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Pressure to Plead: How Case-Management Mediation Will Alter Criminal Plea-Bargaining

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The Pressure to Plead: How Case-Management Mediation Will Alter Criminal Plea-Bargaining

State v. Milligan[1]

I. INTRODUCTION

In the criminal prosecution of Jason Milligan, the state court of Kansas was confronted with the constitutionality and validity of a guilty plea obtained during a judicially facilitated mediation.[2] Alternative dispute resolution (ADR) techniques, particularly mediation, have become increasingly popular tools in criminal proceedings and a number of jurisdictions are experimenting with their proper application in criminal law. Although post-sentencing victim-offender mediation remains the dominant method of mediation in the criminal context, case-management mediation is slowly making its way into courtrooms across the nation.[3] The decision by the Kansas court to uphold Jason Milligan's plea bargain, despite his allegations of coercion, further strengthened the trend of mediation as part of the plea-bargaining process.

The growing use of case-management mediation has prompted concerns over the differences between, and applicability of, mediation in civil and criminal cases. The increasing prevalence of judges acting as case-management mediator raises questions regarding the coerciveness that a magistrate's presence may have on the bargaining process. Jason Milligan's plea-bargaining experience, in which a former trial judge served as mediator,[4] highlights both the problems and potential inherent in this new form of alternative dispute resolution.

This note first discusses the facts and proceedings in *Milligan.* Next, it explores the history and importance of plea-bargaining in the United States and how mediation has slowly become a part of criminal proceedings. Next, this note examines the *Milligan* court's reasoning for upholding the mediation plea bargain at issue in that case, in light of the legal landscape concerning ADR and the criminal justice system. Finally, this note argues in favor of using case-management mediation in criminal plea negotiations, and explores the proper methods and procedures to make these mediations successful.

II. FACTS AND HOLDING

On July 30, 2008 Jason Milligan ("Milligan") was charged by the State of Kansas ("State") with rape, in violation of Kansas Statutory Authority 21-

1. No. 108,094, 2013 WL 2919942 (Kan. Ct. App. June 27, 2013).
2. *Id.*
3. Jennifer Gerarda Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique*, 43 EMORY L. J. 1247, 1258 (1994); Mark S. Umbreit et al., *The Impact of Victim-Offender Mediation: Two Decades of Research,* 65 FED. PROBATION 29, 29 (stating that in 2001, there were 1300 VOM programs in almost 20 countries).
4. *Milligan,* 2013 WL 2919942, at *3-4.

3502(a)(1)(a).[5] The State alleged that Randy Pickering ("Pickering") dropped Milligan off at Milligan's younger sister's ("K.H.") home.[6] Milligan persuaded K.H., who was pregnant, to go on a walk with him.[7] During the walk, Milligan told K.H. he wanted to feel the baby move and asked her to lie down on a table.[8] When K.H. lay down, Milligan got on top of K.H., removed her pants, and forcibly penetrated her.[9]

In response to K.H.'s screams, two witnesses, William Brubaker ("Brubaker") and Andrew Shepherd ("Shepherd"), arrived at the scene and saw a man on top of K.H.[10] As Shepherd and Brubaker approached, the assailant jumped off of K.H. and fled.[11] Shepherd chased the assailant but was unable to catch him.[12] Brubaker called 911 and K.H. began screaming that her brother had attempted to rape her.[13] K.H's screams were audible on the 911 recording of Brubaker's phone call.[14] When Pickering returned to pick Milligan up from K.H's home, Milligan told him that, "if anyone asks, say I was with you all night," and that "my sister may say something about me raping her."[15] On August 16, 2011, Milligan was arrested and placed in custody.[16]

The State and Milligan agreed to have the case mediated by a mediator of the presiding judge, Judge Wilson's, choosing.[17] Judge Wilson selected retired judge Thomas Conklin (Judge Conklin) as the mediator.[18] During the mediation, Judge Conklin communicated the strength of the State's case, telling Milligan that his conviction was guaranteed.[19] During an all-day mediation session on a Friday, Milligan refused any offered plea deals and continually insisted on a trial, despite facing a presumed jail sentence of 166-176-186[20] months.[21]

The following Monday morning, prior to trial beginning, the State offered a final plea deal, recommending a significant downward departure[22] of 131 months of incarceration.[23] Milligan accepted the plea.[24] At his plea hearing, Milligan

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5. *Id.* at *1; Law of July 1, 2006, Kan. Stat. Ann. § 32-3592(a)(1)(A) (repealed by Laws 20, Ch.136, § 307).

