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Criminal Law - Constitutional Contract - Courts Can Vacate Plea Agreements if State Proves Material Breach. (State v. Rivest)

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CRIMINAL LAW—Constitutional Contract—Courts Can Vacate Plea Agreements if State Proves Material Breach. *State v. Rivest*, 106 Wis. 2d 406, 316 N.W.2d 395 (1982).

In *State v. Rivest*[1] the Wisconsin Supreme Court, in a case of first impression, held that a court can vacate a plea agreement upon motion by the state after the defendant has begun to serve his sentence. Prior to vacation a full evidentiary hearing must be held, preferably before the judge who approved the plea agreement, at which the state has the burden of proving that the defendant materially breached the plea agreement.[2] In so holding, the court adopted the constitutional contract theory, a theory the court believes helps to resolve plea agreement disputes. This theory views plea agreements, by analogy, as contracts but also recognizes that, unlike contracts, plea agreements involve important constitutional rights which courts must safeguard.

This note will analyze the constitutional contract theory and its application in *Rivest*. In addition, it will argue that, while this is a viable theory, the majority applied its principles incorrectly and thus reached an unjust result, as the dissent concluded.

I. THE FACTS IN *RIVEST*

After his arrest, Alan Rivest admitted to his participation in an armed robbery of a gas station with an accomplice, Edward Rodriguez, but denied any participation in the murder of the gas station owner. Also, Rivest claimed that he left the scene of the crime prior to his accomplice's flight but after the stabbing of the victim. The results of a private polygraph test taken by Rivest indicated that his account was truthful.

Subsequently, an assistant district attorney entered into a plea agreement with Rivest in which "Rivest agreed to (1) plead guilty to a charge of robbery; (2) testify against Rodriguez whenever requested; and (3) pass a second poly-

1. 106 Wis. 2d 406, 316 N.W.2d 395 (1982).

2. Wisconsin has an established procedure for the withdrawal of a guilty plea upon a motion by the defendant. *See* B. BROWN, THE WISCONSIN DISTRICT ATTORNEY AND THE CRIMINAL CASE 273-78 (1977).

graph examination conducted by a party to be chosen by the district attorney."[3]

Following the agreement, Rivest took the second polygraph test which was conducted by the police. Rivest pled guilty and was sentenced to six years in prison. The alleged breach occurred one week later at Rodriguez's preliminary hearing when Rivest testified that he had not come into contact with the victim and that "he ran 'straight out across the street' shortly after Rodriguez stabbed [the victim]."[4]

While reviewing the Rodriguez file after his preliminary hearing, the newly elected district attorney discovered that evidence existed at the time of the agreement which showed that Rivest had come into contact with the victim and had fled the scene with Rodriguez.[5] The district attorney concluded that Rivest had breached the plea agreement because his prior statements and testimony were false. Thereafter, the district attorney filed first degree murder charges against Rivest.

Subsequently, Rivest secured a writ of habeas corpus. At the habeas corpus proceeding the judge held that the state could not prosecute Rivest for murder unless the state was able to secure from the judge who approved the plea agreement an order to vacate it. Upon motion of the state, the original trial judge did set aside the agreement and the guilty plea to the robbery. The trial judge concluded that "Rivest had fraudulently induced the state to enter into the plea agreement through his false and misleading statements and had materially breached the agreement by giving false testimony at Rodriguez' preliminary hearing."[6]

Rivest appealed. Since this was a case of first impression, the court of appeals petitioned the Wisconsin Supreme Court for certification. The supreme court upheld the trial court's decision that Rivest had materially breached the

3. State v. Rivest, 106 Wis. 2d 406, 408-09, 316 N.W.2d 395, 397 (1982).

4. *Id.* at 409, 316 N.W.2d at 397.

5. "All the physical evidence [including the victim's blood on Rivest's clothes and Rivest's footprint on the victim's head], the names of the eye witnesses and some statements of the eyewitnesses were in the district attorney's or investigators' files when the plea agreement was reached." *Id.* at 425 n.7, 316 N.W.2d at 405 n.7.

6. *Id.* at 410, 316 N.W.2d at 398.

agreement[7] and, for the first time, adopted a procedure for vacating plea agreements based on a "constitutional contract theory."

II. BACKGROUND: CONSTITUTIONAL CONTRACT THEORY

In *Santobello v. New York*[8] the United States Supreme Court recognized that plea agreements involved constitutional rights of the defendant, that they were legally enforceable and that when the state failed to perform as promised the defendant was entitled to relief.[9] Although the *Santobello* Court did not explicitly note the similarities between contracts and plea agreements, later lower court decisions noted those similarities and often applied the principles of contract law to assist them in settling disputes which arose over plea agreements. However, the law of contracts would be applied only by analogy because it was recognized that plea agreements, unlike contracts, involve important constitutional rights of the defendants. This section, therefore, will discuss the two essential elements of the constitutional contract theory: (1) the application of contract law to plea agreements; and (2) the constitutional rights of the defendant which are involved in plea agreements.

By definition a "contract is a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes a duty."[10] In *Santobello* the Supreme Court indicated that a plea agreement also involved promises, for the breach of which the law gives a remedy or the performance of which the law in some way recognizes as a duty.[11] The District of Columbia Circuit Court of Appeals in *United States v. Bridgeman*[12] specifically noted the similarity between contracts and plea agreements:

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7. Because a material breach was found which was sufficient to vacate the plea agreement, the supreme court did not find it necessary to determine whether Rivest had fraudulently induced the state to enter into the plea agreement. *Id.* at 420, 316 N.W.2d at 402.

