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Notes and Comments

NOT ALL PLEA BREACHES ARE EQUAL: EXAMINING *HEREDIA*'S EXTENSION OF IMPLICIT BREACH ANALYSIS

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ABSTRACT—When the government enters into a plea agreement with a criminal defendant that stipulates that the government will give a specific sentence recommendation in exchange for the defendant's guilty plea, it can implicitly breach that agreement by clearly distancing itself from the recommendation at the sentencing hearing. In most circuits, the implicit breach of a non-court-binding plea agreement—an agreement where the defendant is bound to the guilty plea even if the court rejects the sentence recommendation—entitles defendants to a remedy. However, in 2014, the Ninth Circuit was the first circuit to hold that a defendant is entitled to a remedy when the government implicitly breaches a court-binding plea agreement—an agreement where the defendant is only bound to the guilty plea if the court accepts the plea agreement's sentence recommendation.

This Note examines whether the same implicit breach analysis used for non-court-binding plea agreements should be applied to court-binding plea agreements. To examine this question, this Note balances the actual harms imposed on criminal defendants by an implicit breach in each context against the potential impact increased appellate scrutiny may have on prosecutors' ability to fulfill their duties as ministers of justice. Ultimately, this Note concludes that court-binding plea agreements should not be subject to the same implicit breach analysis and, at the very least, should be subject to harmless error analysis.

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INTRODUCTION

Since the practice of plea bargaining first developed in the United States in the nineteenth century, it has been met with sharp criticism by many in the legal community.[1] Critics have contended that plea bargaining grants too much discretion to prosecutors, is coercive in nature, and frustrates the truth-seeking objective of the criminal justice system.[2]

Nonetheless, the practice of plea bargaining quickly developed into the primary means of resolving criminal prosecutions,[3] and now accounts for approximately ninety-five percent of criminal convictions annually.[4] The practice has thrived despite its legions of detractors because it facilitates the efficient adjudication of criminal cases, enabling the

[1] Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 5–6 (1979) (noting that the Supreme Court was poised to invalidate the practice of plea bargaining in its early years).

[2] *See* RICHARD L. LIPPKE, THE ETHICS OF PLEA BARGAINING 1–4 (2011); *see also* Kenneth Kipnis, *Criminal Justice and the Negotiated Plea*, 86 ETHICS 93 (1976). For a discussion of the various collateral factors that influence the plea bargaining process, see generally Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464 (2004).

[3] Alschuler, *supra* note 1, at 6.

[4] LIPPKE, *supra* note 2, at 1; Julian A. Cook, III, *All Aboard! The Supreme Court, Guilty Pleas, and the Railroading of Criminal Defendants*, 75 U. COLO. L. REV. 863, 866 (2004).

government to consistently pursue enforcement of its myriad criminal statutes despite its limited resources.[5] Without the efficiency of plea bargaining, the United States' already overburdened criminal justice system would likely be forced to abandon the adjudication of several crimes at the expense of public safety and the legitimacy of the criminal code.[6]

More recently, the federal government has begun to leverage the efficiencies of plea bargaining to increase its enforcement of its immigration policy. Specifically, in light of the dramatic increase in suspected illegal reentry, the Attorney General authorized the use of "fast-track" plea agreements by U.S. Attorneys to prosecute immigrants that were previously deported and illegally reentered the United States in violation of 8 U.S.C. § 1326.[7]

The fast-track plea agreement requires defendants to plead guilty prior to being indicted, in exchange for the prosecutor's recommendation of a reduced sentence under the federal Sentencing Guidelines.[8] Notably, if the sentencing court accepts the plea agreement, the sentencing recommendation is binding on the court.[9] However, if the court rejects the agreement, defendants retain their right to revoke their plea.[10] This differs from the non-court-binding plea agreements used in most federal and state criminal cases, which permit the trial court to accept the defendant's guilty plea while retaining the discretion to impose any sentence.[11]

The Department of Justice's use of fast-track plea agreements has proven effective as it has resulted in a dramatic increase in the number of

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[5] *See* GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 23–32 (2003) (discussing the development of plea bargaining as an efficient and effective means of enforcing local liquor laws); Alschuler, *supra* note 1, at 6 ("[Plea bargaining] was accompanied and probably aided by the substantive expansion of the criminal law, particularly the enactment of liquor-prohibition statutes.").

[6] *Cf.* Michael D. Cicchini, *Broken Government Promises: A Contract-Based Approach to Enforcing Plea Bargains*, 38 N.M. L. REV. 159, 161–63 (2008) (discussing the efficiency of plea bargaining and the burden that would be imposed in its absence); Warren Burger, *The State of the Judiciary—1970*, 56 A.B.A. J. 929, 931 (1970) ("A reduction from 90 per cent to 80 per cent in guilty pleas requires the assignment of twice the judicial manpower and facilities—judges, court reporters, bailiffs, clerks, jurors and courtrooms. A reduction to 70 per cent trebles this demand.").

[7] Memorandum from John Ashcroft, Att'y Gen., U.S. Dep't of Justice, to All U.S. Attorneys, Department Principles for Implementing an Expedited Disposition or "Fast-Track" Prosecution Program in a District (Sept. 22, 2003) [hereinafter Ashcroft Memorandum], *reprinted in* 16 FED. SENT'G REP. 134 (2003). While most immigration offenses are subject to civil penalties, § 1326 cross-references Title 18 of the U.S. Code, subjecting offenders to criminal penalties. *See* 8 U.S.C. § 1326 (2012).

[8] Ashcroft Memorandum, *supra* note 7.

[9] FED. R. CRIM. P. 11(c)(1)(C).

[10] *Id.* 11(c)(5)(B).

[11] *See id.* 11(c)(1)(B).

criminal illegal reentry prosecutions and convictions.[12] However, since its inception, it has faced widespread criticism and even constitutional challenges in the circuit courts.[13] While the general practice has withstood all of the constitutional challenges to date, the Ninth Circuit sought to reign in the practice in 2014 when it examined the due process rights of a defendant who entered into a fast-track plea agreement.

In *United States v. Heredia*, the defendant alleged that the prosecutor implicitly breached the fast-track plea agreement by filing a sentencing memo that detailed the defendant's criminal history, even though the prosecutor agreed to recommend a sentence at the low end of the Sentencing Guidelines.[14] Unlike an explicit breach where the prosecutor overtly acts in a manner that violates the terms of the plea agreement, an implicit breach occurs when the prosecutor superficially abides by the terms of the agreement but covertly seeks to undermine a benefit conferred on the defendant by the terms of the agreement.[15] Prior to *Heredia*, several circuits held that non-court-binding plea agreements can be implicitly breached;[16] however, none of the circuits had ever considered whether a prosecutor can implicitly breach a court-binding plea agreement.[17]

Heredia chartered new waters by holding that the assessment of an alleged implicit breach of a court-binding, fast-track plea agreement should be the same as non-court-binding plea agreements.[18] Moreover, *Heredia* held that such a breach is automatically reversible error—meaning that

[12] *See* United States v. Heredia, 768 F.3d 1220, 1225–26 (9th Cir. 2014); Abe Cho, Note, *Lowering Sentences for Illegal Immigrants? Why Judges Should Have Discretion to Vary from the Guidelines Based on Fast-Track Sentencing Disparities*, 43 COLUM. J.L. & SOC. PROBS. 447, 459–60 (2010). In addition to emphasizing the use of fast-track plea agreements, commentators have highlighted the attendant increase in department resources dedicated to immigration offenses and overall prioritization of curbing illegal immigration along the border regions as contributing factors to the significant increase in illegal reentry prosecutions. *See, e.g.*, Patrick Kirby Madden, Note, *Illegal Reentry and Denial of Bail to Undocumented Defendants: Unjust Tools for Social Control of Undocumented Latino Immigrants*, 11 HASTINGS RACE & POVERTY L.J. 339, 350–51 (2014) (discussing Los Angeles County's allocation of county resources to support federal illegal reentry prosecutions and the federal government's hardline position concerning the decision to prosecute under "Operation Streamline").

[13] *See, e.g.*, United States v. Litteral, 910 F.2d 547, 551–53 (9th Cir. 1990) (discussing four constitutional challenges advanced by a defendant sentenced under the Guidelines); ACLU, REFORM U.S. APPROACH TO BORDER PROSECUTIONS, https://www.aclu.org/sites/default/files/assets/14_7_3_aclu_streamline_recommendations_final.pdf [https://perma.cc/E9RB-LPS8]; Jane L. McClellan & Jon M. Sands, *Federal Sentencing Guidelines and the Policy Paradox of Early Disposition Programs: A Primer on "Fast-Track" Sentences*, 38 ARIZ. ST. L.J. 517, 523 (2006).

[14] 768 F.3d at 1224.

[15] *See, e.g.*, State v. Poole, 394 N.W.2d 909, 910–11 (Wis. Ct. App. 1986).

[16] *See, e.g.*, United States v. Cachucha, 484 F.3d 1266, 1270–71 (10th Cir. 2007); United States v. Canada, 960 F.2d 263, 269–71 (1st Cir. 1992); United States v. Brown, 500 F.2d 375, 377–78 (4th Cir. 1974).

[17] *See Heredia*, 768 F.3d at 1230–31.