6. State v. Milligan, No. 108,094, 2013 WL 2919942, at *1 (Kan. Ct. App. June 27, 2013).

7. *Id.*

8. *Id.*

9. *Id.* at *2.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Milligan,* 2013 WL 2919942, at *1.

16. *Criminal History of Jason Lewis Milligan — Shawnee County, KS*, JUST MUG SHOTS, http://www.justmugshots.com/kansas/shawnee-county/16743425 (last visited Oct. 2, 2013.)

17. State v. Milligan, No. 108,094, 2013 WL 2919942, at *2 (Kan. Ct. App. June 27, 2013).

18. *Id.*

19. *Id.* at *3.

20. The center number represents the presumptive number of months an offender should be sentenced to prison. The other two numbers reflect a number of months the offender can be sentenced to serve without the judge engaging in what is called "departure" sentencing. *Sentencing Guidelines—Sedgwick County District Attorney*, http://www.sedgwickcounty.org/da/sentencing_guidelines.asp (last visited Mar. 4, 2014).

21. State v. Milligan, No. 108,094, 2013 WL 2919942, at *3 (Kan. Ct. App. June 27, 2013).

22. BLACK'S LAW DICTIONARY 469 (9th ed. 2009) (defining a downward departure as "a court's imposition of a sentence more lenient that the standard guidelines propose, as when the court concludes that a criminal's history is less serious than it appears.").

23. State v. Milligan, No. 108,094, 2013 WL 2919942, at *2 (Kan. Ct. App. June 27, 2013).

assented to the State's narrative of the facts,[25] confirmed that he understood the charges against him and his rights,[26] and stipulated that he was not coerced or threatened into taking the plea.[27] Judge Wilson accepted Milligan's guilty plea.[28]

Before sentencing occurred, Milligan filed a motion to withdraw his plea.[29] Milligan claimed that the mediator, Judge Conklin, coerced him into accepting the plea agreement and that, due to the judicial participation in the mediation and plea process, Milligan did not make his plea knowingly or intelligently.[30] After an evidentiary hearing, Judge Wilson denied Milligan's motion to withdraw his plea.[31] Judge Wilson held that Judge Conklin appropriately acted as a third party mediator by strongly, but correctly, communicating the reality of the case to Milligan.[32] Judge Wilson maintained that Milligan's initial resistance to a plea deal, despite Judge Conklin's statements on Friday, coupled with his acceptance of a more favorable plea deal the following Monday, was further evidence that no coercion had occurred.[33] Judge Wilson sentenced Milligan to 131 months of incarceration in accordance with the downward departure agreed to in the plea bargain.[34]

Milligan appealed the denial of his motion to withdraw his guilty plea, again arguing that the mediation process facilitated by Judge Conklin, and Judge Conklin's guarantee that Milligan would lose at trial, forced him to accept the State's plea deal.[35] Milligan's appeal specifically argued that Judge Conklin overstated the likelihood of the State's success, and that such a guarantee of defeat at trial satisfied the standard of coercion necessary for Milligan's plea to be withdrawn.[36] The Kansas Court of Appeals rejected Milligan's coercion claims and affirmed the district court's denial of Milligan's motion to withdraw. The Kansas Court of Appeals held that the Shawnee District Court had not abused its discretion, and that Milligan had failed to meet the standard of good cause required to permit the withdrawal of Milligan's plea.[37]

III. LEGAL BACKGROUND

Plea-bargaining is the "process whereby the accused and the prosecutor in a criminal case work out a mutually satisfactory disposition of the case subject to court approval."[38] Plea-bargaining "[u]sually involves the defendant pleading guilty to a lesser offense or to one or some of the counts of a multi-count indict-

24. *Id.* at *3.
25. *Id.* at *1.
26. *Id.*
27. *Id.* at *3.
28. *Milligan*, 2013 WL 2919942, at *1.
29. *Id.* at *2.
30. *Id.* at *2-*3.
31. *Id.* at *3.
32. *Id.*
33. *Milligan*, 2013 WL 2919942, at *3.
34. *Id.* at *2.
35. *Id.* at *3.
36. *Id.*
37. *Id.*
38. *Plea Bargaining – Criminal Law*, USLEGAL, http://criminallaw.uslegal.com/plea-bargaining/ (last visited June 16, 2014).

ment in return for a lighter sentence than the possibly graver charge."[39] The plea-bargaining process has become commonplace in criminal law.[40] Today 90% of federal and state court cases end with defendants entering a guilty plea.[41] While pre-trial adjudication has become common in the U.S legal system, plea agreements in criminal cases require special scrutiny. When a defendant accepts a plea, he waives important constitutional rights, such as the right to trial by jury, the right to confront witnesses, and the privilege against self-incrimination.[42]