8. 404 U.S. 257 (1971).

9. *Id.* at 261-63.

10. RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981).

11. *Santobello*, 404 U.S. at 262-63.

12. 523 F.2d 1099 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 961 (1976).

"[T]he decision in *Santobello* . . . involved fundamental principles of contract law, notably those concerning mutually binding promises freely given in exchange for valid consideration."[13]

In addition to the definitional similarities between contracts and plea agreements, the disputes which arise out of both are similar. The courts have been asked to resolve whether an agreement was entered into,[14] whether one party had entered involuntarily or under duress[15] and whether the nonperformance of one party relieved the other party of its duty to perform.[16]

Thus many courts, noting the similarities between contracts and plea agreements, have found the principles of contract law to be useful in resolving disputes arising out of plea agreements. For example, in *United States v. Calabrese*[17] the Tenth Circuit Court of Appeals recognized that, although not the sole criteria, the "[c]ourts have frequently looked to contract law analogies in determining rights of the defendants in the plea negotiation process."[18] Although courts recognize the existing similarities and the usefulness of applying contract law to plea agreements, important differences[19] which exist between the two warrant caution. The

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13. *Id.* at 1109-10.

14. *Compare* United States v. James, 532 F.2d 1161, 1162-63 (7th Cir. 1976) (evidence did not support defendant's claim that a plea agreement was entered into with the government) *with* Ehlers-Mann & Assocs. v. Madison Am. Guar. Ins. Corp., 28 Wis. 2d 12, 15-16, 135 N.W.2d 815, 817 (1965) (evidence supported plaintiff's claim that it entered into a contract to perform financial services for defendant).

15. *Compare* United States v. Bridgeman, 523 F.2d at 1109-10 (prosecutor's promise not to prosecute prisoner in exchange for prisoner's promise to end violence not enforceable because the prosecutor's promise was secured under duress) *with* Stark v. Gigante, 14 Wis. 2d 13, 16-17, 109 N.W.2d 525, 527 (1961) (mortgagor not able to claim that he was coerced into signing the documents when he was at all times represented by an attorney who knew the material facts).

16. *Compare* United States v. Boulier, 359 F. Supp. 165, 169-70 (E.D.N.Y. 1972), *aff'd sub nom.* United States v. Nathan, 476 F.2d 456, 459 (2d Cir. 1973) (government's promise not to charge the defendant with a second crime not enforceable because defendant breached agreement providing that he would provide the government with drug information) *with* Seidling v. Unichem, Inc., 52 Wis. 2d 552, 557, 191 N.W.2d 205, 208 (1971) (defendant's nonperformance was a substantial breach of the contract and rescission of the contract was the appropriate remedy).

17. 645 F.2d 1379, 1390, *cert. denied*, 451 U.S. 1018 (1981).

18. *Id.* at 1390.

19. *See, e.g.*, Westen & Westin, *A Constitutional Law of Remedies for Broken Plea Bargains*, 66 CALIF. L. REV. 471 (1978) ("The subject of [commercial contracts] is

most significant difference is that constitutional rights are involved in the plea agreement.

Upon entering into a plea agreement, the defendant waives certain fundamental rights. Justice Douglas, in his concurring opinion in *Santobello*, identified those waived rights: "[A guilty plea] 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."[20]

Due process rights of defendants are also involved in plea agreements. The *Santobello* Court stated that "[t]his phase [plea bargaining] of the process of criminal justice, and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances."[21] In *Austin v. State*[22] the Wisconsin Supreme Court also made it clear that when a plea agreement is at issue "good public policy requires the application of the doctrine of due process, which rests upon 'that whole community sense of "decency and fairness" that has been woven by common experience into the fabric of acceptable conduct.' "[23]

Certain safeguards have been established in an attempt to protect the defendant's due process rights when he enters into a plea agreement. The defendant has a right to counsel.[24] A plea must be entered into voluntarily and knowingly.[25] Both the Federal[26] and Wisconsin[27] Rules of

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civil in nature and typically takes the form of an agreement between private parties; the subject matter of [plea agreements] is criminal in nature and invariably represents an agreement between a private individual and the state." *Id.* at 534.) *See also* United States *ex rel* Selikoff v. Commissioner of Corrections, 524 F.2d 650 (2d Cir. 1975), *cert. denied*, 425 U.S. 951 (1976) ("[Contract] principles . . . are inapposite to the ends of criminal justice. High among those ends are the protection of the public from criminal behavior and the protection of the defendant from indiscriminate punishment." *Id.* at 654.).

20. *Santobello*, 404 U.S. at 264 (Douglas, J., concurring) (citations omitted).

21. *Id.* at 262.

22. 49 Wis. 2d 727, 183 N.W.2d 56 (1971).

23. *Id.* at 736, 183 N.W.2d at 61 (quoting Breithaupt v. Abram, 352 U.S. 432, 436 (1957)).

24. *See, e.g.*, Moore v. Michigan, 355 U.S. 155, 160 (1957).

