DA 18-0646

IN THE SUPREME COURT OF THE STATE OF MONTANA

2020 MT 148

STATE OF MONTANA,

Plaintiff and Appellee,

v.

ZACHARY BRENNAN NEWBARY,

Defendant and Appellant.

APPEAL FROM: District Court of the Fourth Judicial District,
In and For the County of Missoula, Cause No. DC-14-530
Honorable John W. Larson, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Zachary Brennan Newbary, Self-Represented, Deer Lodge, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, Aislinn W. Brown, Assistant Attorney General, Helena, Montana

Kirsten H. Pabst, Missoula County Attorney, Jennifer Clark, Deputy County Attorney, Missoula, Montana

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Submitted on Briefs: March 18, 2020

Decided: June 2, 2020

Filed:

Clerk

Justice Beth Baker delivered the Opinion of the Court.

¶1 Zachary Brennan Newbary appeals the order of the Fourth Judicial District Court denying his motion to withdraw his guilty plea. Newbary argues that the Montana Legislature's repeal of the Boot Camp Incarceration Program rendered his plea involuntary, placed the State in breach of the plea agreement, and constitutes an invalid *ex post facto* law. We affirm.

PROCEDURAL AND FACTUAL BACKGROUND

¶2 On October 14, 2014, the State charged Newbary with Aggravated Assault, a felony, in violation of § 45-5-202, MCA, and Sexual Intercourse Without Consent, a felony, in violation of § 45-5-503, MCA. The latter offense carries a possible maximum sentence of life imprisonment. Section 45-5-503(2), MCA. Newbary pleaded guilty to both counts on May 21, 2015. In exchange for his guilty plea, the State agreed to recommend a sentence of twenty years, with twelve years suspended, for both offenses and that the sentences should run concurrently. The State also agreed to recommend placement in the Boot Camp Incarceration Program followed by pre-release and to recommend that the District Court automatically suspend the remainder of Newbary's sentence of imprisonment upon his successful completion of the boot camp program.

¶3 The District Court held a sentencing hearing on November 12, 2015, and the parties jointly recommended that the court follow the plea agreement. The District Court announced that it would add a four-year parole restriction to the recommended sentence. It continued the sentencing hearing at defense counsel's request to give Newbary time to consider the new sentence. At the continued sentencing hearing on November 25, Newbary

accepted the plea with the added parole restriction. The court sentenced him to twenty years at Montana State Prison with twelve years suspended on each count; ordered the sentences to run concurrently; imposed a four-year parole restriction; and recommended that Newbary be placed in the boot camp program upon completion of the first four years of his sentence. The court listed over forty conditions of probation in its written judgment, including that "[i]f the Defendant enters and successfully completes the Boot Camp Incarceration Program after the first four years of incarceration, pursuant to § 53-30-402, MCA and upon Defendant's successful completion, the Court shall suspend all or part of the remainder of the sentence of imprisonment."

¶4 On July 1, 2017, the Montana Legislature repealed the statutes authorizing the Boot Camp Incarceration Program. *See* 2017 Mont. Laws ch. 384. That November, Montana Department of Corrections officials informed Newbary that he could not apply for or enroll in the program due to the repeal. Newbary filed a Motion to Withdraw Guilty Plea on April 30, 2018, arguing that the repeal of the boot camp program deprived him of the expected benefits of enrollment in the program and the possibility for a sentence reduction. Newbary contended that the repeal retroactively placed the State in breach of the plea agreement and rendered his plea involuntary. The District Court denied Newbary's motion. Newbary appeals.

STANDARDS OF REVIEW

¶5 When a criminal defendant appeals the denial of his motion to withdraw a guilty plea, we review the trial court's findings of fact to determine whether they are clearly erroneous and its conclusions of law to determine if they are correct.

