The Standard of Proof Necessary to Establish that a Defendant has Materially Breached a Plea Agreement

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THE STANDARD OF PROOF NECESSARY TO ESTABLISH THAT A DEFENDANT HAS MATERIALLY BREACHED A PLEA AGREEMENT

INTRODUCTION

Plea bargaining has become the most common method of criminal case disposition in the United States. Each party stands to benefit from a plea bargain. The defendant bargains in order to receive the most lenient treatment the court will afford him. The prosecutor bargains because neither he nor the courts have the time or resources to prosecute fully every criminal case.

Plea bargaining serves a valuable social function only if both parties comply with the agreement. A plea agreement is essentially a contract, 


2. See Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978); Brady v. United States, 397 U.S. 742, 752 (1970); H. Lummus, The Trial Judge 46 (1937); Alschuler, The Changing Plea Bargaining Debate, 69 Calif. L. Rev. 652, 652 (1981). See also United States v. Ramos, 572 F.2d 360, 363 n.2 (2d Cir. 1978) (indicating the legitimacy of "extend[ing] leniency to a defendant who is willing to cooperate with the government") (Lumbard, J., concurring); Fielding v. LeFevre, 548 F.2d 1102, 1106 (2d Cir. 1977) (offer of more lenient sentence upon a plea of guilty involves no constitutional violation); United States v. Rodriguez, 429 F. Supp. 520, 524 n.5 (S.D.N.Y. 1977) (same); United States v. Wiley, 184 F. Supp. 679, 685 (N.D. Ill. 1960) ("[I]t is incorrect . . . to say . . . that a 'more severe sentence' is imposed on one who stands trial. Rather, it is more correct . . . to say that a defendant who stands trial is sentenced without leniency . . ."). It is interesting to note, however, that the Supreme Court has upheld the right of a court to consider a defendant's failure to cooperate after pleading guilty, and therefore impose a more severe sentence on the defendant. See Roberts v. United States, 445 U.S. 552, 559-62 (1980).

3. See Blackledge v. Allison, 431 U.S. 63, 71 (1977); Santobello v. New York, 404 U.S. 257, 260 (1971) ("If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.").

4. See infra note 37 and accompanying text.

5. See United States v. Verrusio, 803 F.2d 885, 887 (7th Cir. 1986); United States v. Fields, 766 F.2d 1161, 1168 (7th Cir. 1985); United States v. Mooney, 654 F.2d 482, 486 (7th Cir. 1981); United States v. Krasn, 614 F.2d 1229, 1233 (9th Cir. 1980); United States v. Arnett, 628 F.2d 1162, 1164 (9th Cir. 1979); United States v. McIntosh, 612 F.2d 835, 837 (4th Cir. 1979); State v. Makinson, 35 Wash. App. 183, 185, 665 P.2d 1376, 1377 (1983) (McInturff, J., dissenting); In re Palodichuk, 22 Wash. App. 107, 110, 589 P.2d 269, 271 (1978). But see United States ex rel. Selikoff v. Commissioner of Cor-
and thus a legally enforceable exchange of promises, the breach of which affords a legal remedy. If a party breaches the plea agreement, it may not be enforced against the non-breaching party. The non-breaching party, on the other hand, is entitled to relief in the form of either rescission or specific performance.

This contract, however, is unlike other contracts because of its constitutional implications. Because a plea bargain involves a guilty plea by the defendant, which entails a waiver of several important fifth and sixth amendment rights, the defendant has a due process interest in this agreement. Similarly, because the government is held to a high level of performance when it makes a promise to a citizen, the defendant also

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7. See, e.g., Mabry v. Johnson, 467 U.S. 504, 509 (1984) ("when the prosecution breaches its promise with respect to an executed plea agreement, the defendant pleads guilty on a false premise, and hence his conviction cannot stand"); United States v. Wood, 780 F.2d 929, 932 (11th Cir.) (per curiam) (defendant's "substantial breach" of an agreement made the prosecutor's promise unenforceable), cert. denied, 107 S. Ct. 97 (1986); United States v. Donahue, 529 F.2d 831, 832 (5th Cir.) (where defendant did not live up to her part of agreement, government was freed from obligation to perform as promised), cert. denied, 429 U.S. 828 (1976); United States v. Simmons, 537 F.2d 1260, 1261-62 (4th Cir. 1976) (same); State v. Warren, 124 Ariz. 396, 401, 604 P.2d 659, 665 (Ct. App. 1979) (where defendant is found to have breached plea agreement, state will no longer be bound to perform under agreement); Gamble v. State, 95 Nev. 904, 907-08, 604 P.2d 335, 336-37 (1979) (per curiam) (prosecutor who can prove in pre-trial hearing that defendant has materially breached a plea agreement is released from its obligations under that agreement); State v. Hall, 32 Wash. App. 108, 109-10, 645 F.2d 1143, 1145 (1982) (when prosecutor breaches an agreement defendant is entitled to withdraw his plea or have agreement specifically enforced; if defendant breaches agreement, it cannot be enforced against prosecutor); State v. Bangert, 131 Wis. 2d 246, 289, 389 N.W.2d 12, 33 (1986) (material and substantial breach of the plea agreement by prosecutor entitles defendant to withdraw guilty plea). See also Santobello v. New York, 404 U.S. 257, 262-63 (1971) (when defendant pleads guilty in reliance on prosecutor's promise, prosecutor must fulfill that promise, because if he breaks it, the defendant is not bound to agreement but rather, is entitled to relief in the form of either specific performance or withdrawal of his guilty plea).

8. See infra note 69.

9. See infra note 70.

10. See infra note 49.

11. See infra note 84 and accompanying text.

12. See infra note 85.

13. See Palermo v. Warden, 545 F.2d 286, 296 (2d Cir. 1976) ("[F]undamental fairness and public confidence in government officials require that prosecutors be held to 'meticulous standards of both promise and performance.'") (quoting Correale v. United States, 479 F.2d 944, 947 (1st Cir. 1973)), cert. dismissed, 431 U.S. 911 (1977); Geisser v. United States, 513 F.2d 862, 863 (5th Cir. 1975) ("This is an extraordinary case calling for extraordinary action. It is a case of the great United States going back on its word in..."
has a due process interest in being assured that the government does not break its promise unless he has materially breached his end of the bargain.\textsuperscript{14} When a person has any "interest" for purposes of due process, he cannot be deprived arbitrarily of that interest by the government.\textsuperscript{15} Thus, procedural due process dictates that if the defendant is alleged to have breached his plea agreement, he must be afforded a hearing to determine whether he in fact has breached.\textsuperscript{16} The government cannot unilaterally declare itself free from its obligations to the defendant.\textsuperscript{17}

The question remaining, however, is what process is due within that hearing.\textsuperscript{18} In cases in which a defendant is alleged to have broken his plea agreement by misconduct\textsuperscript{19} amounting to a material breach, the courts are divided on the question of the standard of proof the government must meet to establish the defendant’s breach.\textsuperscript{20}

This Note explores the standards of proof used in a defendant's pre-deprivation hearing.\textsuperscript{21} Part I discusses plea bargaining generally, ex-
plains the contractual aspects of plea bargains, and identifies the source of the constitutional implications of plea agreements. Part II outlines the division of authority on the issue of the standard of proof, discusses the rationale behind each standard of proof and applies these rationales to the pre-deprivation hearing. This Note concludes that the most appropriate standard to adopt is preponderance of the evidence.

I. Plea Bargaining: General Background

A plea bargain is an agreement between a prosecutor and a criminal defendant. Typically, a prosecutor initiates the agreement with an offer to drop some of the charges against the defendant or to make a favorable sentence recommendation to the court in exchange for the defendant's guilty plea to a lesser offense. A prosecutor often bargains for something in addition to the defendant's guilty plea, such as testimony in another criminal prosecution. Although a prosecutor has wide discretion to decide whether to plea bargain with a defendant and on what terms, he cannot compel a defendant to accept a plea bargain or to plead guilty, since a guilty plea involves the defendant's unilateral waiver of fifth and sixth amendment rights. The defendant, on the other hand,

before trial. For a discussion of the various procedures adopted by courts, see United States v. Verrusio, 803 F.2d 885, 888-89 (7th Cir. 1986). In procedural due process cases, a hearing prior to any deprivation should be afforded, unless "the state successfully demonstrates that 'some valid government interest is at stake that justifies postponing the hearing until after the event.'" Tribe, supra note 15, at 544.


