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Withdrawal of Pleas in Nebraska: The Rejected Plea Bargain: *State v. Evans*, 194 Neb. 559, 234 N.W.2d 199 (1975)

Rick L. Ediger
University of Nebraska College of Law, rediger@simmonsolsen.com

Note

Withdrawal of Pleas in Nebraska: The Rejected Plea Bargain

State v. Evans, 194 Neb. 559, 234 N.W.2d 199 (1975).

> The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called "plea bargaining," is an essential component of the administration of justice. Properly administered, it is to be encouraged. If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.[1]

I. INTRODUCTION

Plea bargaining has become an accepted and widely-used part of our judicial process.[2] The United States Supreme Court in *Santobello v. New York*,[3] noted, however, that all considerations in favor of plea bargaining presuppose fairness in the agreement between the accused and a prosecutor.[4] Rule 11 of the Federal Rules of Criminal Procedure[5] sets out the plea bargaining standards that must be adhered to in federal courts. Nebraska, however, has no court rule or statutory procedure for the proper administration of plea bargaining. Instead, the mandates of the Nebraska supreme court must be relied upon.

This note deals specifically with one particular aspect of the plea bargaining process in Nebraska: whether a criminal defendant has the right to withdraw a plea of guilty or nolo contendere[6]

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1. Santobello v. New York, 404 U.S. 257, 260 (1971).
2. This note deals solely with the withdrawal of guilty pleas entered pursuant to plea bargaining. Arguments for and against plea bargaining are considered elsewhere. *See generally* Berger, *The Case Against Plea Bargaining*, 62 A.B.A.J. 621 (1976); Wheatley, *Plea Bargaining—A Case for its Continuance*, 59 MASS. L.Q. 31 (1974); Note, *The Unconstitutionality of Plea Bargaining*, 83 HARV. L. REV. 1387 (1970).
3. 404 U.S. 257 (1971).
4. *Id.*
5. *See* note 49 *infra*.
6. In State v. Freeman, 193 Neb. 227, 229, 226 N.W.2d 351, 353 (1975), the Nebraska supreme court recognized that for purposes of determining whether to allow withdrawal of a plea, a plea of nolo

entered pursuant to a plea bargain. In *State v. Evans*,[7] the Nebraska supreme court held that not only is there no right to withdraw a guilty plea entered upon a plea bargain, but, absent a manifest injustice, it is *improper* for a trial judge to permit the withdrawal of a plea of guilty.[8] This note will discuss the implications of this decision and examine alternatives which merit serious consideration.

II. THE DECISION

Joel Evans was charged with burglary and agreed to plead nolo contendere pursuant to a plea bargain. The county attorney agreed to recommend a six-month county jail sentence. Contrary to the terms of the agreement, Evans received a two to four year prison term in the Nebraska Penal and Correctional Complex. His motion to withdraw his plea was overruled, and he appealed his conviction based on the trial court's denial of that motion. On appeal, Evans alleged that the trial court abused its discretion, violated his right to the equal protection of the laws, and denied him due process of law as guaranteed by the United States Constitution. The Nebraska supreme court rejected his contentions and affirmed the trial court's action.[9]

The trial court was aware of the defendant's reasons for pleading nolo contendere, because at the time the plea was entered, the court was informed of the plea bargaining agreement. In addition, defendant's counsel requested that the plea be entered with leave to withdraw it if the court chose not to honor the county attorney's recommendation. The request was denied, and the court advised Evans that it would not be bound by any recommendations and that any plea made would be binding.[10] At the sentencing the judge advised the defendant that notice was taken of the county attorney's recommendation but that the judge had chosen not to follow it. Instead, a two to four year prison sentence was imposed. Evans's motion to withdraw his guilty plea was denied despite his contention that he would not have pleaded guilty except for the plea bargain, and that he entered his plea in reliance upon the plea bargain being honored.

The supreme court approved the trial court's refusal to let the defendant enter his plea with leave to withdraw if the plea bargain

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contendere is equivalent to a plea of guilty. In discussing the relevant cases, the two may therefore be considered synonymous.

