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Broken Promises and Involuntary Confessions: May a State Introduce Incriminating Statements Made by a Defendant as a Result of Promises in a Plea Bargain Agreement if the Defendant Breaches That Agreement?

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BROKEN PROMISES AND INVOLUNTARY CONFESSIONS: MAY A STATE INTRODUCE INCRIMINATING STATEMENTS MADE BY A DEFENDANT AS A RESULT OF PROMISES IN A PLEA BARGAIN AGREEMENT IF THE DEFENDANT BREACHES THAT AGREEMENT?

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I. INTRODUCTION

Plea bargaining is a central feature of the American criminal justice system; in most jurisdictions over eighty per cent of all convictions are obtained through guilty pleas.[1] Rule 11(e)(6) of the Federal Rules of Criminal Procedure[2] is intended to facilitate plea bargaining by provid-

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[1] In the federal district courts, 81% of the criminal convictions obtained in fiscal year 1982 were based on guilty pleas. Note, *Double Jeopardy, Due Process, and the Breach of Plea Agreements*, 87 COLUM. L. REV. 142, 142 n.1 (1987); Alschuler, *The Changing Plea Bargaining Debate*, 69 CALIF. L. REV. 652, 652 n.1 (1981). "It is commonly estimated that 90% of all criminal convictions are the result of guilty pleas." *Id.*

[2] Rule 11(e)(6) of the Federal Rules of Criminal Procedure provides in part that:

> [E]vidence of a plea of guilty, later withdrawn, or a plea of *nolo contendere*, or of an offer to plead guilty or *nolo contendere* to the crime charged or any other crime, or of statements made in connection with, and relevant to, any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer.

The Advisory Committee notes to Rule 11(e)(6) are reprinted in 62 F.R.D. 286 (1974). These notes clearly show that a major purpose of the Rule is to facilitate plea bargaining by encouraging frank negotiations. *See* United States v. Davis, 617 F.2d 677, 682-86 (D.C. Cir.

ing certain protections to defendants who seek a deal with the federal government. First, the rule encourages frank negotiations by prohibiting government prosecutors from using incriminating admissions made to them by a defendant if the parties fail to reach an agreement.[3] Second, the rule forbids the government from using incriminating admissions made by a defendant in open court while he is entering a guilty plea if a court later grants him permission to withdraw his plea.[4] Many states in their rules of evidence or criminal procedure provide similar protections.[5]

This Article is concerned with situations in which a defendant intentionally breaches a plea agreement. This problem usually occurs when a plea agreement requires a defendant to testify against his accomplices in exchange for a lesser sentence. Some plea agreements require a defendant to testify against his alleged accomplices before he is permitted to plead guilty to a lesser charge; other bargains allow a defendant to plead guilty before he is obligated to testify.[6] A defendant can breach either type of agreement by: (1) committing perjury; (2) refusing to testify at an important stage of the proceedings, even if he has testified at an earlier hearing; or (3) refusing to plead guilty to the charge specified in the plea agreement and demanding a trial on the charges.[7] Federal and state courts have split over the question of whether their respective rules of evidence or criminal procedure prohibit prosecutors from introducing incriminating admissions made pursuant to a plea agreement where a defendant has intentionally breached that bargain.[8] It should be noted that this problem arises only where a defendant unilaterally breaks the

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1979), *cert. denied*, 445 U.S. 967 (1980); United States v. Stirling, 571 F.2d 708, 730-32 (2d Cir.), *cert. denied*, 439 U.S. 824 (1978) (discussing Rule 11(e)(6)). Rule 410 of the Federal Rules of Evidence is virtually identical to Rule 11(e)(6).

[3] *See supra* note 2.

[4] United States v. Udeagu, 110 F.R.D. 172, 173-75 (E.D.N.Y. 1986).

[5] G. JOSEPH & S. SALTZBURG, EVIDENCE IN AMERICA: THE FEDERAL RULES IN THE STATES § 20 (1987) (thirty states have adopted rules similar to Rule 11(e)(6)).

[6] *See, e.g.*, Ricketts v. Adamson, 107 S. Ct. 2680 (1987) (defendant entered guilty plea before he was required to testify against accomplices). *Cf.* People v. Conte, 421 Mich. 704, 718-21, 365 N.W.2d 648, 652-53 (1984) (this case involved five consolidated appeals. In one case, the defendant Norman was required to testify before being allowed to enter a guilty plea).

[7] *Compare* Ricketts v. Adamson, 107 S. Ct. 2680, 2683 (1987) (defendant refused to testify at retrial of his accomplices) *with* People v. Conte, 421 Mich. 704, 718-21, 365 N.E.2d 648, 652-53 (1984) (defendant refused to plead guilty to the charge agreed upon in his plea agreement and demanded a jury trial). Rule 11(e)(6) of the Federal Rules of Criminal Procedure specifically allows statements made in connection with plea negotiations to be used in a criminal proceeding for perjury. *See* United States v. Gleason, 766 F.2d 1239, 1245 (8th Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986).

[8] *See infra* notes 33-87 and accompanying text.

agreement without permission of the court; a different analysis would apply if the government, as well as the defendant, were at fault.[9]

There is a substantial constitutional question concerning whether admissions made pursuant to a plea bargain that the defendant has breached are admissible under the fifth amendment's privilege against compelled self-incrimination or the due process clauses of the fifth and fourteenth amendments. Courts have reached conflicting results in regard to whether such statements are voluntary.[10] This Article argues that it is difficult to resolve whether such admissions are voluntary because courts have not provided a clear definition as to under what circumstances a confession is voluntary in accordance with the dictates of the fifth and fourteenth amendments.

