the guilty plea, apparently to the exclusion of the alternate remedy of specific performance.\textsuperscript{77}

Recent developments in the law have strengthened the position of the remedy of withdrawal. In the case of \textit{People v.}
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Barajas,78 the defendant entered a plea of guilty to possession of narcotics, pursuant to a bargain in which the prosecutor agreed to move to dismiss another charge and remain silent at the time of sentencing. At the probation hearing the prosecutor violated his agreement to remain silent, and induced the court to abandon its previously announced intention to grant probation.79 The appeals court had no trouble finding that a breach of the terms of the bargain had been committed by the prosecutor.80 Nevertheless, relief in this case was denied on the ground that the defendant failed to move for a withdrawal of his plea of guilty in the trial court, thereby failing to preserve the issue on appeal: “Where the prosecution repudiates its part of the plea bargain, the defendant’s remedy is to move to withdraw his plea of guilty in the trial court.”81 This result is particularly harsh, because the defendant was denied any remedy at all.

The Barajas decision appears at first glance to be inconsistent with the language of Penal Code section 1192.5.82 The statute provides that if the court approves the plea, the punishment imposed must conform to the terms of the agreement. The court may withdraw its approval at the probation hearing or at time of sentencing, in which case the defendant “shall be permitted to withdraw his plea if he desires to do so.”83 However, a careful reading of the section reveals that it applies only

78. 26 Cal. App. 3d 932, 103 Cal. Rptr. 405 (1972).
79. For an account of the exchange between the court and prosecutor at the probation hearing, see id. at 935-36, 103 Cal. Rptr. at 407-08.
80. Id. at 936-37, 103 Cal. Rptr. at 408; accord, Santobello v. New York, 404 U.S. 257 (1971), in which the prosecutor agreed to make no recommendation as to sentence. At the sentence hearing, a new district attorney recommended the maximum sentence, and the judge followed that recommendation. The Supreme Court had no trouble finding this to be a breach of the bargain by the prosecutor.
81. 26 Cal. App. 3d at 937, 103 Cal. Rptr. at 408 (citations omitted); see People v. Delles, 69 Cal. 2d 906, 910, 447 P.2d 629, 632, 73 Cal. Rptr. 389, 392 (1968).
82. The text of the statute is contained in note 11 supra. The section, as originally enacted in 1970, included within its provisions pleas of guilty or nolo contendere to an information or indictment. This, of course, excluded a plea of guilty to a complaint charging a felony or misdemeanor in the municipal court. A 1974 amendment to the section replaced “information or indictment” with “accusatory pleading charging a felony.” Cal. Pen. Code § 1192.5 (West Supp. 1975). The result is an expansion of the availability of the terms of the section: “A recent (1974) amendment to section 1192.5 has confirmed the availability of felony plea bargaining in the municipal court.” Malone v. Superior Court, 47 Cal. App. 3d 313, 318 n.4, 120 Cal. Rptr. 851, 854 n.4 (1975). A reasonable construction of the foregoing is that the section is applicable only to felony prosecutions which are disposed of by plea bargaining. All misdemeanor prosecutions would therefore be subject to the law applicable to motions under sections 1018, 1237.5 and petitions for writs of error coram nobis.
83. The text of the statute is contained in note 11 supra.
to plea bargains which formally specify the terms of punishment. Barajas pleaded guilty pursuant to a bargain which did not specify the terms of punishment, but merely included a promise on the part of the prosecutor to remain silent at the sentencing hearing. Barajas failed to move to withdraw his plea of guilty in the trial court under Penal Code section 1018, resulting in a denial of any relief on appeal.

Had the plea bargain in Barajas come within the provisions of section 1192.5, a different result would have been reached. The statute provides that a plea not accepted by the prosecutor and approved by the court is "deemed withdrawn." And if the court approves the plea, but prior to sentencing withdraws its approval, the defendant "shall be permitted to withdraw his plea if he desires to do so." Initially, however, there was a question as to whether the defendant or the court had the burden of initiating withdrawal of the guilty plea.