Despite the important constitutional rights implicated in guilty pleas, U.S. public policy continues to favor settlement over resorting to trial.[43] Mediation is an informal, non-adversarial ADR process whereby a neutral third party encourages and facilitates the parties in voluntarily resolving their dispute.[44] As ADR has gained popularity in civil litigation, mediation of civil claims has become standard,[45] and even required. Today, more than two-thirds of federal district courts have mediation programs.[46] The growing cost of litigation and the increasingly underfunded judiciary have contributed to the growth of plea-bargaining in the criminal sector.[47] In response to the demand for alternative dispute resolution, states have begun to implement mediation in criminal plea negotiation.[48]

A. Criminal Plea-Bargaining: History of Federal Law

By 1920 plea-bargaining was an integral part of the execution of criminal justice.[49] In *Brady v. United States*,[50] the United States Supreme Court officially legitimized plea-bargaining, and acknowledged that the nature of plea-bargaining is itself coercive.[51] In *Brady*, the Court held that plea-bargaining was presumptively constitutional as long as the defendant's guilty plea met three requirements.[52] First, the plea must be entered voluntarily; second, the plea must be knowingly committed to and the defendant must be aware of the consequences; and third, the defendant must have assistance of counsel during the bargaining process.[53] In

39. BLACK'S LAW DICTIONARY 1152 (6th ed. 1990), *available at* http://archive.org/stream/BlacksLaw6th/Blacks%20Law%206th_djvu.txt.

40. Bureau of Justice Statistics (2005). *State Court Sentencing of Convicted Felons.* Washington, DC: U.S. Department of Justice, *available at* http://www.bjs.gov/content/pub/pdf/fjs05.pdf.

41. *Id.*

42. Brady v. United States, 397 U.S. 742 (1970). U.S. CONST. AMEND. V; U.S. CONST. AMEND. VI.

43. *See generally* Lindsey Devers, Ph.D., Bureau of Justice Assistance, *Plea and Charge Bargaining Research Summary* (2011), https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf.

44. *See* Black's Law Dictionary 1003 (8th ed. 2004).

45. In many jurisdictions divorce mediation is mandatory. *See, e.g.,* Dennis Saccuzzo, *Controversies in Divorce Mediation*, 79 N.D. L. REV. 425, 430 (2003). In employment law, mediation is becoming more commonplace due to mandatory mediation and arbitration clauses in contracts. *See, e.g.,* Jason Schatz, *Imposing Mandatory Mediation of Public Employment Disputes in New Jersey to Ameliorate an Impending Fiscal Crisis*, 57 RUTGERS L. REV. 1111, 1119 (2005).

46. Thomas J. Stipanowich, *ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution,"* 1 J. EMPIRICAL LEGAL STUD. 843 (2004).

47. Santobello v. New York, 404 U.S. 257 (1971).

48. *See generally* State v. Milligan No. 108,094, 2013 WL 2919942 (Kan. Ct. App. June 27, 2013). *See also* Jack Hanna, *Mediation in Criminal Matters,* 15 DISP. RESOL. MAG. 4 (2008).

49. Douglas D. Guidorizzing, *Should We Really "Ban" Plea Bargaining?: The Core Concerns of Plea Bargaining Critics*, 47 EMORY L.J. 753, 765 (1998).

50. 397 U.S. 742 (1970).

51. *Id.*

52. *Id.*

53. *Id.*

addressing each factor, the majority opinion noted that voluntariness would need to be established on a case-by-case basis, in light of the circumstances unique to each case.[54]

The Court recognized that, "[t]he state to some degree encourages pleas of guilty at every important step in the criminal process."[55] The Court, in *Brady*, also established the standard that defendant must meet in order to withdraw a guilty plea. The Court explained that, unless a defendant enters a plea as a result of actual or threatened physical harm or mental coercion resulting in the loss of free will, plea-bargaining will not be considered coerced or involuntary, and a guilty plea will be upheld.[56] Despite the pressures faced by the defendant during the plea-bargaining process, the Court declined to hold guilty pleas invalid under the Fifth Amendment.[57] Although the Court acknowledged that defendants may be motivated by the likelihood of a lesser sentence in response to a plea of guilt versus a trial in which punishment is uncertain, they stipulated that any such incentive does not amount to the level of coercion required to invalidate a guilty plea.[58]