Instead of focusing on whether these types of admissions are voluntary, it may be more fruitful to ask whether a defendant can waive his right to exclude involuntary admissions by intentionally breaching a plea agreement. In *Ricketts v. Adamson*,[11] the United States Supreme Court recently held that a defendant under certain circumstances can waive his rights under the fifth amendment's double jeopardy clause by intentionally breaching a plea agreement. This Article concludes that the waiver analysis in *Ricketts* may be applied to confessions made in connection with an aborted plea bargain and that even involuntary confessions may be used against a defendant who intentionally breaches a plea agreement that contains a written waiver clause to that effect.

II. Remedies for Broken Plea Agreements

A prosecutor has a number of options if a defendant intentionally breaches a plea agreement. Rule 11(e)(6) clearly allows the federal government to prosecute for perjury a defendant who breaks a plea bargain by lying instead of providing the truthful testimony that is the implied or express condition of every bargain.[12] If a defendant fails to provide testimony required under the terms of his plea agreement and has not yet entered a guilty plea, a judge can refuse to enforce the government's obligations under the bargain.[13] In *Ricketts v. Adamson*,[14]

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[9] Under some circumstances a defendant can demand specific performance of the government's obligations in a plea agreement. *See* Mabry v. Johnson, 467 U.S. 504 (1984). This Article is not concerned with situations in which a prosecutor breaches a plea agreement.

[10] *See infra* notes 33-87 and accompanying text.

[11] 107 S. Ct. 2680 (1987).

[12] Fed. R. Crim. P. 11(e)(6).

[13] *See, e.g.*, United States v. Baldacchino, 762 F.2d 170, 179 (1st Cir. 1985) (government is not required to fulfill a plea bargain when a defendant acts in bad faith).

[14] 107 S. Ct. 2680 (1987).

the United States Supreme Court held that a state may reindict a defendant on more serious charges if he substantially breaches his duties under a plea agreement even after he has entered a guilty plea, been sentenced, and begun to serve a prison term. In the wake of the *Ricketts* decision, a key question is whether a state may introduce, in a subsequent trial as substantive evidence, incriminating admissions made by a defendant during plea negotiations if he intentionally breaches his plea agreement. It should be noted that if a defendant simply decides not to enter into a plea agreement after engaging in some preliminary negotiations, Rule 11(e)(6) prohibits the federal government from using any incriminating admissions even for impeachment,[15] although some states allow such statements to be used for that limited purpose.[16] Prosecutors have a number of potential remedies if a defendant walks out of a plea bargain; however, it is unclear whether a state can use the best evidence of all, a defendant's confession of guilt during plea negotiations.

III. PLEA BARGAINS, CONFESSIONS AND VOLUNTARINESS

The United States Supreme Court has failed to provide a consistent explanation of which circumstances make a confession voluntary under the fifth and fourteenth amendments. On one hand, the Court has stated that a confession is involuntary if it is induced by the slightest promise of leniency.[17] On the other hand, the Court has sanctioned a plea bargaining system in which guilty pleas are exchanged for promises of leniency.[18]

In 1897, the United States Supreme Court in *Bram v. United States*[19] reversed Bram's murder conviction on the ground that his statements to a detective were involuntary. The detective had forced Bram to strip off all clothing and then had interrogated him.[20] In the course of its discussion, the *Bram* Court set forth the following rule:

> But a confession, in order to be admissible, must be free and voluntary: that is, must not be extracted by any sort of threats or violence, *nor obtained by any direct or implied promises, however slight,* nor by the exertion of any improper influence. . . . A confession can never be received in evidence where the prisoner

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[15] *See, e.g.*, United States v. Lawson, 683 F.2d 688, 690-93 (2d Cir. 1982).

[16] *Compare* Williams v. State, 491 A.2d 1129 (Del.), *cert. denied*, 474 U.S. 824 (1985) (state may impeach defendant with false statement made during plea negotiations) *with* Gillum v. State, 681 P.2d 87 (Okla. Crim. App. 1984) (state may not impeach defendant with prior inconsistent statement made during plea negotiations).

[17] Bram v. United States, 168 U.S. 532, 542-43 (1897).

[18] Brady v. United States, 397 U.S. 742 (1970).

[19] 168 U.S. 532 (1897).

[20] *Id* at 542-43.

> has been influenced by any threat or promise; for the law cannot measure the force of the influence used, or decide its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of influence has been exerted.[21]

While *Bram* is an old case, it has never been overruled and its test is frequently applied in cases in which a criminal defendant claims that his confession was involuntary.[22]

In 1970, the United States Supreme Court in *Brady v. United States*[23] sought to reconcile the *Bram* test with the widespread practice of plea bargaining. The *Brady* Court distinguished confessions induced by promises that were made in the presence of counsel from those admissions made by defendants who lacked the advice of counsel, and, therefore, were especially likely to be influenced by promises of leniency.

