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Criminal Procedure: Withdrawal of Plea as a Matter of Right When Plea Agreement Is Rejected

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also succumb to the ascending sixth amendment of the Constitution as defendants seek other privileged information.[48]

Finally, the requirement that a judge make a preliminary determination before ordering *in camera* inspection of confidential information when a statutory privilege conflicts with a criminal defendant's constitutional right should provide adequate protection for newsmen against unreasonable disclosure. Although some chilling effect on both sources and reporters will occur, it seems correct to elevate a defendant's rights above this privilege. Because of the interest and publicity the *Farber* case has generated, it is expected to cause other states to pass shield statutes. If this happens, reporters would be protected in states where they are not currently protected, and a reporter could be certain about the extent of his privilege in a given state. The enactment of a shield statute would protect confidential sources in all situations except those where the statute conflicted with a criminal defendant's sixth amendment right of compulsory process. In the long run, if more states pass shield statutes, and newsmen discover that most judges are able to make fair determinations of need and materiality, the *Farber* decision will be recognized as containing benefits as well as detriments for reporters.

MORLEY SWINGLE

CRIMINAL PROCEDURE: WITHDRAWAL OF PLEA AS A MATTER OF RIGHT WHEN PLEA AGREEMENT IS REJECTED

Schellert v. State[1]

Patrick Schellert, the defendant, was charged with feloniously writing a check for over one hundred dollars without sufficient funds for payment.[2] He appeared on the trial date without counsel and pled guilty. The

deep roots in the common law. Examples are the lawyer-client privilege, WIGMORE, *supra*, at § 2290, and the husband-wife privilege, *id.* § 2333. When any of these privileges conflicts with a criminal defendant's sixth amendment right of compulsory process, the privileges that have a common law history might be less likely to fall than the purely statutory privileges.

48. Eckhardt & McKey, *supra* note 17, at 86-87.

1. 569 S.W.2d 735 (Mo. En Banc 1978).

2. Apparently Schellert was convicted under RSMo § 561.460 (1978). Under the new criminal code which went into effect January 1, 1979, the amount

prosecuting attorney informed the court that the defendant's guilty plea was being made pursuant to a plea agreement in which the prosecutor had agreed to recommend probation. The judge asked the defendant if he understood that the prosecutor's recommendation was merely a recommendation, and that the court was free to impose different punishment. The defendant replied, "Yes, sir, I'm very well aware of that."[3] The court accepted[4] the guilty plea and ordered a pre-sentence investigation. On the date set for sentencing, appellant again appeared without the benefit of counsel. The judge again reminded the defendant that the court was not bound by the prosecutor's recommendation of probation and was free to impose whatever sentence it deemed appropriate. At no time prior to imposing the sentence did the trial judge expressly declare that he was not going to follow the recommendation. The court granted allocution and then sentenced the defendant to five years' imprisonment.

The defendant subsequently filed a rule 27.26 motion[5] in which he contended that his plea of guilty had been involuntary.[6] The trial court overruled his motion without an evidentiary hearing. The Missouri Court of Appeals, St. Louis District, affirmed the ruling.[7] After granting transfer, the Missouri Supreme Court reversed and remanded to the trial court for the entry of a new plea. Addressing only one major issue in its opinion, the supreme court overruled past Missouri precedent by holding that when there is a plea agreement which contemplates a recommendation by the prosecutor for a reduced sentence and the judge decides that he cannot follow this recommended sentence concession, the trial court is required to

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of the insufficient funds check would have had to exceed $150 to constitute a class D felony, where the maximum punishment exceeds six months.

3. 569 S.W.2d at 736.

4. The court also informed appellant of his rights being waived by the guilty plea and determined that there was a factual basis for the plea.

5. MO. R. CRIM. P. 27.26 provides in part:

> A prisoner in custody under sentence and claiming a right to be released on the ground that such sentence was imposed in violation of the Constitution . . . or is otherwise subject to collateral attack, may file a motion at any time in the court which imposed such sentence to vacate, set aside or correct the same . . . . Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, a prompt hearing thereon shall be held . . . . If the court finds that the judgment was rendered without jurisdiction or that the sentence imposed was illegal or otherwise subject to collateral attack, or that there was such a denial or infringement of the Constitutional rights of the prisoner as to render the judgment subject to collateral attack, the court shall vacate and set aside the judgment and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate . . . .

6. Appellant also contended that he had not knowingly and intelligently waived the assistance of counsel. Because of its disposition of the case on the involuntary plea issue, the supreme court did not discuss this contention.

7. The court of appeals held that the trial court had followed previously existing law in conducting the guilty-plea proceeding.

allow the defendant to withdraw his guilty plea. In addition the supreme court established a process to be followed in any guilty plea proceeding.

