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Let's Put Plea Discussions-- and Agreements--On Record

Chief Justice Robert C. Underwood*

Much has been written about the validity of a "negotiated" guilty plea,[1] including several analyses of the wisdom of the practice in general.[2] Although it appears that these questions may not yet be completely resolved at the theoretical level, it is clear that the practice is being used by a great number of prosecutors in connection with a considerable number of the guilty pleas entered.[3]

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1. The terminology used in the area has been rather interesting. The plea itself generally has been called a "negotiated plea" (*e.g.*, Rosett, *The Negotiated Guilty Plea*, THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE, November 1967, at 70) or a "bargained plea" (*e.g.*, State v. Larkins, 450 P.2d 968 (Wash. 1969)), while the process which results in the plea has been given a number of different labels: "plea bargaining", Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968); "plea copping", Kuh, *Plea Copping*, 24 N.Y. COUNTY B. BULL. 160 (1966-67). The American Bar Association has deemed the label important enough to make it an issue. They expressly prefer the phrases "plea discussions" and "plea agreements" to describe those practices which would be permitted under their minimum standards for criminal justice. AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY 3, 62 (Approved Draft 1968) (hereinafter cited as ABA PROJECT). One writer considers these an improvement and suggests an additional term, "plea recommending". Owens, *Plea Bargaining . . . Agreeing . . . Recommending?* 26 LEGAL AID BRIEF CASE 55, 57 (1967).

2. A commentator, free to espouse what "ought to be", may suggest abolition of plea bargaining. Alschuler, *supra* note 1, at 52. However, most judicial opinion reflects an awareness of the limited role that the judicial branch plays in the allocation of resources, and therefore proceeds upon the assumption that plea bargaining will continue to be necessary. *E.g.*, United States v. Jackson, 390 F.2d 130, 138 (7th Cir. 1968) (Kiley, J., dissenting). *But see* People v. Byrd, 12 Mich. App. 186, 162 N.W.2d 777, 797-98 (1968) (Levin, J., concurring). Thus a judge may recognize the common usage of plea bargaining practices and yet question their wisdom. Rigby v. Russell, 287 F. Supp. 325, 331 (E.D. Tenn. 1968).

3. Guilty pleas account for a high percentage of the convictions. The United States Supreme Court recently noted in McCarthy v. United States, 394 U.S. 459, n.7,

The purpose of this article is not to re-evaluate the practices but rather to propose that a record be made of any plea discussions, the understanding of the parties as to those discussions, and the terms of any agreement reached. Such record should be sufficient to apprise the trial and reviewing courts as to the beliefs of the parties arising from those discussions. This assumes, as this writer believes, that plea discussions or agreements do not *per se* render a guilty plea void, a position that is supported by a majority of the cases.[4] However, it is not claimed that every promise or inducement is valid merely because it is incorporated into the record.[5] Rather, the writer believes that substantial amounts of criminal litigation could be avoided, and, when an appeal is taken, a more informed appellate review would be possible if an adequate record were made prior to the acceptance of the guilty plea.

It may be helpful at the outset to place the problem and these comments in context. The suggestions herein made and the supportive arguments are by no means entirely unique. In some respects they are quite similar to those contained in the "Standards Relating to Pleas of Guilty" (Approved Draft, 1968) of the American Bar Association Project on Minimum Standards for Criminal Justice.[6] While the principal

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(1969), that during 1968 approximately 86% of the convictions obtained in United States district courts were pursuant to the plea of guilty or *nolo contendere*. During 1968 approximately 86% of the Illinois defendants convicted of felonies pleaded guilty. ADMINISTRATIVE OFFICE OF THE ILLINOIS COURTS, 1968 ANNUAL REPORT TO THE SUPREME COURT OF ILLINOIS.

There is little empirical evidence on the percentage of the total number of guilty pleas which are negotiated pleas. The results of the survey of prosecutors conducted by the *University of Pennsylvania Law Review* showed that over 86% of those responding do engage in plea bargaining. Note, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas*, 112 U. PA. L. REV. 865, 897, (1964) [hereinafter cited as Note, 112 U. PA. L. REV.]. Of those responding to the question "Out of all guilty pleas handled through your office, approximately what percentage are bargained pleas?" over 42% indicated 50% or more were bargained pleas. *Id.* at 899 (a more detailed breakdown is contained therein).