The California Supreme Court faced this issue squarely in People v. Johnson. In that case the defendant pleaded guilty to forgery pursuant to a court-approved bargain in which he was to receive a misdemeanor sentence, suspension of sentence and a grant of probation. Prior to the scheduled sentencing hearing, the court discovered that in negotiating the plea bargain Johnson had concealed his true name and past criminal record. This discovery induced the judge to withdraw his approval of the bargain and to sentence the defendant to prison for the term prescribed by law. Johnson was not at any time informed of his right under Penal Code section 1192.5 to withdraw his plea in the event the court withdrew its approval of the bargain. The failure of the court to inform the defendant of his rights under Penal Code section 1192.5 was deemed reversible error. In reversing, the California Supreme Court

84. See People v. West, 3 Cal. 3d 595, 477 P.2d 409, 91 Cal. Rptr. 385 (1970), in which the defendant, with the consent of the prosecutor, pleaded guilty to a lesser offense than that charged. The trial court accepted the plea and entered judgment. On appeal the court stated that "section 1192.5 [does not] encompass the form of plea bargain used in the present case, that is, the plea to a lesser offense without specification of punishment..." Id. at 608, 477 P.2d at 416, 91 Cal. Rptr. at 392.
85. 26 Cal. App. 3d at 935, 103 Cal. Rptr. at 405.
86. See text accompanying note 81 supra.
87. The text of the statute is contained in note 11 supra.
88. 10 Cal. 3d 868, 519 P.2d 604, 112 Cal. Rptr. 556 (1974).
89. Id. at 870-71, 519 P.2d at 605, 112 Cal. Rptr. at 557.
90. See note 11 supra.
91. The requirements of section 1192.5 are set out in the text accompanying note 128 infra.
held that the court may not impose a sentence contrary to the
terms of the proposed bargain without giving the defendant an
opportunity to withdraw his plea of guilty.92

Johnson, like Barajas, had failed to affirmatively request
a change of plea after the court withdrew its prior approval of
the plea bargain.93 The court determined that the "deemed
withdrawn" language of section 1192.5 indicates that the court
must give the defendant an opportunity to change his plea
when it initially rejects his plea and when it withdraws its prior
approval of the bargain.94

This conclusion places the burden on the court to see that
the procedures outlined in section 1192.5 are complied with.95
Prior to the making of the plea, the court must advise each
defendant of his right to withdraw his plea in the event the
court later withdraws its approval of the bargain. Furthermore,
the defendant must be afforded the opportunity to enter a new
plea after the court does withdraw its approval.

The Johnson decision established the right of a defendant
whose bargain has been broken either by the prosecutor or the
court (resulting in the court's rejection of the offer) to withdraw
his plea of guilty and enter a new plea.96 The effect of this may
be to foreclose the availability of specific performance as a
remedy for these types of breach. In Johnson the defendant
argued that he should have the option of enforcing the original
bargain according to its terms, as an alternative to the right to

92. 10 Cal. 3d at 872, 519 P.2d at 606, 112 Cal. Rptr. at 558.
93. Id. at 871, 519 P.2d at 606, 112 Cal. Rptr. at 558.
94. The court succinctly stated its conclusion and reasoning:
Although this provision by its terms appears to apply to the initial rejec-
tion of a defendant's offer for a plea bargain, rather than to the court's
withdrawal of its prior approval of such a bargain, nevertheless this lan-
guage confirms our view that the Legislature intended that in either
situation defendant be given the opportunity to change his plea.
Id. at 872, 519 P.2d at 606-07, 112 Cal. Rptr. at 558-59.
95. Had the Barajas bargain been included within the terms of section 1192.5,
this conclusion would have overruled Barajas.

There is language in People v. Delles, 69 Cal.2d 906, 910-11 [73 Cal.Rptr. 389, 447
P.2d 629], suggesting that the burden might be upon defendant to move the trial court
to withdraw the guilty plea, or to move to vacate the judgment. Delles, however, was
decided prior to the enactment of section 1192.5 which, as we have seen, requires the
trial court to inform defendant of his right to withdraw the plea, and which "deems"
the plea withdrawn in the event the bargain is not approved by the court. See also
People v. Barajas, 26 Cal.App.3d 932, 937 [103 Cal.Rptr. 405]. Id. at 872, n.3, 519 P.2d
at 607 n.3, 112 Cal. Rptr. at 559 n.3.
96. Note that Johnson involved a court breach. Nevertheless, its principles are
equally applicable to cases of breach by the prosecutor.
withdraw his plea. The court, finding nothing in the language of section 1192.5 which compels specific performance, rejected defendant's argument.\(^97\)

We think it sufficient . . . to require the court to provide defendant with an opportunity to withdraw his plea, despite defendant's failure to request such an opportunity. Certainly nothing in the language of section 1192.5 compels any further relief.\(^98\)