25. *See, e.g.*, *Santobello*, 404 U.S. at 261; Cresci v. State, 36 Wis. 2d 287, 296, 152 N.W.2d 893, 897 (1967).

26. FED. R. CRIM. P. 11(c) provides:

Criminal Procedure require that before a court accepts a plea of guilty that court must address the defendant personally to make sure that the defendant enters into the agreement voluntarily and intelligently.

In summary,[28] many courts in adopting the theory that a plea agreement is a constitutional contract have recognized the usefulness of contract principles in analyzing disputes arising out of plea agreements but they are willing to apply those principles by analogy only lest a strict application

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(c) Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and

(2) if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if necessary, one will be appointed to represent him; and

(3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and

(4) that if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and

(5) that if he pleads guilty or nolo contendere, the court may ask him questions about the offense to which he has pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement.

27. WIS. STAT. § 971.08 (1979) provides:

(1) Before the court accepts a plea of guilty or no contest, it shall:

(a) Address the defendant personally and determine that the plea is made voluntarily with understanding of the nature of the charge and the potential punishment if convicted; and

(b) Make such inquiry as satisfies it that the defendant in fact committed the crime charged.

(2) The court shall not permit the withdrawal of a plea of guilty or no contest later than 120 days after conviction.

(3) Any plea of guilty which is not accepted by the court or which is subsequently permitted to be withdrawn shall not be used against the defendant in a subsequent action.

28. For a more complete discussion on the view that a plea agreement is similar to a contract, see Jones, *Negotiation, Ratification, and Recission of the Guilty Plea Agreement: A Contractual Analysis and Typology*, 17 DUQ. L. REV. 591 (1978-79). For a more complete discussion of the constitutional contract theory, see generally Westen & Westin, *supra* note 19.

should violate the constitutional rights of defendants. It is this approach that the Wisconsin Supreme Court adopted in *State v. Rivest*.[29]

III. DISCUSSION

A. Application of Contract Law

1. Material Breach

In accepting the view that a plea agreement is a contract, albeit a constitutional one, the *Rivest* court recognized that contract law is useful in resolving disputes arising out of plea agreements.[30] In particular, the court indicated that a material breach of a plea agreement was similar to a material breach of a contract.[31] And the issue which the court addressed was whether Rivest had materially breached the plea agreement by giving false testimony.[32]

Although the standard of materiality in contract law is "necessarily imprecise and flexible,"[33] both the Wisconsin Supreme Court[34] and the *Restatement (Second) of Contracts*[35] agree that a material breach is one that goes to the essence of the contract, that is, one which would deny the nonbreaching party the benefit of his bargain. Thus, in determining whether a defendant has materially breached a plea agreement, a court by analogy should ask whether the

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29. 106 Wis. 2d 406, 316 N.W.2d 395 (1982).

30. State v. Rivest, 106 Wis. 2d 406, 316 N.W.2d 395 (1982).

31. *Id.* at 411-13, 316 N.W.2d at 398-99.

32. *Id.* at 417, 316 N.W.2d at 401.

33. RESTATEMENT (SECOND) OF CONTRACTS § 241 comment a (1981), which states:

> [A] standard of materiality . . . is necessarily imprecise and flexible . . . . [because] [t]he standard of materiality applies to contracts of all types without regard to whether the whole performance of either party is to be rendered at one time or part performances are to be rendered at different times. . . . It also applies to pairs of agreed equivalents under § 240. It is to be applied in the light of facts of each case in such a way as to further the purpose of securing for each party his expectation of an exchange of performance.

Id. (citations omitted).

34. *See* Hoffmann v. Danielson, 251 Wis. 34, 38, 27 N.W.2d 759, 761 (1947). *See also* M & I Marshall & Ilsley Bank v. Pump, 88 Wis. 2d 323, 333, 276 N.W.2d 295, 299 (1979); Appleton State Bank v. Lee, 33 Wis. 2d 690, 692-93, 148 N.W.2d 1, 2-3 (1967) (citing 17 AM. JUR. 2D *Contracts* § 504 (1964)).

35. RESTATMENT (SECOND) OF CONTRACTS § 241(a) (1981).

breach goes to the essence of the "contract" or whether the nonbreaching party was denied the benefit of his bargain.

The majority concluded that the perjured testimony of Rivest was a material breach because it denied the state the benefit of its bargain. The state was denied a credible witness.[36] However, the majority never considered any evidence which would have indicated whether the state believed the essence of the agreement was the defendant's promise to testify truthfully. Rather, the court simply concluded that perjured testimony would always be considered a material breach.[37]

On the other hand, Justice Abrahamson, in her dissent, did ask whether the defendant's breach went to the essence

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36. *Rivest*, 106 Wis. 2d at 416, 316 N.W.2d at 400.