23. See United States v. Verrusio, 803 F.2d 885, 886-87 (7th Cir. 1986); United States v. Donahey, 529 F.2d 831, 832 (5th Cir.) (per curiam), cert. denied, 429 U.S. 828 (1976). For other examples of such exchanges, see United States v. McCarthy, 445 F.2d 587, 591 (7th Cir. 1971) (defendant agreed to make full payment of all taxes, penalties and interest in addition to pleading guilty to tax evasion); State v. Warren, 124 Ariz. 396, 399, 604 P.2d 660, 663 (Ct. App. 1979) (defendant agreed to cooperate with both federal and state authorities and provide information relating to a homicide); State v. Marino, 100 Wash. 2d 719, 720-21, 674 P.2d 171, 172 (1984) (en banc) (defendant agreed to successfully complete several therapy programs for child abuse); State v. Morley, 35 Wash. App. 45, 46-47, 665 P.2d 419, 420 (1983) (defendant agreed to enter an alcohol rehabilitation program and maintain good behavior while on probation).


has no absolute right to plea bargain in the first instance.27

Once the parties agree, the defendant enters a guilty plea with the court. After the judge has ascertained that the plea is voluntary28 and intelligent,29 he has the authority to accept or reject the plea. The defendant has no absolute constitutional right to have a guilty plea accepted by a court.30 Until the judge accepts the plea and incorporates it into the judgment of the court,31 the plea bargain is only an executory agreement.32 Once the plea is accepted, however, the agreement is binding and constitutionally enforceable.33 At that point the government must perform its part of the agreement, unless it is determined, in a hearing that comports with due process, that the defendant is not entitled to have the agreement enforced because he has materially breached.34

The Supreme Court has explained the pervasiveness of plea bargaining in terms of the "mutuality of advantage" it confers on both defendants and prosecutors.35 The Court has stated that because each party receives

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27. See Weatherford v. Bursey, 429 U.S. 545, 561 (1977); Cooper v. United States, 594 F.2d 12, 19-20 (4th Cir. 1979); Wright, supra note 25, § 175.1, at 637 n.8.
28. See infra note 84.
29. See infra note 84.
31. As is apparent from the courts' actions, a guilty plea must be accepted by a court in order to be valid. See, e.g., Santobello v. New York, 404 U.S. 257, 258 (1971) (in describing the facts as they occurred in the court below, the Court stated that after the defendant pleaded guilty, the judge then accepted the plea); United States v. Simmons, 537 F.2d 1260, 1261 (4th Cir. 1976) (after defendant pleaded guilty the judge accepted plea); United States v. Resnick, 483 F.2d 354, 358 (5th Cir.) (defendant may withdraw his guilty plea if the judge does not accept it), cert. denied, 414 U.S. 1008 (1973).
32. "A plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest. It is the ensuing guilty plea that implicates the Constitution." Mabry v. Johnson, 467 U.S. 504, 507-08 (1984) (footnote omitted).
33. Id. at 507-08. See also Santobello v. New York, 404 U.S. 257, 267 (1971) (Douglas, J., concurring) (when a prosecutor breaks a binding agreement with a defendant, the defendant is entitled to relief in the form of either specific performance or withdrawal of his guilty plea, which is to be determined by deciding which remedy due process requires in the particular circumstances of his case).
a substantial benefit from the process and because it reduces the already overburdened criminal court docket, it is not only "essential," but "it is to be encouraged."37

For the defendant whose chances of acquittal are low, plea bargaining limits his probable penalty38 because he is pleading guilty to a lesser offense, or receiving a recommendation for a lower sentence. In addition, plea bargaining limits both the defendant's idleness during pre-trial confinement39 and the inconvenience and expenses of trial,40 because once the defendant pleads guilty, he is convicted automatically, and only sentencing remains.41 For the prosecutor, plea bargaining conserves his limited time and resources for cases where there is weak proof of the defendant's guilt.42 In addition, because the defendant begins serving his sentence immediately, plea bargaining protects the public from dangerous persons who otherwise may engage in further criminal activity while on pre-trial release,43 and expedites the process of rehabilitation.44

[48x113]note 1, § 20.1, at 775 (quoting Brady, 397 U.S. at 752 (1970)).


A. The "Constitutional Contract" Theory of Plea Bargains

Although a plea bargain is essentially a contract, it is a peculiar creature of contract law. The exchange that effectuates the agreement is the defendant's guilty plea and its attendant waiver of constitutional rights. Acceptance of the guilty plea by the court validates the agreement and the waiver. A defendant who plea bargains thus has a due process interest in assuring that the state will not arbitrarily deny him the fulfillment of that agreement. Although contract law provides a framework for legal analysis of plea bargain disputes, it is an imperfect analogy.

The theory that a plea agreement is a "constitutional contract" has two main facets: the application of contract law to plea agreements and the due process interest of a defendant in the agreement. Although principles of contract law guide the resolution of plea bargain disputes, due process dictates the type of hearing required to resolve such disputes and the remedies available to the non-breaching party for a broken plea agreement. This "constitutional contract" theory is rooted in the

45. See supra note 5.
47. See infra note 84 and accompanying text.
48. See infra notes 84-86 and accompanying text.
50. The phrase "constitutional contract" was used to characterize plea agreements in Westen & Westin, A Constitutional Law of Remedies for Broken Plea Bargains, 66 Calif. L. Rev. 471, 539 (1978).
52. See Brooks v. United States, 708 F.2d 1280, 1281-82 (7th Cir. 1983); United States v. Mooney, 654 F.2d 482, 486 (7th Cir. 1981); United States v. Calabrese, 645 F.2d 1379, 1390 (10th Cir.), cert. denied, 451 U.S. 1018 (1981); United States v. Krasn, 614 F.2d 1229, 1233 (9th Cir. 1980); United States v. Arnett, 628 F.2d 1162, 1164 (9th Cir. 1979); United States v. McIntosh, 612 F.2d 835, 837 (4th Cir. 1979).
53. Justice Douglas, in his concurring opinion in Santobello v. New York, 404 U.S. 257 (1971), indicated that the remedy to be awarded for an unexcused breach of a plea agreement by a prosecutor is dictated by due process. See id. at 267 (Douglas, J., concurring).
Supreme Court decision of *Santobello v. New York,*\(^{55}\) in which the Court first stated that a plea agreement is a legally enforceable exchange of promises, the breach of which the aggrieved party would be afforded a remedy.\(^{56}\) The Court implied that this right of an aggrieved party to the enforcement of a plea agreement and a remedy for its breach was a due process right.\(^{57}\) The Court, however, neither specifically noted the analogy between contract law and plea agreements\(^{58}\) nor explicitly defined the source of the constitutional rights that give defendants a right to enforce such agreements.\(^{59}\)

In the absence of a clear Supreme Court mandate, lower courts have stated explicitly what *Santobello* only implied: that plea agreements are essentially contracts to which contract law may be applied,\(^{60}\) and that the due process clause is the source of the defendant's constitutional rights.
implied in plea agreements.\textsuperscript{61}

B. The Application of Contract Law to Plea Agreements

A plea agreement obligates both parties to perform.\textsuperscript{62} In Santobello, the Supreme Court held that when a defendant is induced to plea bargain chiefly because of a prosecutor’s promises, such promises must be fulfilled.\textsuperscript{63} Conversely, if a defendant materially breaches the terms of a plea bargain,\textsuperscript{64} the government is relieved of its obligations under that agreement.\textsuperscript{65} This mutuality of obligation is consistent with the “mutuality of advantage” rationale of plea bargaining.\textsuperscript{66} Courts that have addressed plea bargain disputes have used to some extent a contract law framework and terminology to analyze and describe plea agreements.\textsuperscript{67}


\textsuperscript{64} See United States v. Verrusio, 803 F.2d 885, 888 (7th Cir. 1986); United States v. Strawser, 739 F.2d 1226, 1229 (7th Cir.), cert. denied, 469 U.S. 1018 (1984); United States v. Perkins, 503 F. Supp. 1107, 1112 (S.D. Tex. 1980).