State v. Warclub, 2005 MT 149, ¶ 24, 327 Mont. 352, 114 P.3d 254. Whether a plea is voluntary is a mixed question of law and fact that this Court reviews de novo for correctness. *Warclub*, ¶ 24. Whether the State has breached a plea agreement is a question of law that we review de novo. *State v. McDowell*, 2011 MT 75, ¶ 12, 360 Mont. 83, 253 P.3d 812 (citing *State v. Bullplume*, 2011 MT 40, ¶ 10, 359 Mont. 289, 251 P.3d 114).[1]

DISCUSSION

¶6 *1. Did the District Court err in denying Newbary's motion to withdraw his guilty plea?*

¶7 Newbary argues that the District Court erred in denying his motion to withdraw his guilty plea because the Legislature's repeal of the boot camp program retroactively rendered his plea involuntary and constitutes good cause for withdrawal.

¶8 A plea must be voluntary because the defendant is waiving his constitutional rights to not incriminate himself and to a trial by jury. *State v. Terronez*, 2017 MT 296, ¶ 27, 389 Mont. 421, 406 P.3d 947 (citation omitted). This Court has adopted the standard articulated in *Brady v. United States*, 397 U.S. 742, 90 S. Ct. 1463 (1970), to determine whether a plea is voluntary:

> A plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or

[1] In *State v. Rahn*, 2008 MT 201, ¶ 8, 344 Mont. 110, 187 P.3d 622, we reviewed for abuse of discretion the district court's determination about whether a plea agreement was breached. We subsequently held that the abuse of discretion standard of review we applied in *Rahn* was incorrect. *State v. Shepard*, 2010 MT 20, ¶¶ 7-8, 355 Mont. 114, 225 P.3d 1217. Although we did not expressly overrule *Rahn* on the standard of review, we do so now to avoid any confusion. Whether a plea agreement was breached is a question of law that we review de novo. *Shepard*, ¶¶ 7-8.

> unfulfillable promises), or perhaps by promises that are by their nature improper to the prosecutor's business (e.g. bribes).

Warclub, ¶ 18 (citing *Brady*, 397 U.S. at 755, 90 S. Ct. at 1472); *see also Terronez*, ¶ 27. The actual value of any commitments made to the defendant by the court, prosecutor, or his own counsel are of significant consequence in determining the voluntariness of a plea. *State v. Hendrickson*, 2014 MT 132, ¶ 29, 375 Mont. 136, 325 P.3d 694 (Cotter, J., dissenting) (citing *State v. Lone Elk*, 2005 MT 56, ¶ 21, 326 Mont. 214, 108 P.3d 500, *overruled in part on other grounds by State v. Brinson*, 2009 MT 200, ¶ 9, 351 Mont. 136, 210 P.3d 164). The defendant has the burden to show that his plea was involuntary. *Terronez*, ¶ 27 (citing *State v. Robinson*, 2009 MT 170, ¶¶ 17-18, 350 Mont. 493, 208 P.3d 851). "If any doubt exists on the basis of the evidence presented regarding whether a guilty plea was voluntarily and intelligently made, the doubt must be resolved in favor of the defendant." *Terronez*, ¶ 27 (quoting *Hendrickson*, ¶ 14). But a plea is not necessarily "vulnerable to later attack if the defendant did not correctly assess every relevant factor in entering into his decision." *Lone Elk*, ¶ 26 (quoting *Brady*, 397 U.S. at 757, 90 S. Ct. at 1473).

¶9 A defendant may withdraw his guilty plea within one year of final judgment for good cause.[2] Section 46-16-105(2), MCA. "An involuntary plea can justify withdrawal, but is not the only basis for establishing good cause." *Terronez*, ¶ 32 (internal quotations

[2] The State concedes that it did not preserve for appeal the issue whether Newbary's motion to withdraw his guilty plea was statutorily time-barred. As a result, we decline to address the timeliness of Newbary's motion. *See, e.g., State v. Akers*, 2017 MT 311, ¶ 10, 389 Mont. 531, 408 P.3d 142.

and citations omitted). We analyze numerous case-specific considerations to determine whether good cause is shown to withdraw a guilty plea, including an inadequate colloquy, newly discovered evidence, intervening circumstances, or any other reason for withdrawal that did not exist when the defendant pleaded guilty. *Terronez*, ¶ 32; *Robinson*, ¶ 11.