37. *Id.* at 416-18, 316 N.W.2d 400-01. In that portion of the opinion the court supports its conclusion based upon the following: (1) False testimony undermines the primary goal of our judicial system, justice, and thus giving false testimony of a material fact must be a material breach; (2) the Wisconsin Legislature has recognized the necessity of truthful testimony by making perjury a felony (*See* WIS. STAT. § 946.31 (1979)); (3) it is unethical and illegal for an attorney to knowingly present false testimony at a trial (*See* WIS. STAT. § 757.29(1) (1979)); and (4) other jurisdictions have voided plea agreements under similar circumstances. The court cited United States v. Eucker, 532 F.2d 249 (2d Cir. 1976), where the defendant, not the government, moved to vacate the plea agreement:

> The Assistant United States Attorney who represented the Government on the trial promised [the defendant] that if he pleaded guilty and cooperated in the preparation and presentation of the case against [another], the Government would "go to bat" for him. Thereafter, [the defendant] pleaded guilty. However, his cooperation consisted of presenting the prosecution with a version of the facts in which he attempted to completely exculpate himself from any wrong-doing. Under these circumstances the Government was unwilling to vouch for his credibility and did not call him as a witness. The prosecutor also did not "go to bat" for him, because he did not consider [the defendant's] willingness to testify falsely to be cooperation.
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> The District Court found that this decision was made in good faith and refused to permit [the defendant] to withdraw his plea. . . . [W]e see no reason to disturb it.

Id. at 256. The *Rivest* court also cited United States v. Donahey, 529 F.2d 831 (5th Cir.), *cert. denied*, 429 U.S. 828 (1976). In *Donahey*, the defendant moved for specific performance of a plea agreement in which the defendant agreed to testify before a grand jury and to cooperate fully in the prosecution of another accused person. The court denied the defendant's request for an order of specific performance, finding that the defendant had not lived up to her part of the plea agreement. The government produced witnesses at a pretrial hearing whose testimony supported the conclusion that the defendant was uncooperative and gave evasive, misleading and unverifiable testimony. Neither the *Eucker* nor the *Donahey* court made reference to the constitutional contract theory.

of the plea agreement. Upon examining the evidence which indicated the intentions of the "contracting party," the dissent concluded that the breach was not material.[38]

It may be argued, as the majority does, that a defendant should never reap the benefits of a plea agreement if he commits perjury in violation of the terms of the agreement.[39] However, that rule cannot be supported by analogy to a material breach of a contract. Every breach of a contract is not material. A material breach occurs only if the breaching party violates the essence of the contract or deprives the nonbreaching party of the benefit of his bargain. In *Rivest*, by the state's own admission, Rivest's promise to testify was not the essence of the plea agreement nor did it deprive the state of the benefit of its bargain. Therefore, it was not contract law which the majority was applying, but public policy.

2. Public Policy

The issue the *Rivest* majority actually addressed was whether it was against public policy to enforce a plea agreement when the defendant had given perjured testimony, rather than whether that perjured testimony was a material breach. Framing the issue in terms of public policy does not defeat the usefulness of identifying a plea agreement as a constitutional contract. The *Restatement (Second) of Contracts* recognizes that public policy can limit the freedom to

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38. Justice Abrahamson noted:

> The assistant district attorney described the defendant's agreement to testify against Rodriguez as a secondary term of the agreement both at the hearing at which the guilty plea was accepted and at the habeas corpus proceeding. When the circuit court explained the terms of the plea agreement to the defendant before the court accepted the defendant's guilty plea, the court did not refer to the defendant's testimony in the Rodriguez trial at all. The circuit court referred only to the lie detector test.
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> Finally, the assistant district attorney, in a letter dated May 30, 1979, in response to a discovery request by Rodriguez' attorney, set forth the factors underlying the plea agreement with the defendant and characterized the defendant's agreement to testify against Rodriguez as "not a major factor" in the plea agreement. The plea agreement hinged on the physical evidence and the defendant's statement confirmed by the polygraph.

Rivest, 106 Wis. 2d at 431-32, 316 N.W.2d at 407-08 (Abrahamson, J., dissenting) (footnotes omitted).

39. *Id.* at 416, 316 N.W.2d at 400.

contract.[40] And the Wisconsin Supreme Court has stated that it may not enforce a contract when the contract injures the state or the public,[41] especially when it is an agreement to commit a crime[42] or when it results in the unjust enrichment of one of the parties.[43] Similarly, the *Rivest* majority stated that truthful testimony is necessary "to achieve the primary goal of our judicial system, justice,"[44] that the legislature has made perjury a crime[45] and that "[t]o 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."[46]

It is surprising that the *Rivest* majority did not base its holding on public policy as opposed to basing it on an analogy to a material breach of a contract. Perhaps because the state did not so argue in its brief,[47] the court felt it was inappropriate to raise the issue *sua sponte*. Moreover, when a decision is based on public policy, the court must weigh all factors,[48] which in this case would be those favoring enforcement as well as those favoring vacation of the plea agree-

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40. RESTATEMENT (SECOND) OF CONTRACTS vol. 2, ch. 8, p. 2 (1981) (Introductory Note), which states:

> In general, parties may contract as they wish, and courts will enforce their agreements without passing on their substance. Sometimes, however, a court will decide that the interest in freedom of contract is outweighed by some overriding interest of society and will refuse to enforce a promise or other term on grounds of public policy. Such a decision is based on a reluctance to aid the promisee rather than on solicitude for the promisor as such. Two reasons lie behind this reluctance. First, a refusal to enforce the promise may be an appropriate sanction to discourage undesirable conduct, either by the parties themselves or by others. Second, enforcement of the promise may be an inappropriate use of the judicial process in carrying out an unsavory transaction. The decision in a particular case will often turn on a delicate balancing of these considerations against those that favor supporting transactions freely entered into by the parties.