[18] *Id.* at 1232–35.

upon a finding of a breach on appellate review, the sentence must automatically be vacated and the case remanded to the trial court.[19] The court asserted that the breach is not curable because any remedial action taken by the prosecutor after the alleged breach would be insufficient to overcome the harm done by the breach.[20] Accordingly, a finding of breach is not subject to harmless error analysis—a separate assessment by the appellate court of whether the breach (error) likely prejudiced the defendant—prior to granting relief.

The Ninth Circuit's holding potentially challenges the efficiency of the fast-track plea bargaining process by subjecting the process to a higher level of scrutiny by appellate courts. Given the federal government's heavy reliance on plea agreements, particularly fast-track plea agreements,[21] for criminal enforcement, a heightened level of appellate scrutiny will impact the criminal justice system with an overwhelming breadth. Accordingly, it is imperative that the costs of heightened scrutiny be fully understood and appropriately balanced against any potential gain.

The most notable and direct cost of heightened appellate scrutiny is the threat posed to prosecutors' ability to make sentencing remarks once they have entered into a plea agreement. Specifically, the threat of appellate reversal may compel prosecutors to withhold relevant information from the sentencing court, including the prosecutors' rationale for entering into the plea agreement, because the comments could be construed as undercutting the recommendation.[22] If prosecutors are forced to stand mute before sentencing courts, the courts will lose a vital source of information that is essential to their ability to impose a fair and just sentence.

In light of this cost and others, this Note examines whether traditional implicit breach analysis should be extended to fast-track plea agreements or, more broadly, any court-binding plea agreement. Further, this Note contends that the finding of an implicit breach should not be considered an automatic reversible error.[23] Part I discusses the Supreme Court's recent departure from its prior plea breach analysis and the Court's indication that

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[19] *Id.* at 1235–37.

[20] *Id.*

[21] Illegal reentry cases, which most commonly result in court-binding plea agreements, have become the most frequently prosecuted federal crime. *See* Jason D. Anton, Note, *Defining "Found in": Constructive Discovery and the Crime of Illegal Reentry*, 113 COLUM. L. REV. 1239, 1240 (2013).

[22] Shortly after *Heredia*, one prosecutor interpreted the heightened level of scrutiny as abridging his ability to respond to direct questions posed to him by the court during sentencing. *See* United States v. Torres, No. 14CR0890-LAB, 2014 WL 7176466, at *3–4 (S.D. Cal. Dec. 5, 2014).

[23] As will be discussed in greater depth in Section I.B, all but a few trial and sentencing court errors are subject to harmless error analysis. This Note argues that an implicit plea breach should not be exempt from this analysis.

not all breaches constitute reversible error. Part II reviews the development of implicit breach doctrine for non-court-binding plea agreements on both the federal and state levels. Part III discusses the emergence of fast-track plea agreements and *Heredia*'s extension of implicit breach analysis to them. Finally, Part IV argues that fast-track plea agreements should not be subject to the same breach analysis as non-court-binding pleas, and that all court-binding plea breaches[24] should be subject to harmless error analysis.

I. A SHIFT IN APPELLATE BREACH ASSESSMENT

Despite the practice of plea bargaining extending back to the early part of the nineteenth century, the Supreme Court did not acknowledge the constitutionality of plea bargaining until 1970.[25] At that time, the Court seemed to begrudgingly accept the practice as being necessary for the administration of the modern criminal justice system.[26] Accordingly, the Court began to define the boundaries of plea bargaining and assess what rights and protections should be afforded to defendants who enter into a guilty plea. This Part will discuss the Court's foundational assessment of a plea breach in *Santobello v. New York*[27] and the subsequent ambiguity concerning a defendant's remedial entitlements. Then, it will examine the implication of recent harmless error cases and the Court's contemporary assessment of a plea breach in *Puckett v. United States*.[28]

A. Santobello*'s Ambiguous Breach Remedy*

Santobello established that the breach of a plea agreement entitles defendants to a remedy, but it failed to articulate the exact nature and requirements for that remedy. In *Santobello*, the Court focused on the importance of protecting a defendant's rights in the event of an explicit breach of a sentencing recommendation.[29] The prosecutor in *Santobello*

[24] While this Note focuses on fast-track plea agreements because this is the type of agreement involved in *Heredia* and is the most commonly used court-binding plea agreement for federal prosecutions, federal prosecutors have the authority to enter into a general court-binding plea agreement outside of the fast-track context. *See* FED. R. CRIM. P. 11(c)(1)(C).

[25] *See* Brady v. United States, 397 U.S. 742, 753 (1970) (noting that plea bargaining could offer potential benefits to both the government and defendants, and that the Constitution does not forbid its practice); Alschuler, *supra* note 1, at 40.

[26] *See* John H. Langbein, *Land Without Plea Bargaining: How the Germans Do It*, 78 MICH. L. REV. 204, 205 (1979).

[27] 404 U.S. 257 (1971).

[28] 556 U.S. 129 (2009).

[29] 404 U.S. at 264 ("[A] guilty plea is a serious and sobering occasion inasmuch as it constitutes a waiver of the fundamental rights 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 all reasonable doubt." (citations omitted)).

promised to make no recommendation at the sentencing hearing in exchange for the defendant's guilty plea to a lesser-included offense.[30] The defendant accepted the agreement and entered a binding guilty plea that he would be unable to withdraw absent the sentencing court's discretionary approval.[31] However, after a new prosecutor was assigned to the case, the new prosecutor explicitly breached the plea agreement by recommending that the defendant be sentenced to the maximum confinement time.[32] Despite the defendant's objection to the breach, the court proceeded with sentencing after the prosecutor made his unequivocal recommendation,[33] leaving the defendant with no option to obtain a remedy for the breach other than filing an appeal.

To define the defendant's rights with respect to the plea agreement, *Santobello* borrowed basic contract law principles and asserted that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled."[34] While this application of contract law's manifestation of assent principle was clear and has been consistently acknowledged in subsequent cases,[35] what was less clear was the burden imposed on a defendant to obtain relief for a breach and the exact remedy that should be afforded when that burden is met.[36]

In large part, this lack of clarity stems from two omissions in *Santobello*. First, the Court did not specify the exact remedy that was to be afforded to the defendant. Instead, the Court remanded the case to the state court to determine if vacatur or specific performance would be more appropriate in this case.[37] While some courts have interpreted this as affording the defendant a choice between these two remedies,[38] the

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30 *Id.* at 258.

31 *See id.* Defendant Santobello actually attempted to withdraw his guilty plea after his newly appointed counsel advised him that some crucial evidence may not be admissible due to the manner in which it was obtained, but the court denied his motion to withdraw his plea. *Id.* at 258–59.

32 *Id.* at 259.

33 *Id.* at 259–60.

34 *Id.* at 262.

35 *See, e.g.*, Mabry v. Johnson, 467 U.S. 504, 508 (1984).

36 *See generally* Peter Westen & David Westin, *A Constitutional Law of Remedies for Broken Plea Bargains*, 66 CALIF. L. REV. 471 (1978) (noting *Santobello*'s failure to provide lower courts with clear guidance concerning appropriate remedies for plea breaches, and evaluating the potential implications a plea breach may have on a defendant's constitutional rights and the attendant remedies that would be most appropriate).

37 *Santobello*, 404 U.S. at 263.

38 *See, e.g.*, United States v. Heredia, 768 F.3d 1220, 1236–37 (9th Cir. 2014); State v. Pope, 564 P.2d 1179, 1182 (Wash. Ct. App. 1977) ("[W]here bad faith is found to exist, the court should give considerable weight to the choice of remedy sought by [the] defendant . . . .").

allocation of a choice of remedy may be unnecessary and even inappropriate, depending on the interest that is being protected.[39]

Second, even though *Santobello* articulated that the explicit breach in that case automatically entitled the defendant to relief, regardless of whether it influenced the judge's sentencing decision, the Court did not specify general criteria for when a defendant is automatically entitled to relief.[40] Further, *Santobello* articulated that a defendant does not have a right to plea bargain or have a plea agreement accepted by the trial court, but it also indicated that a breach of an enforceable plea agreement implicates a violation of a defendant's due process rights.[41] While one may interpret *Santobello*'s reference to due process rights and its refusal to apply harmless error analysis as an indication that an explicit breach of a sentencing recommendation always entitles a defendant to a remedy, *Santobello*'s failure to explicitly state this, and its assertion that defendants do not have a right to plea bargain, could logically lead one to conclude some breaches may be subject to harmless error analysis.[42] Accordingly, *Santobello* leaves some ambiguity as to if and when a plea breach may be subject to harmless error analysis. While many circuits refuse to subject plea breaches to harmless error analysis when the defendant makes a timely objection to the alleged breach,[43] the Eighth Circuit employs harmless error analysis regardless of whether the defendant objected.[44]

B. Narrowing Appellate Protection for Breaches

Since *Santobello*, the Court has taken affirmative steps to limit the scope of appellate protection afforded to defendants who enter into plea agreements, and has indicated in dicta that it may further limit these protections. With respect to initially entering into plea agreements, the

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[39] *See* Westen & Westin, *supra* note 36, at 507–14 (noting that either vacatur or specific performance can sufficiently protect the defendant's need to "intelligently" exercise the choice to plead guilty, but that only specific performance can adequately protect a defendant's expectation interest).

[40] *See* 404 U.S. at 262–63.