> *Bram* is not inconsistent with our holding that Brady's plea was not compelled even though the law promised him a lesser maximum penalty if he did not go to trial. *Bram* dealt with a confession given by a defendant in custody, alone and unrepresented by counsel. In such circumstances, even a mild promise of leniency was deemed sufficient to bar the confession, not because the promise was an illegal act as such, but because the defendants at such times are too sensitive to inducement and the possible impact on them [is] too great to ignore and too difficult to assess. But *Bram* and its progeny did not hold that the possibly coercive impact of a promise of leniency could not be dissipated by the presence and advice of counsel, any more than *Miranda v. Arizona* . . . held that the possibly coercive atmosphere of the police station could not be counteracted by the presence of counsel or other safeguards.[24]

The counsel versus no counsel distinction employed in *Brady* makes sense to a certain extent, but does not answer all questions concerning whether a confession induced by a plea bargain is voluntary. Under *Brady*, a guilty plea entered in open court upon the advice of counsel is considered voluntary.[25] *Brady* is less helpful, however, in explaining under what circumstances the state may use incriminating admissions if a plea

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[21] *Id.* (emphasis added).

[22] The *Bram* test for determining the voluntariness of a confession was cited with approval in the following cases. *See, e.g.*, Hutto v. Ross, 429 U.S. 28, 30 (1976); Brady v. United States, 397 U.S. 742, 753-54 (1970); United States v. Grant, 622 F.2d 308, 316 (8th Cir. 1980); Gunsby v. Wainwright, 596 F.2d 654, 658 (5th Cir.), *cert. denied*, 442 U.S. 932 (1979).

[23] 397 U.S. 742 (1970).

[24] *Id* at 753-54.

[25] *Id.*

bargain is not completed. *Brady* could be read to permit the government to use *any* admission made by a defendant in plea negotiations against him as long as he was represented by counsel. Rule 11(e)(6) in a sense mutes the potential conflict between *Brady* and *Bram* by excluding admissions made during plea negotiations, despite the presence of defense counsel, as a means of encouraging such bargaining.[26] *Brady* did not resolve whether a confession which would not have been made but for a plea agreement can truly be viewed as voluntary.

In 1976, the United States Supreme Court in *Hutto v. Ross*[27] was again able to avoid resolving the potential conflict between the *Bram* test and the practical realities of plea bargaining. In *Hutto*, the defendant, with the assistance of counsel, reached a plea agreement with an Arkansas prosecutor; it is important to note that the bargain did not require the defendant to give a confession.[28] The prosecutor later asked the defendant's counsel whether the defendant would be willing to make a statement concerning the crimes committed.[29] "Although counsel advised respondent of his Fifth Amendment privilege and informed him that the terms of the negotiated plea bargain were available regardless of his willingness to comply with the prosecuting attorney's request, the respondent agreed to make a statement confessing to the crime charged."[30] The *Hutto* Court rejected the defendant's argument that *Bram* prohibited the admission of a confession that would not have been made but for a plea bargain.[31] *Hutto* adopted a more restrictive interpretation of *Bram*, albeit one that was reasonably plausible. The Court concluded that the defendant's confession was voluntary even under the *Bram* test because the prosecutor had not promised the defendant any benefit in exchange for the statement.[32] *Hutto* was an easy case for a Supreme Court that was apparently eager to maintain the fiction that plea bargaining was really compatible with traditional standards concerning the voluntariness of confessions. The Court has never addressed the much tougher issue of whether a confession required as a condition of a plea agreement is voluntary.

IV. Broken Plea Bargains, Confessions and Voluntariness

Courts have split over whether a state may use incriminating statements made by a defendant as a condition of a plea agreement where he

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[26] *See supra* notes 2-4 and accompanying text.
[27] 429 U.S. 428 (1976).
[28] *Id* at 428-31.
[29] *Id.* at 28.
[30] *Id.* at 28-29.
[31] *Id.* at 30.
[32] *Id.*

deliberately breaks that bargain. A key issue has been whether courts should apply the strict *Bram* per se standard or a totality of the circumstances test to determine the voluntariness of admissions under these circumstances. Should courts focus on the fact that the plea agreement required the defendant to make incriminating admissions, or upon circumstances such as whether the defendant initiated plea negotiations, confessed in open court or voluntarily backed out of his obligations under the agreement? Good arguments can be made for both points of view since the concept of voluntariness is not easily defined. This Article argues that the voluntariness of a confession induced by an aborted plea agreement may not be determinative. The real question may be whether a defendant has knowingly and intelligently waived his right to challenge the admissibility of such statements.

A. Involuntary Statements

In *Gunsby v. Wainwright*,[33] Gunsby, a habeas corpus petitioner, had entered into a plea agreement with the State of Florida under which he agreed to plead guilty to robbery and testify against two co-defendants in exchange for a reduced sentence. "Shortly after entering the guilty plea, Gunsby made a statement to the prosecutor in which he incriminated himself and a codefendant. Gunsby's testimony at trial, however, tended to exculpate the codefendant, who was acquitted."[34] After a contested hearing, a Florida trial court vacated the plea agreement on the ground that he had breached his bargain by making inconsistent statements.[35] In addition, the trial court ruled that the incriminating admission that Gunsby made in his first statement was admissible and, as such, was introduced during his subsequent robbery trial.[36] The Florida Appellate Court affirmed his robbery conviction.[37] A federal district court granted his petition for a writ of habeas corpus.[38] The United States Court of Appeals for the Fifth Circuit affirmed the district court's judgment in part and vacated it in part.[39] The Fifth Circuit concluded that the incriminating statement made by Gunsby as a result of promises in the aborted plea agreement was involuntary and inadmissible in light of *Hutto*.[40] One may