41. Hawkins Realty Co. v. Hawkins State Bank, 205 Wis. 406, 416, 236 N.W. 657, 662 (1931).

42. Kryl v. Frank Holton & Co., 217 Wis. 628, 630, 259 N.W. 828, 829 (1935).

43. Puttkammer v. Minth, 83 Wis. 2d 686, 688-90, 266 N.W.2d 361, 363 (1978).

44. State v. Rivest, 106 Wis. 2d 406, 417, 316 N.W.2d 395, 401 (1982).

45. *Id.*

46. *Id.* at 414, 316 N.W.2d at 399.

47. *See generally* Brief for Respondent, State v. Rivest, 106 Wis. 2d 406, 316 N.W.2d 395 (1982).

48. RESTATEMENT (SECOND) OF CONTRACTS § 178 (1981), states:

> (1) A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its

ment. However, the *Rivest* decision appears to be outcome-determinative in that the majority completely ignores the factors which favored enforcement. The dissent, like the majority, was concerned about maintaining the integrity of the judicial system. But it emphasized that the state must be held to a strict standard of performance to maintain the credibility of that system:[49]

> In our system of law the state must be held to a high, strict standard that it fulfill its prosecutorial promises, not merely to vindicate the expectation of the defendant as to state behavior but more importantly to vindicate the expectation of the public as to state behavior and to promote the sound and effective administration of the criminal justice system. As the United States Court of Appeals said in *United States v. Carter*:
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> "There is more at stake than just the liberty of this defendant. At stake is the honor of the government[,] public confidence in the fair administration of justice, and the efficient administration of justice . . . ."[50]

3. Remedies

In contract law, recission is an equitable remedy[51] and a

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enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.

(2) In weighing the interest in the enforcement of a term, account is taken of

(a) the parties' justified expectations,

(b) any forfeiture that would result if enforcement were denied, and

(c) any special public interest in the enforcement of the particular term.

(3) In weighing a public policy against enforcement of a term, account is taken of

(a) the strength of that policy as manifested by legislation or judicial decisions,

(b) the likelihood that a refusal to enforce the term will further that policy,

(c) the seriousness of any misconduct involved and the extent to which it was deliberate, and

(d) the directness of the connection between that misconduct and the term.

49. Justice Abrahamson was concerned in the instant case that prior to the time the state entered into the plea agreement, it did not perform its duties properly; specifically, it did not take the time to evaluate all the information which was available. *Rivest*, 106 Wis. 2d at 435-36, 316 N.W.2d at 409-10 (Abrahamson, J., dissenting).

50. *Id.* at 436-37, 316 N.W.2d at 410 (quoting United States v. Carter, 454 F.2d 426, 428 (4th Cir. 1972), *quoted with approval in* Cooper v. United Sates, 594 F.2d 12, 20 (4th Cir. 1979)).

51. RESTATEMENT (SECOND) OF CONTRACTS § 359 comment c (1981). Examples

remedy in equity is appropriate only when no adequate remedy at law exists.[52] The contract analogy to plea agreements is strained when it is applied to remedies because the typical contract remedy at law, money damages, is not appropriate.[53] The *Rivest* majority, however, never addressed the issues of whether vacation was the only remedy, and, if not, whether some other remedy may be more appropriate when a breach of a plea agreement occurs.

Justice Abrahamson, while indicating that under certain circumstances vacation may be the only appropriate remedy, warned that the court must "be cognizant of the impulse to find a remedy for every breach and to vacate the plea agreement in situations where such a drastic remedy is not warranted."[54] An alternative and more appropriate remedy under the circumstances of this case, which was suggested by the dissent, would have been to prosecute Rivest for perjury,[55] a criminal offense[56] which carries its own penalties.[57]

Certainly, if a material breach of a plea agreement occurs, vacation may be the appropriate remedy under the circumstances of the case. However, the *Rivest* majority did the law a disservice when, in this case of first impression, it did not take the opportunity to clarify its position on remedies, especially when its dissenting colleagues brought the issue to the majority's attention.

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of other equitable remedies are specific performance, restitution, replevin, reformation and cancellation.

52. Kramer v. Bohlman, 35 Wis. 2d 58, 65, 150 N.W.2d 357, 360 (1967); RESTATEMENT (SECOND) OF CONTRACTS § 359 comment a (1981).

53. State v. Rivest, 106 Wis. 2d 406, 429-30 n.12, 316 N.W.2d 395, 407 n.12 (Abrahamson, J., dissenting) (quoting Petition of Geisser, 554 F.2d 698, 706 (5th Cir. 1977), which states: "When a plea bargain is breached, the courts must fashion a remedy that insures the petitioner 'what is reasonably due en [sic] the circumstances'. . . . Generally, the bargain is 'either specifically enforceable between the parties to the agreement or the plea is void.'" (Citations and emphasis omitted)).

54. *Rivest*, 106 Wis. 2d at 430, 316 N.W.2d at 407.

55. *Id.*

56. WIS. STAT. § 946.31 (1979).

57. Justice Abrahamson, however, believed that sufficient evidence did not exist beyond a reasonable doubt to prove that Rivest had committed perjury. *Rivest*, 106 Wis. 2d at 424-28, 316 N.W.2d at 404-06.