[41] *See id.* at 262; Daniel Frome Kaplan, Comment, *Where Promises End: Prosecutorial Adherence to Sentence Recommendation Commitments in Plea Bargains*, 52 U. CHI. L. REV. 751, 755 (1985) (discussing *Mabry*'s confirmation that the Court perceives "due process concerns [being] implicated in the process of enforcing a plea agreement").

[42] *See, e.g.*, United States v. Diaz-Jimenez, 622 F.3d 692, 695–96 (7th Cir. 2010) (citing Puckett v. United States, 556 U.S. 129, 141–42 (2009)) (discussing whether *Santobello* precludes plea breaches from being subject to harmless error analysis, and concluding that it left the specific requirements for a remedy as an open question).

[43] *See, e.g.*, United States v. Clark, 55 F.3d 9, 13–14 (1st Cir. 1995) (quoting Correale v. United States, 479 F.2d 944, 949 (1st Cir. 1973)).

[44] *See, e.g.*, United States v. Smith, 584 F.3d 1127, 1129 (8th Cir. 2009); United States v. E.V., 500 F.3d 747, 754–55, 755 n.13 (8th Cir. 2007).

Court clarified that a prosecutor reserves the right to withdraw from the agreement prior to the trial court's acceptance of the plea.[45] Since defendants do not have a right to plea bargain with the government, and defendants do not officially sacrifice their "liberty or any other constitutionally protected interest" prior to the court's acceptance of their guilty plea, a prosecutor's initial promise has not induced the defendant to detrimentally sacrifice any right.[46] Further, a clearly rescinded plea offer does not compromise the voluntariness or intelligence of a subsequent guilty plea.[47] Thus, the Court's protection of defendants who engage in plea bargaining varies based on the sacrifices defendants have actually incurred at a given stage of the plea bargaining process.

Most recently, in *Puckett v. United States*, the Court clearly articulated that the breach of a plea agreement is not "structural" error.[48] A structural error is an error that "*necessarily* render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence."[49] Accordingly, proof of a breach alone is not sufficient to warrant an automatic remedy. Instead, in certain situations, a defendant may bear the additional burden of proving that the breach was not harmless.[50]

In *Puckett*, the defendant was induced to plead guilty, in part, by the prosecutor's promise to recommend an offense-level reduction that would have significantly reduced the amount of prison time the defendant would be eligible for under the federal Sentencing Guidelines.[51] However, after the defendant entered his binding guilty plea with the court, the prosecutor explicitly breached the plea agreement by filing a sentencing addendum that unambiguously recommended that the court not give the defendant the offense-level reduction because he committed another crime after the plea agreement was made.[52] Notably, while defendant's counsel made a general objection to the prosecutor's new recommendation in the addendum, counsel failed to "object [at sentencing] that the Government was violating

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45 Mabry v. Johnson, 467 U.S. 504, 506–08 (1984).

46 *See id.* at 507, 510–11 ("The Due Process Clause is not a code of ethics for prosecutors; its concern is with the manner in which persons are deprived of their liberty.").

47 *See id.* at 510.

48 556 U.S. 129, 140–41 (2009).

49 Neder v. United States, 527 U.S. 1, 9 (1999).

50 *Puckett*, 556 U.S. at 141–42 (2009) ("The defendant whose plea agreement has been broken by the Government will not always be able to show prejudice, either because he obtained the benefits contemplated by the deal anyway (*e.g.*, the sentence that the prosecutor promised to request) or because he likely would not have obtained those benefits in any event (as is seemingly the case here).").

51 *Id.* at 131. The difference between the low end of the Guidelines range with the offense-level reduction and without the reduction was seventy-four months. *See id.* at 132–33.

52 *See id.* at 132.

its obligations under the plea agreement by backing away from its request for the reduction."[53] After review by the Supreme Court, *Puckett* held that a plea breach is subject to plain error review—which includes an assessment of whether there was a clear or obvious error and whether it was harmless—if the defendant fails to object to the breach in a timely fashion.[54]

In *Puckett*'s rejection of the idea that a plea breach is necessarily prejudicial to a defendant, the Court noted that a breach may be curable. *Puckett* articulated that the breach itself does not impact the voluntary and intelligent nature of the defendant's decision to plead guilty; rather, it merely means the prosecutor has failed to fulfill a contractual obligation.[55] Since the nature of the plea is not impacted, the filing of a timely objection may induce the prosecution to take action to fulfill its obligation under the agreement, curing the alleged breach.[56] If the prosecution refuses, the trial court then has the ability to "grant an immediate remedy [for the breach] (*e.g.*, withdrawal of the plea . . .) and thus avoid the delay and expense of a full appeal."[57] By emphasizing the ability to immediately cure a breach, *Puckett* appears to be trying to protect the efficient nature of plea bargaining—which is the primary attribute that justifies its practice—by limiting the need for and authorization of appellate court intervention.[58]

While these clear declarations about curability and nonstructural error illustrate the limited scope of breaches that are subject to automatic reversal

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[53] *Id.* at 133; *see also* Brief for the United States at 8–9, Puckett v. United States, 556 U.S. 129 (2009) (No. 07-9712).

[54] 556 U.S. at 134–36.

[55] *Id.* at 137–38.

[56] *Id.* at 140.

[57] *Id.*

[58] Similarly, the majority of the circuits have promoted the efficiency of plea bargaining by upholding the validity of various appealability waivers in plea agreements. *See, e.g.*, United States v. Allison, 59 F.3d 43, 46 (6th Cir. 1995); United States v. Schmidt, 47 F.3d 188, 190, 192 (7th Cir. 1995); United States v. Attar, 38 F.3d 727, 731 (4th Cir. 1994); United States v. DeSantiago-Martinez, 980 F.2d 582, 583 (9th Cir. 1992), *amended by* 38 F.3d 394 (9th Cir. 1994); United States v. Melancon, 972 F.2d 566, 567–68 (5th Cir. 1992); United States v. Rivera, 971 F.2d 876, 896 (2d Cir. 1992); United States v. Rutan, 956 F.2d 827, 829–30 (8th Cir. 1992), *overruled on other grounds by* United States v. Andis, 333 F.3d 886 (8th Cir. 2003); *cf.* United States v. Bushert, 997 F.2d 1343, 1350 (11th Cir. 1993) (noting that most appealability waivers will be upheld on appeal, despite invalidating the waiver in the case). Generally, when defendants sign an appealability waiver, they waive the right to challenge either a particular stipulation in the agreement or their sentence via direct appeal unless they can assert that the plea agreement was not entered into knowingly and voluntarily or that they received ineffective assistance of counsel. These waivers protect the efficiency of the plea bargaining process by significantly reducing defendants' ability to use appellate courts as a trial court for the plea process. The inclusion of appealability waivers in plea agreements became common in the 1990s in response to the notable increase in direct and collateral appeals filed by defendants that entered into plea agreements. *See* FED. R. CRIM. P. 11(c)(6) advisory committee's note to 1999 amendment (acknowledging the increase in the use of waivers and the federal courts' tendency to uphold their validity).

in accordance with *Santobello*, *Puckett* did not go as far to overrule *Santobello*'s holding that certain explicit breaches of a plea agreement automatically entitle a defendant to relief. However, Justice Scalia, writing for the majority, gave an indication that recent precedent concerning harmless error principles may demand a reexamination of *Santobello*.[59] Since *Santobello*, the Court has repeatedly affirmed that harmless error analysis is applicable to the vast majority of appeals, including "[a]ny error . . . which does not affect substantial rights" and is "simply an error in the trial process itself."[60] Such errors are not exempt from harmless error analysis because the impact of the error is quantifiable in the context of the other evidence that was presented against the defendant.[61] Accordingly, a select few constitutional violations, such as the denial of counsel, avoid harmless error analysis,[62] but most violations, including the admission of a coerced confession, do not.[63] This raises the question of whether a defendant who enters into a plea agreement, which itself is not a constitutional right, should be afforded more protection—by way of having to meet a lower burden of proof on appeal—than a defendant who is compelled to stand witness against himself in the form of a coerced police confession, in violation of his Fifth Amendment right.

II. COURT ANALYSIS OF IMPLICIT BREACHES

Plea bargains often entail a sentence-recommendation bargain—the prosecutor agrees to make a specific sentencing recommendation to the court in exchange for the defendant's guilty plea.[64] Usually, these sentencing recommendations are not binding on the court;[65] however, the prosecutor's recommendation is often influential in determining the sentence imposed.[66] If a prosecutor makes a different recommendation than the one agreed to, or fails to make a recommendation at all, it is clear that the prosecutor has explicitly breached the agreement. What is much less

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59 *Puckett*, 556 U.S. at 141 n.3.

60 *See* Neder v. United States, 527 U.S. 1, 7–8 (1999) (first alteration in original) (first quoting FED. R. CRIM. P. 52(a); and then quoting Arizona v. Fulminante, 499 U.S. 279, 310 (1991)).

61 *See Fulminante*, 499 U.S. at 307–08.

62 *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963).

63 *See Fulminante*, 499 U.S. at 311.

64 *See* FED. R. CRIM. P. 11(c)(1).

65 *See id.* 11(c)(1)(B); *see also, e.g.*, United States v. Gaertner, 593 F.2d 775, 777 (7th Cir. 1979); People v. Pahlman, 366 N.E.2d 1090, 1095 (Ill. App. Ct. 1977).