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[33] 596 F.2d 654 (5th Cir.), *cert. denied*, 442 U.S. 932 (1979).
[34] *Id.* at 655.
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] Gunsby v. Wainwright, 596 F.2d 654 (5th Cir.), *cert. denied*, 442 U.S. 932 (1979).
[39] *Id.* at 655-58.
[40] *Id.* at 655-56.

reasonably infer that the Fifth Circuit was applying the *Bram* test discussed in *Hutto*.[41]

In addition, the Fifth Circuit concluded that another statement made by Gunsby was involuntary and inadmissible. After Florida prosecutors had sought to vacate his plea agreement, but before a hearing was held on the matter, "Gunsby appeared at a deposition in response to a subpoena issued by another codefendant who had not yet been tried. Gunsby again incriminated himself."[42] This statement was introduced during Gunsby's robbery trial. A federal district court concluded that this statement was involuntary under the *Bram* test because Gunsby believed that he had to testify at the deposition in order to save his plea agreement.[43] The Fifth Circuit affirmed the district court's determination that this statement was involuntary. "At no time was he advised, as in *Hutto*, that he need not testify in order to retain the benefits of the plea bargain should the court refuse to nullify it, or that the State would not use his refusal to testify as additional ground for the motion to set aside the plea bargain."[44] The Fifth Circuit, however, vacated an order by the district court prohibiting an increased sentence if Gunsby should be convicted after a new trial on the robbery charge because the facts concerning his post-sentencing conduct were not known.[45] The Fifth Circuit in *Gunsby* essentially applied the *Bram* test where a defendant had failed to fulfill his obligations under a plea agreement.[46] According to the *Gunsby* court, *Hutto* was a narrow exception to the rule that admissions made as a result of promises in a plea bargain are involuntary.[47]

In *People v. Conte*,[48] the Michigan Supreme Court was divided over whether the state could introduce incriminating statements made by the defendant Norman as a result of a plea bargain where he deliberately broke that agreement. Norman had been convicted by a jury in a separate case of first-degree murder and robbery; Bobby Jacks was the victim in that case.[49] While in jail awaiting sentencing, Norman sent a letter to the prosecutor's office in which he claimed that he had valuable information

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[41] *See* Hutto v. Ross, 429 U.S. 28, 30 (1976) (applying the voluntariness test in Bram v. United States, 168 U.S. 532, 542-43 (1897)).

[42] Gunsby v. Wainwright, 596 F.2d 654, 655 (5th Cir.), *cert. denied*, 442 U.S. 932 (1979).

[43] *Id.* at 656-58.

[44] *Id.*

[45] *Id.* at 658.

[46] *See supra* note 41 and accompanying text.

[47] *See* Gunsby v. Wainwright, 596 F.2d 654, 655-56 (5th Cir.), *cert. denied*, 442 U.S. 932 (1979).

[48] 421 Mich. 704, 365 N.W.2d 648 (1984) (People v. Norman was consolidated with four other appeals that were reported with People v. Conte).

[49] *Id.* at 718.

concerning other crimes.[50] He later reached a plea agreement with the state in which he agreed to testify against his accomplice in the River Rouge jewelry store murders in exchange for the state's promise that he would be allowed to plead guilty to a single count of second-degree murder, instead of being charged with four counts of felony murder and one count of armed robbery.[51] In addition, the state promised that after Norman had testified at his accomplice's trial, it would permit dismissal of the first-degree murder conviction in the *Jacks* case and allow him to plead guilty to one count of second-degree murder in that matter.[52] In accordance with the terms of the plea agreement, Norman made a written statement in which he implicated himself and an accomplice, Reginald Johnson, in the robbery of the River Rouge jewelry store and the murder of four people during the course of the robbery.[53] Norman then testified against Johnson at the latter's preliminary hearing.[54] Norman admitted in open court that he personally had killed all four victims.[55] Subsequently, Norman refused to plead guilty to second-degree murder in the River Rouge jewelry store murders and sought a jury trial in that case.[56] One may note that his action in this regard made little sense because he was already serving a long sentence for the Jacks' murder, and, therefore, would have remained incarcerated even if he had been acquitted of the jewelry store murders.[57] The inculpatory admissions made by Norman during Johnson's preliminary hearing were introduced during the former's trial.[58] A jury convicted Norman of four counts of first-degree murder and one count of armed robbery.[59]

Four of the seven justices on the Michigan Supreme Court held that Norman's statement was inadmissible.[60] Three of the justices in the majority took the view that under the Michigan constitution an inculpatory admission "induced by a law enforcement official's promise of leniency is involuntary and inadmissible."[61] They contended that the

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[50] *Id.* at 718-19.
[51] *Id.* at 719.
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Id.* at 718-19.
[60] *Id.* at 747-48, 759-61, 762-63. Justices Cavanagh and Levin joined Chief Justice Williams' opinion to affirm the decision of the Michigan Court of Appeals, which had reversed Norman's conviction. Justice Cavanagh, in a separate opinion, also voted to affirm the judgment of the Court of Appeals. Justices Ryan and Brickley joined Justice Boyle's dissenting opinion in which he argued that the statements made by Norman during his plea negotiations were properly admitted during his subsequent trial.
[61] *Id.* at 749-50 (opinion of Chief Justice Williams).