A long line of Missouri cases had held that a defendant could not withdraw his guilty plea as a matter of right.[8] *Schellert* changed this rule for the situation where the trial judge declines to follow the recommendation of the prosecutor. In an earlier case involving similar facts, *Brown v. State*,[9] the court emphasized that the defendant had not been misled by anyone into believing that the plea agreement was binding on the trial court, and that the prosecutor had made the agreed recommendation. The court in *Brown* reasoned that the fact that the defendant's plea resulted from bargaining did not prevent it from being voluntary, even though the recommendations for which the defendant had bargained were not allowed.[10] After considering rule 27.25,[11] which allows withdrawal of a guilty plea when necessary to correct manifest injustice, the court held that the failure of the trial court to follow the prosecutor's recommendation was not manifest injustice. The defendant in *Brown*, therefore, was granted no relief. In *Schellert*, the court expressly overruled its prior holding.

Schellert is important because, in addition to rejecting judicial precedent, the majority opinion sets out a procedure for conducting a guilty plea proceeding which complements that procedure set out by the concurring opinion in *Flood v. State*.[12] Taken together (and briefly summarized),

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8. Beach v. State, 488 S.W.2d 652 (Mo. 1972); Watson v. State, 446 S.W.2d 763 (Mo. 1969); Vaughn v. State, 443 S.W.2d 632 (Mo. 1969); State v. Tyler, 440 S.W.2d 470 (Mo. En Banc 1969); Young v. State, 438 S.W.2d 280 (Mo. 1969); Drew v. State, 436 S.W.2d 727 (Mo. 1969); State v. Mountjoy, 420 S.W.2d 316 (Mo. 1967); State v. Nielsen, 547 S.W.2d 153 (Mo. App., D. St. L. 1977); State v. Jackson, 514 S.W.2d 638 (Mo. App., D. St. L. 1974); Huffman v. State, 499 S.W.2d 565 (Mo. App., D.K.C. 1973).

9. 485 S.W.2d 424 (Mo. 1972).

10. *Id.* at 430.

11. MO. R. CRIM. P. 27.25 provides:

> A motion to withdraw a plea of guilty may be made only before sentence is imposed or when imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

12. 476 S.W.2d 529 (Mo. 1972). The court set out in full the following procedures:

> If defendant's plea is guilty:
> a. before accepting plea:
> (1) ascertain and make finding that defendant:
> (a) is acting voluntarily (if in doubt, consider whether the defendant should be given a mental examination, V.A.M.S. § 552.020);
> (b) fully understands his rights;
> (c) fully understands the consequences of his plea;
> (d) is in fact guilty;
> (2) explain and ask defendant if he understands:
> (a) that the court need not accept his plea unless satisfied of defendant's guilt and that the defendant fully understands

Flood and *Schellert* contemplate the following procedure when the defendant renders a guilty plea:

1. Before accepting the plea the trial judge should ascertain and make a finding that the defendant
   (a) is acting voluntarily;
   (b) fully understands his rights;
   (c) fully understands the consequences of his plea; and
   (d) is in fact guilty.
2. Before accepting the plea the judge should inquire whether there is a plea agreement.
   (a) If there is a plea agreement, the trial judge should:
      (i) require that it be disclosed on the record at the time the plea is offered; and
      (ii) accept or reject the agreement or defer the decision as

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his rights;
   (b) that if he pleads not guilty he would be entitled to a speedy and public trial by a judge or jury;
   (c) that at such trial the State would have to confront him with the witnesses upon whose testimony it relied to obtain a conviction, and he would have the right to cross-examine these witnesses;
   (d) that at such trial he would be presumed innocent until such time, if ever, as the State established his guilt by competent evidence to the satisfaction of the judge or jury beyond a reasonable doubt;
   (e) that at such trial he would be entitled to compulsory process to call witnesses;
   (f) the nature and essential elements of the charge to which he is pleading;
   (g) the range of penalties to which he is subjecting himself by his plea including the maximum sentence;
(3) ask defendant:
   (a) if any threats or promises have been made to induce him to plead guilty;
   (b) if he believes there is any understanding or if any predictions have been made to him concerning the sentence he will receive;
   (c) if he committed the offense;
   (d) just what he did (obtain admission of necessary acts, knowledge, and intent);
   (e) if he still wishes to plead guilty;
   (f) any additional questions required by the circumstances;
(4) ask defense counsel if he knows any reason why defendant should not plead guilty;

b. accept or reject plea;
c. if plea is rejected, or if defendant refuses to plead, enter a plea of not guilty and set date for trial;
d. if plea is accepted, enter an order finding that the plea is made voluntarily with understanding of the nature of the charge, and is therefore accepted.

Id. at 535-36 (Donnelly, J., concurring).

to acceptance or rejection until there has been an opportunity to consider the pre-sentence report.

(b) If the plea agreement contemplates the granting of sentencing concessions, the trial judge should give the agreement due consideration, but notwithstanding its existence, he should reach an independent decision on whether to grant the sentence concessions.