7. 194 Neb. 559, 234 N.W.2d 199 (1975).
8. *Id.* at 564, 234 N.W.2d at 202.
9. *Id.* at 560, 234 N.W.2d at 200.
10. *Id.* at 560-61, 234 N.W.2d at 200.

was not accepted. Specifically, it held that "[a] trial judge should not enter into any agreement that the defendant will be permitted to withdraw his plea if he does not accept the county attorney's recommendation on sentence."[11] Further, in accordance with its decision in *State v. Turner*,[12] the court acknowledged that the *Standards Relating to Pleas of Guilty*[13] promulgated by the American Bar Association outline the minimum procedural standards for the taking of guilty pleas. In the view of the court, these standards mandate that "[i]t is not proper for a trial judge to permit the withdrawal of a plea of guilty or nolo contendere unless such withdrawal is necessary to correct a manifest injustice."[14] Thus, only in limited circumstances will withdrawal of a guilty plea be allowed.

III. ANALYSIS OF THE DECISION

The majority, in an opinion written by Judge Spencer, apparently relied on the *ABA Standards* as its sole authority. However, those standards in fact do little to support the court's conclusion that a trial judge cannot permit withdrawal of a guilty plea absent a manifest injustice.

Section 2.1[15] of the standards concerns the general subject of plea withdrawal. More specifically, section 2.1(b) provides that "[i]n the absence of a showing that withdrawal is necessary to correct a manifest injustice, a defendant may not withdraw his plea of guilty or nolo contendere as a matter of right once the plea has been

11. *Id.* at 561, 234 N.W.2d at 201.
12. 186 Neb. 424, 183 N.W.2d 763 (1971).
13. ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY (Approved Draft 1968) [hereinafter cited as ABA STANDARDS]. Formulation of these standards was authorized by the ABA in 1964. The ABA's Special Committee on Minimum Standards for the Administration of Criminal Justice presented a tentative draft in 1967, and on February 19, 1968, the ABA House of Delegates approved an amended version of the draft.
14. 194 Neb. at 564, 234 N.W.2d at 202.
15. 2.1 Plea withdrawal.
    (a) The court should allow the defendant to withdraw his plea of guilty or nolo contendere whenever the defendant, upon a timely motion for withdrawal, proves that withdrawal is necessary to correct a manifest injustice.
    (i) A motion for withdrawal is timely if made with due diligence, considering the nature of the allegations therein, and is not necessarily barred because made subsequent to judgment or sentence.
    (ii) Withdrawal is necessary to correct a manifest injustice whenever the defendant proves that:

accepted by the court."[16] Thus, a defendant does not have an absolute right to withdraw his plea. However, that same section continues: "Before sentence, the court in its discretion may allow the defendant to withdraw his plea for any fair and just reason unless the prosecution has been substantially prejudiced by reliance on the defendant's plea."[17] Thus, a trial judge should at least have the opportunity to allow withdrawal of a guilty plea prior to sentencing. Yet under the supreme court's holding, the trial judge would not have had the discretion to grant a motion to withdraw even if Evans had made the motion prior to sentencing.[18] As pointed out in Judge McCown's dissent, the majority apparently ignored the latter provision even though they had previously

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(1) he was denied the effective assistance of counsel guaranteed to him by constitution, statute, or rule;

(2) the plea was not entered or ratified by the defendant or a person authorized to so act in his behalf;

(3) the plea was involuntary, or was entered without knowledge of the charge or that the sentence actually imposed could be imposed; or

(4) he did not receive the charge or sentence concessions contemplated by the plea agreement and the prosecuting attorney failed to seek or not to oppose these concessions as promised in the plea agreement; or

(5) he did not receive the charge or sentence concessions contemplated by the plea agreement concurred in by the court, and he did not affirm his plea after being advised that the court no longer concurred and being called upon to either affirm or withdraw his plea.