B. Safeguarding the Defendant's Constitutional Rights

1. The Hearing

The *Rivest* court recognized that the constitutional contract theory requires that the defendant's constitutional rights be protected.[58] The majority adopted two rules that have been recognized by other jurisdictions[59] as being necessary to safeguard those rights when the government brings a motion to vacate a plea agreement: (1) a full evidentiary hearing, preferably before the judge who approved the plea agreement, is required; and (2) the state has the burden of proving the material breach.[60] Placing the burden of proof upon the state clearly places the burden where it assures the defendant the greatest protection. However, the *Rivest* majority found that Rivest committed perjury, a violation of a criminal statute, raising the issue of whether a full evidentiary hearing adequately safeguards the defendant's rights.[61]

Upon entering into a plea agreement, the state creates and sanctions a unique relationship with an individual in which the defendant voluntarily pleads guilty to a crime in exchange for some benefit to be conferred by the state. The defendant has the right to expect that the state will perform as promised.[62] When the state creates an interest or expectation and then attempts to alter or deny that interest or expectation, due process requires that the individual be afforded some form of evidentiary hearing.[63]

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58. State v. Rivest, 106 Wis. 2d 406, 413-14, 316 N.W.2d 395, 399 (1982).

59. *See, e.g.*, United States v. Simmons, 537 F.2d 1260, 1261-62 (4th Cir. 1976); United States v. Donahey, 529 F.2d 831, 832 (5th Cir.), *cert. denied*, 429 U.S. 828 (1976); Adamson v. Superior Court of Arizona, 125 Ariz. 579, —, 611 P.2d 932, 936-37 (1980); Gamble v. State, 95 Nev. 904, —, 604 P.2d 335, 336-37 (1979).

60. *Rivest*, 106 Wis. 2d at 414, 316 N.W.2d at 399.

61. Neither the majority nor the dissent addressed this issue.

62. Santobello v. New York, 404 U.S. 257, 262 (1971); *Rivest*, 106 Wis. 2d at 420, 436, 316 N.W.2d at 402, 410 (Abrahamson, J., dissenting).

63. Paul v. Davis, 424 U.S. 693 (1976), which states that:

> [T]here exists a variety of interests which are difficult of definition but are nevertheless comprehended within the meaning of either 'liberty' or 'property' as meant in the Due Process Clause. These interests attain this constitutional status by virtue of the fact that they have been initially recognized and protected by state law, and we have repeatedly ruled that the procedural guarantees of the Fourteenth Amendment apply whenever the State seeks to remove or significantly alter that protected status. . . .

Under certain circumstances, a full evidentiary hearing may adequately safeguard the defendant's rights. However, unlike the cases which the *Rivest* majority cited to support its holding that a full evidentiary hearing satisfies due process,[64] *Rivest* was a case in which the court found that the defendant had committed "perjury," a term of art which connotes a violation of a criminal law.[65]

The sixth amendment of the United States Constitution,[66] which has been incorporated into the fourteenth amendment's due process clause,[67] and the Wisconsin Constitution[68] provide that a person who is accused of committing a crime is entitled to a full and speedy trial by an impartial jury. Thus, it can be argued that the *Rivest* court erred in requiring only a full evidentiary hearing. A defendant's violation of a criminal statute may be a sufficient reason for vacating a plea agreement. But prior to the court ordering vacation, the defendant first must be afforded a full trial to determine beyond a reasonable doubt whether he committed the crime. Due process requires no less.

> In each of these cases, as a result of the state action complained of, a right or status previously recognized by state law was distinctly altered or extinguished.

Id. at 710-11 (footnote and citations omitted).

64. *Rivest*, 106 Wis. 2d at 411, 316 N.W.2d at 398. The *Rivest* court cited United States v. Donahey, 529 F.2d 831 (5th Cir.), *cert. denied*, 429 U.S. 828 (1976) (state government alleged that the defendant violated the plea agreement in that she "had given evasive and misleading answers, had given answers which could not be verified, and, on numerous occasions, had refused to answer questions at all." *Id.* at 832); United States v. Nathan, 476 F.2d 456 (2d Cir. 1973) (government claimed that the defendant had "failed to carry out his bargain by refusing to disclose the promised information . . . ." *Id.* at 459); and Gamble v. State, 95 Nev. 904, 604 P.2d 335 (1979) (state claimed that because the defendant had refused to stipulate to the revocation of his probation, as agreed, the state was not to be held to its promises. *Id.* at —, 604 P.2d at 336).

65. WIS. STAT. § 946.31 (1979).

66. U.S. CONST. amend. VI, which states that: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

67. U.S. CONST. amend. XIV, § 1, which states "nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." *See* Duncan v. Louisiana, 391 U.S. 145 (1968), as to the right to a trial by jury being incorporated into the fourteenth amendment.

68. WIS. CONST. art. I, § 7, states that: "In all criminal prosecutions the accused shall enjoy the right to . . . a speedy public trial by an impartial jury of the county or district wherein the offense shall have been committed . . . ."

2. The Actual Prejudice and Improper Motive Tests

In addition to the full evidentiary hearing and burden of proof requirements, the *Rivest* majority held that the "actual prejudice" and "improper motive" tests were sufficient to protect the defendant's rights from harm due to prosecutorial delay when the state brings a motion to vacate a plea agreement after the defendant has begun to serve his sentence.[69] The dissent argued that the defendant's rights are not adequately safeguarded by these tests.[70] For the purposes of the following discussion, the right to a speedy trial, a constitutional right[71] which can be affected by prosecutorial delay, will be used as an example to determine if the two tests do adequately safeguard a defendant's constitutional rights when the state attempts to vacate a plea agreement at the post-sentencing stage.