(c) If the court rejects the plea agreement, either at the time of the plea proceedings or at the time of sentencing, the court shall, on the record
  (i) inform the parties of that fact;
  (ii) advise the defendant personally that the court is not bound by the plea agreement;
  (iii) afford the defendant the opportunity then to withdraw his plea; and
  (iv) advise the defendant that if he persists in his guilty plea, the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

(d) If the agreement is rejected and the defendant wishes to withdraw his plea, if defendant refuses to plead, or if the plea is rejected, the court should enter a plea of not guilty, and set date for trial.

(e) If the plea is accepted, the court should enter an order finding that the plea is made voluntarily with understanding of the nature of the charge, and is therefore accepted.

This procedure articulated by *Schellert*[13] gets the plea agreement in the record. Further, it allows for withdrawal of guilty pleas when the trial court rejects the plea agreement.[14]

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13. The court in *Schellert* described the proper procedure as follows:
The trial judge should not accept a plea of guilty without first inquiring whether there is a plea agreement and, if there is one, requiring that it be disclosed on the record in open court, or on a showing of good cause, in camera, at the time the plea is offered. Thereupon the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report.

If the plea agreement contemplates the granting of sentence concessions by the trial judge, he should give the agreement due consideration, but notwithstanding its existence reach an independent decision on whether to grant sentence concessions. If the court rejects the plea agreement, either at the time of the plea proceedings or at the time of sentencing, the court shall, on the record inform the parties of that fact, advise the defendant personally in open court, or on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity then to withdraw his plea, and advise the defendant that if he persists in his guilty plea, the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

569 S.W.2d at 739.

14. This procedure is virtually identical to FED. R. CRIM. P. 11(e)(2) which

In practical effect the *Schellert* procedure amends[15] rule 27.25 by judicial decision.[16] It seems most likely that the "amendment" will be limited to cases where there is a rejected plea agreement.[17] In other situations, whether to allow withdrawal of the guilty plea will still rest in the sound discretion of the trial court.[18] For example, if the defendant merely discovers that the government's case is not as strong as he thought, he will not be allowed to withdraw his guilty plea.[19] An important factor that the trial court will consider is whether prejudice to the government has resulted from the guilty plea.[20]

> If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. Thereupon the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report.

FED. R. CRIM. P. 11(e)(4) provides:

> If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw his plea, and advise the defendant that if he persists in his guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

15. 569 S.W.2d at 740. The rule of *Schellert* is to operate prospectively only. This was done, presumably, to prevent the large number of rule 27.25 and rule 27.26 motions which would ensue if prisoners were allowed to assert that the trial judge had not followed these procedures in guilty plea proceedings occurring before *Schellert*. This is often done when this type of procedural decision is made. *See, e.g.*, King v. State, 553 P.2d 529 (Okla. Crim. App. 1976).

16. 569 S.W.2d at 740 (concurring opinion).

17. *See* the express terms of the *Schellert* rule in note 13 *supra*. There is a difference in the rights of defendants depending on whether there is a plea agreement. *See* Commonwealth v. Sutherland, 234 Pa. Super. Ct. 520, 524, 340 A.2d 582, 584 (1975). The guilty plea could become just a delay tactic if any guilty plea could be withdrawn before sentencing as a matter of right. In some jurisdictions, it could also become a ploy to get a different judge. *See* notes 69-72 and accompanying text *infra*.

18. 21 AM. JUR. 2d *Criminal Law* § 504 (1965).

19. Brady v. United States, 397 U.S. 742, 757 (1970).

20. United States *ex rel.* Culbreath v. Rundle, 466 F.2d 730 (3d Cir. 1972) (no prejudice to government shown, trial court should have allowed withdrawal); United States v. Savage, 561 F.2d 554 (4th Cir. 1977) (withdrawal not allowed as a matter of right, remanded for a determination of whether the government had been prejudiced by defendant's guilty plea); United States v. Tabory, 462 F.2d 352 (4th Cir. 1972) (withdrawal not allowed, probable prejudice to government); State v. Loyd, 291 Minn. 528, 190 N.W.2d 123 (1971) (no showing of prejudice, withdrawal allowed); Commonwealth v. Wilson, 234 Pa. Super. Ct. 7, 335 A.2d 777 (1975) (no prejudice shown, withdrawal allowed). *See* State v. Doherty, 261 N.W.2d 677 (S.D. 1978) (no prejudice shown, withdrawal allowed); ABA STANDARDS, PLEAS OF GUILTY § 2.1(b) (1968).