The court's concern with the fact that Johnson had made serious misrepresentations while negotiating the plea bargain reinforced its "reluctance to create a right to specific performance of a plea bargain . . . ."\(^99\) Other courts may refuse to grant the remedy of specific performance because they are reluctant to allow the defendants to "dictate" the disposition of their cases.\(^100\) Nevertheless, specific performance is more closely tailored to the circumstances of each unkept bargain,\(^101\) and therefore provides more effective relief to a defendant. Withdrawal may be an unsatisfactory form of relief to the defendant because he is not returned to the pre-bargain status quo. He must face the time and expense of pretrial procedures, and he may have disclosed information damaging to his defense.\(^102\) Thus, the remedy granted in Johnson may be more illusory than substantive to the bargaining defendant.

The future availability of specific performance as a remedy

\(^{97}\) 10 Cal. 3d at 873, 519 P.2d at 607, 112 Cal. Rptr. at 559.

\(^{98}\) Id.

\(^{99}\) Id. The court placed particular emphasis on Johnson's misconduct in negotiating the bargain. Nevertheless, the "deemed withdrawn" language of section 1192.5 as applied in Johnson appears to be the reason for the court's refusal to consider specific performance.

\(^{100}\) See the comments of the trial judge in People v. Smith, 22 Cal. App. 3d 25, 29, 99 Cal. Rptr. 171, 173 (1971). Among the court's statements was the following: "[L]ooks to me like the possibility that the people who have violated the law are dictating the disposition of their case rather than the Judge." Here the court refused to consider the defendant's conditional pleas at all. See note 118 infra.


\(^{102}\) Id. In addition, upon withdrawing his plea of guilty defendant may have to face reinstatement of the original, higher charges and conviction for a more serious offense. See Comment, The Constitutionality of Reindicting Successful Plea-Bargain Appellants on the Original, Higher Charges, 62 CALIF. L. REV. 258 (1974).

In the case of In re Sutherland, 6 Cal. 3d 666, 493 P.2d 857, 100 Cal. Rptr. 129 (1972), the court did restore the status quo:

Since by granting relief we are in effect permitting defendant to withdraw his guilty plea, the ends of justice require that the status quo ante be restored by reviving the four dismissed counts.

Id. at 672, 493 P.2d at 861, 100 Cal. Rptr. at 133.
when the prosecutor violates the terms of the agreement is not absolutely certain. Johnson has considerably expanded the availability of plea withdrawal, but recognition of the right to withdraw a plea of guilty appears to have foreclosed the availability of specific performance. However, the Johnson court did not reject specific performance outright. It merely refused to acknowledge a right to specific performance.

It has been suggested by one commentator that section 1192.5 has restricted the trial judge to permitting withdrawal of the defendant's plea in compliance with section 1192.5 only when the prosecutor or court breaches the bargain prior to sentencing; consequently, if the bargain is breached after the probation and sentencing hearing and subsequent to the court's giving final approval of the bargain, section 1192.5 may not be applicable and the remedy of specific performance may be available.

However, the Johnson court's negative attitude toward any general availability of specific performance seems to render this suggested distinction meaningless. A more probable conclusion after Johnson is that even if section 1192.5 does not cover breaches which occur after the court gives final approval of the bargain, the court's disapproval of specific performance would render the remedy unavailable in the vast majority of such cases.

The alternative for a defendant whose bargain has been breached by the prosecutor and who has not moved under section 1018 to withdraw his plea of guilty, or whose bargain does

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103. See text accompanying note 99 supra.

This conclusion has resulted in an interesting post-Johnson decision. In People v. Newton, 42 Cal. App. 3d 292, 116 Cal. Rptr. 690 (1974), the defendant pleaded guilty to receiving stolen property, using a stolen credit card and possession of heroin, after the prosecutor represented that he would recommend commitment to the rehabilitation facility. The plea was accepted by one judge; at the sentencing hearing before another judge, a different deputy district attorney failed to make the promised recommendation. The defendant was sentenced to prison. On appeal the court reversed with instructions to give the prosecutor the opportunity to make good his representation. If the prosecutor refused to comply, the defendant could withdraw his guilty plea and enter a new plea:

Because this case lends itself to specific performance under the alternative procedure delineated in Santobello v. New York and People v. Johnson, the judgment . . . is reversed.

Id. at 298, 116 Cal. Rptr. at 694-95 (citations omitted).

While specific performance was set forth as an alternative to withdrawal, the court allowed the prosecutor, not the defendant, to choose the most appropriate alternative. The defendant was not given the right to choose the remedy of specific performance.