If the state is successful in vacating a plea agreement, there will most likely be a new trial.[72] It is necessary, there-

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69. *Rivest*, 106 Wis. 2d at 418, 316 N.W.2d at 401. The court noted that:

> Where a defendant seeks to avoid prosecution based upon prosecutorial delay, it is clear that it must be shown that the defendant has suffered actual prejudice arising from the delay and that the delay arose from an improper motive or purpose such as to gain a tactical advantage over the accused.

Id.

70. *Id.* at 435-37, 316 N.W.2d at 409-10.

71. The right to a speedy trial is guaranteed in the United States and Wisconsin Constitutions. *See supra* notes 66 & 68. In addition, the United States Supreme Court has held that the right to a speedy trial is incorporated into the due process clause of the fourteenth amendment. *See, e.g.*, Klopfer v. North Carolina, 386 U.S. 213 (1967).

72. Since robbery (the charge in Rivest's first trial) and first degree murder (Rivest's charge after vacation of his plea agreement) are separate offenses (*see* WIS. STAT. § 943.22 (1979) (robbery) and WIS. STAT. § 940.01 (1979) (first degree murder)), the *Rivest* case presents no double jeopardy problem. *See* WIS. STAT. § 939.65 (1979) (prosecution under more than one section permitted). *See also* Harris v. State, 78 Wis. 2d 357, 368, 254 N.W.2d 291 (1977).

In the garden variety criminal case, however, the prosecutor will not usually have a separate offense available with which to charge the defendant. Moreover, a person cannot be retried for a lesser included offense which is part of the first charge. *See Ex parte* Nielsen, 131 U.S. 176 (1889). And some jurisdictions say that a trial for a lesser offense is a bar to prosecution for the greater charge. *See, e.g.*, State v. Labato, 7 N.J. 137, 80 A.2d 617 (1951). *But see, e.g.*, People v. McDaniels, 137 Cal. 192, 69 P. 1006 (1902) (saying that if the first conviction was procured by fraud, connivance or collusion of the defendant, prosecution for the greater offense will not be barred).

In any event, the most recent pronouncement of the United States Supreme Court on the subject of double jeopardy indicates that that constitutional right will be construed narrowly by the present court. Tibbs v. Florida, 102 S. Ct. 2211 (1982) (hold-

fore, to look at what the right to a speedy trial safeguards in order to determine if the right has been violated. "This guarantee [of a speedy trial] is an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and coercion accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself."[73]

Upon an initial examination it appears that the *Rivest* majority stated the law correctly. The United States Supreme Court stated in *United States v. Lovasco*[74] that due process plays a limited role in protecting the defendant from prosecutorial delay. Only if it is proved that the defendant suffered actual prejudice and the government had an improper motive is the defendant's right to a speedy trial violated.[75] Prior to *Rivest*, the Wisconsin Court of Appeals, in *State v. Davis*,[76] adopted the actual prejudice and improper motive tests. The *Rivest* court cites both *Lovasco* and *Davis* as its authorities.[77]

The *Lovasco* and *Davis* cases are distinguishable from the instant case in that they involved an alleged claim of prosecutorial delay at the preindictment stage.[78] By contrast, the *Rivest* case involved such a claim at the post-sentencing stage. As the Supreme Court indicates in *Lovasco*, there are legitimate reasons for prosecutorial delay at the preindictment stage. These include: (1) the need to establish probable cause;[79] (2) the need to establish a suspect's guilt beyond a reasonable doubt;[80] (3) the need to develop the total case if more than one participant or crime is involved;[81] (4) the possibility of hasty or unwarranted prosecutions;[82] (5) the op-

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ing that the double jeopardy clause of the fifth amendment does not bar a retrial after a defendant's conviction has been reversed because the verdict was against the weight of the evidence).

73. Williams v. State, 40 Wis. 2d 154, 157, 161 N.W.2d 218, 220 (1968) (quoting United States v. Ewell, 383 U.S. 116, 120 (1966)).

74. 431 U.S. 783 (1977).

75. *Id.* at 788-97.

76. 95 Wis. 2d 55, 58, 288 N.W.2d 870, 871 (Ct. App. 1980).

77. *Rivest*, 106 Wis. 2d at 419, 316 N.W.2d at 401-02.

78. *Lovasco*, 431 U.S. at 784; *Davis*, 95 Wis. 2d at 56, 288 N.W.2d at 871.

79. *Lovasco*, 431 U.S. at 791.

80. *Id.*

81. *Id.* at 792-93.