The Supreme Court reaffirmed both the constitutionality of plea-bargaining and their support of it, in *Santobello v. New York*.[59] The *Santobello* decision recognized plea-bargaining as critical to the American system of criminal law, stating that the process was "an essential component of the administration of justice."[60] The Court provided further protection for defendants in instances where prosecutorial promises are not kept, ruling that the state's plea-bargaining guarantees to a defendant must be honored.[61] Furthermore, *Santobello* acknowledged that the judicial system relies on plea-bargaining, because "if every criminal charge were subjected to a full-scale trial the States and Federal Government would need to multiply by many times the number of judges and court facilities," in order to meet the need.[62] Finally, in *Santobello,* the Court ruled that a defendant has neither a right to be offered a plea deal, nor a guarantee that a judge will accept a plea.[63]

In *Bordenkircher v. Hayes*,[64] the Court recognized that the state's goal in obtaining a plea deal is to persuade a defendant to admonish the right to plead not guilty and forgo trial.[65] The *Bordenkircher* Court further explained that, although threatening a defendant with more serious charges at trial may be discouraging; the decisions faced by a defendant are a permissible part of a system that encourages negotiation prior to trial.[66] In *Hill v. Lockhart*,[67] the Court established that allegations of ineffective assistance of counsel during plea negotiation are ana-

54. *Id.*
55. *Id.*
56. 397 U.S. 742 (1970).
57. *Id.*
58. *Id.*
59. 404 U.S. 257 (1971).
60. *Id* at 260.
61. *Id.*
62. *Id.*
63. *Id* at 262.
64. 434 U.S. 357 (1968).
65. *Id.*
66. *Id.*
67. 474 U.S. 52 (1985).

lyzed using the two-part test set forth in *Strickland v. Washington.*[68] In a subsequent decision, the Court explained that the *Strickland* holding applies to plea bargains, because "the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel."[69]

In recent years, the Court has continued to hear cases involving plea deals. In *Missouri v. Frye,*[70] the court held that in the instance that a plea deal is offered by the prosecution, defendants have a constitutional right to be presented with plea offers made.[71] In *Lafler v. Cooper,*[72] the Court ruled that the *Strickland* Test applies to cases in which a defendant rejects a plea offer on the advice of counsel and is later convicted at trial.[73] The Court noted that, in a situation where the defendant rejects an offer, the injury is not remedied by specific performance of the original plea offered by the prosecution prior to trial.[74]

B. Plea Withdrawal in Kansas

In *Milligan*, the Kansas Court of Appeals noted the history of Kansas state case and statutory law impacting Milligan's motion to withdraw his plea.[75] Kansas Statute 22-3210 provides the guidelines for accepting and withdrawing guilty pleas and pleas of *nolo contedere* in Kansas state courts.[76] Despite the similarities to its federal counterpart,[77] the pertinent part of the statute provides that in order to withdraw a plea prior to sentencing, a defendant must show good cause.[78] To withdraw a plea following sentencing a defendant must show manifest injustice.[79]

In *State v. Edgar,*[80] the Kansas Supreme Court enumerated a list of considerations for decisions involving review of plea withdrawal.[81] In *State v. Green*,[82] the Kansas Supreme Court cited the *Edgar* Factors, holding that, when deciding a post-sentencing motion to withdraw a plea, a district court should consider: "(1) whether the defendant was represented by competent counsel; (2) whether the defendant was misled, coerced, mistreated or unfairly taken advantage of; and (3) whether the plea was fairly and understandingly made."[83] The *Green* court noted

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68. *Id.* (citing Strickland v. Washington, 466 U.S. 668 (1984)). To obtain relief for ineffective assistance of counsel the defendant must show that the counsel's performance was deficient, such that counsel's errors were "so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment; and, this deficient performance must be so serious as to deprive the defendant of a fair trial." *Strickland*, 466 U.S. at 687.

69. Padilla v. Kentucky, 559 U.S. 356 (2010).

70. 132 S. Ct. 1399 (2012).

71. *Id.*

72. 132 S. Ct. 1376 (2012).

73. *Id.* at 1390.

74. *Id.* at 1391.

75. State v. Milligan, No. 108,094, 2013 WL 2919942 (Kan. Ct. App. June 27, 2013).

76. Kan. Stat. Ann. § 23-3210(d)(1) (2012).

77. FED. R. CIV. P. 11.

78. State v. Morris, 283 Kan. 531, 545 (Kan. 2007).

79. *Id.* A plea of guilty or *nolo contedere*, for good cause shown and within the discretion of the court, may be withdrawn at anytime before sentence is adjudged. To correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw the plea." *Id.*

80. 127 P.3d 986 (Kan. 2006).

81. *Id.* at 989.

82. 153 P.3d 1216 (2007).