104. Fischer, supra note 34, at 137. There is no available California case law to support this suggestion.
not fall within the provisions of section 1192.5, is to file a petition for writ of error coram nobis. The court in People v. Wadkins held that coram nobis was proper where a defendant sought to change his plea of guilty after the prosecutor failed to abide by the terms of his plea bargain. There is no indication that any relief other than allowing withdrawal of the guilty plea is appropriate under the coram nobis procedure.

**Bargain Breached by Court**

Plea bargains which have been frustrated by acts or omissions of the judge make up the third category of litigated guilty pleas. It has been recognized that judicial participation in plea bargaining presents special problems. For this reason, courts have been more receptive to defendants’ requests for relief where frustration of their bargains has been precipitated by the courts. "The idea behind court participation in plea bargaining is to spread the entire bargain on the table and make it a part of the record." At the same time, judicial participation must be kept to a minimum to avoid unintentional coercion of defendants. Relief is often granted if the judge violates his duties in the bargaining process.

*People v. Delles* serves as an appropriate example of how

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105. The procedural requirements for filing a writ of error coram nobis are set forth in notes 67-69 and accompanying text supra.


107. *Id.* at 113, 403 P.2d at 432, 45 Cal. Rptr. at 176; see People v. Phillips, 263 Cal. App. 2d 423, 426, 69 Cal. Rptr. 675, 677 (1968):

It is settled that a petition for a writ of error coram nobis is an appropriate means to raise the contention that defendant was induced to plead guilty in reliance on an unkept promise by a state official.

108. See People v. Campos, 3 Cal. 2d 15, 43 P.2d 274 (1935); People v. Schwarz, 201 Cal. 309, 257 P. 71 (1927); People v. Miller, 114 Cal. 10, 45 P. 986 (1896).

109. People v. Williams, 269 Cal. App. 2d 879, 884, 75 Cal. Rptr. 348, 351 (1969); see People v. Orin, 13 Cal. 3d 937, 533 P.2d 193, 120 Cal. Rptr. 65 (1975), in which the court accepted defendant’s offer to plead guilty to a lesser offense over the People’s objection. The appeals court stated the trial court cannot substitute itself for the People in negotiations. To do so would detract from the judge’s ability to remain detached and neutral in evaluating the voluntariness of the plea and the fairness of the bargain to society as well as to the defendant . . . .

*Id.* at 943, 533 P.2d at 197, 120 Cal. Rptr. at 69.


112. 69 Cal. 2d 906, 447 P.2d 629, 73 Cal. Rptr. 389 (1968); see People v. Pinon, 35 Cal. App. 3d 120, 110 Cal. Rptr. 406 (1973), in which the court failed to advise the defendant that his probation (which was one of the terms of a plea bargain) would be
this type of breach commonly occurs. The defendant entered into an agreement with the court in which he consented to plead guilty to possession of marijuana in exchange for a four-month jail term and probation. The court granted probation and stayed execution of sentence for two weeks. During that time it learned that the defendant had been arrested on another narcotics charge prior to the date on which probation was granted. The trial judge then announced his intention to revoke probation, and the defendant moved to withdraw his plea of guilty. The motion was denied and the defendant was sentenced to prison. On appeal the court directed the trial judge to either reinstate probation or permit the defendant to withdraw his guilty plea. The court of appeal reasoned:

If a defendant pleads guilty as part of a bargain with an apparently authoritative and reliable public official—usually the prosecutor or, as here, the trial judge himself—whereby he is assured of receiving in return for his plea probation, a lenient sentence, or some other form of special consideration, the trial judge may not impose judgement contrary to the terms of such bargain withoutaffording the defendant an opportunity to withdraw his guilty plea . . . .

The Delles decision was followed by People v. Ramos, in which the defendant pleaded guilty to one count of possessing dangerous drugs in exchange for the judge’s promise to dismiss all remaining counts, strike five prior convictions, grant probation and impose no additional time in custody. The trial court then sentenced the defendant to prison for violation of probation on three of the five priors. Defendant sought to withdraw his plea, arguing that he had understood the bargain to include all five priors. The trial court denied the motion.

The California Court of Appeal reversed the trial judge, and gave him the option to permit withdrawal of the guilty plea or to grant probation in compliance with the terms of the agreement.

revoked upon conviction of another charge. The court of appeal stated that if the court is unable to comply with the terms of the bargain, the defendant must be given the opportunity to change his plea. Nevertheless, relief was denied here because the defendant did not move to withdraw his guilty plea in the trial court. Id. at 125-26, 110 Cal. Rptr. at 410.