\textsuperscript{66} See supra note 19 for a representative listing of the kind of breaches that warrant the vacation of a plea agreement between a defendant and the government.

\textsuperscript{67} Issues of general contract law typically arise in plea bargaining disputes. Examples include whether an agreement was reached, see United States v. James, 532 F.2d 1161, 1162-63 (7th Cir.),cert. denied, 429 U.S. 840 (1976); Commonwealth v. Tirrell, 382 Mass. 502, 505-06, 416 N.E.2d 1357, 1359 (1981); whether evidence admitted shows that a promise was made, see United States v. Hammerman, 528 F.2d 326, 330-31 (4th Cir. 1975); Schoultz v. Hocker, 469 F.2d 681, 682 (9th Cir. 1972) (per curiam); United States v. Carter, 454 F.2d 426, 427-28 (4th Cir. 1972); the terms of the agreement, see Brooks v. United States, 708 F.2d 1280, 1282-83 (7th Cir. 1983); United States v. Mooney, 654 F.2d 482, 486 (7th Cir. 1981); Correale v. United States, 479 F.2d 944, 946-47 (1st Cir. 1973); State v. Yoon, 66 Haw. 342, 345-46, 662 P.2d 1112, 1114-15 (1983); whether one party entered voluntarily or under duress, see United States v. Bridgeman, 523 F.2d 1099, 1109-
Courts hold that a party is bound to perform under a plea agreement unless excused by the other party's material breach.\(^6\)

The remedies available for a breach of a plea agreement, rescission\(^6\) and specific performance,\(^7\) are among the remedies available to an aggrieved party in a commercial contract.\(^7\) The application of remedies, however, demonstrates that the contract law analogy is imperfect. It is limited by the defendant's fundamental due process rights in the agreement. The remedies available to a prosecutor and a defendant differ. If a prosecutor materially breaches, the defendant is granted either rescission or specific performance.\(^7\)

Yet, if the defendant materially breaches, the

10 (D.C. Cir. 1975), cert. denied, 425 U.S. 961 (1976); whether one party breached its promise, see United States v. Verrusio, 803 F.2d 885, 888-89 (7th Cir. 1986); Brooks v. United States, 708 F.2d 1280, 1281 (7th Cir. 1983); United States v. Simmons, 537 F.2d 1260, 1261-62 (4th Cir. 1976); United States v. Donahay, 529 F.2d 831, 832 (5th Cir.) (per curiam), cert. denied, 429 U.S. 828 (1976).

In addition, the terminology sometimes used to describe plea agreements is also that used to describe commercial contracts, see Santobello v. New York, 404 U.S. 257, 262 (1971) (when the promise of the prosecutor "can be said to be part of the inducement or consideration," the promise must be fulfilled); United States v. Simmons, 537 F.2d 1260, 1261 (4th Cir. 1976) (condition precedent); Ellison v. State, 56 Md. App. 567, 577, 468 A.2d 413, 418 (1983) (express condition); State v. Rivest, 106 Wis. 2d 406, 412, 316 N.W.2d 395, 398 (1982) (condition precedent) (quoting Simmons, 537 F.2d at 1261).

68. See supra note 62. See also J. Calamari & J. Perillo, The Law of Contracts § 11-22, at 407 (2d ed. 1977) ("If the breach is material . . . [and] the breaching party's performance is a constructive condition to the aggrieved party's duty of performance the latter may also treat the material breach as a failure of condition. In other words, he has the power to cancel the contract.") (footnote omitted).

69. When a court vacates a plea agreement, it is the functional equivalent of the traditional contract remedy of rescission. See Westen & Westin, supra note 50, at 510; see, e.g., United States v. Wood, 780 F.2d 929, 929 (11th Cir.) (per curiam) (when defendant breached agreement, it was nullified and the state thereby released from its promises), cert. denied, 107 S. Ct. 97 (1986); United States v. McCarthy, 445 F.2d 587, 591 (7th Cir. 1971) (when defendant did not fulfill his part of agreement, court held government entitled to a "rescission" of the agreement); State v. Curry, 49 Ohio App. 2d 180, 183, 359 N.E.2d 1379, 1381 (1976) ("If the defendant has not fulfilled his part of the bargain, the trial court may, at its option, proceed to sentencing or vacate the pleas and require the defendant to stand trial.") (emphasis in original); State v. Hall, 32 Wash. App. 108, 110, 645 P.2d 1143, 1145 (1982) (since defendant breached agreement, prosecutor was entitled to "rescission" of that agreement). See also Santobello v. New York, 404 U.S. 257, 268 (1971) (Marshall, J., concurring in part and dissenting in part) (calling vacating a plea "rescinding the plea").


72. See Santobello v. New York, 404 U.S. 257, 263 (1971) (stating the lower court has discretion to award whichever remedy may be required under the circumstances of a case); Palermo v. Warden, Green Haven State Prison, 545 F.2d 286, 296-97 (2d Cir. 1976) (affirming district court's grant of specific performance of plea agreement), cert.
prosecutor can only rescind. A prosecutor is not entitled to specific performance by a defendant because it is unconstitutional to compel a criminal defendant to plead guilty. Therefore, while contract analogies are important to the resolution of issues arising under a plea agreement, such analogies are not absolute.

C. The Defendant's Due Process Interest in the Plea Agreement

A due process analysis involves two steps. The first step inquires whether the defendant has a protected "interest" for purposes of procedural due process. A procedural due process interest must derive from a right created in either state law or in the federal Bill of Rights. If the defendant has such an interest, he is entitled to a pre-deprivation hearing. The second step involves what process is due within that hearing. This varies depending on the nature of the protected interest.


75. See Perry v. Sinderman, 408 U.S. 593, 599-603 (1972) (discussing whether teacher had a due process interest in his employment contract with a state university); Board of Regents v. Roth, 408 U.S. 564, 569-71 (1972) (same); Morrissey v. Brewer, 408 U.S. 471, 481 (1972) ("The question is . . . whether the nature of the interest is one within the contemplation of the 'liberty or property' language of the Fourteenth Amendment."); Bell v. Burson, 402 U.S. 535, 539 (1971) (considering whether a driver's license constituted liberty or property under the fourteenth amendment); G. Gunther, supra note 74, at 567-68; L. Tribe, supra note 15, at 507, 533.


78. See G. Gunther, supra note 74, at 584-85; L. Tribe, supra note 15, at 507, 533; see also Santosky v. Kramer, 455 U.S. 745, 758-69 (1982) (after stating that parents had due process interest, court discussed standard of proof required in hearing to terminate par-
Among the issues considered are the type of hearing and burden of proof required.

It is well established that when a defendant enters into a binding plea agreement, he has a due process right in the fulfillment of that agreement. It is this due process right that gives the defendant an "interest" for purposes of procedural due process and entitles him to a pre-deprivation hearing before the state is excused from performance under an agreement. Lower courts have identified two possible sources of this due process interest: the waiver of constitutional rights involved in a defendant's custody of their natural children; Little v. Streeter, 452 U.S. 1, 13-16 (1981) (after finding due process interest, court held that due process required the state to pay for blood grouping tests in state-involved paternity action when the defendant is indigent); Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 19-22 (1978) (because customers have due process interest in utility services, municipal utility must allow them an opportunity to meet with an employee who has authority to settle billing disputes before it can terminate their services); Mathews v. Eldridge, 424 U.S. 319, 333-35 (1976) (discussing factors to be balanced when deciding what process is due once due process interest is identified); Goldberg v. Kelly, 397 U.S. 254, 260-65 (1970) (because recipients have due process interest in welfare benefits, they must be afforded pre-deprivation hearing similar to judicial trial before benefits may be cut off).

79. In Mathews v. Eldridge, 424 U.S. 319 (1976), Justice Powell explained that "[d]ue process', unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." Accordingly, resolution of the issue whether the administrative procedures provided [in a due process case] are constitutionally sufficient requires analysis of the governmental and private interests that are affected.