82. *Id.* at 793.

portunity to give adequate consideration to the desirability of prosecution;[83] (6) the need not to expose undercover informers;[84] (7) the need to determine the degree of punishment that the prosecutor seeks;[85] (8) the possibility that offenses may not be immediately reported;[86] (9) the possibility that the investigation may not immediately uncover the criminal;[87] and (10) the need to assign police resources to matters of higher priority.[88]

In addition to these reasons the defendant's right to a speedy trial is usually not impaired by prosecutorial delay at the preindictment stage. The defendant is not incarcerated; the public is unaware of any state accusations against the defendant; and while there are some risks that the defendant will suffer anxiety or that a delay will make it less likely that he will be able to defend himself adequately, these risks are minimal. Thus, if the defendant at the preindictment stage claims that prosecutorial delay affected his right to a speedy trial, the courts have concluded that it is not unreasonable to require proof of actual prejudice and improper motive.[89]

At the post-sentencing stage, however, the government's preindictment reasons for prosecutorial delay are inapplicable and the chances are greater that the defendant's right to a speedy trial cannot be safeguarded if the plea agreement is vacated upon motion of the state. Both the *Santobello* and *Rivest* courts recognize this fact as well as the possibility that other constitutional rights may be jeopardized.[90]

The determination of whether a delay in prosecution violates the defendant's right to a speedy trial depends upon a review of all the circumstances of the case,[91] not solely upon

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83. *Id.* at 794.

84. *Id.* at 797 n.19 (citing Amsterdam, *Speedy Criminal Trial: Rights and Remedies*, 27 STAN. L. REV. 525, 527-728 (1975)).

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *See Lovasco*, 431 U.S. at 790; *Davis*, 95 Wis. 2d at 56-58, 288 N.W.2d at 870.

90. Santobello v. New York, 404 U.S. 257, 262-63 (1971); *Rivest*, 106 Wis. 2d at 413, 316 N.W.2d at 399.

91. Pollard v. United States, 352 U.S. 354, 361 (1957); State v. Reynolds, 28 Wis. 2d 350, 352-53, 137 N.W.2d 14, 15 (1965).

the mere lapse of time.[92] As the *Rivest* majority indicates, the state and the public interest in preserving the integrity of the judicial system must be considered.[93] However, that and any other interest must be considered along with factors which may affect the defendant's right to a speedy trial. In the *Rivest* case, there is strong evidence that this right may have been violated. Almost four years had passed since the crime. While time itself does not indicate a violation of the right, Rivest's ability to defend himself may have been harmed in that witnesses could have become unavailable or their memories could have faded. Also, the right to a speedy trial protects the accused from incarceration prior to trial. Rivest was already serving his sentence based on the plea agreement. And he was entitled to believe that once he had entered into the plea agreement, that was the final step, thus minimizing his anxiety.[94]

Using the right to a speedy trial as an example demonstrates how the constitutional rights of the defendant may be harmed if a court vacates a plea agreement upon motion of the state after the defendant has begun to serve the sentence. The "actual prejudice" and "improper motive" tests do not offer adequate safeguards of the defendant's rights. Those tests are meant to be applied at the preindictment stage, a stage where constitutional due process has limited application. At the post-sentencing stage, however, constitutional rights are involved. The *Rivest* majority recognized this fact but did not provide adequate safeguards.

IV. CONCLUSION

The United States and the Wisconsin Supreme Courts recognize the constitutional validity of plea agreements.[95] And in spite of the controversy which surrounds the propriety of plea agreements,[96] it is probable that they will continue to be an important tool of the prosecutor in obtaining

92. Commodore v. State, 33 Wis. 2d 373, 377-78, 147 N.W.2d 283, 285 (1967).

93. *Rivest*, 106 Wis. 2d at 416-17, 316 N.W.2d at 400-01.

94. *Id.* at 435-36, 316 N.W.2d at 409 (Abrahamson, J., dissenting).

95. Brady v. United States, 397 U.S. 742, 753 (1970); State *ex rel.* White v. Gray, 57 Wis. 2d 17, 21-22, 203 N.W.2d 638, 640 (1973).

96. For an extensive discussion on plea agreements, including a discussion on the propriety of making them, see D. NEWMAN, CONVICTION: THE DETERMINATION OF

guilty pleas,[97] since defendants and the state often find them advantageous.[98] Courts, therefore, will continue to adjudicate disputes arising out of plea agreements. The constitutional contract theory is one approach which can give the courts guidance in resolving these disputes while at the same time protecting the defendant's constitutional rights.

The Wisconsin Supreme Court adopted the constitutional contract theory in *State v. Rivest*, a case of first impression in that the state moved to vacate the plea agreement after the defendant pled guilty and began to serve his sentence.[99] In adopting this theory, however, the court misapplied contract law and did not provide adequate protection for the defendant's constitutional rights. As Justice Abrahamson suggests in her strong dissent, the court missed an opportunity to establish a procedure which safeguards the rights of the defendant as well as protects the interests of the public and the state in the integrity of the judicial system.

JOHN F. GALLAGHER

GUILT OR INNOCENCE WITHOUT TRIAL (1966); *Special Issue on Plea Bargaining*, 13 LAW & SOC'Y REV. (1978-79).

97. It is estimated that over 90% of all criminal convictions are by pleas of guilty. D. NEWMAN, *supra* note 96, at 3.

98. Brady v. United States, 397 U.S. 742 (1970), which states:

> For a defendant who sees slight possibility of acquittal, the advantages of pleading guilty and limiting the probable penalty are obvious — his exposure is reduced, the correctional processes can begin immediately, and the practical burdens of a trial are eliminated. For the State there are also advantages — the more promptly imposed punishment after an admission of guilt may more effectively attain the objectives of punishment; and with the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof.

Id. at 752 (footnote omitted).

99. *Rivest*, 106 Wis. 2d 406, 316 N.W.2d 395 (1982).