There is considerable non-empirical evidence on the widespread use of plea bargaining. Ganger v. Peyton, 379 F. 2d 709 (4th Cir. 1967); Cortez v. United States, 337 F.2d 699 (9th Cir. 1964), *cert. denied*, 381 U.S. 953 (1965); Barber v. Gladden, 220 F. Supp. 308 (D.C. Ore. 1963), *aff'd*, 327 F.2d 101 (9th Cir. 1964); Shelton v. United States, 242 F.2d 101, 115 (5th Cir. 1957) (dissenting opinion); Semon v. Turner, 289 F. Supp. 803, 806 (D. Utah 1968); Commonwealth *ex rel.* Kerekes v. Maroney, 423 Pa. 337, 223 A.2d 699 (1966); Alschuler, *supra* note 1; ABA PROJECT, *supra* note 1, at 3-5, 60-78, ("substantial number" at 60).

4. *E.g.*, Kinney v. United States, 391 F.2d 901 (1st Cir. 1968); Ganger v. Peyton, 379 F.2d 709 (4th Cir. 1967); Brown v. Beto, 377 F.2d 950 (5th Cir. 1967); State v. Jennings, 104 Ariz. 3, 448 P.2d 59 (1968); People v. Darrah, 33 Ill. 2d 175, 210 N.E.2d 478 (1965); Commonwealth *ex rel.* Kerekes v. Maroney, 423 Pa. 337, 223 A. 2d 699 (1966); Garrison v. Rhay, 74 Wash. 101, 449 P.2d 92 (1968). *But see* Scott v. United States, 349 F.2d 641 (6th Cir. 1965) citing Shelton v. United States, 356 U.S. 26 (1958); Application of Buccheri, 6 Ariz. App. 196, 431 P.2d 91 (1967).

5. For example, a plea induced by a promise to discontinue improper harassment would not be valid even if the promise were of record. *See* Owens, *supra* note 1, at 56.

6. The specific requirements of determining whether the plea is a result of prior plea discussions or agreements and disclosing the terms of the agreement is contained

purpose of this article is not a re-evaluation of the practices prevalent in plea bargaining, it would, perhaps, clarify the balance of this article if my personal views on the plea bargaining process were known to the reader.

While in my opinion plea bargaining does not, *per se*, invalidate a subsequently entered guilty plea, the more difficult question is the extent to which judicial participation in this process is permissible. The proposed standards incorporated in the ABA draft (§3.3) would permit judicial participation only upon request by the parties and only at the time defendant appears to enter his plea. Judicial participation would be limited to a statement by the bench of its willingness or unwillingness to follow a recommended disposition, subject of course to subsequent disclosure of then unrevealed factors which, in the court's opinion, would necessitate a departure from the recommended disposition. Subsequent revelation of such factors in a pre-sentence report or otherwise would be justification for a disposition different from that indicated by the judge, but he must then so advise the defendant and request him to either affirm or withdraw his plea of guilty.[7]

As a theoretical proposition I incline to agree that a judge should not be a party to the plea bargaining process at any stage.[8] Unfortunately, this question, like most others, must be resolved on a realistic, pragmatic basis. The fact of the matter is that a very substantial majority of criminal and quasi-criminal cases in metropolitan areas are disposed of by pleas of guilty,[9] and that such pleas are not entered until the defendant has achieved what his counsel and he consider to be the most advantageous disposition possible in the form of prosecution

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in Section 1.5. A more detailed discussion of the basis for and advantages of such a procedure is contained in the commentary to §3.1, p. 60.

For a similar proposal, see Note, 112 U. PA. L. REV., *supra* note 3, at 894-95; PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967); Scott v. United States, — F.2d —, — (D.C. Cir. 1969) (37 U.S.L.W. 2463) (seemed to hold it required by Fed. Rule 11). There has been some judicial opinion on the advisibility of an adequate record of these matters: United States v. Jackson, 390 F.2d 130, 134, 138 (7th Cir. 1968) (Swygert, J., concurring and Kiley, J., dissenting, respectively); United States *ex rel.* Thurmond v. Mancusi, 275 F. Supp. 508, 519 (E.D.N.Y. 1967).

7. ABA PROJECT, *supra* note 1, at §3.3(b). This was a change from the Tentative Draft which provided that at the time a different disposition was made the judge "shall state for the record what information in the presentence report contributed to his decision not to grant these concessions." (Tent. Draft, 1967). Apparently the Tentative Draft did not contemplate an opportunity for defendant to withdraw his plea solely because the court did not grant the concessions.