80. See, e.g., Memphis Light, Gas and Water Div. v. Craft, 436 U.S. 1, 22 (1978) (meeting with an employee having authority to handle billing disputes required before utility can be cut off); Smith v. Organization of Foster Families, 431 U.S. 816, 847-56 (1977) (informal procedures required before a foster child may be removed from a foster home); Goldberg v. Kelly, 397 U.S. 254, 260-65 (1970) (hearing similar to a judicial hearing required to terminate welfare benefits).


82. See infra note 96 and accompanying text.

guilty plea, and an expectation interest in the state's performance of its promises.

1. The Waiver of Constitutional Rights

The defendant's decision to plead guilty constitutes a valid waiver of fifth and sixth amendment rights. Accordingly, this waiver gives rise to a right of the defendant to be assured that the state will not arbitrarily deprive him of the agreement that caused him to waive such important rights.


A waiver of constitutional rights must always be voluntary. See id. The requirement that a guilty plea be “voluntary” means that the plea must be a willful and informed choice of the defendant, without threats, bribes, or misrepresentations by the state. See id. at 755; Kercheval v. United States, 274 U.S. 220, 224 (1927); Shelton v. United States, 246 F.2d 571, 572 n.2 (5th Cir. 1957), reversed on other grounds, 356 U.S. 26 (1958); Westin & Westin, supra note 50, at 478-79 (1978). A waiver of constitutional rights must also be intelligent. The requirement that a guilty plea be “intelligent” means that the defendant must be aware of the nature and elements of the charges against him, see Brady v. United States, 397 U.S. 742, 749 n.6 (1970); see also Henderson v. Morgan, 426 U.S. 637, 645 (1976) (if defendant is not aware of the nature and elements of the crime charged, his admission of guilt is not intelligent and therefore involuntary), and of all the probable and material consequences of his guilty plea (e.g., maximum sentence), see North Carolina v. Allford, 400 U.S. 25, 31 (1970) (an intelligent guilty plea requires knowledge of “alternative courses”); Brady v. United States, 397 U.S. 742, 749 n.6 (1970); Machibroda v. United States, 368 U.S. 487, 493 (1962) (citing Kercheval v. United States, 274 U.S. 220, 223 (1927)); Kercheval v. United States, 274 U.S. 220, 223 (1927). The record must clearly show that the defendant is aware of all of the above and of the constitutional rights he is waiving by entering a guilty plea. See Boykin v. Alabama, 395 U.S. 238, 243 & n.5 (1969). Due process also requires that the defendant's decision to plead guilty must be made only after he has consulted with counsel, absent a waiver of his right to counsel. See Santobello v. New York, 404 U.S. 257, 265 (1971) (Douglas, J., concurring); Brady v. United States, 397 U.S. 742, 748 & n.6 (1970); White v. Maryland, 373 U.S. 59, 60 (1963); Moore v. Michigan, 355 U.S. 155, 160-61 (1957). This waiver also must be made with sufficient awareness of the relevant circumstances and the likely consequences. See Brookhart v. Janis, 384 U.S. 1, 4-8 (1966); Adams v. United States ex rel. McCann, 317 U.S. 269, 275 (1942) (must be an intelligent waiver); Johnson v. Zerbst, 304 U.S. 458, 464 (1938). These same principles have been applied specifically to plea agreements because courts acknowledge that a guilty plea is such a waiver that gives rise to the defendant's due process interest. See Brady v. United States, 397 U.S. 742, 748 (1970); Boykin v. Alabama, 395 U.S. 238, 242-43 (1969); Gamble v. State, 95 Nev. 904, 907-08, 604 P.2d 335, 337 (1979).

85. Several courts indicate that if the right to enforcement of the plea agreement is
Courts after Santobello clearly indicate that this waiver of fifth and sixth amendment rights gives the defendant a due process interest in a plea agreement.86

2. The "Expectation" Interest

Some courts acknowledge a second source of the defendant's due process interest. This is an interest in having expectations fulfilled that were created by promises made to the defendant by the state.87

not observed, it renders the waiver of fifth and sixth amendment rights underlying the guilty plea involuntary and unintelligent. An involuntary or unintelligent waiver of constitutional rights is violative of due process. See supra note 84. Thus, the defendant has a due process interest in the enforcement of the prosecutor's promise that induced his guilty plea, unless the prosecutor is excused from fulfilling that promise by the defendant's material breach. See, e.g., Cooper v. United States, 594 F.2d 12, 18 n.8 (4th Cir. 1979) ("In cases where guilty pleas have already been entered before the government has reneged, many courts, including this one, have apparently considered that the constitutional rights most directly, and perhaps solely, involved are those that protect against involuntary and unintelligent guilty pleas."); Gamble v. State, 95 Nev. 904, 907-08, 604 P.2d 335, 337 (1979) ("Since the defendant relinquishes constitutional protections by pleading guilty, a waiver of those protections must be knowingly and voluntarily made; and it is obvious that a waiver induced by an unkept promise cannot be valid. The government is held to 'the most meticulous standards of both promise and performance' precisely because 'it is the defendant's rights which are being violated when the plea agreement is broken or meaningless.'") (quoting Correale v. United States, 479 F.2d 944, 947 (1st Cir. 1973)); State v. Rivest, 106 Wis. 2d 406, 416 N.W.2d 395, 402 (Abrahamson, J., dissenting) ("One [constitutional] principle [involved in plea agreement protections] is the due process rights of the defendant which are implicated in the repudiation of a plea agreement. The state's refusal to honor a plea agreement after a guilty plea has been entered may undermine the voluntariness of the plea...") (citations omitted); State v. Marino, 100 Wash. 2d 719, 725, 674 P.2d 171, 174 (1984) (en banc) ("Because important constitutional rights have been waived, the accused is entitled to judicial enforcement of the terms of the agreement."); State v. Tourtellotte, 88 Wash. 2d 579, 583-84, 564 P.2d 799, 801-02 (1977) (en banc) ("A plea of guilty constitutes a waiver of significant [fifth and sixth amendment] rights by the defendant", and "when the prosecutor breaks the plea bargain, he undercuts the basis for the [defendant's] waiver of constitutional rights implicit in the plea."); W. LaFave & J. Israel, supra note 1, § 20.2, at 785 (indicating the possible source of the defendant's right to constitutional protection of plea agreements is the due process requirement that guilty pleas be voluntary, "for that requirement reflects the notion that the defendant has a constitutional interest in making an informed choice and that the state cannot mislead the defendant into making a disadvantageous choice.").

86. See supra note 85.

87. Commentators have named this due process interest an "expectation" interest. See W. LaFave & J. Israel, supra note 1, § 20.2, at 785 ("protection-of-expectation theory"); Westen & Westin, supra note 50, at 512. A few cases directly support the existence of this due process expectation right. See, e.g., Cooper v. United States, 594 F.2d 12, 18 n.8 (4th Cir. 1979) ("The commentators [cited previously] make a persuasive argument that the allowance of specific performance relief, as in Santobello, can only be explained if the constitutional right protected is, as they believe, one deriving simply from government induced expectations of a proposal's fulfillment."); United States v. Minnesota Mining & Mfg. Co., 551 F.2d 1106, 1111-12 (8th Cir. 1977) (although defendants could be restored to status quo ante by rescinding their guilty pleas and suppressing all interim incriminating statements, district court, under Santobello, could remedy the prosecutor's breach by granting defendants specific benefit of state's promise not to prosecute them on any additional charges); Palermo v. Warden, Green Haven State Prison, 545 F.2d 286,
When the state breaches a plea agreement, a court may restore a defendant to the status quo ante by vacating the plea agreement and granting immunity for any incriminating statements made during the plea negotiations that otherwise might be admissible. When the state breaches a plea agreement, a court may restore a defendant to the status quo ante by vacating the plea agreement and granting immunity for any incriminating statements made during the plea negotiations that otherwise might be admissible. It is significant that the Supreme Court in *Santobello*, in addition to rescission, provided for the remedy of specific performance, which entitles the defendant to the fulfillment of his expectations under the agreement—his benefit of the bargain. That this remedy was made available specifically to defendants.