The *Schellert* opinion points out the pervasiveness of the practice of plea bargaining.[21] Although some commentators have argued that plea bargaining should be eliminated,[22] the Missouri Supreme Court has given formal recognition[23] to plea bargaining in Missouri[24] and has recognized it as a highly desirable part of the criminal justice process.[25] The *Schellert* procedure requires that if the guilty plea results from a plea agreement, then that agreement must be made a part of the record. This seems to have eliminated the problem of a defendant denying that there was a plea agreement at trial and later claiming that his guilty plea was induced by a promise which was never fulfilled.[26] In fact, if the trial courts follow the *Schellert* and *Flood* procedures, practically all guilty plea convictions should be insulated from subsequent collateral attack.[27]

The *Schellert* rule also allows for withdrawal of the defendant's guilty plea as a matter of right when the plea agreement has been rejected.[28] This precise issue has never been passed upon by the United States Supreme Court.[29] There is a split of authority among the many courts that have confronted the issue, and it is difficult to determine which is the majority posi-

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21. Reliable statistical information is limited but some estimates indicate that guilty pleas account for the disposition of as many as 95% of all criminal cases with a substantial number of these resulting from plea discussions. 8 MOORE'S FEDERAL PRACTICE ¶ 11.01[4], at 11-11 (2d ed. 1978).

22. *See, e.g.*, Parnes & Atkins, *Abolishing Plea Bargaining: A Proposal*, 14 CRIM. L. BULL. 101 (1978).

23. Apparently the Missouri Supreme Court concurred in this position taken by State v. Doherty, 261 N.W.2d 677, 681 (S.D. 1978), that "[a]lthough the current high visibility of plea bargaining has stirred much controversy, recognition of the existence of plea bargaining, with proper supervision, is preferable to nonrecognition which would not eradicate the practice but merely return it to the unsupervised and unpublicized manner practiced in years past." *Doherty* relied upon Raines v. United States, 423 F.2d 526 (4th Cir. 1970).

24. "Properly administered it should be used and should be encouraged." 569 S.W.2d at 739.

25. Plea bargaining is characterized as "an essential component of the criminal justice system, satisfying many useful purposes." 569 S.W.2d at 739.

26. This problem is illustrated in United States v. Hammerman, 528 F.2d 326 (4th Cir. 1975). The problem also surfaced in a line of Missouri cases. The leading case was Burgin v. State, 522 S.W.2d 159 (Mo. App., D.K.C. 1975). *Burgin* and its progeny, including Williams v. State, 560 S.W.2d 887 (Mo. App., D. St. L. 1978); Giggar v. State, 560 S.W.2d 870 (Mo. App., D.K.C. 1977); and Mainord v. State, 541 S.W.2d 779 (Mo. App., D. St. L. 1976), all involved claims by the appellants that they had been instructed by their lawyers to deny the existence of any agreement with the prosecutor.

27. Boykin v. Alabama, 395 U.S. 238, 244 (1969).

28. An interesting question, not raised by *Schellert*, is whether the defendant must assert his innocence in this situation. *Cf.* State v. Griffin, 238 N.W.2d 780, 781 (Iowa 1976) (defendant need not assert his innocence).

29. Neely v. Pennsylvania, 411 U.S. 954 (1973) (dissenting opinion). The right to withdraw has been discussed in dissents in Dukes v. Warden, 406 U.S. 250, 259 (1972) and Santobello v. New York, 404 U.S. 257, 267 (1971).

tion.[30] It does seem that there is a trend toward deciding the issue in the same way that *Schellert* has decided it,[31] although there is authority which takes the opposite view.[32]

Those states which do not allow withdrawal of the guilty plea in this situation are promoting the public policy of preserving the independence of the trial court[33] from the plea bargaining process.[34] These jurisdictions do not want anything to fetter the discretion of the trial judge.[35] States like Missouri which do allow withdrawal of guilty pleas as a matter of right when the judge declines to follow the prosecutor's recommendation[36] are promoting the public policy of "substantial fairness" to the defendant.[37]

30. *Compare* Alschuler, *The Trial Judge's Role in Plea Bargaining, Part 1*, 76 COLUM. L. REV. 1059, 1072 (1976) ("most state courts have refused to permit defendants to withdraw their guilty pleas when prosecutorial recommendations have been disregarded") *with* Comment, *Withdrawal of the Plea of Guilty Upon a Decision by the Judge Not to Accept the Plea Agreement*, 8 ST. MARY'S L.J. 342, 353 (1976) ("[t]he majority of courts dealing with the issue have permitted withdrawal when the judge fails to incorporate the agreement in his sentence").

31. Three state supreme courts decided cases with the same issue as *Schellert* during 1978. All three reached the same result as *Schellert*. People v. Wright, 573 P.2d 551 (Colo. 1978); Eller v. State, 92 N.M. 52, 582 P.2d 824 (1978); State v. Doherty, 261 N.W.2d 677 (S.D. 1978). Other fairly recent cases which agree with the *Schellert* result are State v. Griffin, 238 N.W.2d 780 (Iowa 1976); State v. Goodrich, 116 N.H. 477, 363 A.2d 425 (1976); King v. State, 553 P.2d 529 (Okla. Crim. App. 1976).