(iii) The defendant may move for withdrawal of his plea without alleging that he is innocent of the charge to which the plea has been entered.

(b) In the absence of a showing that withdrawal is necessary to correct a manifest injustice, a defendant may not withdraw his plea of guilty or nolo contendere as a matter of right once the plea has been accepted by the court. Before sentence, the court in its discretion may allow the defendant to withdraw his plea for any fair and just reason unless the prosecution has been substantially prejudiced by reliance upon the defendant's plea.

ABA STANDARDS § 2.1. The court failed to include § 2.1(a)(ii)(5) in its reference to the standard. *See* State v. Evans, 194 Neb. 559, 562, 234 N.W.2d 199, 201 (1975). Section 2.1(a)(ii)(5) was an amendment to the tentative draft, and was included in the approved draft as passed in February 1968. The supreme court quoted only the tentative draft; the approved draft is set forth in full above.

16. ABA STANDARDS § 2.1(b).
17. *Id.*
18. *See* text accompanying note 14 *supra.*

affirmed the *ABA Standards* in total.[19]

In *Jurgenson v. State*,[20] the supreme court emphasized the discretion of the trial judge:

> A motion to withdraw a plea of guilty, and to be allowed to enter a plea of not guilty, addresses itself to the discretion of the trial judge before whom the plea is entered, and, in the absence of a clear abuse of that discretion, the appellate court will not interfere.[21]

In contrast, the requirement that the defendant prove a manifest injustice in order to sustain a motion to withdraw a plea of guilty appeared in *State v. Johnson*.[22] At this point, the trial judge's discretion appeared to be somewhat limited. Only where "manifest injustice"[23] was shown could the trial judge allow a guilty plea to be withdrawn whether entered pursuant to a plea bargain or not.

Apparently, the matter of discretion of the trial judge was not yet settled as demonstrated by the court's holding in *State v. Daniels*:[24]

> In the absence of a showing that a withdrawal is necessary to correct a manifest injustice, a defendant may not withdraw his plea of guilty or nolo contendere as a matter of right once the plea of guilty or nolo contendere has been accepted by the court. Before sentence the court in its discretion may allow the defendant to withdraw his plea for any fair and just reason unless the prosecution has been substantially prejudiced by reliance upon the defendant's plea.[25]

The court was therefore granted discretion to allow withdrawal up to the time of sentencing. Again, however, this granting of discretion was apparently taken away and the court held that a plea will not be permitted to be withdrawn in the absence of fraud,

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19. The majority opinion now holds that it is not proper for a trial judge to permit the withdrawal of a plea of guilty or nolo contendere unless such withdrawal is necessary to correct a manifest injustice, and also holds that a trial judge should not enter into an agreement in advance that the defendant will be permitted to withdraw his plea if the court does not accept the recommendation on the sentence. The opinion completely ignores the second sentence of section 2.1(b) of the ABA Standards, without any attempt to limit or overrule it, and after having first reaffirmed the complete standards.
194 Neb. at 566, 234 N.W.2d at 203 (McCown, J., dissenting).
20. 166 Neb. 111, 88 N.W.2d 129 (1958).
21. *Id.* at 118, 88 N.W.2d at 133.
22. 187 Neb. 26, 187 N.W.2d 99 (1971).
23. *See* ABA STANDARDS § 2.1(a)(ii), *supra* note 15.
24. 190 Neb. 602, 211 N.W.2d 127 (1973).
25. *Id.* at 605, 211 N.W.2d at 129.

mistake, or other improper means used in its procurement.[26] The case at hand evidently requires a showing of manifest injustice in order to withdraw a guilty plea. Yet, in *Evans*, the supreme court relied solely on the *ABA Standards*, which at the very least allow the trial court discretion to allow withdrawal of a guilty plea prior to sentencing.[27]

Admittedly, in this case, Evans did not move to withdraw his plea of guilty prior to sentencing. He was aware of the judge's decision before the motion to withdraw was made. However, the commentary[28] to the *ABA Standards* makes it clear that sentence or judgment should not necessarily cut off the opportunity for plea withdrawal. Furthermore, it has been held in one jurisdiction that a defendant will be permitted to withdraw his plea after judgment and sentencing, but before the sentence is filed with the clerk of the court.[29] This argument would undoubtedly have little impact in Nebraska, yet under the *ABA Standards* as accepted by the supreme court, at the very least the trial judge should have discretion up until the time of sentencing. This may have no bearing on Evans's situation, but will have a substantial effect on relevant future cases.