88. Restoring the defendant to the status quo ante is in the discretion of the court. See United States ex rel. Anolick v. Commissioner of Correction, 393 F. Supp. 48, 51-52 (S.D.N.Y. 1975), rev'd on other grounds sub nom. United States ex rel. Selikoff v. Commissioner of Correction, 524 F.2d 650 (2d Cir. 1975); United States v. Minnesota Mining & Mfg. Co., 551 F.2d 1106, 1111-12 (8th Cir. 1977) (while court noted that returning defendants to their status quo ante was an option, it nevertheless upheld trial court's dismissal of the indictment); Fed. R. Evid. 410. Courts also have the discretion to award specific performance, which does more than merely restore the defendant to his status quo ante, and supports the existence of an expectation right of the defendant in the fulfillment of a plea agreement. See supra note 87.

89. 404 U.S. 257, 263 (1971). In his concurrence, Justice Douglas stated that not only should specific performance be provided as a possible remedy for defendants, but that in granting relief, a court ought to consider a defendant's preference. *Santobello*, 404 U.S. at 267 (Douglas, J., concurring). See supra note 87 and cases cited therein.

90. The object of damages for breach of contract is to put the plaintiff in the same position he would have been in had the contract been performed. This remedy is also known as awarding the non-breaching party his expectation interest, or benefit of the bargain. See Restatement (Second) of Contracts § 344, at 102-04 (1979); J. Calamari & J. Perillo, supra note 133, § 14-4 at 521-22 (1977); D. Dobbs, Handbook on the Law of Remedies § 12.1 at 786 (1973); Farnsworth, *Legal Remedies for Breach of Contract*, 70 Colum. L. Rev. 1145, 1147-48 (1970). In cases where money damages will not place the
when the state breaches a plea agreement, supports the existence of such an expectation interest.91

When the prosecutor reindicts the defendant in contravention of their plea agreement, the defendant usually asserts the agreement as a defense, since the reindictment deprives him of his benefit of the bargain.92 Because the prosecutor is not bound to perform if the defendant materially breaches,93 the issue then becomes whether the defendant has in fact materially breached. If he has breached the agreement, the prosecutor is entitled to a rescission of the plea agreement.94 If he has not breached, the defendant may be granted specific performance and the full benefit of the bargain.95

Although there are two possible sources of the defendant's due process right, the first step of the due process analysis is resolved uniformly. The defendant clearly has an "interest" for purposes of procedural due process, and, therefore is entitled to a pre-deprivation hearing.96 The second

plaintiff in the position he would have been in had the promise been performed, the plaintiff may be awarded specific performance. See Restatement (Second) of Contracts § 359, at 169 (1979); see also J. Calamari & J. Perillo, supra note 68, § 16-4, at 581 (1977) (specific performance is available only when legal remedies are inadequate); D. Dobbs, supra, § 12.2, at 795-97 (1973) (same). See supra note 87 and cases cited therein.

91. See Cooper v. United States, 594 F.2d 12, 18 n.8 (4th Cir. 1979) ("[T]he commentators [cited previously] make a persuasive argument that the allowance of specific performance relief, as in Santobello, can only be explained if the constitutional right protected is, as they believe, one deriving simply from government-induced expectations of the proposal's fulfillment."); Palermo v. Warden, Green Haven State Prison, 545 F. 2d 286, 296-97 (2d Cir. 1976), cert. dismissed, 431 U.S. 911 (1977) (where prosecutor made an ultra vires promise, which was therefore unfulfillable, court enforced promise anyway because of the great importance attached to promises made to a defendant by government); W. LaFave & J. Israel, supra note 1, § 20.2(d), at 785-86; Westen & Westin, supra note 50, at 513-17.


However, in cases where the defendant bargains for a sentence recommendation and the prosecutor breaches, the defendant often requests a vacation of the plea rather than specific performance. See, e.g., Santobello v. New York, 404 U.S. 257, 263 (1971) (where defendant requested vacation of the guilty plea); Gamble v. State, 95 Nev. 904, 905-06, 604 P.2d 335, 336 (1979) (per curiam); State v. Makinson, 35 Wash. App. 183, 184, 665 P.2d 1376, 1377 (1983).

93. See supra note 65 and accompanying text.

94. The government is then freed from its obligations under the agreement and may reindict the defendant. See United States v. Verrusio, 803 F.2d 885, 887-88 (7th Cir. 1986); United States v. Wood, 780 F.2d 929, 932 (11th Cir.), cert. denied, 107 S. Ct. 97 (1986).

95. See supra notes 85-87 and accompanying text.

step in the due process analysis, which determines what process is due
within that hearing, however, is an issue over which the courts disagree.
In particular, courts have applied different standards of proof that the
government must meet to prove that the defendant materially breached
his plea agreement.

II. ANALYSIS AND APPLICATION OF THE STANDARDS OF PROOF

A. Standards of Proof Generally

Once it is determined that a pre-deprivation hearing is required, it
must also be determined what burden of proof is necessary within that
hearing to show a defendant’s material breach. Courts have adopted
three different standards: beyond a reasonable doubt, clear and con-
(banc); In re James, 96 Wash. 2d 847, 849-51, 640 P.2d 18, 20 (1982) (en banc) (per curiam); see also United States v. Verrusio, 803 F.2d 885, 888 (7th Cir. 1986) (discussing when deprivation occurs for purposes of procedural due process, and therefore when a hearing is required before the defendant may be deprived of an agreement); United States v. Donahey, 529 F.2d 831, 832 (5th Cir.) (per curiam), cert. denied, 429 U.S. 828 (1976) (conducting a hearing before defendant is deprived of her agreement); State v. Warren, 124 Ariz. 396, 401, 604 P.2d 660, 665 (1979) (stating that a hearing and other procedures are “constitutionally required”); State v. Hall, 32 Wash. App. 108, 110, 645 P.2d 143, 145 (1982) (providing defendant with a pre-deprivation hearing); State v. Rivest, 106 Wis. 2d 406, 411-12, 316 N.W.2d 395, 398 (1982) (same); cf. State v. Morley, 35 Wash. App. 45, 48, 665 P.2d 419, 420-21 (1983) (probation revocation hearing where the defendant is accorded the same procedural safeguards).

97. In State v. Rivest, 106 Wis. 2d 406, 412, 316 N.W.2d 395, 398-99 (1982), a defend-
ant and his accomplice were arrested for robbery and murder. The defendant made a
sworn statement that he did not participate in the homicide, and was allowed to plead to
the lesser robbery charge. See Rivest, 106 Wis. 2d at 408-09, 316 N.W.2d at 396-97. After
further investigation, however, the prosecutor’s office discovered evidence that directly
contradicted the defendant’s testimony and indicated that he, in fact, may have been
involved in the murder. Id. at 409-10, 316 N.W.2d at 397. Although the defendant al-
ready had begun serving his sentence, a hearing was held to determine whether the de-
fendant had materially breached the agreement so that the prosecution would be freed
from its obligations and be allowed to charge the defendant with murder. Id. at 412, 316
N.W. 2d at 398. The court stated that the issue was whether the defendant had perjured
himself, since false testimony about his participation in the homicide would be a material
breach of his agreement. Id. at 411-14, 316 N.W.2d at 398-99. Applying a beyond a
reasonable doubt standard, the lower court had concluded, and the Wisconsin Supreme
Court agreed, that the defendant had committed perjury. Id. at 412, 316 N.W.2d at 398-
99. As a result, the court affirmed the vacation of the plea agreement and allowed the
prosecution to indict the defendant on charges of homicide. Id. at 420, 316 N.W.2d at 402. The purpose of the hearing was not to decide whether to convict the defendant of
either perjury or homicide, but only whether to set aside the plea agreement.