83. *Id.* at 1225.

that the *Edgar* Factors are benchmarks, and that the district court must consider the relevant circumstances of every case independently.[84] Additionally, the court stipulated that, in Kansas, good cause does not require the defendant to prove that his constitutional rights have been violated.[85]

C. Mediation and the Criminal Law

Mediation has been recognized as a tool of criminal law since the 1970's, and today there are over 300 programs integrating mediation and criminal justice.[86] Two forms of criminal mediation exist, Victim Offender Mediation Programs (VOM), and case-management mediation. The majority of mediation programs used in the criminal justice system are VOMs.[87] In VOM programs, the victim and offender meet under the guidance of a mediator and discuss the crime and its impacts.[88] The second form of criminal mediation, case-management mediation, focuses on ending lawsuits and providing additional options to avoid trial.[89]

VOM programs take a restorative justice approach to the law, in contrast to traditional criminal law, which is dominated by a retributive justice approach.[90] Retributivists seek to decide "what law was broken, determine who broke the law, and provide a punishment to the perpetrator."[91] Conversely, the goal of restorative justice is to repair the damage sustained by the victim or community, at the hands of the perpetrator.[92] VOM programs emphasize offering the victim and the perpetrator a chance to meet in a controlled environment to "share the pain of being victimized and answer questions about how and why."[93]

The appropriateness of VOM depends on the crime. Most states with VOM programs require that a perpetrator plead or admit guilt prior to participation in the mediation.[94] The fact that VOM takes place following adjudication, and the penalty phase of the criminal process, is an interesting distinction from civil mediation, in which the focus is on settlement for the parties.[95] Additionally, unlike plea ne-

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84. State v. Aguilar, 290 Kan. 506, 512 (Kan. 2009) (citing to State v. Green, 283 Kan. 530, 546 (Kan. 2007)).

85. *Id.*

86. Mark S Umbreit, Robert Coates, & Betty Vos, *Victim Offender Mediation: Three Decades of Practice and Research*, 222 CONFLICT RESOL. Q. 279, 279-81 (2004).

87. Jennifer Gerarda Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique*, 43 EMORY L. J. 1247, 1280-81 (1994).

88. *See* Umbreit, Coates & Vos, *supra* note 86.

89. Maureen E. Laflin, *Remarks on Case-Management Criminal Mediation*, 40 IDAHO L. REV. 571, 573 (2004).

90. *See* Marty Price, *Crime and Punishment: Can Mediation Produce Restorative Justice for Victims and Offenders?*, VICTIM-OFFENDER RECONCILIATION PROGRAM INFO. & RESOURCE CENTER, http://www.vorp.com/articles/crime.html (last visited Apr. 14, 2014); *see also* Katherine L. Joseph, *Victim-Offender Mediation: What Social and Political Factors Will Affect its Development?,* 11 OHIO ST. J. ON DISP. RESOL. 207 (1996).

91. *Id.*

92. *Id.*

93. Mark S. Umbreit, Robert B. Coates, & Betty Vos, *The Impact of Victim-Offender Mediation: Two Decades of Research,* 65 FED. PROBATION 29, 30 (2001).

94. Mark S. Umbreit & Jean Greenwood, *National Survey of Victim-Offender Mediation Programs in the United States*, 16 MEDIATION Q. 235, 250 (1999) (writing on the number of victim-offender mediation programs that exist in the United States).

95. Mark S. Umbreit, Robert Coates, & Betty Vos, *Victim-Offender Mediation: Three Decades of Practice and Research*, 22 CONFLICT RESOL. Q. 279, 270-81 (2004).

gotiations or trial, in VOM, offenders' attorneys are rarely present or invited to the mediation.[96] VOM provides many victims with a chance to discuss the impact that the offender's actions had on their life.[97] For victims, VOM can be an important therapeutic tool, a chance to ask an offender questions about the incident, and hopefully obtain closure. [98]

An alternative to VOM, and the criminal mediation method at issue in *Milligan*, is known as Voluntary Settlement Conferencing or case-management mediation. Unlike VOM's relationship-centered focus, case-management mediation is motivated by a need to conserve limited governments funds, by cutting court dockets and increasing the likelihood of pre-trial plea bargains.[99] In case-management mediation, the prosecutor, defendant, defendant's counsel, and a mediator are all present throughout negotiations.[100] Advocates of case-management mediation urge that the presence of a neutral third party during plea negotiations limits the potential for abuse in plea-bargaining.[101] Despite the lack of data on the topic, it appears that third party judges serve as the mediators in most case-management mediations, which has led to concerns about judicial coercion and undue influence.[102]

In the face of the established method of plea-bargaining, mediation is gaining increased popularity in criminal proceedings. VOM and case-management mediation allows courts to take two different approaches to facilitate pre-trial adjudications and post-trial proceedings, depending on the desired outcome given the facts and circumstances of each case.