Bram test should be applied where a defendant is prompted by a promise to make incriminating admissions, but also stated that it made little sense to exclude confessions that would have been given even if the state had made no promises.[62] For the purposes of this Article, it is clear that these three justices would have concluded that an incriminating statement that is made by a defendant as a requirement of a plea agreement is involuntary even if he intentionally breaches his obligations under that bargain.[63] While they did not rely upon the fifth amendment of the United States Constitution, it is evident that the three justices in the majority would reach the same result under both the federal and the Michigan Constitution.[64]

One justice in the majority declined to hold that Norman's statements were inadmissible under the Michigan Constitution, but concluded that these admissions were barred by a Michigan rule of evidence based on Rule 11(e)(6) of the Federal Rules of Criminal Procedure:[65]

> It would be unfair to treat defendants who give statements in connection with an offer or agreement to plead more harshly than defendants who actually plead and later withdraw their pleas. The inability to introduce statements made in a bargaining session does not place the prosecution in a worse position than it would have occupied if the defendant had not engaged in plea bargaining at all.[66]

Three justices in the minority contended that the voluntariness of a confession under both the federal and the Michigan constitutions depended upon the totality of the circumstances.[67] They concluded that Norman's statement was voluntary.

> The bargain was solicited by a sophisticated suitor seeking to avoid a mandatory life sentence. The statement was not made while [the] defendant was in custody, but rather was made in open court. None of the indicators of involuntariness which we have set forth today are here implicated. We have no doubt that defendant's testimony was the product of a defendant's free will.[68]

Conte is an excellent case for the purposes of this Article because it presents all three major points of view. First, any confession that is made

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[62] *Id.* at 738-43 (opinion of Chief Justice Williams).
[63] *Id.* at 721-50 (opinion of Chief Justice Williams).
[64] *Id.*
[65] *Id.* at 762-63 (opinion of Justice Cavanagh).
[66] *Id.* at 763 (opinion of Justice Cavanagh).
[67] *Id.* at 750-61 (opinion of Justice Boyle).
[68] *Id.* at 760 (opinion of Justice Boyle).

as a result of promises by the state is involuntary.[69] Second, such statements should be barred as a matter of policy because a defendant may withdraw from a completed plea bargain and should have the same right to withdraw a statement made as the result of an aborted plea bargain.[70] Finally, such statements are voluntary if the defendant solicited the plea agreement and made his admissions in open court.[71] This Article will first examine the policy arguments in this area and will then discuss the constitutional problem.

B. Policy

There are three main policy arguments for excluding statements made as a requirement of a plea agreement that a defendant later intentionally breaches. First, such a defendant should have the same right to withdraw this type of statement as one who withdraws from a guilty plea that has been entered in open court.[72] A major problem with this point of view is that a defendant must receive permission from a judge to withdraw a guilty plea entered in open court and has very limited rights in that regard.[73] Courts usually disfavor allowing defendants to withdraw a guilty plea.[74] To the extent that courts seek to facilitate plea bargaining, they have a strong incentive to discourage defendants from simply walking out of their obligations under a plea agreement.[75] This argument is compelling only if a defendant has received permission from a court to withdraw from a plea agreement and seeks to block the use of statements made in connection with that agreement.[76]

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[69] *Id.* at 721-50 (opinion of Chief Justice Williams).

[70] *Id.* at 762-63 (opinion of Justice Cavanagh).

[71] *Id.* at 750-61 (opinion of Justice Boyle).

[72] *Id.* at 762-63 (opinion of Justice Cavanagh).

[73] It is well-settled that a voluntary and intelligent plea of guilty made by an accused person, who has been advised by competent counsel, may not be collaterally attacked. . . . Thus, only when it develops that the defendant was not fairly apprised of its consequences can his plea be challenged under the due process clause.

Mabry v. Johnson, 467 U.S. 504, 504-05 (1984).

[74] *Id.*

[75] *See* United States v. Davis, 617 F.2d 677, 682-86 (D.C. Cir. 1979), *cert. denied*, 445 U.S. 967 (1980); United States v. Stirling, 571 F.2d 708, 730-32 (2d Cir.), *cert. denied*, 439 U.S. 824 (1978) (both opinions argued that the judicial system has strong incentive to discourage defendants from simply breaching plea agreements with impunity). *See also* United States v. Doe, 671 F. Supp. 205, 208-09 (E.D.N.Y. 1987); Groover v. State, 458 So.2d 226, 228 (Fla. 1984), *cert. denied*, 471 U.S. 1009 (1985).

[76] Courts in their discretion may permit a defendant to withdraw a guilty plea. *See, e.g.*, United States v. Stayton, 408 F.2d 559, 561 (3d Cir. 1969); Paradiso v. United States, 482 F.2d 409, 416 (3d Cir. 1973); United States v. Swinehart, 614 F.2d 853, 857 (3d Cir. 1980). Once a court has allowed a defendant to withdraw a plea of guilty the government may not

Second, the argument can be made that the inability to introduce statements made in a bargaining session does not place the prosecution in a worse position than it would have occupied if the defendant had not engaged in plea bargaining at all.[77] It is possible, however, that the sudden withdrawal of a defendant from a plea agreement may harm a state's chance of winning a conviction because the prosecutor may not be prepared to try the defendant before a jury. The resulting delays may be to the defendant's advantage.[78] The main problem with this policy argument is that, standing alone, it is not very compelling. Why should the state not be able to use reliable evidence to establish the truth in a case? This argument is much stronger if it is combined with the contention that such admissions are involuntary or discourage defendants from negotiating plea bargains.