66 *See* Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992) ("[J]udges often give bargained-for sentences because of what prosecutors and defense lawyers do *not* say at sentencing; the sentencing hearing seems rigged to support the deal that the two attorneys have already struck."); *see also* FISHER, *supra* note 5, at 131–33.

clear is whether a prosecutor implicitly breaches an agreement by making additional statements beyond the specific sentence recommendation about the defendant or the particular crime. This Part will examine how both the federal circuits and the state courts have addressed the issue of implicit breaches. Further, this Part will discuss the difficulty of balancing the need to protect a defendant from an implicit breach with the prosecutor's duty to inform the sentencing court.

A. Federal Court Implicit Breach Analysis

Federal prosecutors are constrained by the dual obligation to (1) uphold the negotiated sentence recommendation and (2) fully inform the court of all facts relevant to sentencing.

Generally, federal circuits have acknowledged that a prosecutor can implicitly breach a plea agreement by effectively arguing against the agreed-to sentencing recommendation. However, the circuits have applied varying levels of scrutiny to prosecutors' sentencing recommendations. Under the old discretionary sentencing system, some circuits critically reviewed the tenor of prosecutors' comments and conduct during the sentencing phase.[67] For example, in *United States v. Grandinetti*, the Fifth Circuit articulated that a prosecutor's sentencing recommendation needs to be "forceful and intelligent" to fulfill the plea agreement obligation.[68] The Ninth Circuit went even further, imposing an implied-in-law requirement for the prosecutor to be "enthusiastic" in the articulation of a sentencing recommendation.[69]

However, after the passage of the Sentencing Reform Act of 1984,[70] the Supreme Court addressed circuits' application of a high level of scrutiny to all sentencing recommendations. The Sentencing Reform Act sought to remedy the issue of widely disparate sentences being imposed by different federal judges for similar criminal conduct.[71] The Act created the U.S. Sentencing Commission that was responsible for establishing Sentencing Guidelines to constrain judges' sentencing discretion and

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[67] *See* United States v. Grandinetti, 564 F.2d 723 (5th Cir. 1977); United States v. Brown, 500 F.2d 375, 377 (4th Cir. 1974) ("[I]t is manifest that the consideration which induced defendant's guilty plea was not simply the prospect of a formal recitation of a possible sentence, but rather the promise that an Assistant United States Attorney would make a *recommendation* on sentencing.").

[68] 564 F.2d at 727.

[69] *See* United States v. Benchimol, 738 F.2d 1001, 1002 (9th Cir. 1984), *rev'd*, 471 U.S. 453 (1985) (per curiam).

[70] Pub. L. No. 98-473, tit. II, ch. II, 98 Stat. 1987 (codified as amended in scattered sections of 18 and 28 U.S.C.).

[71] *See* Ross Galin, Note, *Above the Law: The Prosecutor's Duty to Seek Justice and the Performance of Substantial Assistance Agreements*, 68 FORDHAM L. REV. 1245, 1250 (2000).

promote sentencing consistency.[72] Since judges' sentencing discretion is constrained by the ranges delineated in the Sentencing Guidelines,[73] a federal prosecutor's sentencing recommendation has a more limited potential to impact the sentence imposed.[74]

Possibly due to this limited impact potential, the Court rejected the concept of an implied-in-law requirement that a recommendation be given enthusiastically.[75] In *United States v. Benchimol*, the Court noted that a prosecutor is bound to uphold any explicit promises that were made regarding a sentence recommendation, including a promise to make a forceful or enthusiastic recommendation.[76] However, the Court further noted that plea agreements do not inhere to them a demand of a high level of advocacy on the part of the prosecutor; the agreements simply require that the express terms be fulfilled and not undermined by the prosecutor's conduct.[77] In so holding, *Benchimol* referenced the inability of an appellate court to fairly assess a prosecutor's level of advocacy from a transcript.[78]

While *Benchimol* places some limit on the scrutiny applied to a prosecutor's sentence recommendation, it does not clearly define the bounds of an implicit breach. Generally, circuit courts have articulated that a prosecutor must affirmatively make the negotiated sentencing recommendation and must avoid making comments that clearly undermine that recommendation.[79] However, since federal prosecutors have a duty to

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[72] *Id.*; *see* Memorandum from John Ashcroft, Att'y Gen., U.S. Dep't of Justice, to All U.S. Attorneys, Department Policies and Procedures Concerning Sentencing Recommendations and Sentencing Appeals (July 28, 2003) [hereinafter Ashcroft PROTECT Act Bluesheet], *reprinted in* 15 FED. SENT'G REP. 375, 375 (2003).

[73] While strict adherence to the federal Sentencing Guidelines is no longer technically mandatory, the sentencing discretion of federal judges is still constrained by the Guidelines. *See generally* United States v. Booker, 543 U.S. 220 (2005) (precluding judges from imposing sentences that exceed the applicable guideline absent a jury determination that an aggravating factor exists beyond a reasonable doubt or the defendant's admission of the aggravating factor).

[74] *See* Scott & Stuntz, *supra* note 66, at 1912 n.12 ("Sentencing in [Guidelines] jurisdictions does not depend on the prosecutor's representations to the same extent as in discretionary sentencing systems because the guidelines often dictate a particular sentence.").

[75] United States v. Benchimol, 471 U.S. 453, 456 (1985) (per curiam).

[76] *Id.* at 455–56.

[77] *See id.*

[78] *See id.* at 456 (noting that a prosecutor's expression of personal reservations about a plea agreement "is quite a different proposition than an appellate determination from a transcript of the record made many years earlier that the Government attorney had 'left an impression with the court of less-than-enthusiastic support for leniency'").

[79] *See, e.g.*, United States v. Cachucha, 484 F.3d 1266, 1270 (10th Cir. 2007) (holding that the prosecutor's recommendation was undermined by his subsequent complaints about the inadequacy of the Sentencing Guidelines); United States v. Saling, 205 F.3d 764, 766 (5th Cir. 2000) (highlighting the prosecutor's attempt to distance himself from the original agreement by discussing the defendant's conduct in trial after the agreement was made); United States v. Canada, 960 F.2d 263, 269–70 (1st Cir.

fully inform a sentencing court regardless of the terms of a plea agreement, appellate courts are saddled with the complicated task of parsing comments made solely for the purpose of informing the court with comments made to clearly undermine the recommendation.[80]

As ministers of justice, federal prosecutors have an affirmative duty to ensure that sentencing courts make an informed decision.[81] Society's interest in just punishment and safety demands that this affirmative duty is not abridged.[82] Thus, attorneys general have sought to codify this duty in recent "bluesheets."

In accord with the purpose of the Sentencing Guidelines, attorneys general strive to promote consistency in the prosecution of criminal activity by issuing bluesheets that provide broad guidelines prosecutors must adhere to in their charging and plea negotiation decisions.[83] These guidelines require all sentencing recommendations to honestly reflect the totality of a defendant's conduct, and that prosecutors fully inform the sentencing court of all readily provable facts relevant to sentencing.[84] This would include certain details about the particular crime and information about the defendant's criminal history. A prosecutor's divulgence of such relevant facts is paramount to ensuring the consistent sentencing of similarly situated defendants.

This obligation to inform the court presents an issue with an implicit breach analysis because a prosecutor's recitation of the relevant facts may be viewed as undermining the negotiated sentence recommendation. In fact, due to the adversarial nature of the adjudicatory process, almost any statement made by the prosecutor pertaining to the prosecuted crime or the

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1992) (asserting that the prosecutor's expression of "material reservations about the agreement" served to "cut off the government's agreement at the knees").

[80] *See* Galin, *supra* note 71, at 1281 (discussing some courts' refusal to force a prosecutor to uphold a plea agreement if it infringes on their duty to inform the court).

[81] *See, e.g.*, *Saling*, 205 F.3d at 767 ("A prosecutor has the duty as an officer of the court to inform the court of all factual information relevant to the defendant's sentence so that a sentence may be imposed based upon a complete and accurate record."); United States v. Read, 778 F.2d 1437, 1442 (9th Cir. 1985) ("[T]he prosecutor was obligated to bring her conduct subsequent to conviction to the court's attention: '[A]ny time a prosecutor is aware that the court is about to impose sentence based upon incomplete or inaccurate information, the prosecutor has the duty to inform the court of the correct or missing information.'" (second alteration in original) (quoting United States v. Block, 660 F.2d 1086, 1091 n.7 (5th Cir. 1981))).

[82] *Cf.* United States v. Hand, 913 F.2d 854, 856–57 (10th Cir. 1990) ("[T]he plea agreement did not restrict the court's access to . . . information, nor could such an agreement properly do so.").

[83] *See, e.g.*, Ashcroft PROTECT Act Bluesheet, *supra* note 72, at 375–76; Memorandum from Janet Reno, Att'y Gen., U.S. Dep't of Justice, to Holders of U.S. Attorneys' Manual, Title 9, Principles of Federal Prosecution (Oct. 12, 1993), *reprinted in* 6 FED. SENT'G REP. 352, 352 (1994).

[84] Ashcroft PROTECT Act Bluesheet, *supra* note 72, at 376 (noting that the Guidelines explicitly prohibit a federal prosecutor from being a "party to any plea agreement that results in the sentencing court having less than a full understanding of all readily provable facts relevant to sentencing").

defendant's criminal history could be viewed as an implied distancing from the sentence recommendation.