This high standard of proof may have been adopted because the defendant was alleged
to have breached his plea agreement by activity that connoted criminal activity. See
Rivest, 106 Wis. 2d at 421-23, 316 N.W.2d at 403-04 (Abrahamson, J., dissenting)
(though not stated outright, the dissent emphasizes the criminal nature of the activity);
Courts Can Vacate Plea Agreements, supra note 49, at 207 (1982) (stating that this was
appropriate in Rivest, because not only did the author feel that the standard was approp-
riate, but that the defendant should have been afforded a full trial rather than a hearing,
stating that “due process requires no less”). It is important to note that in several other
cases defendants were alleged to have breached their plea agreements by actions that
connoted criminal activity, but the fact of the breach was proven by a preponderance of
The main purpose of a standard of proof is to minimize the risks resulting from an erroneous decision. In any judicial proceeding it is impossible for the trier of fact to be absolutely accurate in its process of factfinding. The trier is able only to "acquire a belief of what probably happened." A standard of proof serves to inform the factfinder of how certain society believes he should be in the correctness of the conclusions of fact he draws in a particular type of proceeding. Because the factfinding process is inherently imprecise, a margin of error is anticipated, and the risk of error for each party is distributed according to the value society places on the loss that each party would suffer as a result of the evidence standard. See, e.g., United States v. Verrusio, 803 F.2d 885, 890 (7th Cir. 1986) (perjury); United States v. Donahey, 529 F.2d 831, 832 (5th Cir.) (false grand jury testimony), cert. denied, 429 U.S. 828 (1976); In re James, 96 Wash. 2d 847, 848, 640 P.2d 18, 19 (1982) (en banc) (per curiam) (defendant arrested prior to sentencing on two misdemeanor charges); State v. Hall, 32 Wash. App. 108, 109-10, 645 P.2d 1143, 1145 (1982) (fraudulent misrepresentation of identity during and after plea negotiations). Rivest, then, cannot be explained in terms of whether the breach was caused by the defendant's criminal activity.

98. The court in State v. Bangert, 131 Wis. 2d 246, 288-89, 389 N.W.2d 12, 32 (1986), is the only jurisdiction to adopt the clear and convincing standard, but it did so without explanation. Although the court cited to State v. Rivest, 106 Wis. 2d 406, 316 N.W.2d 395 (1982), for discussion of relieving a party of its obligations if the other party has materially breached, the court did not explain, clearly overrule or mention the different standards adopted in Rivest. See Bangert, 131 Wis. 2d at 288-89; 389 N.W.2d at 32.


100. See supra notes 97-99.


103. In re Winship at 370 (Harlan, J., concurring) (emphasis omitted).

an erroneous finding in the proceeding.\textsuperscript{105}

In a lawsuit there are always two types of factual error, each of which entails certain consequences.\textsuperscript{106} The first type of error occurs when the trier of fact renders an erroneous judgment in the plaintiff’s favor.\textsuperscript{107} In the criminal context, this error results in the conviction of an innocent man.\textsuperscript{108} The second type of error occurs when the trier of fact mistakenly renders a verdict in favor of the defendant.\textsuperscript{109} The criminal equivalent is the acquittal of a guilty man.\textsuperscript{110} The possibility of either error occurring is influenced by the standard of proof applied in a particular proceeding.\textsuperscript{111} The higher the standard of proof placed on a party, the more often an erroneous verdict will be rendered against him.\textsuperscript{112} Therefore, in selecting a standard of proof, the standard should be adjusted to reflect the importance society attaches to that party’s interest at stake as compared to the other party to the litigation.\textsuperscript{113}


\textsuperscript{106} See Addington v. Texas, 441 U.S. 418, 423 (1979); United States v. Verrusio, 803 F.2d 885, 890 (7th Cir. 1986) (quoting In re Winship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring)); see also C. McCormick, Evidence § 341, at 962 (3d ed. 1984) (For civil cases, the preponderance of the evidence standard of proof is adequate, since it is no worse to find an erroneous judgment for the plaintiff than to find an erroneous judgment for the defendant (the two types of erroneous outcomes)). The beyond a reasonable doubt standard is necessary in criminal actions, however, where it is worse to make an erroneous judgment in the prosecution’s favor than in the defendant’s favor).


\textsuperscript{112} See, e.g., United States v. Verrusio, 803 F.2d 885, 890 (7th Cir. 1986) (standard of proof reflects the frequency of erroneous outcomes against each party) (quoting In re Winship, 397 U.S. 358, 370-71 (1970) (Harlan, J., concurring)); Santosky v. Kramer, 455 U.S. 745, 765-66 (1982) (same); Addington v. Texas, 441 U.S. 418, 423-24 (1979) (same); In re Winship, 397 U.S. 358, 370-71 (1970) (Harlan, J., concurring) (same); C. McCormick, Evidence § 341, at 962 (3d ed. 1984) (when a court uses beyond a reasonable doubt, the court increases the total number of erroneous decisions against the prosecutor and simultaneously decreases the number of erroneous decisions against the defendant).

For example, in a civil suit the risk of error is usually distributed almost equally between the parties. The value at stake, usually money damages, is deemed by society to be equally as serious to have an erroneous outcome in either party's favor.\textsuperscript{114} On the other hand, in criminal cases the risk of an erroneous conviction far outweighs the risk of an erroneous acquittal, because society believes that it is far worse to convict an innocent man than to let a guilty man go free.\textsuperscript{115} Thus, the standard of proof applied in a particular proceeding reflects the comparative social utility of each party's interest at stake in the litigation, and adjusts the relative frequency of an erroneous outcome for either party accordingly.\textsuperscript{116} If our society deems both interests to be of equal value, preponderance of the evidence, as the lowest standard, is most appropriate.\textsuperscript{117} If one party's interest outweighs the other party's interest, however, the standard should be raised.

C. Beyond a Reasonable Doubt

The Supreme Court has declared that the beyond a reasonable doubt standard of proof\textsuperscript{118} is required by due process to prevent the possibility that an innocent person will be convicted.\textsuperscript{119} Because this standard is so high, it increases the overall number of erroneous decisions in criminal cases, yet simultaneously decreases the number of erroneous convictions.\textsuperscript{120} The Supreme Court has warned, however, that this standard should not be applied too broadly or too casually in non-criminal


\textsuperscript{118} Beyond a reasonable doubt is the highest of the three standards. In terms of determining the overall probability of whether a particular fact in issue is true, it is suggested that this level of proof is equivalent to finding that the fact in issue is "almost certainly true." See C. McCormick, Evidence § 339, at 956 n.4 (1984).

\textsuperscript{119} See Lego v. Twomey, 404 U.S. 477, 486-87 (1972); In re Winship, 397 U.S. 358, 364 (1970); see also United States v. Verrusio, 803 F.2d 885, 891 (7th Cir. 1986); C. McCormick, Evidence § 341, at 962 (3d ed. 1984); Kaplan, supra note 114, at 1073; 9 Wigmore on Evidence § 2497a, at 416 n.2, § 2498, at 419-20 (Chadbourn rev. 1981).

\textsuperscript{120} See supra note 112.
The Supreme Court has promulgated guidelines for using the beyond a reasonable doubt standard in criminal cases. In Lego v. Twomey, the criminal defendant argued that this higher standard should be adopted in a pre-trial suppression hearing to determine the voluntariness of a confession. The Court rejected this contention and held that because a suppression hearing had nothing to do with the reliability of a jury verdict, the beyond a reasonable doubt standard should not be adopted in that type of hearing.

Because a criminal conviction is not directly at issue in pre-deprivation hearings, the reasonable doubt standard should not be used to determine whether a defendant materially breached a plea agreement. The central issue in such hearings is whether the defendant’s material breach warrants vitiating the plea agreement. The validity of the waiver of the fifth and sixth amendment rights is not at issue at this stage. Indeed, the defendant is affirming the validity of the waiver by raising the agreement as a defense to the reindictment. Therefore, the due process interest arising out of the waiver is not in jeopardy at the hearing. If a defendant materially breached the plea agreement, it will be rescinded.

Upon reindictment, all of the constitutional rights the defendant waived to bind the agreement are reinstated, and he must be proven guilty of the underlying charges beyond a reasonable doubt.