8. *Accord, e.g.*, United States v. Jackson, 390 F.2d 130, 134 (7th Cir. 1968) (Swygert, J., concurring); Commonwealth v. Evans, 434 Pa. 52, 252 A.2d 689 (1969); Comment, 19 STAN. L. REV. 1082 (1967).

9. *See* note 3, *supra.*

recommendations. There are no completely reliable statistics known to me which indicate the extent of judicial participation in such plea discussions;[10] however, my conversations with trial judges in metropolitan areas lead me to believe that in a very substantial number of such cases the defendant has some form of assurance that the recommended disposition resulting from the plea bargaining process will be honored by the judge.

This process is recognized, even by those trial judges who do not like it, as necessary if the flood-tide of criminal litigation is to be kept anywhere within manageable limits. I suspect they are right, and that an adamant attitude of non-participation in plea discussions by all judges in metropolitan areas would result in wholesale demands for jury trials with which our judicial system, now back-logged with civil cases, would be completely unable to cope.[11]

Largely for practical reasons, therefore, I incline to view as permissible a somewhat greater degree of judicial participation in the plea bargaining process than do the ABA standards. But I do so only on the premise that such participation disqualifies the judge to try the case in the event a trial is necessary. It seems to me somewhat unrealistic to expect a judge who has participated to some extent in plea discussions to thereafter set completely aside the information gained in such discussions and try the case with the same degree of objectivity otherwise possible. It does appear from the committee comments on section 3.3 of the ABA approved standards that the most persuasive arguments against judicial participation in plea discussions are the accompanying loss of judicial objectivity and the possible impression on the part of the defendant that he cannot thereafter secure a fair trial from that judge. The Committee does indicate its serious consideration, and ultimate rejection, of the alternative of permitting participation conditioned upon subsequent disqualification of the judge for trial purposes. The stated reasons for rejection of this alternative (that any other trial judge would then know that a prior tendered plea disposition had been rejected) are not, to me, particularly persuasive. It is, of course, true that the judge ultimately presiding at trial might well know generally that a prior plea disposition had been rejected, but it is

10. The closest empirical data available would appear to be the *University of Pennsylvania Law Review* survey. The results of that survey, which are published as a percentage of the prosecutors, not of the cases, indicate that judges are present at some bargaining sessions. Note, 112 U. PA. L. REV., *supra* note 3, at 905.

11. The study cited above reported that over 85% of the prosecutors responding who engaged in plea bargaining felt the percentage of guilty pleas would decrease if plea bargaining were eliminated. *Id.* at 899.

unlikely that he would have knowledge of the details thereof—and it seems to me that it is principally the detailed knowledge gained from participation in plea discussions which results in impairment of judicial objectivity.

It is, therefore, my conclusion (not because I like it or consider it desirable, but because I consider it a practical necessity) that, to the extent requested by the parties and considered appropriate by the judge, judicial participation in plea discussions should be permitted. Preferably, this would occur only after tentative agreement had been reached by the parties, but I would not prohibit such participation prior thereto, if requested by the parties and considered appropriate by the judge. This conclusion is premised, however, on the condition that a subsequent trial, should trial become necessary, must be before a different judge.

The theme of this article, as earlier noted, is that plea discussions and agreements should be of record, at least in summary agreed form, and that substantial benefits to both the prosecution and defense, as well as the judicial system, would accrue from such procedure.

The volume of post-conviction proceedings and appellate review stemming from plea bargaining would be reduced for two reasons. First, as will be shown later, errors do occur merely because one or more of the parties was mistaken as to the agreement reached. Under this proposal, the plea would not be accepted until all parties had agreed that no bargaining had transpired, or, if there had been some agreement reached, the exact terms thereof were of record. Apart from the reduction of errors, a full and agreed record of the bargain, or lack of it, would forestall much litigation which now eventually concludes either with an affirmance of the conviction, because no error was committed, or a remandment necessitated by the absence from the record of an adequate basis for reviewing the allegations made by the defendant. Frequently such remandments for evidentiary hearings are followed by further appeal and review with ultimate affirmance of the conviction, all or much of which would have been eliminated had there originally existed an adequate record of the plea negotiations.

The appellate review that would continue to stem from allegations of impropriety surrounding plea negotiations (I make no claim that an adequate record will end all review of these matters) could be much more intelligently and efficiently decided than is possible without such a record. Frivolous appeals, as well as unfulfilled promises and similar errors, would be readily apparent. Even apart from those instances in

which there existed no factual dispute, a sufficient record would aid the reviewing court in a consideration of the integrity of the practices actually used.[12] In addition to the benefits to defendants and judges from the presence of an adequate record, counsel would be protected from subsequent contentions that they had misinformed their clients.