In light of this issue, circuits have taken disparate approaches in balancing the prosecutors' obligations to the defendant that entered into the plea agreement and the sentencing court. For example, the Eighth Circuit generally affords prosecutors a great deal of leeway in apprising the court of all relevant sentencing information as long as the prosecutor affirmatively makes the negotiated sentence recommendation. In *United States v. Baker*, after summarizing the defendant's criminal conduct, the prosecutor stated, "They don't get much worse than this, Your Honor. . . . [T]he defendant has made it abundantly clear by his own actions that he has a sexual preference for young children, and he's never going to stop."[85] But, after this statement, the prosecutor reaffirmed that the plea agreement's recommended sentence was appropriate.[86] *Baker* asserted that the prosecutor's detailing of the facts of the crime and subsequent commentary on the conduct and defendant did not undermine the recommendation, despite being less-than-enthusiastic.[87]

In contrast, the Ninth Circuit has been more critical in assessing the necessity of a prosecutor's sentencing comments. The Ninth Circuit has asserted that if a prosecutor's comment does not serve to provide the trial court with new information or correct a factual inaccuracy, it can be presumed that the comment was made to imply that a different sentence than the one recommended is warranted.[88] Accordingly, the Ninth Circuit has held that a prosecutor's restatement or unnecessary elaboration on information already contained in a presentence report can constitute an implicit breach of a plea agreement.[89]

In short, while the circuits agree that a prosecutor implicitly breaches a plea agreement by clearly undermining a sentence recommendation, the extent to which this obligation constrains the prosecutor's duty to inform the court varies amongst the circuits.

B. State Court Implicit Breach Analysis

Many state courts have similarly struggled to establish a clear standard for analyzing alleged implicit plea breaches that balances the prosecutor's duties to the sentencing court and to the defendant. This Section will focus

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[85] 674 F.3d 1066, 1067 (8th Cir. 2012).

[86] *Id.* at 1067–68.

[87] *Id.* at 1068.

[88] *See* United States v. Whitney, 673 F.3d 965, 971 (9th Cir. 2012) (quoting United States v. Mondragon, 228 F.3d 978, 980 (9th Cir. 2000)).

[89] *Mondragon*, 228 F.3d at 980–81.

on the evolution of implicit breach analysis for one state that has articulated a clear standard of review—Wisconsin.[90] Unlike the federal system, Wisconsin employs a discretionary sentencing system, potentially enabling a prosecutor's sentencing recommendation to have a more significant impact on the sentence imposed.[91] Additionally, Wisconsin acknowledges a state constitutional right to the enforcement of plea agreements, but all sentence recommendations are nonbinding on the court.[92]

For implicit breaches, Wisconsin appellate courts initially adopted the standard articulated by the Fourth Circuit in *United States v. Brown*—a sentence recommendation "that is something *less* than a neutral recitation of the product of the bargain—is a breach of the plea agreement."[93] In the first application of this standard in *State v. Poole*, the prosecutor presented the negotiated sentence recommendation to the court, but noted that the agreement was entered into prior to the state being aware of other instances of similar criminal conduct by the defendant.[94] *Poole* articulated that couching the recommendation in a qualifying statement made the recommendation a less-than-neutral recitation and constituted a breach of the plea agreement.[95] This indicated that the less-than-neutral standard may impose a rigid restriction on a prosecutor's comments in connection with a negotiated sentence recommendation.

However, since *Poole*, Wisconsin courts have taken a less critical approach in reviewing a prosecutor's conduct in connection with fulfilling a plea agreement.[96] Accordingly, subsequent Wisconsin cases have limited the level of scrutiny to be applied by appellate courts under the less-than-neutral standard. The courts have consistently articulated that the less-than-neutral standard prohibits prosecutors from clearly distancing themselves

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90 While Wisconsin's sentencing scheme and rules of criminal procedure differ from that of the federal government, and the federal government has exclusive jurisdiction over the prosecution of criminal illegal reentry, Wisconsin's long history of balancing the need to protect defendants from implicit breaches with the need to protect prosecutors' ability to fulfill their duties, and its objective of increasing consistency in sentencing, can serve as a helpful comparison to the federal system.

91 *See* State v. Gallion, 678 N.W.2d 197, 208–09 (Wis. 2004).

92 State v. Williams, 637 N.W.2d 733, 741, 744 (Wis. 2002); State v. Smith, 558 N.W.2d 379, 385, 389–90 (Wis. 1997).

93 State v. Poole, 394 N.W.2d 909, 910 (Wis. Ct. App. 1986) (citing United States v. Brown, 500 F.2d 375, 377–78 (4th Cir. 1974)).

94 *Id.* at 909.

95 *Id.* at 910–11.

96 *See, e.g.*, State v. Bangert, 389 N.W.2d 12, 32–33 (Wis. 1986) (noting that not all plea agreement breaches warrant a remedy); State v. Howard, 630 N.W.2d 244, 250 (Wis. Ct. App. 2001) (same); *cf. Williams*, 637 N.W.2d at 740 (rejecting a "close case" standard of review for an appellate court's analysis of an alleged implicit breach of a plea agreement).

from the negotiated sentence recommendation.[97] For example, prosecutors clearly distance themselves from the negotiated recommendation when they recite an alternative sentence recommendation listed in the presentence investigation report (PSR)[98] or emphasize that the negotiated sentence recommendation was made prior to the discovery of certain negative information about the defendant.[99] However, the courts have also articulated that the prosecutors' duty to fully inform the sentencing court authorizes them to convey relevant negative information about the defendant to the court without breaching the plea agreement.[100] In fact, any plea agreement that would impede a prosecutor's authority to convey such information contravenes Wisconsin's public policy and will not be enforced by the court.[101]

Most notably, in *State v. Naydihor*, the Wisconsin Supreme Court asserted that a prosecutor is free to comment on the nature of the offense, the defendant's character, and the rights of the public in presenting a negotiated sentence recommendation to the court.[102] *Naydihor* analyzed an alleged implicit breach of a plea agreement that required the prosecutor to recommend probation, but did not stipulate the length of probation.[103] At sentencing, the prosecutor recited portions of the PSR pertaining to the victim impact statement and the defendant's substance abuse history.[104] Since this negative information was relevant to the nature of the offense and the defendant's character, discussion of this information merely served to fully inform the court and did not constitute a less-than-neutral recitation of the agreement.[105]

Overall, Wisconsin's analysis of implicit breaches strives to avoid creating a rigid standard that impedes prosecutors' duty to the sentencing court, and limits breaches to irrelevant, negative commentary that undermines the negotiated recommendation.

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[97] *See, e.g.*, *Williams*, 637 N.W.2d at 746; State v. Sprang, 683 N.W.2d 522, 529 (Wis. Ct. App. 2004).

[98] *Sprang*, 683 N.W.2d at 529.

[99] *Williams*, 637 N.W.2d at 746.

[100] *See, e.g.*, State v. Naydihor, 678 N.W.2d 220, 231 (Wis. 2004); State v. Hanson, 606 N.W.2d 278, 283 (Wis. Ct. App. 1999); *see also Williams*, 637 N.W.2d at 745 ("At sentencing, pertinent factors relating to the defendant's character and behavioral pattern cannot be immunized by a plea agreement between the defendant and the State.").

[101] *Williams*, 637 N.W.2d at 745.

[102] 678 N.W.2d at 230–31.

[103] *Id.* at 227–28.

[104] *Id.* at 226–27.

[105] *See id.* at 231.

III. IMPLICIT BREACH ANALYSIS EXTENDED TO FAST-TRACK PLEAS

The federal and state implicit plea breach analysis has exclusively focused on non-court-binding plea agreements. This means the court is able to accept the defendant's guilty plea, then disregard the negotiated sentence recommendation and impose a harsher sentence. Thus, the impact of the alleged implicit breach is only known to the parties after the defendant is bound to the guilty plea, and the defendant's only means of obtaining an equitable remedy for the breach is through the appellate process.

In contrast, fast-track pleas are court-binding plea agreements. This means that if the court accepts the plea agreement, it is bound to impose the recommended sentence.[106] Thus, if an implicit breach occurs that induces the judge to reject the recommended sentence, the defendant is automatically entitled to rescind the guilty plea.

This Part will begin by discussing the recent increase in fast-track plea agreements for immigration offenses. Then, it will examine the Ninth Circuit's extension of implicit breach analysis to a fast-track plea agreement in *Heredia*.

A. The Increased Use of Fast-Track Pleas

The use of fast-track pleas has increased dramatically in recent years, representing a fundamental shift in immigration policy and adjudication. In 1952, Congress made the illegal reentry of a previously deported alien a felony.[107] To obtain a conviction under § 1326 a prosecutor only needs to prove that the defendant is (1) an alien, (2) that was previously deported, (3) who was found in the United States, and (4) did not have the Attorney General's permission to reenter the United States.[108] Since the defendant's guilt is primarily contingent upon establishing the defendant's immigration status, the only evidence needed to secure a conviction is usually readily available documentation of their status.[109] Thus, the prosecutor's need to

[106] *See* FED. R. CRIM. P. 11(c)(1)(C).

[107] *See* Pub. L. No. 82-414, § 276, 66 Stat. 163, 229 (1952) (codified at 8 U.S.C. § 1326 (2012)). Prior to the passage of § 1326, immigration laws were enforced exclusively through civil proceedings. Despite the criminalizing of illegal reentry, the number of civil removal proceedings still outweighs criminal immigration proceedings. ACLU IMMIGRANTS' RIGHTS PROJECT, ISSUE BRIEF: CRIMINALIZING UNDOCUMENTED IMMIGRANTS 3 fig.1 (2010), https://www.aclu.org/files/assets/FINAL_criminalizing_undocumented_immigrants_issue_brief_PUBLIC_VERSION.pdf [https://perma.cc/3EXC-86GK]. Notably, these civil removal proceedings do not afford defendants the same constitutional protections as the criminal illegal reentry defendants. *Id.* at 2.