The due process expectation right created by the government’s promise to the defendant, however, is more directly involved. Because the

123. See id. at 482.
124. See id. at 486-87; see also W. Lafave & J. Israel, supra note 1, § 10.4, at 463-64.
125. See infra note 126 and accompanying text.
127. See supra note 92.
128. See supra note 65.
129. See United States v. Verrusio, 803 F.2d 885, 890-91 (7th Cir. 1986); see also United States v. Perkins, 503 F. Supp. 1107, 1111 (S.D. Tex. 1980) (“A [d]efendant who withdraws his guilty plea may be re-charged and tried both on the counts to which he originally plead [sic] guilty and on those dismissed in return for the plea.”); Gamble v. State, 95 Nev. 904, 908, 604 P.2d 335, 337 (1979) (per curiam) (“If the court finds that appellant deliberately and knowingly [breached his agreement], as the State alleges, the proper course of action is to nullify the plea bargain, permit appellant to withdraw his guilty plea, and allow him to plead anew.”); State v. Rivest, 106 Wis. 2d 406, 410, 316 N.W.2d 395, 397 (1982) (where state wished to prosecute defendant on a murder charge, “the state would have to secure an order vacating the plea agreement”).
130. See supra notes 87-91 and accompanying text.
materiality of the breach determines whether the plea agreement stands, the defendant’s expectation interest in that agreement, or benefit of the bargain, is at stake. Because this expectation interest is so closely analogous to the interest at stake in civil contract litigation, and because contract law seeks to protect the litigants’ expectation interests, the burden of proof used in such cases, a preponderance of the evidence, clearly is adequate to protect the defendant’s interest.

Although the beyond a reasonable doubt standard is also necessary to protect innocent defendants from the social stigma that attaches to a criminal conviction, it is inapplicable in a pre-deprivation hearing. If a defendant breaches and loses a plea bargain agreement, even if the decision is in error, the defendant is returned to his status quo ante: neither convicted nor stigmatized.

Finally, requiring the state to prove that the defendant materially breached the agreement beyond a reasonable doubt discourages the state from entering into mutually advantageous plea bargains. Requiring proof beyond a reasonable doubt greatly increases the likelihood that de-

131. See supra note 65.
132. See supra notes 92-95 and accompanying text.
133. See supra note 90 and accompanying text.
134. See J. Calamari & J. Perillo, supra note 68, § 14.4, at 522 (“It has been pointed out that a contracting party has three legally protected interests: a restitutionary interest, a reliance interest, and an expectation interest. . . . The expectation interest represents the prospect of gain from the contract.”); D. Dobbs, Remedies § 12.1, at 786 (1973) (“The traditional goal in awarding damages for breach of contract is to . . . put the non-breaching party in as good a position as he would have been in had the contract been performed. This gives him the benefit of his bargain. . . . [which] gives him his expectancy and . . . protect[s] his ‘expectation interest.’”) (footnote omitted); Farnsworth, Legal Remedies for Breach of Contract, 70 Colum. L. Rev. 1145, 1147-49 (1970) (contract law protects non-breaching party’s expectation interests to encourage “promises” to rely on promises of others).
135. See J. Calamari & J. Perillo, supra note 68, § 14.8, at 528; see also C. McCormick, Evidence § 339, at 956 (3d ed. 1984) (burden of proof in ordinary civil cases, of which breach of contract actions are a common component, is preponderance of the evidence); 9 Wigmore, Evidence § 2498, at 419 (Chadbourn rev. 1981). In a few contract actions, usually where there is a greater risk of unreliable evidence, such as where an alleged contract is oral, or where there is a risk of stigma associated with the outcome, such as where fraud is alleged, the standard of proof is often clear and convincing evidence. See C. McCormick, supra, § 340, at 960-61 (1984); 9 Wigmore, supra, § 2498, at 419-24 (Chadbourn rev. 1981).
138. See supra notes 92-98 and accompanying text.
139. See United States v. Verrusio, 803 F.2d 885, 891 n.4 (7th Cir. 1986). Cf Santosky v. Kramer, 455 U.S. 745, 769 (1982) (“Although Congress found a ‘beyond a reasonable doubt’ standard proper in one type of parental rights termination case, another legislative body might well conclude that a reasonable-doubt standard would erect an unreasonable barrier to state efforts to free permanently neglected children for adoption.”).
fendants will breach their plea agreements with impunity. Absent some overriding societal benefit, it is against society's interests to encourage defendants to breach their part of the bargain and yet retain its benefits.

D. Clear and Convincing

The clear and convincing burden of proof is used in "exceptional" cases where the interest that one party has at stake is deemed more important than the interest of the other party, but not so important that it requires a standard as high as beyond a reasonable doubt. This standard of proof most commonly is employed in two types of cases.

First, this standard is often used in a civil action when fraud or some other type of quasi-criminal activity is alleged. The defendant's interest is deemed more substantial than a mere loss of money: the defendant could suffer a tarnished or diminished reputation if found to have committed fraud. Accordingly, the burden of proof is raised to a clear and convincing standard. The stigma of conviction, however, is not a threat to the defendant in a pre-deprivation hearing because a finding of a material breach by the defendant results in vacation of the guilty plea

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140. Raising the government's burden of proof increases the total number of erroneous decisions in the defendant's favor. See supra note 112.

141. One example of such a benefit is the prevention of erroneous convictions. See supra note 115.

142. See Ellison v. State, 56 Md. App. 567, 575, 468 A.2d 413, 417 (1983); see also Brown v. State, 607 S.W.2d 801, 805 (Ct. App. Mo. 1980) ("Indeed to allow [the defendant] to prevail would be to hold that he could profit by his violation of the agreement and in effect obtain a reward for his own wrongdoing."); vacated on other grounds, 450 U.S. 1027 (1981); State v. Rivest, 106 Wis. 2d 406, 414, 316 N.W.2d 395, 399 (1982) ("To allow a defendant to claim the benefit of an agreement where he, himself, is in default, offends fundamental concepts of honesty, fair play and justice.").

143. The clear and convincing burden of proof is equivalent to a finding that the fact in issue is "highly probably true." See C. McCormick, Evidence § 339, at 956 & n.4 (3d ed. 1984) (citing McBaine, supra note 118); McBaine, supra note 118, at 246. See also, W. LaFave & J. Israel, supra note 1, § 10.4, at 463 ("highly probably").

144. See Santosky v. Kramer, 455 U.S. 745, 756-57 (1982); Addington v. Texas, 441 U.S. 418, 427 (1979); Kaplan, supra note 114, at 1072; see also Bartels, Punishment and the Burden of Proof in Criminal Cases: A Modest Proposal, 66 Iowa L. Rev. 899, 899 (1981) ("[Beyond a reasonable doubt] is certainly higher than the 'clear and convincing evidence' standard that is used in fraud cases and required in civil commitment proceedings.").

145. See Addington v. Texas, 441 U.S. 418, 424 (1979); see also Bartels, supra note 144, at 899 (naming two classifications of cases where this standard is most commonly employed).


148. See id.
and resulting conviction.\textsuperscript{149} To the contrary, his material breach actually serves to remove any prior stigma associated with a criminal conviction.\textsuperscript{150}

Clear and convincing evidence also is required in proceedings in which the defendant is threatened with a significant deprivation of liberty as well as being stigmatized.\textsuperscript{151} Examples include when the defendant may be institutionalized involuntarily for an indefinite period,\textsuperscript{152} when the defendant will be denaturalized\textsuperscript{153} or deported,\textsuperscript{154} or when the defendant may lose custody of his natural children.\textsuperscript{155}

When a defendant is reindicted in violation of a plea agreement by a prosecutor who claims that the state is excused from performance due to the defendant's material breach, the interest at stake is a potential loss of the defendant's benefit of the bargain.\textsuperscript{156} Although the interest is not insignificant, it does not approach the same level of gravity as a more significant liberty interest.\textsuperscript{157} If the defendant is incorrectly found to have breached, he is tried on charges that were dropped or not filed pursuant to the plea agreement.\textsuperscript{158} If the defendant is declared not to have breached his agreement, but he has in fact breached, he is protected from prosecution on charges that were dropped or not filed because of the plea agreement.\textsuperscript{159}