Particularly in recent years the Illinois trial and reviewing courts have experienced a flood of post-conviction litigation in which allegations of incompetency of trial counsel have been almost uniformly made by the defendant. Not infrequently these allegations include claims that defendant was told by his attorney prior to entering his plea that certain prosecution or judicial promises had been made. Trial court disposition of the case, however, was not in accordance with the alleged promises.[13] Ordinarily the trial record is devoid of reference to these matters, and attempted resolution of them several years later by evidentiary hearings at which witnesses' memories are dimmed, or key witnesses are dead or unavailable, is at best an unsatisfactory solution. Nor is it always a safe assumption that an uneducated, unsophisticated defendant, whose case is being disposed of in a manner more prejudicial to him than he had been told would be true, is going to have the courage to speak up and say so. Many judges, including myself, have disposed of such cases at least in part on the basis of the defendant's silence in the presence of what he much later claimed to be coercive circumstances or unfulfilled promises. However, I suspect all of us would have been happier with our decisions had the defendant's later contentions been refuted by an adequate record of the plea negotiations.[14] This is not

12. The legal profession has changed its attitudes toward negotiated pleas from one of general opposition to the qualified approval the practice enjoys today. Alschuler, *supra* note 1, at 51. Because of this change of philosophy, there has been little appellate review of current bargaining practices until recently. ABA PROJECT, *supra* note 1, at 63-64; State v. Crenshaw, 183 Neb. 449, 161 N.W.2d 502 (1968). One critic of the negotiated plea system predicts that unveiling the system will reveal its undesirability and lead to its gradual abolition. People v. Byrd, 12 Mich. App. 186, 162 N.W.2d 777, 792 (Levin, J., concurring).

13. *E.g.*, People v. Riebe, 40 Ill. 2d 565, 241 N.E.2d 313 (1968).

14. Many of us have cited the "have any promises been made"—"No, sir" colloquy as the basis or at least support for a conclusion that no promises were made. State v. Popejoy, 450 P.2d 411 (Ariz. App. 1969); People v. Morris, (No. 41471, Ill. Sup. Ct., not as yet filed); People v. Barnes, 11 Mich. App. 455, 161 N.W.2d 398 (1968); State v. Borough, 279 Minn. 199, 156 N.W.2d 757 (1968). There have been cases, however, where the inconclusive nature of a colloquy has been recognized. *See* State v. Ortiz, 77 N.M. 751, 427 P.2d 264 (1967) (permitted the defendant to withdraw plea after promise was broken in spite of the typical colloquy); Smith v. People, 162 Colo. 558, 428 P.2d 69 (1967) (court went on to determine whether the promise had been fulfilled even though there was the typical colloquy and an affidavit that no promise had been made). Both views are represented in People v. Granello, 18 N.Y.2d 823, 222 N.E.2d 393, 275 N.Y.S.2d 528 (1966), where the Court of Appeals in a 5-2 decision held that the typical colloquy is not conclusive proof that in fact no promises

to say that an imprisoned defendant's delayed allegations of misunderstanding, misrepresentations, and alike must be viewed as gospel; of course, they need not be. Indeed the similarity between such allegations and those upon which some recent appellant has succeeded in securing a remandment is often striking. I am, however, reasonably certain that every judge would rest more easily if all possibility of truth in those allegations was refuted by an adequate record of what was actually done.

This proposal constitutes an additional step in the procedure generally in use now. We have evolved, and quite properly, from:

> Court: Has your attorney explained to you all of your constitutional rights?
> Defendant: Yes, sir.

to a more comprehensive examination of the defendant, and a much more detailed explanation by the court of his rights.[15] This judicial inquiry at the time the plea is accepted affords the defendant an additional explanation of his rights if his attorney had in fact previously explained them to him. If the attorney had not, or if the defendant subsequently alleges that his attorney did not, this judicial admonition, and the record of it, would preclude the defendant from later alleging that he did not knowingly waive those rights.

The rights to indictment by grand jury, trial by jury, confrontation of witnesses, and similar rights, are either knowingly waived or they are not (this is not to suggest that the line between the two answers is always that easily drawn), but the plea bargaining problem is more complex. There may or may not have been plea discussions. If an agreement was reached, the precise terms as well as the identity of the parties thereto may need clarification, and it must be determined that the defendant's understanding of those terms was the same as that of the other parties. Plea bargaining as occasionally practiced is fraught with an additional shortcoming—the charade which sometimes takes a form similar to the following:

> Court: [often aware that a promise has been made and sometimes a party to the agreement] Have any promises or inducements been offered to prompt this plea?
> Defendant: [usually aware of any promise when one has been made (always aware of a promise according to the allegations made

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were made. The dissent indicated, in view of defendant's answer, that it was not an abuse of discretion for the trial court to refuse to inquire into the matter beyond the colloquy and ensuing plea.