[108] *See* 8 U.S.C. § 1326(a); DENNIS CANDELARIA, IMMIGRATION: DEFENDING AGAINST THE ILLEGAL ENTRY AND ILLEGAL REENTRY CHARGES 2, http://www.fd.org/pdf_lib/MT08/MT08_DefendIllegalEntryReenty.pdf [http://perma.cc/GVB6-ZJBS].

[109] *See* CANDELARIA, *supra* note 108, at 2. Mr. Candelaria notes that, absent admission from the defendant, proof of alienage is obtainable through a birth certificate, proof of removal is obtainable

allocate time to compile the necessary documentation is generally the only significant impediment to pursuing illegal reentry convictions.

Nonetheless, prosecutors rarely pursued illegal reentry charges prior to the 1990s, favoring deportation without criminal charges.[110] However, federal prosecutors have recently begun to increase their enforcement of § 1326. For example, the Department of Justice charged fewer than 2500 individuals with illegal reentry in 1993, but charged more than 13,000 with illegal reentry in 2004.[111] This trend has continued as prosecutions reached a new high of 37,440 in 2013.[112]

Much of this increase has been facilitated by the use of fast-track pleas, in which the defendant pleads guilty at the initial appearance in exchange for a court-binding sentence recommendation below the applicable Sentencing Guideline range.[113] By utilizing this efficient form of plea bargaining, prosecutors are able to minimize any increase in time or resources to pursue illegal reentry convictions. Thus, fast-track plea agreements have enabled federal prosecutors to consistently enforce the immigration law without negatively impacting their enforcement of other criminal statutes.

With the passage of the PROTECT Act in 2003, Congress officially endorsed the use of this plea system by directing the Sentencing Commission to define a clear policy for accommodating reduced sentences for fast-track pleas.[114] Similarly, the Attorney General endorsed the use of

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through an I-205 warrant of removal, proof of presence in the United States is obtainable from the arresting officer's report, and proof of nonconsent is obtainable from testimony about the absence of documented consent in the immigration databases. *Id.*; *see also* United States v. Berrios-Centeno, 250 F.3d 294, 299–300 (5th Cir. 2001) (noting that several of the federal circuits have construed § 1326 as a general intent statute by which the requisite *mens rea* "'may be inferred by the fact that a defendant was previously "deported" . . . and subsequently "found in" the United States,' without consent" (quoting United States v. Hernandez-Landaverde, 65 F. Supp. 2d 567, 572 (S.D. Tex. 1999))).

[110] *See* Alan D. Bersin, *Reinventing Immigration Law Enforcement in the Southern District of California*, 8 FED. SENT'G REP. 254, 254–55 (1996).

[111] United States v. Heredia, 768 F.3d 1220, 1225 (9th Cir. 2014).

[112] *Id.* This increase in prosecutions has outpaced the increase in Homeland Security's noncriminal deportation actions over the same time period, and has persisted despite an overall decrease in the collective number of removal actions by all federal agencies. *See* JESSICA M. VAUGHAN, CTR. FOR IMMIGRATION STUDIES, DEPORTATION NUMBERS UNWRAPPED: RAW STATISTICS REVEAL THE REAL STORY OF ICE ENFORCEMENT IN DECLINE 8 tbl.4 (2013), http://cis.org/sites/cis.org/files/Deportation-Numbers-Unwrapped.pdf [https://perma.cc/6XJ9-3EPG]; *cf.* Ana Gonzalez-Barrera & Jens Manuel Krogstad, *U.S. Deportations of Immigrants Reach Record High in 2013*, PEW RES. CTR. (Oct. 2, 2014), http://www.pewresearch.org/fact-tank/2014/10/02/u-s-deportations-of-immigrants-reach-record-high-in-2013 [http://perma.cc/2BB3-JDTS] (documenting an overall increase in Homeland Security deportations from 2004 to 2013 of less than 100%).

[113] *See Heredia*, 768 F.3d at 1225; *see also* McClellan & Sands, *supra* note 13, at 523.

[114] *See* Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108-21, § 401(m)(2)(B), 117 Stat. 650, 675; *Heredia*, 768 F.3d at 1226.

the fast-track plea program by creating a nationwide standard for defendants' eligibility for a fast-track plea.[115]

B. Heredia*'s Extension of Breach Analysis to Fast-Track Pleas*

In *Heredia*, the Ninth Circuit[116] extended its precedent concerning implicit breaches to fast-track plea agreements. Mr. Heredia was an alien from Mexico who had been previously deported in 1992, 2009, and 2010; was found in the United States in 2011; and had not received authorization from the Attorney General to reenter the United States.[117] As far as the record shows, none of these facts have ever been contested by Mr. Heredia.

The federal prosecutor charged Mr. Heredia with illegal reentry, which carried with it a potential maximum penalty of twenty years imprisonment due to Mr. Heredia's criminal history.[118] The prosecutor offered Mr. Heredia a fast-track plea deal—he pled guilty to criminal reentry and waived his right to appeal his conviction in exchange for a court-binding sentence recommendation of six months followed by three years of supervision.[119]

After the PSR was issued for Mr. Heredia, the prosecutor filed a sentencing position with the court that affirmatively recommended the negotiated sentence, recited some of the information contained in the PSR pertaining to Mr. Heredia's criminal history, and noted that the history "communicate[d] a consistent disregard for both the criminal and immigration laws of the United States."[120] Defense counsel immediately objected, alleging the prosecutor's inclusion of negative information from the PSR implicitly breached the agreement.[121] The prosecutor denied breaching, but still submitted a supplemental sentencing position reaffirming the government's support of the negotiated sentence.[122]

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[115] *See Heredia*, 768 F.3d at 1226; Memorandum from James M. Cole, Deputy Att'y Gen., U.S. Dep't of Justice, to All United States Attorneys, Department Policy on Early Disposition or "Fast-Track" Programs 2 (Jan. 31, 2012), http://www.justice.gov/dag/fast-track-program.pdf [http://perma.cc/964G-4QK3].

[116] It is important to note that the Ninth Circuit, encompassing portions of the southwest border, handles a substantial portion of the illegal reentry prosecutions every year. *See Illegal Reentry Becomes Top Criminal Charge*, TRAC IMMIGR. (June 10, 2011), http://trac.syr.edu/immigration/reports/251 [http://perma.cc/4QA3-HGHQ]. Thus, the circuit's precedent concerning these prosecutions is of significant import to the enforcement of illegal reentry generally.

[117] *See Heredia*, 768 F.3d at 1227–28.

[118] *Id.* at 1228; *see* 8 U.S.C. § 1326(b)(2) (2012).

[119] *Heredia*, 768 F.3d at 1228–29.

[120] *Id.* at 1229.

[121] *Id.*

[122] *Id.*

Ultimately, the court rejected the plea agreement, affirmatively noting that the prosecutor's comments did not influence the court's rejection.[123] After informing Mr. Heredia that the plea agreement was rejected, the court afforded Mr. Heredia the opportunity to withdraw his guilty plea.[124] Mr. Heredia declined to withdraw his plea, and after verifying that he was still knowingly and voluntarily pleading guilty, the court imposed a twenty-one-month sentence, which is within the Guideline range for Mr. Heredia's offense.[125]

Relying on precedent for implicit breaches of *non-court-binding* plea agreements, the Ninth Circuit held that the prosecutor's sentencing position constituted an implicit breach.[126] *Heredia* asserted that the recitation of information already contained in the PSR was unnecessary since the court already had access to the PSR, and it solely served to undermine the sentence recommendation.[127] *Heredia* explicitly rejected the argument that the information contained in the sentencing position was necessary to fully inform the court of the government's reasons for requesting supervised release.[128]

Relying on contract principles, *Heredia* articulated that since Mr. Heredia was induced to enter into the fast-track plea by the offer of a court-binding recommendation of a lower sentence, the undermining of that recommendation constituted a substantial breach that injured the defendant by forcing him to sacrifice his Sixth Amendment rights.[129] Further, *Heredia* held that an implicit breach is not curable by the prosecutor, and that it is an automatic reversible error, demanding vacatur of the conviction and remand to a new judge for further proceedings.[130] At these proceedings, the defendant is afforded the choice of specific performance of the agreement or withdrawal of the plea agreement.[131] However, it is important to note that the Ninth Circuit did not vacate Mr. Heredia's conviction because he did not contest the conviction, only the sentence.[132]

[123] *Id.* at 1229–30.

[124] *Id.* at 1230.

[125] *Id.*; *see also infra* notes 138–139 and accompanying text.

[126] *See id.* at 1231–33 (first citing United States v. Mondragon, 228 F.3d 978 (9th Cir. 2000); and then citing United States v. Whitney, 673 F.3d 965 (9th Cir. 2012)).

[127] *See id.* at 1232–33.

[128] *Id.* at 1233.

[129] *See id.* at 1233–34.

[130] *Id.* at 1235–36.

[131] *Id.* at 1236–37.

[132] *Id.* at 1237.