IV. INSTANT DECISION

In *State v. Milligan*, the Kansas Court of Appeals ("court") rejected Milligan's claim that a coercive atmosphere forced him to accept the plea deal offered to him by the state, and held that the district court did not abuse its discretion in denying Milligan's motion to withdraw the plea.[103] The court first outlined the good cause standard used to consider a defendant's motion to withdraw a plea, prior to sentencing.[104] The court explained that district courts must consider the *Edgar* Factors to determine whether a defendant has established good cause for overturning his guilty plea.[105]

96. Jennifer Gerarda Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique*, 43 EMORY L.J. 1247, 1280-81 (1994).

97. KIMBERLEE K. KOVACH, MEDIATION IN A NUTSHELL 282, 284 (2003).

98. *Id.* at 283.

99. *See* Thomas H. Oehmke, *Arbitration Highways to the Courthouse: A Litigator's Roadmap*, 86 AM. JUR TRIALS 111, § 2 (2003).

100. Maureen E Laflin, *Remarks on Case-Management Criminal Mediation*, 40 IDAHO L. REV. 571, 587 (2004).

101. *Id.*

102. *Id.*

103. No. 108,094, 2013 WL 2919942 (Kan. Ct. App. June 27, 2013).

104. *Id.* "Prior to Sentencing a district court may, in the exercise of sound judicial discretion, withdraw a defendants plea of guilty or nolo condere for 'good cause shown.'" *Id.* (citing K.S.A. 2012 Supp. 22-3210(d)(1)).

105. *Milligan*, 2013 WL 2919942, at *2 (citing State v. Edgar, 281 Kan. 30, 36 (2006); K.S.A. 2012 Supp. 22-3210(d)(1)). The Edgar Factors are: "(1) whether the defendant was represented by competent counsel, (2) whether the defendant was misled, coerced, mistreated, or unfairly taken advantage of, and (3) whether the plea was fairly and understandably made." *Edgar*, 281 Kan. at 36.

The court next explained that the standard of review on an appeal when assessing a trial court's refusal of a motion to withdraw a plea requires that a "defendant sufficiently demonstrate that the district court abused its sound discretion," in its refusal to withdraw the plea.[106] The court further explained that in order for a judicial action to be considered an abuse of discretion, the judicial action must be arbitrary or unreasonable and based on either an error of law, due to an inaccurate legal conclusion, or an error of fact, where there is insubstantial evidence supporting a finding of fact by the court.[107]

The court began by analyzing Milligan's claim that the alleged coercive conditions of the plea-bargaining satisfied the good cause shown standard.[108] The court first noted that Judge Conklin was not referred to the case for mediation until both parties had agreed to participate in mediation, in an effort to avoid trial.[109] The court further noted that the conditions surrounding Milligan's mediation session were not coercive, as a lunch break was provided, in addition to water and restroom breaks.[110] The court stressed that despite the lack of physical coercion, as a defendant facing an imminent trial for rape, Milligan faced mounting pressure to accept a plea deal.[111] Despite these facts, the court found that the pressure that Milligan faced was no more than that faced by any other defendant in a similar position.[112]

Next, the court considered Milligan's argument that Judge Conklin's statement guaranteeing a verdict for the State was coercive. The court agreed that the Conklin's guarantee of conviction at trial was a strong statement.[113] Despite the severity of Judge Conklin's statement, the court explained that Judge Conklin was simply fulfilling his duty as a mediator, communicating the strength of the state's case to Milligan and informing him of the "harsh reality that the outcome of a jury trial is determined by what the jury believe the facts to be."[114] The court explained that the mediation process allowed Milligan to understand the reality and uncertainty of a jury trial when determining whether or not to plead guilty.[115]

In the second portion of its decision, the court evaluated whether the coercion that Milligan allegedly faced during the plea negotiation was sufficient to prevent him from exercising his free will, preventing him from freely pleading guilty.[116] The court emphasized the fact that Judge Wilson presided over both the plea hearing, and the motion to withdraw the plea, which the court found substantially weakened Milligan's claim of coercion.[117] The court also found that Milligan's claims of coercion and undue influence were undermined by the fact that he ac-