15. *See* ILL. REV. STAT. ch. 38, § 113-4 (1967); Ill. S. Ct. R. 401.

in those cases which reach appellate litigation on this point)] No, sir.[16]

It is not entirely clear why this charade persists, but most probably a combination of several factors account for it. States attorneys have public relations problems, *i.e.*, an indignant community may vent its wrath upon a prosecutor who, faced with an aroused public and weak proof, acknowledges in open court that he has agreed to less punishment than the maximum provided by law. Secondly, some prosecutors may have a vague feeling that plea negotiations are inherently evil and somehow endanger the validity of the plea. Certainly this danger is many times enhanced when such negotiations have occurred and the record does not adequately reflect them. A third factor may be the feeling that while private litigation may be disposed of on any basis agreed to by competent parties, the State should not compromise its prosecution of the wrong-doer. It is always possible that there may be present factors other than these—such as the fact that trial of a case will reflect unfavorably upon entirely innocent persons—which either the prosecution or defense may wish to avoid without making a public statement thereof.

The true basis for disposition of a criminal case should always be such that it can be preserved in the record. A simple statement by the prosecutor summarizing the agreement or advising that none existed, which is verified, supplemented or corrected by the defendant and his attorney, would neither unduly extend the record nor consume an inordinate amount of time, particularly when compared to the extensive resources necessitated by post-conviction or appellate review.

An examination of cases reveals that an adequate trial court record, specifying the existence or non-existence of a plea agreement, and any terms thereof, would act both to decrease and simplify appellate and trial court post-conviction litigation. A close look will reveal that in each of the following categories of cases such record would have been helpful to one or more of the parties.

I. Promises by prosecutors, in exchange for a plea of guilty, to do acts within their discretion, *i.e.*, dismiss some counts in a complaint, dismiss other charges in the same or other juris-

16. In addition to the cases cited in note 14, *supra*, which have either directly or impliedly permitted an attack on the credibility of both judge and defendant in this process, there have been numerous authorities which have called this practice the charade it is. United States v. Jackson, 390 F.2d 130, 138 (7th Cir. 1968) (Kiley, J., dissenting); TREBACH, THE RATIONING OF JUSTICE 159-60 (1964); Owens, *supra* note 1, at 58; PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 9 (1967); ABA PROJECT, *supra* note 1, at 63.

dictions, dismiss charges against another person, or reduce the filed charge to a lesser one.

Nearly all of these are commonly used bargaining subjects.[17] Where the defendant has pleaded guilty as a result of the prosecutor's promise to do one or more of the above acts, the conviction is generally sustained if the State fulfills its share of the bargain.[18] It would be to defendant's advantage to have a record of the promises; for, if he can show that the State has failed to fulfill those promises, most courts will set aside the conviction and permit the defendant to withdraw his plea of guilty.[19] When the agreement included a promise to dismiss other charges, a record thereof would also serve to protect the defendant from subsequent prosecution on those charges.[20]

Often an agreement has been reached by the prosecution and the defense attorney, but is, or is alleged to have been, misrepresented to or misunderstood by the defendant. A record of the agreement, made immediately prior to the acceptance of the plea and in the presence and with the confirmation of the defendant, would point up any disparities between the State's version and the defendant's understanding of the agreement. If the defendant entered his plea pursuant to this agreement as developed in the record, he would ordinarily be precluded from subsequently alleging that in fact he relied upon an agreement inconsistent with that shown by the record.[21]

II. Promises by the state representatives to take action which is not binding upon the court, *i.e.*, a conspicuous example is a promise to recommend a certain sentence or probation.

The promise to recommend is a common subject of bargaining and seems to have received a rather good press so far as the philosophical

17. *E.g.*, Reed v. State, 204 S.2d 26 (Fla. App. 1967) (promised to abandon other pending count); Smith v. People, 162 Colo. 558, 428 P.2d 69 (1967) (promised not to file other charges and not to file habitual criminal charge); People v. Eldredge, 41 Ill. 2d 520, 244 N.E.2d 151 (1969) (court inferred that the plea was offered in reliance that other charges and charges in other jurisdictions would be dropped); State v. Baumgardner, 79 N.M. 341, 443 P.2d 511 (1968) (defendant alleged he pleaded to avoid the imposition of charges on his co-defendant's wife).