Furthermore, section 2.1(a)[30] of the *ABA Standards* provides that withdrawal of a plea *should* be allowed whenever the defendant proves that withdrawal is necessary to correct a manifest injustice. The word *should*, of course, is not exclusive. It only describes situations in which plea withdrawal must be allowed, and clearly does not exclude other possible circumstances. The commentary to section 2.1(b) points this out: "The standard does recognize the generally acknowledged discretion of the judge to permit withdrawal before sentence even in the absence of a mani-

26. *See* State v. Freeman, 193 Neb. 227, 226 N.W.2d 351 (1975); State v. Williams, 191 Neb. 57, 213 N.W.2d 727 (1974).

27. *See* text accompanying note 17 *supra*.

28. The standard expresses the position, consistent with that found in the federal system but contrary to that taken in most states, that sentence or judgment should not necessarily cut off the opportunity for plea withdrawal.
ABA STANDARDS § 2.1(a)(i), commentary, at 55.

29. Ballard v. State, 131 Ga. App. 847, 848, 207 S.E.2d 246, 248 (1974). As to what constitutes finality in sentencing, the Georgia court stated:
When is a sentence pronounced? Does the mere *signing* of the written judgment constitute the pronouncement of the sentence? No, there is one step further to be taken before pronouncement of the sentence is complete. The judgment must be in writing, it must be signed, and *it must be filed with the clerk of the court.*

30. *See* note 15 *supra*.

fest injustice."[31] Yet, the supreme court on the basis of these standards alone held that "[i]t is not proper for a trial judge to permit the withdrawal of a plea of guilty or nolo contendere unless such withdrawal is necessary to correct a manifest injustice."[32]

The supreme court did not restrict its discussion to section 2.1. It included a treatment of Part III of the *ABA Standards* which deals specifically with plea discussions and plea agreements.[33] The specific responsibilities of the trial judge in dealing with plea agreements are explained in section 3.3.[34] In quoting this provision, the court omitted and thus failed to consider a sentence making it the responsibility of the trial judge to grant the defendant a right to withdraw his plea where the judge had previously concurred in the

31. ABA STANDARDS § 2.1(b) commentary, at 58. Other commentary in the *ABA Standards* further indicates the nonexclusivity of the exception:

> No attempt has been made in the standards to identify all the pressures upon a defendant which could render a plea involuntary. Although a plea agreement reached in conformance with these standards may make the plea of guilty or *nolo contendere* more attractive to the defendant, the resulting plea is in no sense involuntary . . . . Whether certain inducements beyond those authorized in the standards, such as a promise not to prosecute another person, renders the plea involuntary . . . is left to judicial decision.

Id. § 2.1(a)(ii) commentary, at 57.

32. 194 Neb. at 564, 234 N.W.2d at 202.

33. *See id.* at 563-64, 234 N.W.2d at 201-02.

34. 3.3 Responsibilities of the trial judge.

> (a) The trial judge should not participate in plea discussions.
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> (b) If a tentative plea agreement has been reached which contemplates entry of a plea of guilty or nolo contendere in the expectation that other charges before that court will be dismissed or that sentence concessions will be granted, upon request of the parties the trial judge may permit the disclosure to him of the tentative agreement and the reasons therefore in advance of the time for tender of the plea. He may then indicate to the prosecuting attorney and defense counsel whether he will concur in the proposed disposition if the information in the presentence report is consistent with the representations made to him. If the trial judge concurs, but later decides that the final disposition should not include the charge or sentence concessions contemplated by the plea agreement, he shall so advise the defendant and then call upon the defendant to either affirm or withdraw his plea of guilty or nolo contendere.
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> (c) When a plea of guilty or nolo contendere is tendered or received as a result of a prior plea agreement, the trial judge should give the agreement due consideration, but notwithstanding its existence he should reach an independent decision on whether to grant charge or sentence concessions under the principles set forth in section 1.8.