113. 69 Cal. 2d at 908, 447 P.2d at 630-31, 73 Cal. Rptr. at 390-91.
114. Id. at 910, 447 P.2d at 632, 73 Cal. Rptr. at 392.
116. Id. at 110, 102 Cal. Rptr. at 503-04.
117. Id. at 112, 102 Cal. Rptr. at 505.
Similar grounds for breach include the court's arbitrary rejection of the defendant's proffered bargain without taking the offer into consideration, and incorrect representations made by the court which become part of the bargain.

Delles and Ramos explicitly provide for either plea withdrawal or specific performance, at the discretion of the trial court. However, Delles was decided prior to the enactment of section 1192.5, and Ramos was decided prior to Johnson. In both Delles and Ramos, the trial courts withdrew prior approval of the bargains and sentenced defendants to prison without affording them opportunities to withdraw their pleas. The language of section 1192.5 is applicable to the Delles and Ramos situations; Johnson would limit the available remedy (when the court reneges on the bargain prior to sentencing) to withdrawal of the guilty plea. Therefore the Johnson interpretation of the "deemed withdrawn" language may have effectively eliminated the option of the trial court to allow withdrawal or to grant specific performance.

Another line of recent decisions involves a failure by the court to disclose the terms of the bargain in their entirety. In People v. Williams, the court assured the defendant that if he entered a plea of guilty, it would be within the court's discretion to grant probation. Prior to sentencing the court learned that Penal Code section 1203 prevented granting probation, absent unusual circumstances. Since there were none, the defendant was sentenced to prison. The appeals court reversed the judgment, and granted the defendant's motion to withdraw his plea of guilty. The court ruled that "if an uncoerced bargain is made it must be carried out by the court or withdrawal of the guilty plea must be allowed."

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118. People v. Smith, 22 Cal. App. 2d 25, 99 Cal. Rptr. 171 (1971). In this case the trial judge expressed hostility to a plea bargain which had been accepted by the prosecutor and previously approved by the court. The judge refused to accept the defendant's conditional plea, and the appeals court found this arbitrary refusal to be an abuse of discretion. Id. at 30, 99 Cal. Rptr. at 174.


120. See text accompanying notes 93-97 supra.

121. See text accompanying note 94 supra. Note that when an act which is inconsistent with the terms of the bargain after judgment is committed, the court may, in its discretion, grant relief. See People v. Superior Court, 11 Cal. 3d 793, 523 P.2d 636, 114 Cal. Rptr. 596 (1974); People v. Allen, 46 Cal. App. 3d 583, 120 Cal. Rptr. 127 (1975).


123. Id. at 884, 75 Cal. Rptr. at 351.
A similar case is *People v. Flores*,124 in which the bargain-
ing defendant was not advised that the charge to which he
agreed to plead guilty added a mandatory consecutive term of
five more years to his minimum sentence.125 The supreme court
held that the defendant was not subject to the additional term
because it was not disclosed in the original bargain. Defen-
dant’s remedy was to “move to have his plea set aside, or the
judgment may be modified to conform with the terms of his
bargain.”126 The court ruled that under these circumstances
defendant must be given the benefit of his bargain.127

These cases again point out the availability of withdrawal
and specific performance as remedies to a defendant whose
bargain has been frustrated. This allows flexibility in order to
provide the most meaningful remedy to the defendant. How-
ever, these cases, too, were decided prior to *Johnson*, which
construed the “deemed withdrawn” language of section 1192.5
as requiring the court only to give the defendant an opportunity
to withdraw his plea. In *Williams* and *Flores* the courts im-
posed sentences inconsistent with the stated terms of the agree-
ment, thereby implicitly withdrawing their prior approval of
the original bargains. Therefore *Johnson* would seem to bar the
remedy of specific performance to defendants in future misre-
presentation cases of this type. The remedy of plea withdrawal
of right remains available.

Finally there is another means by which a court may vio-
late its duty in the plea bargaining process. Section 1192.5
requires the following procedure:

> 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

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> Any person who uses a firearm in the commission or attempted com-
mision of a robbery, assault with a deadly weapon, murder, rape, bur-
glary, or kidnapping, upon conviction of such crime, shall, in addition to
the punishment prescribed for the crime of which he has been convicted,
be punished by imprisonment in the state prison for a period of not less
than five years. Such additional period of punishment . . . shall not run
concurrently with such sentence.