18. *But see* McClure v. Boles, 233 F. Supp. 928, 931 (N.D.W.Va. 1964) (in dicta court indicated it would be improper for prosecution to condition its use of habitual criminal act upon defendant's willingness to plead guilty).

19. *E.g.*, Darnell v. Timpani, 68 Wash. 2d 666, 414 P.2d 782 (1966).

20. Although it is a common practice for the representatives of the state to promise to dismiss the remainder of a number of charges in exchange for a plea of guilty to one or two of the charged offenses, these agreements seldom find their way into the record and it remains for the reviewing court to sift this out of the record in a bits-and-pieces manner. *See* People v. Eldredge, 41 Ill. 2d 520, 526-27, 244 N.E.2d 151 (1969). Illinois has taken steps to clarify and record the proceedings in this process. ILL. REV. STAT. ch. 38, §113-7 (1967).

21. *See* State v. Adkison, 279 Minn. 1, 155 N.W.2d 394 (1967).

wisdom of the process is concerned.[22] However, the fact that the sentencing judge is not bound by the prosecutor's recommendation leaves this process open to misapprehension by the defendant, and thus the process has been the subject of much subsequent litigation. The combination of defendant's allegations of misapprehension and state answers thereto are numerous. It appears that some courts have distinguished among the allegations according to the defendant's sources of information and the alleged origin of the promise.[23] The niceties of these distinctions and much of the original confusion and misapprehension could have been avoided by adequate inquiries from the trial court which would have disclosed: (1) that no agreement to recommend had been made;[24] (2) that while an agreement to recommend had been made, it was followed by a clear and express admonition by the court to the defendant that such a recommendation was not binding on the judge;[25] or, (3) that not only did an agreement between the litigants exist, but also that the court indicated that sentence would be in accordance with the agreed recommendation.[26] This type of record would more clearly reflect the defendant's state of mind and would eliminate doubt as to whether all defendants are aware that the prosecution's recommendation of sentence is not binding upon the court.[27]

III. Cases in which the reviewing court concludes that there was no agreement, but that defendant entered his plea in reliance upon a representation or belief that an agreement existed.

The courts are split on whether the defendant's subjective mental state, absent evidence of an agreement in fact, is a sufficient ground to set aside a conviction.[28] In those jurisdictions where this is a basis

22. *E.g.*, Rogers v. Wainwright, 394 F.2d 492 (5th Cir. 1968); Buckley v. Warden, 28 Conn. Sup. 15, 246 A.2d 705 (1968); Owens, *supra* note 1.

23. Some of the distinctions are set out in Semon v. Turner, 289 F. Supp. 803, 808 (D. Utah 1968).

24. *E.g.*, United States v. McClellan, 194 F. Supp. 128, 130 (W.D. Pa. 1960), *aff'd*, 289 F.2d 319 (3d Cir. 1961).

25. Numerous writers have proposed that the court caution the defendant as to its independence from the recommendation of the prosecutor. Owens, *supra* note 1, at 58; Note, 112 U. PA. L. REV., *supra* note 3, at 895; ABA PROJECT, *supra* note 1, at §1.5. Only the American Bar Association seems to have foreseen the obvious challenge of the defendant, *i.e.*, "But I thought (was told) that the judge had in fact agreed to the recommendation". The ABA commentary cites People v. Baldridge, 19 Ill. 2d 616, 169 N.E.2d 353 (1960), where the reviewing court told the defendant that the trial court meant what it said.

26. United States *ex rel.* Rosa v. Follette, 395 F.2d 721 (2d Cir. 1968). The judicial assent is not so well received by the writers. Comment, 32 U. CHI. L. REV. 167, 172 (1964); Owens, *supra* note 1, at 58 (1967). *But see* Comment, 19 STAN. L. REV. 1082, 1090 n.58 (1967). As indicated earlier (text accompanying note 7, *supra*), the ABA proposals permit judicial assent.

27. *See* State v. Popejoy, 9 Ariz. App. 170, 450 P.2d 411 (1969).