32. United States v. Savage, 561 F.2d 554 (4th Cir. 1977); United States v. Futeral, 539 F.2d 329 (4th Cir. 1975); Miles v. Parratt, 543 F.2d 638 (8th Cir. 1976); United States v. Henderson, 565 F.2d 1119 (9th Cir. 1977); United States v. Sarubbi, 416 F. Supp. 633 (D.N.J. 1976); State v. Cagnina, 113 Ariz. 387, 555 P.2d 345 (1976); State v. Adams, 342 So. 2d 818 (Fla. 1977); State v. Gumienny, 58 Hawaii 304, 568 P.2d 1194 (1977); People v. Lambrecht, 69 Ill. 2d 544, 372 N.E.2d 641 (1977); Haver v. State, 162 Ind. App. 93, 317 N.E.2d 884 (1974); Kane v. State, 114 R.I. 406, 333 A.2d 684 (1975); Cruz v. State, 530 S.W.2d 817 (Tex. Crim. App. 1975); State v. Garfield, 552 P.2d 129 (Utah 1976); *In re* Hughes, 19 Wash. App. 155, 575 P.2d 252 (1978).

33. A couple of questions regarding the independence of trial judges were not raised by *Schellert* but are quite interesting. First, are there occasions when it would be error for the trial judge not to accept the agreement? According to United States v. Ammidown, 497 F.2d 615 (D.C. Cir. 1973), the answer is yes. Stewart v. State, 568 P.2d 1297 (Okla. Crim. App. 1977), on the other hand, says no. Secondly, can the trial judge insist that specific terms be included in the agreement? People v. Bennett, 16 Ill. App. 3d 972, 307 N.E.2d 176 (1974) says no.

34. State v. Gumienny, 58 Hawaii 304, 307, 568 P.2d 1194, 1197 (1977).

35. *In re* Hughes, 19 Wash. App. 155, 575 P.2d 252 (1978); *See* State v. Cagnina, 113 Ariz. 387, 555 P.2d 345 (1976); State v. Gumienny, 58 Hawaii 304, 568 P.2d 1194 (1977); Cruz v. State, 530 S.W.2d 817 (Tex. Crim. App. 1975); State v. Garfield, 552 P.2d 129 (Utah 1976); TEX. R. CRIM. P. ANN. 26.13 (Vernon) (Supp. 1978).

36. The language actually used in *Schellert* is "rejects the agreement." *See* note 13 *supra*. For the potential significance of this distinction, *see* text accompanying notes 55-68 *infra*.

37. 569 S.W.2d at 737.

Schellert stands for the proposition that it is substantially unfair for the defendant to be persuaded to enter the bargain with hopes of a sentence concession, only to have a judge impose an entirely different and harsher sentence. "To say in these circumstances that all which was bargained for and agreed to was fulfilled by the prosecutor's mere act of recommending probation would reduce the bargain to a trap, or, at best, a formality."[38] The defendant's "reasonable" expectation that his bargain will be carried out should not be frustrated.[39]

The reason that the defendant pleads guilty in return for a sentence recommendation from the prosecutor is often to avoid the risk which results from jury trials. If the defendant were taking the same sentencing risk with a guilty plea,[40] it would be foolish for the defendant to waive his constitutional rights[41] by pleading guilty. Since a guilty plea results in a waiver of several constitutional rights, the guilty plea must be scrutinized to see that it is knowing and voluntary. The due process clause of the fourteenth amendment to the United States Constitution has been interpreted to mandate that every guilty plea be entered knowingly and voluntarily.[42] The courts require that the record must disclose that this requirement has been met.[43]

The possibility that the defendant will misunderstand the guilty plea proceeding presents another policy reason for allowing withdrawal of the plea. Despite the fact that the trial judge warns the defendant that the court is not bound by the prosecutor's recommendation, the defendant may very well have the impression that the warning is just a formality; that

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38. People v. Wright, 573 P.2d 551, 553 (Colo. 1978), *quoting* Thomas v. State, 327 So. 2d 63, 64 (Fla. App. 1976).

39. *See* McMahon v. State, 569 S.W.2d 753, 758 (Mo. En Banc 1978).

40. Even if there is no plea agreement, some defendants may plead guilty because they think the judge will be more lenient with them than if they were found guilty after exercising their constitutional right to a trial by jury. This notion is referred to as "implicit plea bargaining." In United States v. Resnick, 483 F.2d 354 (5th Cir. 1973), the defendant presented a unique argument. The defendant had been offered a plea agreement with a recommended sentence which the trial court had indicated was acceptable. The defendant decided not to accept the plea agreement offer and pled not guilty. He was found guilty and received a sentence which was harsher than the one that the judge had earlier found to be acceptable. The defendant's argument was that he was being punished for exercising his fifth and sixth amendment rights. His argument was rejected, but it does seem to have some merit. If the trial judge does, as a matter of routine, give stiffer sentences to those who plead not guilty, then it seems that "implicit plea bargaining" does infringe on the fifth and sixth amendment rights of the defendant.