Flores had pleaded guilty to armed robbery.
126. 6 Cal. 3d at 309, 491 P.2d at 408, 98 Cal. Rptr. at 824.
127. *Id.*
consideration of the matter, and (3) in such case, the defendant shall be permitted to withdraw his plea if he desires to do so.\textsuperscript{128}

In \textit{Johnson} the trial judge failed to comply with these statutory requirements. At no time between the filing of the information and the date of sentencing was Johnson advised of his right to withdraw his plea in the event the court withdrew its approval of the bargain. The California Supreme Court responded to this issue by requiring the trial court to comply with the stated procedures of section 1192.5.\textsuperscript{129} The court must provide the defendant with an opportunity to change his plea upon its revocation of prior approval of the bargain. The judgment, therefore, was reversed, with instructions to allow Johnson to withdraw his plea of guilty and enter a new plea.\textsuperscript{130}

Noncompliance with the statutory requirements is not a literal “breach” of the terms of the bargain by the court. However, the \textit{Johnson} court determined that strict compliance with the provisions of section 1192.5 is mandatory. Violation is reversible error, for which the appropriate remedy is withdrawal of the plea.\textsuperscript{131} As in the cases of literal breach of the terms of the bargain by the prosecutor or the court, \textit{Johnson} seems to have foreclosed specific performance.

The alternative remedy of \textit{coram nobis} clearly has been available in cases of breach of the terms of the bargain by the court.\textsuperscript{132} However, in view of the strict compliance with the terms of section 1192.5 required by \textit{Johnson}, it would seem that \textit{coram nobis} is not needed to remedy such a breach. An appeal under section 1237.5 would be the proper method to seek review of violations of section 1192.5.\textsuperscript{133}

\textbf{CONCLUSION}

Plea bargaining is constitutionally acceptable.\textsuperscript{134} It is necessary, however, to strike a balance between use of the plea bargain to facilitate disposition of criminal cases, and the enormous gravity of a defendant's waiver of constitutional rights.

\begin{itemize}
  \item \textsuperscript{128} \textsc{Cal. Pen. Code} § 1192.5 (West Supp. 1975).
  \item \textsuperscript{129} 10 Cal. 3d at 872, 519 P.2d at 605, 112 Cal. Rptr. at 559.
  \item \textsuperscript{130} \textit{Id.} at 871, 519 P.2d at 606, 112 Cal. Rptr. at 558.
  \item \textsuperscript{131} \textit{Id.}
  \item \textsuperscript{132} People v. Williams, 269 Cal. App. 2d 879, 885-86, 75 Cal. Rptr. 348, 352 (1969).
  \item \textsuperscript{133} See notes 73-75 supra.
  \item \textsuperscript{134} See notes 9 & 10 supra.
\end{itemize}
Therefore, full disclosure to a defendant of his rights is necessary in order to assure that his plea is freely and voluntarily made.

Defendants who suffer from "cold feet" after their bargains have been approved by the prosecution and the court are not likely to be provided with any remedy at all. The exception is when a defendant makes a clear showing that the plea was not entered freely and voluntarily, or that there was unfairness in the bargaining process. In such case he may be allowed to withdraw his plea and enter a new one.

Defendants whose bargains have been breached by the prosecutor or court prior to sentencing may withdraw their plea of guilty and enter new pleas. The availability of specific performance of the terms of their agreements is less certain, however. Decisions prior to Johnson recognized the validity and availability of both remedies. This is consonant with recent emphasis on flexibility and fairness to the defendant in the bargaining process. Nevertheless, the Johnson interpretation of the language of section 1192.5 requires only that the defendant be afforded an opportunity to withdraw his plea after a breach of the terms of the bargain occurs. This would seem to preclude the availability of specific performance as a remedy in all cases except possibly those in which the breach occurs after sentencing and final approval by the court.

This position appears to be inconsistent with the California courts' earlier recognition of the availability of specific performance as a remedy. The Johnson court, however, clearly indicated dissatisfaction with allowing specific performance of the agreement.

It has been argued that the ultimate remedy for breach of a plea bargain should be chosen by the injured party, in the interest of fair play. Until that time arrives, the right to withdrawal of a guilty plea precludes such a choice in the vast majority of plea bargained cases.

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135. See note 52 supra.
137. See note 100 supra.
138. Fischer, supra note 34, at 143.