28. Subjective mental state is grounds: United States *ex rel.* Grays v. Rundle, 293

for reversal, the process of making an adequate record would have confronted the defendant with the divergence between the facts as they existed and his belief of what the facts were. The defendant could then withdraw his proffered plea or at least plead guilty with more accurate knowledge of the consequences. This practice would remove much of the appeal-reversal-remandment process which follows all too often from present practices,[29] and would also reduce the need for post-conviction hearings.[30]

IV. Cases in which the court is involved as a party to the agreement.

The addition of the trial court as a party to the negotiations and agreement, as a matter of judicial philosophy, seems to diminish the chances of the plea being held valid, particularly when the court is the initiator of the discussions.[31] I should make entirely clear my belief that plea negotiation ought not to be initiated by the judge except in most unusual circumstances. Of course, even where an agreement involving judicial participation is philosophically acceptable, there can be factual disputes as to whether any agreement existed, its terms and whether it was breached, just as in a non-judicial agreement.[32] Agreements to which the trial court is a party are placed in one category because this common characteristic, judicial participation, makes them appear difficult to sustain; further, it may well be precisely this factor which has, in the past, caused the trial judge and the parties to avoid record acknowledgement of judicial participation.

It seems to me safe to assume that a substantial number of trial judges are involved in plea agreements,[33] and that fewer defendants would plead if there were no prior judicial assents to the sentence recommendations offered by the prosecution. As heretofore indicated,

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F. Supp. 643 (E.D. Pa. 1968); United States *ex rel.* Thurmond v. Mancusi, 275 F. Supp. 508 (E.D.N.Y. 1967); State v. Rife, 260 Iowa 598, 149 N.W.2d 846 (1967); People v. Morreale, 412 Ill. 528, 107 N.E.2d 721 (1952); People v. Cassiday, 90 Ill. App. 2d 132, 232 N.E.2d 795 (1967); State v. Rose, 440 S.W.2d 441 (Mo. 1969).

Subjective state is not grounds: Simmons v. Gladden, — Ore. —, 446 P.2d 675 (1968); State v. Knerr, 440 P.2d 808 (N.M. App. 1968).

29. *E.g.*, People v. Riebe, 40 Ill. 2d 565, 241 N.E.2d 313 (1968).

30. *E.g.*, Gibson v. Boles, 288 F. Supp. 472 (N.D.W.Va. 1968); United States *ex rel.* Thurmond v. Mancusi, 275 F. Supp. 508 (E.D.N.Y. 1967); State v. Rose, 440 S.W.2d 441 (Mo. 1969); People v. Walston, 38 Ill. 2d 39, 230 N.E.2d 233 (1967); State v. Larkins, 450 P.2d 968 (Wash. 1969); State v. Rife, 260 Iowa 598, 149 N.W.2d 846 (1967).

31. *See* United States v. Schmidt, 376 F.2d 751 (4th Cir. 1967); United States *ex rel.* Elksnis v. Gilligan, 256 F. Supp. 244 (S.D.N.Y. 1966); Comment, 19 STAN. L. REV. 1082 (1967).

32. *E.g.*, United States *ex rel.* Grays v. Rundle, 293 F. Supp. 643 (E.D. Pa. 1968).

33. *E.g.*, People v. Carter, 91 Ill. App. 2d 120, 235 N.E.2d 382 (1968).

I do not view this as impermissible, but it does necessitate careful and adequate reference in the record as to the parties and the nature and terms of any resulting agreement in order that subsequent problems arising from allegations of coercive influences may be avoided.

Probably advocacy of a somewhat substantial procedural change ought to be accompanied by some suggestion for its implementation—assuming it merits implementation at all. Review of the trial and appellate litigation stemming from plea negotiations and agreements indicates the time is ripe for improvement in procedures which have prevailed in the past. Accomplishment of this objective could result from any one of several methods.

First, it should be noted that there already are some reported cases where the trial court has used some of the procedures advocated herein.[34] Other courts have expressed their approval of such procedures.[35]

Secondly, parties in criminal litigation may offer to make a record of the agreement, or state for the record the non-existence of any such agreement, to protect themselves in the future whether from breach of the agreement[36] or from subsequent litigation.[37]

Thirdly, the practice might be required by judicial rule. Federal Rule 11 contains rather broad language which prohibits the court from accepting a plea of guilty without first "addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea." (Fed. R. Crim. P. 11). Although no court has expressly construed this to require a complete examination of plea negotiations and a statement of the agreement,[38] some opinions could be interpreted as being

34. *E.g.*, United States *ex rel.* Rosa v. Follette, 395 F.2d 721 (2d Cir. 1968); United States *ex rel.* Amuso v. LaVallee, 291 F. Supp. 383, 384 (E.D.N.Y. 1968) (judge stated the agreement as represented to him and asked defendant if he understood its terms); State v. Jennings, 104 Ariz. 3, 448 P.2d 59 (1969).