IV. EXAMINING THE IMPLICATIONS AND WISDOM OF *HEREDIA*'S EXTENSION OF IMPLICIT BREACH ANALYSIS

Heredia's extension of prior implicit breach analysis to the court-binding plea agreement context fails to consider key differences between the position of defendants that enter into court-binding agreements and those that enter into non-court-binding agreements at the time the alleged breach occurs. Instead, *Heredia* superficially examined the potential harm suffered by the defendant after dedicating several pages of the published opinion to detailing the history of the use of fast-track plea agreements for criminal illegal reentry prosecutions, implicitly indicting the practice.[133]

Accordingly, this Part contends that a closer look at the disparity in these defendants' positions supports the notion that *Heredia*'s extension of implicit breach analysis unnecessarily restricts prosecutors' ability to fulfill their obligation to inform the court and protect the accuracy of sentencing. Further, this Part argues that even if an implicit breach of a court-binding plea agreement should be subject to appellate review, the breach should be subject to harmless error analysis.

A. Fast-Track Defendants Do Not Need Heightened Protection

Defendants who enter into a court-binding plea agreement are not subject to the same risks as defendants who enter into non-court-binding plea agreements. *Heredia* implicitly holds that fast-track plea defendants and non-court-binding plea defendants are equally vulnerable to potential prosecutorial misconduct. However, prosecutors do not have the same motive to implicitly breach a fast-track plea agreement as they would for a non-court-binding plea agreement, and fast-track plea defendants are not exposed to the same potential injury as non-court-binding plea defendants.

Foremost, a prosecutor lacks any motivation to implicitly breach a fast-track plea agreement. In the non-court-binding context, a prosecutor could induce a defendant to enter a guilty plea in exchange for a particular sentence recommendation even though the prosecutor feels the defendant should receive a longer sentence than the recommendation. Then, once the defendant's guilty plea is accepted by the trial court, the prosecutor could be motivated to implicitly recommend that the defendant receive a longer

[133] *Id.* at 1224–27 (discussing the role of fast-track pleas as a "cause" in the increase in felony prosecutions of illegal aliens). For example, early on in the court's discussion of fast-track pleas, the court felt compelled to highlight that the government "need not go before a grand jury to secure an indictment; battle motions, including collateral attacks on the underlying deportation; prosecute a jury trial; or oppose an appeal. The defendant, in turn, waives constitutional and other rights and agrees to a term of incarceration and, often, a term of supervised release ordinarily discouraged by the U.S. Sentencing Guidelines." *Id.* at 1224.

sentence than the agreed recommendation because the defendant will likely be unable to withdraw the plea unless there is an explicit breach of the agreement.[134] Protection from this type of misconduct is what warrants appellate review of the potential subtext of a prosecutor's sentencing comments.

In contrast, a prosecutor would not have a similar motive in a court-binding plea context. A court-binding plea defendant is only bound to the guilty plea once the trial court accepts the sentence recommendation.[135] If the court does not accept the recommendation, the defendant reserves the right to withdraw the guilty plea.[136] Additionally, the prosecutor is only precluded from withdrawing the plea agreement when the trial court has fully accepted it and imposed a sentence.[137]

Accordingly, a prosecutor that wants a longer sentence imposed than the one originally agreed to would be better served by withdrawing the agreement than intentionally implicitly breaching it. If the prosecutor does not withdraw the agreement, the defendant retains the opportunity to receive the reduced sentence, regardless of the substance or tenor of the prosecutor's sentencing comments. Meanwhile, if the prosecutor is successful in inducing the judge to reject the sentence recommendation, the prosecutor has not achieved anything he or she would not have achieved by withdrawing the agreement. Thus, the prosecutor runs the risk of having the court accept the original sentence recommendation without obtaining any benefit. Given this lack of incentive to implicitly breach the agreement, defendants are in less need of protection from potential prosecutorial misconduct in this context.

Further, regardless of whether a prosecutor intentionally seeks to implicitly breach the plea agreement, court-binding plea agreements inherently protect defendants from potential adverse consequences of the breach. As noted above, the defendant is not bound by the guilty plea when the sentencing court rejects the recommendation. As occurred in *Heredia*, the sentencing judge must clearly inform the defendant that the recommended sentence is not being accepted and that the defendant retains

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[134] *Cf.* United States v. Pellerito, 878 F.2d 1535, 1537–38 (1st Cir. 1989) (noting that "[h]aving chosen to plead guilty, a defendant possesses no absolute right to retract his plea," listing the factors to be considered by the trial court in evaluating a plea withdrawal motion, and emphasizing that a great deal of deference should be afforded to the trial court in deciding to reject a plea withdrawal motion); FED. R. CRIM. P. 11(c)(3)(B) ("[T]he defendant has no right to withdraw the plea if the court does not follow the recommendation or request.").

[135] FED. R. CRIM. P. 11(c)(1)(C).

[136] *Id.* 11(c)(5)(B).

[137] *See* Mabry v. Johnson, 467 U.S. 504, 507–08 (1984).

the right to withdraw the guilty plea.[138] Then, if the defendant still wishes to plead guilty, the sentencing judge is obligated to complete another plea colloquy—the public courtroom process by which a judge confirms that a defendant is entering a plea knowingly and voluntarily—prior to accepting the guilty plea.[139] In short, defendants are given notice of the effect of the implicit breach (that the sentence recommendation is being rejected), advised of the right to withdraw the plea, and required to verify their understanding of this right. Defendants are thus able to make an informed decision to avoid the consequences of the breach and demand a trial.

Given defendants' ability to avoid the adverse consequences of the breach, prosecutorial conduct that undermines the sentence recommendation would only serve to frustrate the efficiency purpose of fast-track plea agreements, harming the government's interest.[140] After the implicit breach, defendants can force the government to either take them to trial, further taxing the government's limited resources, or to drop the charge.[141] The government has lost all time and resources dedicated to pursuing the original plea agreement, and is now faced with the decision of whether to dedicate additional resources to the prosecution of this individual at the expense of pursuing other cases. Thus, the breach potentially converts the fast-track agreement into the least efficient means of prosecuting the case, resulting in damage to the government.

Overall, defendants who enter into court-binding plea agreements are not subject to the same risks as defendants who enter into non-court-binding plea agreements. Accordingly, there is not a similar justification for appellate review of the tenor of prosecutors' sentencing remarks.

B. The Extension of Implicit Breach Analysis Unnecessarily Hinders Prosecutors' Duty to Inform the Court

Given that there is not a similar justification for the application of implicit breach analysis to court-binding plea agreements, much more

[138] Government's Answering Brief at 15–16, United States v. Heredia, 768 F.3d 1220 (9th Cir. 2014) (No. 12-50331); *see also* FED. R. CRIM. P. 11(c)(5).

[139] FED. R. CRIM. P. 11(b). In *Heredia*, after the sentencing judge informed the defendant he was rejecting the sentence recommendation, the judge advised the defendant on two separate occasions of the consequences of proceeding with a guilty plea. *See* Government's Answering Brief, *supra* note 138, at 16.

[140] *See* Douglas D. Guidorizzi, Comment, *Should We Really "Ban" Plea Bargaining?: The Core Concerns of Plea Bargaining Critics*, 47 EMORY L.J. 753, 763 (1998) (discussing *Santobello*'s emphasis of the government's "interest in the quick and efficient disposition of criminal cases" through plea bargaining, which is materially cheaper and quicker than conducting a full jury trial).

[141] While the defendants will still likely be deported based on their immigration status, the desire to avoid extended incarceration prior to their deportation provides a significant incentive for them to induce the government to drop the criminal illegal reentry charges.

weight must be given to the potential costs of extending the analysis to court-binding pleas when assessing the soundness of such an extension. The greatest potential cost of extending implicit breach analysis may be the erosion of prosecutors' ability to fully inform the sentencing court.[142] As discussed in Part II, both federal and state courts have emphasized the importance of prosecutors serving the interests of the public by ensuring that sentencing courts are adequately informed of all provable facts relevant to sentencing. In fact, initial attempts by prosecutors to engage in plea bargaining in the early nineteenth century were rejected by the courts out of fear that the practice would result in information relevant to sentencing not being disclosed to the court.[143] The concealment of relevant information, whether intentional or inadvertent, frustrates the sentencing court's ability to impose consistent and appropriate sentences. This, in turn, frustrates the public's interest in the imposition of fair and just punishment for antisocial activity.

To protect this interest, judges' ability to make informed decisions and retain some sentencing discretion is paramount. Sentencing courts' ability to serve as a check on prosecutorial plea bargaining discretion has already been limited by the federal Sentencing Guidelines—judges are limited to imposing a sentence within the Guideline range applicable to the charge bargain made by the prosecutor.[144] This ability will only be further limited by eroding prosecutors' affirmative duty to fully inform the court.[145]

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[142] While this Section focuses on the potential cost to prosecutors' ability to inform the court, another notable cost is the potential augmentation of an already overburdened appellate docket. *See* RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 63–65 (1996) (discussing the need to reform and restructure the circuits to solve their capacity issues caused by a substantial increase in the appellate dockets). Many court-binding plea agreements, including fast-track agreements, include an appealability waiver, precluding defendants from appealing the sentence imposed. These waivers serve to avoid negating the time and resource savings that plea bargaining achieves at the trial level by augmenting the appellate docket with challenges to a knowing and voluntary guilty plea. However, appealability waivers do not cover plea breaches, whether explicit or implicit. *See, e.g.*, United States v. Heredia, 768 F.3d 1220, 1235 & n.21 (9th Cir. 2014) (rejecting the government's contention that the appealability waiver prohibits the defendant's ability to challenge the district court's determination that there was not a breach). This means that an extension of implicit breach analysis to court-binding pleas will significantly increase the number of criminal defendants who may seek appellate review. In the fast-track context alone, this could mean an additional 30,000 defendants or more each year who may be able to seek appellate review. *See supra* Section III.A.