41. A guilty plea constitutes a waiver of the right to a jury trial, to confront one's accusers, to present witnesses in one's defense, to remain silent, and to be convicted by proof beyond reasonable doubt. Santobello v. New York, 404 U.S. 257, 264 (1971) (Douglas, J., concurring).

42. *See* Boykin v. Alabama, 395 U.S. 238, 242 (1969).

43. *Id.* at 243.

as a practical matter the judge always goes along with the recommendation.[44] In *Schellert*, the supreme court recognized the very real danger that from the defendant's viewpoint this warning may be seen as mere courtroom rhetoric.[45]

An important question that *Schellert* does not answer is whether the Missouri courts now have a certain ritual that *must* be followed. If there is a deviation from the procedure recommended by Judge Donnelly's concurring opinion in *Flood v. State*,[46] or from the procedure set out in *Schellert*[47] for disclosure of plea agreements, would this be sufficient to give the defendant the right to withdraw his guilty plea? If a certain ritual is required in the plea proceeding, a deviation from the ritual would be presumed prejudicial error and the defendant would be entitled to plead anew.[48] *McMahon v. State*,[49] handed down the same day as *Schellert*, probably has put this question to rest in Missouri. *McMahon* provides that "the test of whether a plea is voluntarily and intelligently made is not whether a particular ritual is followed or whether each and every detail is explained to a defendant but whether the plea in fact is intelligently and voluntarily made."[50]

There also may be some question as to how specific the trial judge must be in rejecting the plea agreement. *Schellert* says the court must "inform the parties of that fact."[51] Will the defendant and his counsel be able to distinguish the court's rejection of the agreement from his customary warning that the court is not bound by the plea agreement? Must the trial judge affirmatively and specifically offer the defendant a chance to withdraw his plea? When must this offer be made? *McMahon* may again be of some help in resolving these ambiguities. The *McMahon* fact situation was similar to *Schellert*. Pursuant to a plea agreement the prosecutor had recommended a sentence of five to eight years. The trial judge in *McMahon*, unlike the one in *Schellert*, informed the defendant at the guilty plea proceeding that "I don't want you to think you may get by with only five or eight years, do you understand that?" The defendant replied in the

44. *See, e.g.*, Alschuler, *supra* note 30, at 1064. A sample of 1000 cases in Houston involving ten judges is discussed. Three of the judges followed the prosecution's recommendations in 100% of the cases. One judge followed the recommendation in 88% of the cases. The remaining judges followed the recommendation in 92-99% of the cases. *See* United States v. Henderson, 565 F.2d 1119, 1123 (9th Cir. 1977); State v. Goodrich, 116 N.H. 477, 479, 363 A.2d 425, 426 (1976); D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 48 (1966).

45. 569 S.W.2d at 738. *See* Blackledge v. Allison, 431 U.S. 63, 78 (1977); Alschuler, *supra* note 30, at 1065-69.

46. The procedure is set out in note 12 *supra*.

47. The procedure is set out in note 13 *supra*.

48. McCarthy v. United States, 394 U.S. 459, 463-64 (1969).

49. 569 S.W.2d 753 (Mo. En Banc 1978).

50. *Id.* at 758.

51. 569 S.W.2d at 739.

affirmative. The trial judge then inquired, "You still want to plead guilty knowing that?"[52] The defendant persisted in his guilty plea, and the sentence was for thirteen years. On this record, the Missouri Supreme Court held that the guilty plea proceeding complied "in essence with the principles laid down in *Schellert*."[53] The supreme court did not allow the defendant to withdraw his plea. It did, however, make a suggestion to trial courts that the better practice would be "for the trial court *at the time of sentencing* and after receiving a presentence investigation to then inform the defendant and counsel that the court rejects the plea agreement and *at that time* afford the defendant an opportunity to withdraw his plea."[54]

Despite the *Schellert* decision, there are several unresolved questions remaining in the area of the withdrawn guilty plea. One involves the meaning of the word "reject." The crucial condition precedent to a defendant gaining the right to withdraw his plea is that the trial court "rejects the plea agreement."[55] Though the meaning of "reject" may seem obvious, several courts have had difficulty determining its meaning in this context. The federal courts, in interpreting Federal Rule of Criminal Procedure 11(e), have reached a surprising result. *United States v. Sarubbi*[56] is the leading case; it reaches the conclusion that "nonacceptance of the *request* is not a rejection of the *agreement*, and so is not within Rule 11(e)[4]."[57] The court looked to congressional intent and decided that "Congress would have had no reason to use the critical language for the type B[58] agreement unless it meant that the *agreement* could be both approved and satisfied even though the *recommendation* or *request* failed to persuade the court to impose the very sentence recommended or requested."[59] *Sarubbi* was followed and its rationale adopted in both *United States v. Savage*[60] and *United States v. Henderson*.[61] The interpretation of the federal rule is that a judge can give a more severe sentence than that recommended without rejecting the agreement. Thus, in the *Schellert* fact situation the federal courts which have confronted the issue would say the