ABA STANDARDS § 3.3.

bargain and now disapproves of it.[35] Without this added provision the standard announced by the supreme court is severely limited. This is particularly troublesome in light of the fact that the intent of the *ABA Standards* is not to restrict plea withdrawal solely to cases where a manifest injustice exists.[36] At the very least, the trial judge should have the discretion to decide based on the particular circumstances of each case.

The whole purpose of the plea bargain is to induce the defendant to plead guilty, and thus expedite the judicial process. Since the purpose of a plea bargain is to get a guilty plea, it may be inferred that absent that agreement, a defendant will plead not guilty to the original charges brought. Any other interpretation is contrary to the concept of plea bargaining itself. The supreme court through its interpretation of the *ABA Standards* made no distinction between pleas made purely voluntarily and those made as a result of an inducement. It seems highly unfair that the same rules are maintained where the circumstances surrounding a plea bargain are substantially different from a noninduced plea. Yet that is exactly the present situation in Nebraska.

Section 3.3(c) of the *ABA Standards* provides that a judge should give a plea bargain due consideration, but that he should reach an independent decision on whether to grant the desired concessions.[37] The court expressed the fear that to allow plea withdrawals would destroy this independence.[38] However, nowhere in section 3.3(c) are the independence of the judge and the defendant's right to withdraw a guilty plea equated. The standard refers solely to independence in determining whether to grant the conditions of the plea bargain. It is essential that the judge maintain this independence, but that does not preclude him from informing the defendant that the agreement is not satisfactory, and from allowing the defendant a chance to reconsider his position. Fur-

35. As was the case with § 2.1, *see* note 15 *supra*, the Nebraska supreme court omitted another important part of § 3.3(b) of the 1968 Approved Draft. The court quoted the tentative draft, which provides:

> If the trial judge concurs but the final disposition does not include the charge or sentence concessions contemplated in the plea agreement, he shall state for the record what information in the presentence report contributed to his decision not to grant these concessions.

194 Neb. at 563-64, 234 N.W.2d at 202. The final amended version is set forth in note 37 *supra*.

36. *See* text accompanying note 18 *supra*.

37. *See* note 34 *supra*.

38. 194 Neb. at 564, 234 N.W.2d at 202.

thermore, the importance of plea bargaining is its time-saving feature. When it is discovered that a guilty plea is binding regardless of the judge's determination, some will be less likely to take the chance of having a plea bargain rejected, and demand a trial immediately. Thus, if the goal is to expedite the judicial process, the supreme court's rule is self-defeating since the state will more often be forced to prove its case than it otherwise would.

IV. THE ALTERNATIVE

Admittedly, proper application of the *ABA Standards* would more than likely not have changed the result in the *Evans* case. The supreme court probably would have held that the trial judge did not abuse his discretion in denying withdrawal of the plea since no manifest injustice was shown. However, the *ABA Standards* presented certain defects in need of resolution. Thus, in June of 1972, the ABA Project on Standards for Criminal Justice proposed an updated set of standards,[39] which was adopted by the ABA House of Delegates in August of 1972. The 1972 *ABA Standards* apparently were intended to supplement and clarify the earlier version.[40] In spite of this, the Nebraska supreme court refused to accept them.[41]

Section 4.1[42] of the 1972 standards concerns the role of the judge in plea discussions and plea agreements. The standards clearly provide that in a plea bargaining situation, the judge should permit withdrawal of the plea in any case in which he determines not to grant the charge or sentence concessions contemplated by the agree-

39. ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE FUNCTION OF THE TRIAL JUDGE (Approved Draft 1972) [hereinafter cited as 1972 ABA STANDARDS].
40. *See* 1972 ABA STANDARDS § 4.1 commentary, at 52.
41. 194 Neb. at 565, 234 N.W.2d at 202.
42. 4.1 Role of the judge in plea discussions and plea agreements.
(a) The trial judge should not be involved with plea discussions before the parties have reached an agreement other than to facilitate fulfillment of the obligation of the prosecutor and defense counsel to explore with each other the possibility of disposition without trial.
(b) The trial judge should not accept a plea of guilty or nolo contendere without first inquiring whether there is a plea agreement and, if there is one, requiring that it be disclosed on the record.
(c) If the plea agreement contemplates the granting of charge or sentence concessions by the trial judge, he should:
(i) unless he then and there grants such concessions, inform the defendant as to the role of the judge with respect to such agreements, as provided in the following subparagraphs;

ment.[43] The Nebraska supreme court went so far as to hypothesize that under these standards the defendant would be allowed to withdraw his guilty plea.[44] However, instead of recognizing that the 1972 *ABA Standards* were meant to supplement the 1968 version, the court set the updated standards aside simply by disapproving of them. The court thus affirmed the old standard while giving no reason whatsoever for rejecting the policies set out in the new. This is particularly of concern since the court relied solely on the American Bar Association Standards for its authority.

Of utmost interest are the words of Chief Justice Burger in *Santobello v. New York*: "[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 promise must be fulfilled."[45] As the defendant in *Evans* argued in his brief, the prosecutor will now be able to make a promise to the defendant which provides the inducement or consideration for a guilty plea, and, even though the prosecutor may not break the promise, the court may do it for him.[46] This is not to imply that there should be an absolute right to have a plea bargain accepted. That would clearly impinge upon judicial discretion. However, whether the prosecutor breaks a promise or the judge disapproves of the bargain, the impact is the same as far as the defendant is concerned. If he is not allowed to at least withdraw the plea when the inducements which led to the plea are removed, the defendant is placed in a highly unfair situation. This can easily lead to the prosecutorial tactic of making promises in the knowledge that the judge will not approve the terms of the bargain.[47] Nowhere in the

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(ii) give the agreement due consideration, but notwithstanding its existence reach an independent decision on whether to grant charge or sentence concessions; and

(iii) permit withdrawal of the plea (or, if it has not yet been accepted, withdrawal of the tender of the plea) in any case in which the judge determines not to grant the charge or sentence concessions contemplated by the agreement.

(d) The trial judge may decline to give consideration to a plea agreement until after completion of a presentence investigation or may, in accordance with ABA Standards, Pleas of Guilty § 3.3(b), indicate his conditional concurrence prior thereto.

1972 ABA STANDARDS § 4.1.

43. *See id.* § 4.1(c)(iii).
44. 194 Neb. at 565, 234 N.W.2d at 202.
45. 404 U.S. at 262.
46. *See* State v. Evans, 194 Neb. 559, 564, 234 N.W.2d 199, 202 (1975).
47. For a general discussion of prosecutorial discretion see Cox, *Prosecutorial Discretion: An Overview*, 13 AM. CRIM. L. REV. 383 (1976);

enumerated "manifest injustices" of section 2.1[48] of the *ABA Standards* is this situation covered; thus, the defendant would apparently be left solely to the mercy of the trial judge.

The Federal Rules of Criminal Procedure now provide that when a court rejects a plea agreement, the defendant shall be given the opportunity to withdraw his plea.[49] Although the federal rules are not applicable to the state courts, in reference to the former version of this same rule, the Nebraska supreme court previously stated that "it is good practice to comply with Rule 11."[50] Rule 11(e)(4) allows withdrawal as a matter of right and at least in a federal criminal case, Evans would have been allowed to change his plea.[51]

Lagoy, Senna & Siegel, *An Empirical Study on Information Usage for Prosecutorial Decision Making in Plea Negotiations*, 13 AM. CRIM. L. REV. 435 (1976); Thomas & Fitch, *Prosecutorial Decision Making*, 13 AM. CRIM. L. REV. 507 (1976).