[143] *See* FISHER, *supra* note 5, at 114. Fisher notes that judges did not accept plea agreements prior to the advent of the PSR process. PSRs detail facts about the defendant's personal, professional, and criminal history, and they describe both the defendant's and government's version of the convicted offense. Since the PSR is prepared by a disinterested probation officer, Fisher contends that judges felt more comfortable accepting plea agreements because the PSR would partially protect the court's ability to impose an informed and appropriate sentence. *See id.*

[144] *See* Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CALIF. L. REV. 1471, 1475 (1993).

[145] *See id.* at 1497 (noting that Assistant United States Attorneys already have incentives to derogate their duty to inform the court).

Sentencing judges will be limited to the facially neutral description of facts in the PSR and the defense's characterization of those facts to make a sentencing decision and determine if the plea agreement is in the public's best interest.

The extension of implicit breach analysis erodes prosecutors' ability to fully inform the court by limiting their ability to speak at sentencing out of fear of appellate scrutiny. Given the inherent adversarial nature of the criminal adjudicatory process, any statement of fact made by the prosecutor about the crime or defendant's criminal history could be perceived as an implicit recommendation for a harsh sentence. Therefore, to avoid potential scrutiny under appellate review, prosecutors will be constrained to reciting the exact sentence recommendation, regardless of whether they possess relevant sentencing information not included in the PSR[146] or feel compelled to explain to the sentencing judge their rationale for agreeing to the recommended sentence.

While this may seem like a hyperbolized description of the potential impact, the facts of *Heredia* illustrate that it is not. In *Heredia*, the fast-track agreement included a recommendation for supervised release after the term of imprisonment was completed, which is rare for fast-track agreements.[147] To justify the unusual imposition of supervised release, the prosecutor only cited facts about the defendant that were already included in the PSR.[148] The prosecutor did not include any additional commentary about these facts other than iterating that they served as the basis for the supervision recommendation.[149] Nonetheless, *Heredia* found this to be an implicit breach because, in the appellate court's opinion, the recitation of facts already made available to the sentencing judge via the PSR was unnecessary for the trial judge's evaluation of the recommendation.[150] This holding essentially cautions prosecutors to assume that judges can infer the nexus between the information in the PSR and the prosecutors' rationale for the recommendation to avoid making a comment that implicitly

[146] Even if the new relevant information discovered by the prosecutor does not dissuade the prosecutor from submitting the plea agreement to the court, the court needs to be apprised of the information to permit it to serve as a check on the prosecutor's discretion. *Cf.* Memorandum from James B. Comey, Deputy Att'y Gen., U.S. Dep't of Justice, to All Federal Prosecutors, Department Policies and Procedures Concerning Sentencing 2 (Jan. 28, 2005), http://sentencing.typepad.com/sentencing_law_and_policy/files/dag_jan_28_comey_memo_on_booker.pdf [https://perma.cc/JVZ9-TS7W] (mandating that federal prosecutors disclose "all readily provable facts relevant to sentencing" to the court "[t]o ensure that sentences reflect real offense conduct").

[147] Government's Answering Brief, *supra* note 138, at 13.

[148] *See id.* at 12–13.

[149] *See id.*

[150] *See* United States v. Heredia, 768 F.3d 1220, 1234 (9th Cir. 2014).

breaches the agreement. In short, it cautions against prosecutors fully informing the court.

Evidence of *Heredia*'s cautioning effect can be seen in *United States v. Torres*.[151] In *Torres*, the sentencing judge asked the prosecutor if the defendant was statutorily eligible for a particular sentence reduction, and the prosecutor accurately replied that the defendant was not.[152] Citing *Heredia*, the defendant alleged that the prosecutor implicitly breached the plea agreement—which included a negotiated sentence recommendation—by answering the judge's direct question.[153] In response, the prosecutor conceded that he implicitly breached the agreement under the *Heredia* standard.[154] This concession illustrates that the prosecutor interpreted *Heredia* as abridging his ability to provide information to the sentencing court, regardless of the fact that the court directly asked for it. While *Torres* ultimately held that the prosecutor did not implicitly breach the agreement,[155] it illustrates how *Heredia* is being interpreted by some prosecutors as materially constraining their ability to inform the court.

While a bright line can be drawn permitting prosecutors to answer questions posed by the sentencing court, such a rule does not address the situation where the prosecutors' fulfillment of their duty to inform the court is of the greatest import—when the court does not ask a question because it is completely unaware of the relevant information. Further, such a rule still results in ambiguity concerning the permissible scope and depth of a prosecutor's response to a given question. As a result, *Heredia*'s heightened scrutiny will likely incline prosecutors to provide limited responses to sentencing courts' questions, inhibiting courts' ability to uncover desired information.

Ultimately, one is left with the question of whether these costs to the criminal adjudicatory process are appropriate given the lack of justification for appellate review.

C. Implicit Breaches Should Be Subject to Harmless Error Analysis

Alternatively, if implicit breach analysis is extended to the court-binding plea context, it should be subject to harmless error analysis because (1) an implicit breach does not undermine the adjudicatory process, (2) an

[151] No. 14CR0890-LAB, 2014 WL 7176466 (S.D. Cal. Dec. 5, 2014).

[152] *Id.* at *2.

[153] *Id.* at *3.

[154] *Id.* at *4.

[155] *Id.* at *4–5.

implicit breach is curable at the trial level, and (3) court-binding pleas can be withdrawn.

As the Supreme Court has iterated numerous times, only structural errors that undermine the legitimacy of the entire trial adjudication process demand automatic reversal.[156] These errors evade harmless error analysis because the nature of the error makes its potential impact incalculable, rendering any assessment of actual harm impractical. However, in a court-binding plea agreement context, the implicit breach does not undermine the rest of the adjudicatory process. Foremost, even if an implicit breach occurs, it is possible for the defendant to receive the benefit conferred by the agreement. Also, just as the explicit breach in *Puckett* did not undermine the knowing and voluntary nature of the guilty plea, an implicit breach of the court-binding plea agreement does not directly affect defendants' ability to knowingly and voluntarily proceed with their guilty plea. Accordingly, if an appellate court determines that there was an implicit breach, the appellate court can assess if the breach proved harmful by independently assessing if the subsequent decision to proceed with the guilty plea was made knowingly and voluntarily.

Also like *Puckett*, an implicit breach is curable at the trial level. In *Puckett*, the Court held that an explicit breach may be curable by objecting and demanding specific performance by the prosecutor.[157] To the same extent that an explicit breach is curable, an implicit breach is curable by a demand for specific performance at sentencing. In *Heredia*, after the defendant objected to the prosecutor's sentencing memorandum, the prosecutor attempted to cure any alleged implicit breach by filing a supplemental memorandum that asserted that the government unequivocally supported the agreed-to sentence recommendation. Under a *Puckett* analysis, this is sufficient to render the breach harmless.

Furthermore, even if the prosecutor did not attempt to cure the breach, court-binding plea agreements have a built-in remedy that affords defendants the opportunity to avoid harm from the breach. After defendants are placed on notice by the sentencing court that the sentence recommendation is not going to be accepted, giving them a clear indication that a harsher punishment will be imposed with a guilty plea, defendants have the ability to return to the same position they were in prior to entering the plea agreement—they can withdraw their plea and proceed to trial. Since defendants do not have a right to plea bargain, they are not

[156] *See* Chapman v. California, 386 U.S. 18, 21–22 (1967).

[157] 556 U.S. 129, 140–42 (2009).

prejudiced by having to go to trial.[158] Thus, as long as they are returned to the same position as before the agreement, the breach would be harmless.

Ultimately, an implicit breach of a court-binding plea agreement is not the type of error that defies harmless error analysis. Therefore, it should not warrant automatic reversal on appeal.

CONCLUSION

In summation, *Heredia* serves as a potentially dangerous extension of implicit breach analysis. The increased level of scrutiny that *Heredia* supports is likely to dissuade prosecutors from making sentencing remarks that serve to inform the sentencing court, impeding the court's ability to impose an informed and appropriate sentence. Given that defendants are not likely to be subjected to unfair prejudice as a result of an implicit breach, the cost of this higher level of scrutiny is not offset by a gain in terms of protecting defendants.

It is important to note that the defendant in *Heredia* never contested his guilt. The defendant concedes that he was guilty, and he was sentenced within the Sentencing Guidelines established by the U.S. Sentencing Commission for the offense he committed. His only objection was that he was not given a sentence well below the minimum sentence he was statutorily eligible for. Essentially, he was asserting that he had a right to plea bargain, and *Heredia* affirmed this new right.

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[158] While criminal defendants may forego certain benefits by having to go to trial—e.g., a possible two-level sentence reduction under the Sentencing Guidelines for accepting responsibility, *see* U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (U.S. SENTENCING COMM'N 2014)—loss of these benefits does not frustrate any of the defendants' rights.