52. McMahon v. State, 569 S.W.2d 753, 760 (Mo. En Banc 1978).
53. *Id.*
54. *Id.* (emphasis added).
55. 569 S.W.2d at 739.
56. 416 F. Supp. 633 (D.N.J. 1976).
57. *Id.* at 636 (court cites FED. R. CRIM. P. 11(e)(1), although obviously intending to refer to 11(e)(4)).
58. FED. R. CRIM. P. 11(e)(1) provides for three types of plea agreements. Type *A* allows the attorney for the government to "move for dismissal of other charges." Type *B* allows the attorney for the government to "make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court." Type *C* allows the attorney for the government to "agree that a specific sentence is the appropriate disposition of the case."
59. United States v. Sarubbi, 416 F. Supp. 633, 636-37 (D.N.J. 1976).
60. 561 F.2d 554 (4th Cir. 1977).
61. 565 F.2d 1119 (9th Cir. 1977).

defendant has no right to withdraw his guilty plea. *Henderson*, however, does suggest that a judge who is going to impose a sentence that is substantially more onerous than that recommended ought to allow the defendant to withdraw his guilty plea, even though the rule does not so require.[62]

The supreme courts of two states have expressly rejected the *Sarubbi* line of cases. *Eller v. State*[63] says the *Sarubbi* interpretation is too narrow. "If the trial court rejects the 'plea agreement' the defendant must be given an opportunity to withdraw his plea. It is implicit in a plea agreement that the court will either accept the recommendation and plea to the charges, or reject *both* the recommendation and the plea."[64] *State v. Doherty*[65] solved the problem by using a different approach. The court expressly disapproved of a "sentence recommendation."[66] The guideline adopted was that the prosecuting attorney should either agree not to oppose the defendant's request or agree that a particular sentence is proper. When handled in this manner, the defendant will not be as apt to be misled by the trial court's sentencing prerogatives.[67] The *Doherty* court reasoned that this approach would promote the two policies that other courts have thought to be conflicting. The trial court retains its sentencing discretion by being able to reject any sentence concession that it considers inappropriate. At the same time, this approach prevents any confusion and misunderstanding on the part of a defendant who has pled guilty on the basis of a promise for a sentence recommendation which he has been led to believe will be followed by the court.

Schellert did not expressly disapprove of the *Sarubbi* line of cases as had both *Eller* and *Doherty*. The procedure established in *Schellert* is virtually identical to the federal procedural rule interpreted by *Sarubbi*, and the federal rule is cited with approval by the *Schellert* court.[68] Thus, it is arguable that the federal interpretation of the rule should be followed in Missouri. The actual disposition of the *Schellert* case, however, rebuts this argument and leads one to believe that Missouri courts will handle the problem as both *Eller* and *Doherty* have done.

A second unresolved question remaining after *Schellert* is whether the defendant who withdraws his guilty plea as a matter of right is entitled to a different judge when he does so. Suppose the defendant pleads guilty as a result of a plea bargain. Pursuant to the bargain, the prosecutor recommends a light sentence. According to *Schellert*, the trial judge must satisfy himself that there is a factual basis for the plea.[69] After doing so the judge

62. *Id.* at 1123.
63. 92 N.M. 52, 582 P.2d 824 (1978).
64. *Id.* at 53, 582 P.2d at 825.
65. 261 N.W.2d 677 (S.D. 1978).
66. *Id.* at 681.
67. *Id.*
68. 569 S.W.2d at 737 (former rule 11); *id.* at 740 (Finch, J., concurring).
69. *E.g.*, FED. R. CRIM. P. 11(f); Flood v. State, 476 S.W.2d 529, 536 (Mo. 1972) (Donnelly, J., concurring); ABA PROJECT ON MINIMUM STANDARDS FOR

decides to give a harsher sentence than the one recommended. The trial court then offers the defendant an opportunity to withdraw his guilty plea. If the defendant does withdraw his plea, it will be prejudicial to the defendant to have this same judge hear his case. The question then devolves to whether the defendant is entitled to a new judge automatically in this situation, or whether the original judge need recuse himself only at his discretion. A few cases have indicated that the defendant is entitled to a different judge,[70] but most cases which present this fact situation are silent on the question. One may infer, however, that if those courts which remained silent had thought it necessary to remove this decision from the trial court's discretion, then they would specifically have done so. One case in which the defendant asked for a per se rule that a judge who rejects a guilty plea should not be allowed to preside at the subsequent jury trial was *United States v. Gallington*.[71] *Gallington* held that a judge may recuse himself and should give serious consideration to doing so, but left it in the sound discretion of the trial judge.[72] As where a criminal case is remanded to the trial court after appeal, the same trial judge may preside over the case a second time as a matter of routine.