48. *See* note 15 *supra*.

49. FED. R. CRIM. P. 11(e) provides in part:

> (2) Notice of Such Agreement. If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. Thereupon the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report.
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> (3) Acceptance of a Plea Agreement. If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.
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> (4) Rejection of a Plea Agreement. If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw his plea, and advise the defendant that if he persists in his guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

For a discussion of the recent changes in Rule 11 see Note, *Revised Rule 11: Tighter Guidelines for Pleas in Criminal Cases*, 44 FORDHAM L. REV. 1010 (1976).

50. State v. Leger, 190 Neb. 352, 354, 208 N.W.2d 276, 278 (1973).

51. Even before the adoption of the new federal rule, some federal courts had followed what was to become the statutory procedure. In United States *ex rel.* Culbreath v. Rundle, 466 F.2d 730 (3d Cir. 1972), the court held that a defendant should be permitted to withdraw his guilty plea, particularly where there is no governmental claim of prejudice or harm. In United States *ex rel.* Elksnis v. Gilligan, 256 F. Supp. 244 (S.D.N.Y. 1966), the court relied on fundamental fairness as a concept of due process of law in allowing the withdrawal of a guilty plea.

In applying the California plea bargaining statute,[52] it has been held that a court may not impose judgment contrary to the bargain without giving the defendant an opportunity to withdraw his guilty plea.[53] Pennsylvania has a similar rule, under which a judge deciding not to concur in a plea bargain must permit the defendant to withdraw his plea.[54] As stated in *Commonwealth v. Barrett*:[55]

> It is to be emphasized that we are to hereafter consider a plea of guilty as a "tender", and as such not be considered as irrevocably "made". Rule 319, we believe, does no more than affirm the long line of cases in this and other jurisdictions that recognize that "manifest injustice" may only be avoided if the accused is afforded necessary safeguards against the possibility of an unfulfilled bargain, which is either the sole or primary inducement in the tender of a guilty plea in the first instance. This clear mandate of this rule and the cases upon which it is founded supports the conclusion that the appellant should have been permitted to withdraw his plea.[56]

In affirming *Barrett*, the Pennsylvania court in *Commonwealth v. Sutherland*[57] expressed the view that "[t]he ABA Standards and *Barrett* are premised on the idea that it would be unfair to accept a guilty plea which was induced in part by a recommendation of a lenient sentence and then impose a greater sentence."[58] It is significant to note the Pennsylvania court's view of the unique nature of plea bargaining itself as opposed to a purely voluntary guilty plea. Finally, a Georgia statute[59] provides that a plea of guilty may be withdrawn at any time before the sentence is pronounced. Under that statute, unless a defendant freely, voluntarily and willingly

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52. CAL. PENAL CODE § 1192.5 (West 1970):
> 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 a plea.

53. *See* People v. Johnson, 10 Cal. 3d 868, 872, 519 P.2d 604, 606, 112 Cal. Rptr. 556, 558 (1974); People v. Ramos, 26 Cal. App. 3d 108, 110-11, 102 Cal. Rptr. 502, 504 (4th Dist. 1972). *See also* Comment, *An Offer You Can't Refuse: The Current Status of Plea Bargaining in California*, 7 PAC. L.J. 80 (1976).

54. *See* PA. R. CRIM. P. 319(b)(3) (Pamphlet 1976).

55. 223 Pa. Super. 163, 299 A.2d 30 (1972).

56. *Id.* at 170, 299 A.2d at 33.

57. 234 Pa. Super. 520, 340 A.2d 582 (1975).

58. *Id.* at 524, 340 A.2d at 584.

59. GA. CODE ANN. § 27-1404 (1972).

accepts the sentence, he has the privilege of withdrawing his plea.[60] Thus, in any of the above jurisdictions, Evans would have had the right to withdraw his plea.