106. *Id.* (citing State v. Macias-Medina, 293 Kan. 833, 836 (2012)).
107. *Id.* (quoting State v. Ward, 292 Kan. 541 (2011), *cert. denied* 132 S. Ct. 1594 (2012). "(1) is arbitrary, fanciful, or unreasonable, *i.e.*, if no reasonable person would have taken the view adopted by the trial court; (2) is based on an error of law, *i.e.*, if the discretion is guided by an erroneous legal conclusion; or (3) is based on an error of fact, *i.e.*, if substantial competent evidence doesn't support a factual finding on which prerequisite conclusion of law or the exercise of discretion is based." *Id.*
108. *Id.* at *2.
109. *Id.*
110. *Id.*
111. *Milligan*, 2013 WL 2919942, at *3.
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. *Milligan*, 2013 WL 2919942, at *3.
117. *Id.*

cepted a better plea offer a few days after he rejected the State's initial plea offer.[118] In rejecting Milligan's argument that the conditions of negotiation were so coercive that his free will was overborne, the court held that the Shawnee District Court was best suited to decide whether Milligan knowingly and intelligently pled guilty.[119]

Upon denying the second prong of Milligan's argument, the court affirmed the district court's ruling, and denied Milligan's motion to withdraw his plea.[120] As a result of the court's holding, Milligan will serve his sentence according to the sentencing provision of the plea agreement.

V. COMMENT

Milligan's claims raise important concerns regarding the implementation of mediation in the criminal law context. This section examines the concerns regarding the use of mediation as a tool to avoid criminal trials, and will explain how mediation can actually serve to decrease the coercive nature of the plea-bargaining process.

A. Current Mediation Concerns

Understanding why the Kansas Court of Appeals upheld the plea agreement in *Milligan* reveals some of the positive and negative aspects of case-management mediation, as well as the impact that mediator-selection has on these negotiations. This section explores concerns about case-management mediation in criminal cases, and suggests safeguards that courts can adopt to protect defendants' rights and ensure fairness during plea-bargaining.

In traditional plea-bargaining, prosecutors are the dominant party, determining when charges will be filed and against whom, and whether to offer a plea deal to the defendant.[121] Additionally, prosecutors normally have discretion to offer defendants pleas agreements with lower sentences, or to threaten those defendants that are unwilling to take the negotiated deal with harsher punishment.[122] Due to the fact that most judges accept the state's sentencing recommendations, the prosecutor often dictates the penalty a defendant receives.[123] Due to prosecutors' power over plea negotiations, there is little incentive to engage in fair bargaining, and even less incentive for defendants to take their chances at trial in which defendants risk the possibility of an unfavorable verdict resulting in an almost guaranteed increase in sentence severity.[124] The prosecutorial dominance found in plea negotiations prevents plea-bargaining from being a method of alternative dispute resolution, in which the defendant and the state work together to reach an agreement.

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118. *Id.*
119. *Id.*
120. *Id.*
121. Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CAL. L. REV. 1471, 1477 (1993).
122. Rodney Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systematic Approach*, 2 CLINICAL L. REV. 73, 88 (1995).
123. *Id.* at 89.
124. *See* Donald G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37, 45 (1983).

Rather, plea-bargaining is a process in which the prosecutor takes on the role of attorney, judiciary, and fact finder, forcing the defendant into a proverbial corner where the only escape is a trial.[125]

Although the prosecutor holds much of the power in plea-bargaining, the judge hearing the case also plays an important role. Despite the judge's role as unbiased guarantor of fair procedure,[126] a judge's previous decisions as to trial date, scheduling, bail, and sentencing also greatly influence the defendant's decision whether to pursue a plea deal.[127] The defendant's fears of coercion can be exacerbated when a judge or former judge serves as the mediator in a plea negotiation. Just as in the court room, third party mediators that have worked as judges may feel compelled to help clear the docket, or entice a particular defendant into the government's offered deal.[128] Normally, a judge is prohibited from telling a defendant that they will likely be given a harsher sentence if they go to trial because of the coercive nature of such a statement.[129] However, in a plea negotiation mediation, where a judge-mediator communicates the strengths and weaknesses of a case to both parties, this is not the rule. In Milligan's case, this behavior was found to be completely acceptable.[130] While scholars and legislatures have expressed concerns about the coercive nature of judges mediating negotiations, the more pressing issue in criminal plea bargain negotiations is ensuring that the defendant's due process rights are not violated. [131] Once the judge, a neutral third party, is removed from the process, and negotiations commence behind close doors, prosecutorial power becomes infinite.[132]

B. Mediation's Positive Impact on Plea-Bargaining

Contrary to Milligan's allegations that the presence of a judge as mediator caused his plea-bargaining negotiation to be coercive, in most situations the presence of a neutral mediator can mitigate some of the coercive effects of the plea-bargaining process. Prosecutors with unlimited power to make plea deals are able to strike unfair bargains, and in some cases, cause innocent people to enter guilty pleas.[133] By adding a neutral party to negotiations that are typically between only the prosecutor and defense attorney, defendants' due process rights may be afforded additional protections, similar to those offered by a judge in a courtroom. The presence of a neutral mediator can ensure that a prosecutor will not overstep his authority or employ unconscionable negotiation techniques.