Finally, there is the argument that the practice of allowing a state to introduce statements made by a defendant as a condition of a plea bargain that he later breached might discourage future defendants from engaging in plea negotiations. In *United States v. Stirling*,[79] the United States Court of Appeals for the Second Circuit held that Rule 11(e)(6) of the Federal Rules of Criminal Procedure did not prohibit the introduction of grand jury testimony made by a defendant as a requirement of a plea agreement where he later intentionally breached his obligations. The *Stirling* court argued that Rule 11(e)(6) was intended by Congress, and the Advisory Committee that wrote it, to protect the confidentiality of plea *negotiations*, but was never designed to bar admissions made pursuant to a *finalized* plea agreement.[80] In *United States v. Davis*,[81] the United States Court of Appeals for the District of Columbia Circuit held that testimony given to a grand jury by the defendant Gelestino pursuant to a formal plea agreement was admissible where he thereafter withdrew from the bargain and pleaded not guilty. The *Davis* court agreed with the *Stirling* decision that Rule 11(e)(6) did not apply to statements made after a plea agreement is reached.[82] "Excluding testimony made after—and

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use any statements made by him during plea negotiations. United States v. Udeagu, 110 F.R.D. 172, 173-75 (E.D.N.Y. 1986).

[77] People v. Conte, 421 Mich. 704, 763, 365 N.W.2d 648, 672 (1984) (opinion of Justice Cavanagh).

[78] Whether a delay in trying a case would work to the advantage of the state or the defendant would depend on the circumstances surrounding an individual case, and, accordingly, it is difficult to generalize about what effect a defendant's breach of a plea agreement would have on the ability of a prosecutor to win a conviction in a subsequent trial on the same charges.

[79] 571 F.2d 708 (2d Cir.), *cert. denied*, 439 U.S. 824 (1978).

[80] *Id* at 730-32.

[81] 617 F.2d 677 (D.C. Cir. 1979), *cert. denied*, 445 U.S. 967 (1980) (consolidated appeal involving the *Gelestino* case reported under United States v. Davis).

[82] *Id* at 682-86.

pursuant to—the agreement would not serve the purpose of encouraging compromise. Indeed, such a rule would permit a defendant to breach his bargain with impunity . . . ."[83]

These three policy arguments against introducing these types of statements have some merit, but they seem rather weak when balanced against the probative value of such admissions and the unclean hands possessed by a defendant who breaks his commitments. The constitutional argument that such statements are involuntary is much more compelling.

C. *What is Voluntariness?*

It is very difficult to determine whether a confession is voluntary. The United States Supreme Court in *Bram* noted that it is perhaps impossible to measure the effect of a promise upon a prisoner and, therefore, developed a per se or bright line rule that any inducement was presumed to render a resulting confession involuntary.[84] On the other hand, some courts have concluded that a confession is voluntary despite promises by the state where the defendant solicited or willingly entered into a plea agreement and then provided testimony in open court.[85] These courts apply a totality of the circumstances test under which they balance the coercive impact of the inducements offered by the state against factors indicating that the confession was the product of the defendant's free will. A good case can be made for either point of view.

Previous decisions of the United States Supreme Court are not very helpful in terms of indicating how the Court might apply voluntariness standards in this area. In *Brady* and *Hutto* the Court cited the strict *Bram* decision with approval, but did not have occasion to apply its per se test. In *State v. Boyle*,[86] the Appellate Division of the New Jersey Superior Court took the view that the United States Supreme court had effectively narrowed the scope of the *Bram* test when it endorsed plea bargaining in *Brady*. In *Davis*,[87] the District of Columbia Circuit noted that a per se application of *Bram* would mean the total abolition of plea bargaining, and suggested that a totality of the circumstances test for determining voluntariness is in accord with *Hutto* and *Brady*. One might speculate about how the Supreme Court would apply voluntariness criteria to a confession made by a defendant in a plea bargain that he later intentionally breached. It is quite possible, however, that the court might not reach

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[83] *Id.* at 685.

[84] 168 U.S. 532, 542-43 (1897).

[85] *See, e.g.*, United States v. Davis, 617 F.2d 677, 682-86 (D.C. Cir. 1979), *cert. denied*, 445 U.S. 967 (1980); United States v. Stirling, 571 F.2d 677, 682-86 (2d Cir.), *cert. denied*, 439 U.S. 824 (1978); People v. Conte, 421 Mich. 704, 750-61, 365 N.W.2d 648 (1984); State v. Boyle, 198 N.J.Super. 64, 66-73, 486 A.2d 852 (App. Div. 1984).

[86] 198 N.J. Super. at 72 n.4, 486 A.2d at 856 n. 4.

[87] 617 F.2d at 682-86.

the voluntariness issue and would instead conclude that such a defendant had waived whatever federal due process rights he had possessed to bar the admission of that confession in a subsequent trial.