The lack of a statutory provision has not, however, stopped other state courts from adopting standards of their own. Based solely on the *ABA Standards*,[61] the Minnesota supreme court has held that

> a "manifest injustice" occurs where contemporaneously with the plea of guilty and before sentence is imposed the court is fully apprised of the terms of a plea agreement and declines to give it effect. Under such circumstances, if the state can show no prejudice by reliance on the plea, it is incumbent on the court to permit the guilty plea to be withdrawn.[62]

Thus, in Minnesota, the failure of the trial judge to approve a plea bargain is a manifest injustice and the plea is allowed to be withdrawn.

More recently section 4.1[63] of the 1972 *ABA Standards* has been utilized to grant a right of withdrawal of guilty pleas. Although not adopting it as a mandatory rule, the New Hampshire supreme court has recognized that a trial judge may think it prudent to follow the more recent standard.[64] Similarly, the Iowa supreme court, in *State v. Fisher*,[65] adopted those standards as a mandatory rule,[66] and Connecticut applies the rule whenever a court disapproves of a plea bargain.[67]

Finally, the work of the American Law Institute on the subject should be examined. The final draft of its *Model Code of Pre-Arraignment Procedure*[68] was adopted in May of 1975. Section 350.6 of that proposal provides:

> If, at the time of sentencing, the court for any reason determines to impose a sentence more severe than that provided for in a plea agreement between the parties, the court shall inform the defendant of that fact and shall inform the defendant that the court will entertain a motion to withdraw the plea. The court after pronouncing the sentence of a defendant who has pleaded guilty or

60. *See* Ballard v. State, 131 Ga. App. 847, 850, 207 S.E.2d 246, 248-49 (1974).
61. *See* note 15 *supra*.
62. State v. Loyd, 291 Minn. 528, 531, 190 N.W.2d 123, 125 (1971).
63. *See* note 42 *supra*.
64. *See* State v. Farris, 114 N.H. 355, 358, 320 A.2d 642, 644 (1974).
65. 223 N.W.2d 243 (Iowa 1974).
66. The *Fisher* decision, however, has apparently been limited by State v. Parrish, 232 N.W.2d 511 (Iowa 1975).
67. *See* Quintana v. Robinson, 31 Conn. Supp. 22, 319 A.2d 515 (Super. Ct. 1973).
68. ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE (Proposed Official Draft, April 15, 1975).

> nolo contendere shall inquire of the defendant personally whether the sentence pronounced violates any agreement or understanding the defendant had with respect to the sentence. If the court determines that the sentence pronounced is inconsistent with an agreement, or that it differs from the defendant's understanding in such a way that it would be unjust to permit the defendant's plea to stand, it shall vacate the plea.[69]

Under this standard it is the defendant's right to withdraw his guilty plea whenever a court determines to impose a sentence more severe than is provided for in the plea agreement.

V. CONCLUSION

It would be misleading to imply that Nebraska is the only state adhering strictly to the rule requiring a showing of manifest injustice for a plea to be withdrawn and allowing the trial judge no discretion.[70] However, the more desirable rule gives the defendant a right to withdraw. As Judge McCown of the Supreme Court of Nebraska stated:

> It is difficult to understand the reluctance of the court to accept a rule which all federal courts and an overwhelming majority of all state courts already follow. We are cited to no state court which recognizes plea discussions and plea agreements as an appropriate part of the administration of criminal justice which has refused to follow the rule since Santobello v. New York . . . . The majority opinion here is a step backward in the continuing search for even-handed justice.[71]

Rick L. Ediger '77

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69. *Id.* § 350.6.
70. *See* Rotenberg, *The Progress of Plea Bargaining: The ABA Standards and Beyond*, 8 CONN. L. REV. 44 (1975); 17 S. TEX. L.J. 343 (1976); Annot., 66 A.L.R.3d 902 (1975).
71. 194 Neb. at 568, 234 N.W.2d at 204 (dissenting opinion).