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125. Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretions*, 67 FORDHAM L. REV. 13, 25 (1998).

126. F. Andrew Hessick III & Reshma M. Saujani, *Plea Bargaining and the Convicting the Innocent: The Role of the Prosecutor, the Defense Counsel and the Judge*, 16 BYU J. PUB. L. 189, 233 (2002).

127. Uphoff, *supra* note 122, at 89.

128. Maureen E Laflin, *Remarks on Case-Management Criminal Mediation*, 40 IDAHO L. REV. 571, 614 (2004).

129. Uphoff, *supra* note 122, at n.56 (citing United States v. Corbitt, 996 F.2d 1132, 1134-35 (11th Cir. 1993); United States v. Barrett, 982 F.2d 193 (6th Cir. 1992); United States v. Bruce, 976 F.2d 552, 555-58 (9th Cir. 1992)).

130. *Milligan,* 2013 WL 2919942.

131. Hessick III & Saujani, *supra* note 126; Maureen E. Laflin, *Remarks on Case-Management Criminal Mediation*, 40 IDAHO L. REV. 571, 614 (2004).

132. Hessick III & Saujani, *supra* note 126.

133. George C. Thomas III, *The End of the Road For Miranda v. Arizona?: On the History and Future of Rules for Police Interrogation*, 37 AM. CRIM. L. REV. 1, 23 (2000).

A mediator's presence also allows for better communication between the parties. Additionally, a neutral third party mediator provides both parties with an objective view of the strengths and weaknesses of their case.[134] The reduction of prosecutorial power, and the distribution of control over communication to all parties involved, is likely to result in fairer agreements and further protection of defendants' constitutional rights. Additionally, the presence of a third party may help settle cases that should not proceed to trial, as defendants are given the opportunity to hear from a neutral party whether their case is weak or has a low chance of success at trial.

In *Milligan,* the defendant sought to withdraw his plea based on the presence of a former judge during the negotiations, and the judge's comments during the negotiation.[135] Although there has been concern about involving judges in mediation, advocates of the process argue that if judicial mediators are properly trained, just as non-judicial mediators are, they will be cognizant of the great power they have over the situation and the parties, and be able to avoid coercive conduct.[136] Criminal mediation can be demanding, and both parties expect the mediator to execute sometimes-conflicting tasks in a high pressure, high stakes setting. The judge's traditional role in the courtroom has caused some to be concerned that they are inherently coercive mediators,[137] but if properly trained, a judge-moderator's judicial experience and training can aid both parties, ensuring greater protection of rights and providing a watchful eye over negotiations.

The criminal justice system in the U.S. is undergoing a necessary modernization, developing alternative dispute resolution programs, and adopting case-management mediation in criminal cases. The *Milligan*[138] court correctly held that the judge-mediator and the plea agreement at issue were not in violation of Milligan's constitutional rights, clearing the way for Kansas to continue to use mediation to ensure both fair negotiating and fair sentencing.

VI. CONCLUSION

The criminal justice system in the United States could not function without the use of plea-bargaining. The current trend of including mediation and alternative dispute resolution techniques in the plea-bargaining process provides another opportunity for criminal cases to be resolved, prior to trial. Despite the benefits, this tool should not be employed without safeguards to protect defendants' constitutional rights. The power of prosecutors and judges in plea-bargaining, and defendants' lack of control over their own fate during negotiations, is the perfect opportunity for alternative dispute resolution's influence. Although, there remain unanswered questions about mediation's successful use in the criminal sector, an argument can be made that mediation will significantly lower the coercive pressures felt by defendants. Despite further concerns about judicial presence in case-management mediation, the benefits of neutral third party involvement far outweigh the dangers, and if properly employed, can have extremely positive outcomes. Plea mediation allows an opportunity to remedy some of the coercive ef-

134. Doug Marfice, *The Mischief of Court Ordered Mediation*, 39 IDAHO L. REV. 57, 59-60 (2002).
135. *Milligan*, 2013 WL 2919942.
136. Laflin, *supra* note 131, at 621.
137. *Id.* at 607.
138. *Milligan*, 2013 WL 2919942.

fects of plea-bargaining, while offering additional protections for defendants' rights. This is accomplished while ensuring the efficiency of our criminal justice system.

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