V. Broken Plea Bargains and Constitutional Waiver

A. *Ricketts v. Adamson*

In *Ricketts v. Adamson*,[88] the United States Supreme Court recently held that a defendant in some circumstances may waive his double jeopardy rights under the fifth amendment to the United States Constitution, which applies to the states through the fourteenth amendment, by breaching a plea agreement. The Court concluded that a state may reindict a defendant on more serious charges if he substantially breaches his obligations under a plea agreement even after he had pleaded guilty to a lesser included offense, been sentenced, and begun to serve a prison term.[89]

The State of Arizona brought first-degree murder charges against John Adamson.[90] Arizona officials and Adamson reached an agreement whereby he would be allowed to plead guilty to second-degree murder in exchange for his testimony against other parties involved in the murder.[91] The agreement specified that he would receive a nominal prison term of between forty-eight and forty-nine years, and would actually serve twenty years and two months.[92] Adamson testified against his accomplices during their first trials, but refused to testify against them again when they were retried on the same charges after the Arizona Supreme Court had reversed their initial convictions.[93] He maintained that the plea agreement did not explicitly require him to testify at a retrial, and also claimed that any obligations he had under the bargain to testify terminated when he was sentenced.[94] Adamson told Arizona officials that he would testify at the retrials only if they agreed to certain conditions, among others, that the state release him immediately after he had provided testimony.[95] His defense counsel acknowledged in a letter to state officials that they might consider his refusal to testify to represent a breach of the agreement, and that they might attempt to reinstate first-degree murder charges against him.[96]

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[88] 107 S. Ct. 2680, 2682-86 (1987).
[89] *Id.*
[90] *Id.* at 2682.
[91] *Id.*
[92] *Id.*
[93] *Id.* at 2683.
[94] *Id.*
[95] *Id.*
[96] *Id.* at 2686-87.

Arizona prosecutors did in fact file a new information charging Adamson with first-degree murder.[97] Adamson filed an interlocutory appeal to bar his prosecution. The Arizona Supreme Court held that the state could reinstate this charge.[98] Adamson then offered to testify at the retrials, but state prosecutors declined his offer.[99] Adamson was convicted of first-degree murder, and was subsequently sentenced to death.[100] The United States Court of Appeals for the Ninth Circuit, sitting *en banc*, held that his prosecution violated double jeopardy principles, and directed the issuance of a writ of habeas corpus.[101] Judge, now Justice, Anthony Kennedy wrote a dissenting opinion in which he argued that Adamson's double jeopardy rights had not been violated.[102] The United States Supreme Court reversed the Ninth Circuit in a five to four decision written by Justice White.

Both the majority and dissenting opinions in *Ricketts* agreed that under certain circumstances a state may reindict a defendant who has substantially breached his obligations pursuant to a plea agreement. The central dispute that divided the majority and minority concerned the extent to which a plea agreement must explicitly warn a defendant that a violation of its terms can effect a waiver of his double jeopardy rights.

Justice White in his majority opinion concluded that the plea agreement between Adamson and Arizona had clearly provided that the state could reindict him if he refused to testify against his accomplices. Paragraph five of the agreement stated that if Adamson failed to testify, "this entire agreement is null and void and the original charge will be *automatically* reinstated."[103] Paragraph fifteen provided: "In the event this agreement becomes null and void, then the parties shall be returned to the positions they were in before this agreement."[104] The majority rejected the contention of the dissenters that double jeopardy rights can be waived only if they are specifically waived by name in the plea agreement.[105] Justice White argued that an "agreement specifying that

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[97] *Id.* at 2683.

[98] *Id.* at 2683-84.

[99] *Id.* at 2684.

[100] *Id.*

[101] Adamson v. Ricketts, 789 F.2d 722 (9th Cir. 1986) (*en banc*), *rev'd*, 107 S. Ct. 2680 (1987). For a discussion of this decision see Note, *Double Jeopardy, Due Process, and the Breach of Plea Agreements*, 87 COLUM. L. REV. 142 (1987).

[102] Adamson v. Ricketts, 789 F.2d at 747-50 (Kennedy, J., dissenting). Justice Powell voted with the majority of five that reversed the Ninth Circuit and held that Adamson's double jeopardy rights had not been violated. Thus, the retirement of Justice Powell and his replacement by Justice Kennedy would not have affected the outcome of this case in the Supreme Court.

[103] Ricketts v. Adamson, 107 S. Ct. 2680, 2685 (1987).

[104] *Id.*

[105] *Id.* at 2685-86, 88 (Brennan, J., dissenting).

charges may be *reinstated* given certain circumstances is, at least under the provisions of this plea agreement, *precisely* equivalent to an agreement waiving a double jeopardy defense."[106]

Justice Brennan in his dissent did not dispute the proposition that under some circumstances a defendant may waive his double jeopardy rights by breaching a plea agreement. He did argue, however, that a plea agreement must "contain an *explicit* waiver of all double jeopardy protection."[107] His dissent contended that an implicit waiver of double jeopardy rights in a plea agreement was insufficient to meet the constitutional standard of a "knowing, intelligent, and voluntary waiver."[108]

B. Ricketts and Confessions

A major question left unanswered by the *Ricketts* decision is whether a defendant can waive other types of constitutional rights by signing and then breaching a plea agreement. There is a considerable possibility that prosecutors will insert waiver clauses concerning confessions in the wake of *Ricketts*, which makes it easier for a state to reindict a defendant who walks out of a plea bargain. Obviously, a prosecutor would seek to use any statements made by a defendant like Adamson in connection with a broken plea bargain in a subsequent prosecution. Thus, it is likely that courts in the near future will confront the question of whether waiver clauses in plea agreements may apply to confessions made as a result of promises made by the state.

It is difficult to predict what courts will hold when confronted with a new issue, but it is likely that courts will extend the waiver analysis in *Ricketts* to confessions made as a condition of a plea bargain which the defendant later intentionally breaks. The strongest argument against the admission of such statements is that they are involuntary. There are two arguments that can be made in favor of introducing these types of admissions. First, a defendant may waive important constitutional rights by signing a plea agreement if the waiver is "knowing, intelligent, and voluntary."[109] It is possible, of course, that courts might conclude that the fifth amendment's prohibition against compelled self-incrimination is more fundamental than its double jeopardy provisions, and, therefore, cannot be waived in a plea agreement. In *Boykin v. Alabama*,[110] however, the United States Supreme Court held that a defendant may waive his fifth amendment right against compulsory self-incrimination by knowingly, intelligently and voluntarily entering a guilty plea in open court.