A third unsettled question remaining after *Schellert* is whether specific performance of the plea agreement is ever an acceptable remedy.[73] *Schellert* only discusses the remedy of allowing the defendant to withdraw his plea when the plea agreement becomes aborted. There are times, however, when withdrawal of the plea will not restore the defendant to his pre-agreement position. For example, the defendant may have cooperated with the police[74] or may have given testimony for the prosecution. As a

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CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY § 1.6 (1968).

70. United States *ex rel.* Culbreath v. Rundle, 466 F.2d 730 (3d Cir. 1972); United States v. Hammerman, 528 F.2d 326 (4th Cir. 1975); People v. Kaanehe, 19 Cal. 3d 1, 559 P.2d 1028, 136 Cal. Rptr. 409 (1977); People v. Lambrecht, 69 Ill. 2d 544, 372 N.E.2d 641 (1977); Commonwealth v. Wilson, 234 Pa. Super. Ct. 7, 335 A.2d 777 (1975); Commonwealth v. Barrett, 223 Pa. Super. Ct. 163, 299 A.2d 30 (1972). *Contra*, United States v. Gallington, 488 F.2d 637 (8th Cir. 1973).

71. 488 F.2d 637 (8th Cir. 1973).

72. *Id.* at 639-40.

73. *Compare* People v. Kaaneke, 19 Cal. 3d 1, 559 P.2d 1028, 136 Cal. Rptr. 409 (1977) (recognizing availability of specific performance in an appropriate case) *and* People v. Johnson, 10 Cal. 3d 868, 519 P.2d 604, 112 Cal. Rptr. 556 (1974) (no specific enforcement where judge withdrew his prior approval of a plea bargain) *with* Davis v. State, 308 So. 2d 27 (Fla. 1975) (plea bargain not specifically enforceable). *See generally* Note, 9 CONN. L. REV. 483 (1977).

74. State v. Giuliano, 270 N.W.2d 33 (S.D. 1978), points out some problems with this type plea agreement. In *Giuliano,* the police investigation went bad and the prosecutor claimed that the defendant had not performed his part of the bargain. The defendant claimed he was prejudiced by having to withdraw his plea. His conviction was affirmed, but an opinion concurring in part and dissenting in part stated that a trial court should reject any plea agreement whose terms cannot be determined until long after the guilty plea is entered. 270 N.W.2d at 40.

result, the defendant may have less bargaining power, or may have given evidence incriminating himself. While it is true that his actual statements cannot be used as an admission[75] when the plea is withdrawn, the defendant's position nonetheless may have been weakened.

The *Schellert* decision promotes both judicial efficiency and fairness to individual defendants. It should increase the number of bargained guilty pleas by removing the gamble from this type of bargain.[76] The decision should also lessen the number of rule 27.25 and rule 27.26 motions and habeas corpus petitions on the ground of an involuntary guilty plea.[77]

Schellert, however, has important implications for prosecutors, trial judges, and defense attorneys. Prosecutors would be wise to retain their evidence against the defendant even after he pleads guilty. They should always be prepared for a possible withdrawal of the plea. Most importantly, prosecutors should not make plea agreements to which the judge is unlikely to agree. Trial judges should follow the procedures of *Flood* and *Schellert* exactly. They should make it very clear to the defendant that they are rejecting the agreement when they intend to levy a sentence stiffer than the one recommended. In cases where it has discretion, the trial court should be liberal in allowing withdrawal.[78] If these suggestions are not carefully followed, *Schellert* could give rise to more rule 27.25 and rule 27.26 motions rather than fewer. The defense attorney should not allow the remedy provided by *Schellert* to lull him into a false sense of security. After the defendant has gone through the guilty plea procedure and the judge has rejected the agreement, withdrawal may not be a realistic option,[79] particularly if it is probable that he will have the same judge presiding over his jury trial.

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75. State v. Hoopes, 534 S.W.2d 26 (Mo. En Banc 1976).

76. *See, e.g.*, Alschuler, *supra* note 30, at 1064. The cited material discusses a sample of 1000 actual cases. The judge who followed the prosecution's recommendation the least often also had the fewest number of guilty pleas in his courtroom. It may be inferred from this small sample that the less apt the judge is to follow the prosecutor's recommendation, then the less apt the defendant is to enter a plea agreement of this type.

77. *See* Flood v. State, 476 S.W.2d 529, 537 (Mo. 1972) (Donnelly, J., concurring).

78. *E.g.*, United States *ex rel.* Culbreath v. Rundle, 466 F.2d 730 (3d Cir. 1972). The law prefers a trial on the merits. United States v. Klein, 560 F.2d 1236 (5th Cir. 1977); State v. Cochran, 332 Mo. 742, 745, 60 S.W.2d 1, 2 (1933).

79. *See* Alschuler, *supra* note 30, at 1072.