35. Rigby v. Russell, 287 F. Supp. 325, 332 (E.D. Tenn. 1968) (citing the American Bar Association proposals); United States *ex rel.* Thurmond v. Mancusi, 275 F. Supp. 508 (E.D.N.Y. 1967).

36. *E.g.*, Buckley v. Warden, 28 Conn. Sup. 15, 246 A.2d 705 (1968). In State v. Ortiz, 77 N.M. 751, 427 P.2d 264, the prosecutor had promised not to proceed under the Habitual Criminal Act, but, after plea was entered, the prosecutor breached his promise and the trial court refused to permit the defendant to withdraw his plea stating that his negative answer to the typical "Have any promises been made" barred him. *See* McClure v. Boles, 233 F. Supp. 928 (N.D.W. Va. 1964).

37. In State v. Hansen, 79 N.M. 203, 441 P.2d 500 (1968), the opinion relates that after the guilty plea was accepted "the district attorney then announced that he could not recommend leniency due to the nature of the crime, and stated that he wanted the record to show that he had never before seen the defendant, in order to preclude any claim in a subsequent Rule 93 proceeding that he had made any promises of leniency. Defendant admitted the correctness of the district attorney's statement." (441 P. 2d at 505); *See* State v. Adkison, 279 Minn. 1, 155 N.W.2d 394 (1967).

38. *But see* Scott v. United States, —F.2d— (D.C. Cir. 1969) (37 L.W. 2463).

in support of such a construction.[39]

The United States Supreme Court has recently held that failure to comply fully with guilty-plea-providency inquiry requirements of Federal Rule 11 requires outright reversal of the conviction and opportunity to plead anew.[40] However, the Court gave no indication that Rule 11 required an inquiry into the existence of a plea agreement.[41]

Illinois already has a Supreme Court rule requiring the trial court to make certain specific inquiries prior to the acceptance of a guilty plea and requiring that a record be made of the proceedings;[42] however, there is no indication that this rule requires that the existence of plea bargaining be inquired into, other than in so far as such inquiry might be thought to be embraced within the requirement that a defendant shall be examined to determine whether he has "understandingly" pleaded or waived certain rights.

Of the possible methods above outlined for incorporating into the record an adequate summary of plea negotiations, my own notion is that this is best accomplished by rule of the highest state court. Only in this fashion will any reasonable semblance of uniform practices result. Such a rule should require every judge when a plea of guilty is tendered in any criminal case to inquire of counsel whether there has been any discussion or agreement as to the disposition of that case, or other related or unrelated charges. Should counsel state there have been none, the court must then make similar inquiry of defendant, if he is present (and he would be, at least in the felony cases).

The rule should further provide that if plea negotiations have occurred with some resulting agreement, the prosecutor should be requested to state the substance of the agreement and the parties thereto. Verification of the prosecutor's statement by defense counsel and defendant would be required with such correction or addition as is necessary to correctly portray the understanding. If judicial participation has occurred, a summary statement by the judge as to the extent thereof would be necessary, again with verification by counsel and defendant. Pursuit of this inquiry should be continued until all counsel, defendant and the court are agreed that the record adequately reflects the correct result of the plea negotiations.

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39. United States v. Howard, 407 F.2d 1102 (4th Cir. 1969).
40. McCarthy v. United States, 394 U.S. 459 (1969).
41. In Boykin v. Alabama, 395 U.S. 238 (1969), the Court raised some of the provisions of Rule 11 to constitutional stature, although again there was no mention of plea bargaining.
42. Ill. S. Ct. R. 401; *see* ILL. REV. STAT., ch. 38, §113.4 (1967).

In the ordinary case this procedure will be completed within a matter of several minutes and no substantial extension of the record will occur. It is only where disagreement as to the results of the plea discussions develops that appreciable amounts of time or record space will be consumed. It is precisely there that the later problems would have arisen had prior inquiry not been made.

I am reasonably certain that a number of judges are now engaging in inquiries similar to those suggested. But I am also reasonably certain that in many other courts no realistic effort is made along these lines. It is in those courts that the problems typified by the cases herein cited will continue to arise. I submit that adoption of the suggested procedure will measurably reduce the amount of post-conviction and appellate litigation now arising from alleged unfulfilled promises or coercive tactics involved in undisclosed plea negotiations; and, further, that resolution of those questions which do arise can be more intelligently, fairly and safely accomplished on the basis of a record which adequately portrays the facts.