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[106] *Id.* at 2686 (emphasis added).
[107] *Id.* at 2688 (Brennan, J., dissenting) (emphasis added).
[108] *Id.* at 2687-91 (Brennan, J., dissenting).
[109] Boykin v. Alabama, 395 U.S. 238, 242-44 (1969).
[110] 395 U.S. 238 (1969).

In *Mabry v. Johnson*,[111] the Court concluded "that plea agreements are consistent with the requirements of voluntariness and intelligence—because each side may obtain advantages when a guilty plea is exchanged for sentencing concessions, the agreement is no less voluntary than any bargained-for exchange." Thus, despite the traditional reluctance of courts to admit confessions that are obtained through promises of leniency, it is quite possible that at least some courts might conclude that a defendant may waive his right against compelled self-incrimination by signing a waiver clause in a plea agreement. As the five to four split in *Ricketts* demonstrated, the clarity of a waiver clause will be an important factor in determining whether a defendant has knowingly, intelligently and voluntarily waived a right by entering into a plea agreement.[112]

Second, the majority opinion in *Ricketts* emphasized that Adamson had made a voluntary choice in refusing to comply with the terms of this plea agreement.[113]

> He could submit to the State's request that he testify at the retrial . . . or he could stand on his interpretation of the agreement, knowing that if he were wrong, his breach of the agreement would restore the parties to their original positions and he could be prosecuted for first-degree murder.[114]

A defendant who simply walks out of a plea agreement instead of receiving judicial permission to withdraw from its terms is less likely to convince a court that a valid waiver clause should not be enforced on equitable grounds and that he should be allowed a second chance to fulfill his obligations.

On the other hand, a court might decline to apply the *Ricketts* rationale to a confession made as a condition of a plea agreement that a defendant later intentionally breaches. In *Ricketts* the only means the state had to force Adamson to testify, after he had entered a guilty plea and been sentenced, was the threat of reindicting him, although one may question the prosecution's decision to proceed even after he had expressed his willingness to testify at the retrial.[115] The state is in no worse position if it can reindict a defendant, but cannot use the statements made by the defendant as a requirement of the agreement.[116] In addition, there are

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[111] 467 U.S. 504, 508 (1984).

[112] Ricketts v. Adamson, 107 S. Ct. 2680, 2687-91 (Brennan, J., dissenting).

[113] *Id.* at 2686.

[114] *Id.*

[115] Justice Brennan in his dissenting opinion suggested that the decision of Arizona prosecutors to abandon prosecution of Adamson's two alleged accomplices, Dunlap and Robinson, in favor of prosecuting Adamson at a time when he had offered to testify at their potential retrials raised the possibility of prosecutorial vindictiveness. *Id.* at 2692 n.13.

[116] *But see* note 78 and accompanying text.

the traditional arguments in *Bram* and its progeny that all confessions obtained in part through promises by the state are potentially involuntary and, therefore, violate the privilege against compelled self-incrimination and due process.[117]

It is possible that courts will not extend the waiver analysis in *Ricketts* to confessions. This author would predict, however, that the five Justices on the Supreme Court who concluded that Adamson could be reindicted and sentenced to death because of the waiver clauses in his plea agreement would apply the same reasoning to confessions made as a condition of a plea bargain despite the arguments in the previous paragraph.[118] A defendant who signs a plea agreement with a waiver clause concerning confessions would be well-advised to ponder Adamson's fate before walking out of his obligations under that contract.

VI. CONCLUSION

Courts have reshaped legal doctrine to conform to the realities of plea bargaining. *Bram v. United States* declared that the slightest promise rendered a confession involuntary.[119] Seventy-three years later, the Supreme Court endorsed plea bargaining in *Brady v. United States*.[120] That court avoided the issue of whether plea bargaining is inconsistent with the *Bram* voluntariness test by concluding that Brady had knowingly, intelligently and voluntarily waived his right against compelled self-incrimination.[121] *Ricketts* was in some ways a logical, if extreme, extension of this waiver analysis, and even Justice Brennan in his dissenting opinion conceded that under some circumstances a defendant may waive important constitutional protections such as the prohibition against double jeopardy by signing and then breaching a plea agreement. This Article has suggested that courts may next apply waiver analysis to confessions made as a condition of a plea agreement that a defendant later unilaterally breaches. Whether defendants should be permitted to waive important constitutional rights pursuant to a plea agreement is a question that would require analysis beyond the scope of this Article.

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[117] See People v. Conte, 421 Mich. 704, 721-50, 365 N.E.2d 648, 650-67 (1987) (opinion of Chief Justice Williams), for an excellent discussion of *Bram* and subsequent decisions concerning the standard for determining whether a confession is voluntary.

[118] It is difficult to predict how the United States Supreme Court will resolve a new issue. This author believes that the waiver analysis in Ricketts v. Adamson, 107 S. Ct. 2680 (1987), could easily be extended from double jeopardy rights to confessions.

[119] 168 U.S. 532, 542-43 (1897).

[120] 397 U.S. 742, 754 (1970).

[121] *Id.*