An argument can be made that because a plea agreement implicates constitutional rights, it is a particularly important interest requiring a higher burden of proof.\textsuperscript{160} The fifth and sixth amendment rights that give these agreements their constitutional element, however, are not threatened at this stage.\textsuperscript{161} In addition, the presence of constitutional

\begin{footnotes}
\textsuperscript{149} See supra notes 92-95 and accompanying text.  
\textsuperscript{150} If the defendant is found to have materially breached the agreement, the guilty plea is vacated and, therefore, the prior conviction is removed. See supra notes 128-29.  
\textsuperscript{152} Id. at 432-33.  
\textsuperscript{156} See supra notes 132-33 and accompanying text.  
\textsuperscript{157} See United States v. Verrusio, 803 F.2d 885, 890-91 (7th Cir. 1986).  
\textsuperscript{158} See id. at 890.  
\textsuperscript{159} See id.  
\textsuperscript{160} See United States v. Verrusio, 803 F.2d 885, 890-91 (7th Cir. 1986); cf. Lego v. Twomey, 404 U.S. 477, 486-89 (1972) (defendant argued that reasonable doubt standard was required to determine whether a confession was voluntary because it implicated fifth amendment right against self-incrimination; court held that preponderance of the evidence was sufficient to satisfy due process); United States v. Inmon, 568 F.2d 326, 332 (3d Cir. 1977) ("It is possible to argue that, since we are dealing with a significant constitutional right . . . we should hold the government to a standard higher than a preponderance, perhaps to proof by clear and convincing evidence. But such a standard is not constitutionally required."); cert. denied, 444 U.S. 859 (1979).  
\textsuperscript{161} The constitutional rights a defendant waives are concedely voluntarily and intelligently waived, because the defendant affirms the agreement by attempting to enforce it, and although the defendant may be tried thereafter, all the rights he waived are restored
\end{footnotes}
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... does not necessarily call for a higher standard of proof than a preponderance of the evidence. On the contrary, several pre-trial hearings that infringe more directly on an individual's constitutional rights require only a preponderance of the evidence to satisfy the accused's due process requirements.

Although a clear and convincing standard may be appropriate for this type of pre-deprivation hearing, it should be remembered that two important interests are to be considered in deciding which burden of proof is most appropriate. While one is to assure that the defendant is given due process, the other is not to overburden the state with a standard so high that it discourages the state from plea bargaining. Failure to sufficiently safeguard either party's interests carries the same risk of discouraging plea bargains. Although it might be argued that a clear and convincing standard does not put the same burden on the state as a reason-
sonable doubt standard, and that courts should be encouraged to adopt this higher standard, the clear and convincing standard still exceeds the constitutional minimum required\textsuperscript{168} and therefore, by definition, puts an unnecessary burden on the state.

E. Preponderance of the Evidence

The most reasonable approach requires that the government prove the defendant's material breach of a plea agreement by a preponderance of the evidence.\textsuperscript{169} Because this standard adequately protects the defendant's due process interests and is the constitutional minimum, no unnecessary burdens are placed upon the state. This standard adequately protects the defendant without discouraging the essential process of plea bargaining.

In a pre-deprivation hearing, the defendant stands to lose only an expectation interest in the state's performance of the plea agreement.\textsuperscript{170} If the plea agreement is vacated and he loses this expectation interest, the constitutional rights he waived remain intact and are restored to him at trial.\textsuperscript{171} Although the defendant loses the benefit of leniency, there are two reasons why this is not a valid consideration. First, the defendant has no right to leniency.\textsuperscript{172} Second, using the expectation interest to argue that an admittedly guilty defendant is somehow entitled to a lesser conviction and sentence undermines the purpose behind plea-bargaining. The defendant plea bargains out of self-interest in as little punishment and expense as possible.\textsuperscript{173} Yet, the purpose of such leniency in plea bargaining is to conserve judicial resources,\textsuperscript{174} and to exchange this promise of leniency for other benefits to society, such as valuable testimony in a criminal proceeding.\textsuperscript{175} Raising the standard of proof to create a right in defendants to leniency allows defendants to obtain this benefit

\textsuperscript{168} The preponderance of the evidence standard is the minimum standard required to satisfy due process. \textit{See supra} note 160.

\textsuperscript{169} It is suggested that the preponderance of the evidence standard, the lowest burden of proof, is equivalent to a finding that the fact in issue is "more probable than not," \textit{see} W. LaFave & J. Israel, \textit{supra} note 1, § 10.4, at 463 ("more probable than its nonexistence"); \textit{see also} Gates v. Ashy Constr. Co., 171 So.2d 742, 746 (La. Ct. App. 1965) (fact must be "more probable than not"), or "probably true", \textit{see} McBaine, \textit{supra} note 118, at 246 (probably has happened); \textit{see also} Kaplan, \textit{supra} note 114, at 1072 ("[T]he [factfinder] must... be satisfied that the probability is greater than 50 per cent ... ").

\textsuperscript{170} \textit{See supra} note 156.

\textsuperscript{171} \textit{See supra} note 129.

\textsuperscript{172} Although the defendant plea bargains because he desires the most lenient sentence he can obtain, \textit{see supra} note 2, the defendant is not entitled automatically to such leniency. The defendant is given this option primarily in return for significant benefits to the state, \textit{see supra} notes 23 & 35-37. It cannot be maintained that the defendant has a "right" to leniency because defendants do not even have a "right" to plea bargain in the first instance. \textit{See supra} note 27.

\textsuperscript{173} \textit{See supra} note 2 and accompanying text.

\textsuperscript{174} \textit{See supra} note 36 and accompanying text.

\textsuperscript{175} \textit{See supra} note 23 and accompanying text.
without giving the state its agreed return. Therefore, only the defendant's expectation interest is validly in need of protection in this hearing.

A defendant's expectation interests are adequately protected by the application of contract law standards to a hearing on whether the defendant materially breached his bargain. Although a plea bargain is a constitutional contract, none of the constitutional aspects of that contract are threatened in a pre-deprivation hearing. In addition, one of the main policy interests that contract law protects is the individual's expectation interests in the enforcement of the contract. The standard of proof required to prove a material breach of contract is preponderance of the evidence. If only the defendant's expectation interest is at stake, then the standard of proof used in contract law is appropriate to protect it.

The balance of probabilities of erroneous outcomes demands a standard of proof that equally allocates the risk of error between the parties—that is, by a preponderance of the evidence. In this proceeding, both parties risk losing only their benefit of the bargain, and the defendant has no additional or more important rights at stake.

Finally, the preponderance of the evidence standard is adequate in this type of proceeding, because other types of pre-trial hearings, which involve an actual risk of loss of a constitutional right, require only a preponderance standard.

Thus, due process is satisfied by a preponderance of the evidence standard in hearings to determine whether a defendant has materially breached a plea agreement because the defendant is threatened only with a loss of his expectation interest in the agreement.

CONCLUSION

It is well established that a defendant has a due process interest in a plea agreement that is derived from a waiver of fifth and sixth amendment rights. It is also established to some degree that defendants have a due process interest in an expectation in the fulfillment of promises made by the state. Therefore, procedural due process guarantees a defendant a hearing before the state can deprive him of an agreement. Once a due process interest has been established, courts should determine what process is due a criminal defendant in that hearing.

176. See supra notes 140 & 142 and accompanying text.
177. See supra notes 130-35 and accompanying text.
178. See supra notes 45-54 and accompanying text.
179. See supra notes 126-35 and accompanying text.
180. See supra notes 125-36 and accompanying text.
181. See supra note 135 and accompanying text.
182. See supra note 117 and accompanying text.
183. See supra note 163.
184. See supra note 12 and accompanying text.
185. See supra notes 87-91 and accompanying text.
186. See supra note 96 and accompanying text.
187. See supra notes 74-81 and accompanying text.
dard of proof used to determine whether a defendant has materially breached his agreement must satisfy due process standards and comport with the value society places on the interests of both prosecutor and defendant. Courts should adopt a preponderance of the evidence standard at a pre-deprivation hearing to determine whether the defendant has materially breached his plea agreement, as the minimum standard to satisfy due process, because only the defendant’s expectation interest is at stake. Although the states are free to adopt a higher standard of proof, doing so would adversely affect the public interest by overprotecting the defendant’s due process interests at the expense of placing a higher burden on the state and discouraging the valuable and essential process of plea bargaining.

Julie A. Lumpkin

188. See supra notes 165-67.
189. See supra note 168.
190. See supra notes 139-42 and accompanying text.