¶10 Newbary argues that the Legislature's repeal of the boot camp program rendered his plea "at least [] involuntary." Newbary claims that the repeal deprived him of the opportunity for sentence reduction through completion of boot camp—which, he contends, he relied upon in agreeing to plead guilty.[3] At the time of Newbary's sentencing, admission to the boot camp program rested solely within the discretion of the Department of Corrections screening committee. *See* Mont. Admin. R. 20.7.1201(4) (2012); *see also VanSkyock v. Manley*, 2017 MT 99, ¶ 12, 387 Mont. 307, 393 P.3d 1068 ("When a district court commits a criminal defendant to DOC for placement pursuant to § 46-18-201(3)(a)(iv)(A), MCA, the sentencing court has no authority to direct or control where or in what program DOC ultimately places the defendant for the term of sentence. . . . The sentencing court may recommend a particular placement for DOC consideration but the recommendation is not binding on DOC."). The "actual value of the commitment made" to Newbary was thus the promise to recommend his placement in the boot camp program—a value he received when the State made its promised recommendation in the written plea agreement and at sentencing.

[3] Newbary does not allege—nor does the record support—that the State made misrepresentations, bribes, or threats.

¶11 There is nothing in the record to suggest that Newbary was unaware that the actual value of this commitment was a recommendation, not a guarantee, to place him in boot camp. He acknowledges in his appellate brief that defense counsel "carefully negotiated a plea agreement" with the State and "kept Newbary reasonably informed." What's more, the District Court took measures to ensure that Newbary's plea was voluntary; after advising the parties that it would be adding a four-year parole restriction to Newbary's sentence, the court continued the sentencing hearing to allow Newbary and his counsel additional time to consider the terms of the agreement. Our review of the record thus convinces us that Newbary fully understood the direct consequences of his guilty plea and the "actual value of the commitment made to him." *Brady*, 397 U.S. at 755, 90 S. Ct. at 1472.

¶12 Newbary additionally contends that the repeal of the boot camp program constitutes an "intervening circumstance" or "other reason" showing good cause to withdraw his plea under the "trilogy" of *Brady*, *Lone Elk*, and *State v. Humphrey*, 2008 MT 328, 346 Mont. 150, 194 P.3d 643. We are unable to locate any support for his position in these decisions. In *Brady*, the defendant was charged with kidnapping in violation of 18 U.S.C. § 1201(a); pleaded guilty; and was sentenced to 50 years' imprisonment. *Brady*, 397 U.S. at 743-44, 90 S. Ct. at 1466. Brady decided to plead guilty in part to avoid the maximum possible sentence under § 1201(a)—death. *Brady*, 397 U.S. at 743-44, 90 S. Ct. at 1466. While Brady was serving his sentence, the United States Supreme Court in a different case struck down the statute's death penalty provision and granted certiorari in Brady's case to consider whether its decision required the Court to set aside Brady's

conviction. *Brady*, 397 U.S. at 756, 90 S. Ct. at 1473. Holding that it did not, the Court explained:

> [A]bsent misrepresentation or other impermissible conduct by state agents . . . a voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicated that the plea rested on a faulty premise. A plea of guilty triggered by the expectations of a competently counseled defendant that the State will have a strong case against him is not subject to later attack because the defendant's lawyer correctly advised him with respect to the then existing law as to possible penalties but later pronouncements of the courts, as in this case, hold that the maximum penalty for the crime in question was less than was reasonably assumed at the time the plea was entered. The fact that Brady did not anticipate *United States v. Jackson*, [390 U.S. 570, 88 S. Ct. 1209 (1968)], does not impugn the truth or reliability of his plea.

Brady, 397 U.S. at 757, 90 S. Ct. at 1473-74.

¶13 We do not doubt that the prospect of boot camp and its attendant opportunity for sentence reduction factored into Newbary's decision to plead guilty. *Brady*, however, forecloses the outcome he would have us reach—that the repeal amounts to an "intervening circumstance" sufficient to invalidate his guilty plea. The fact that Newbary—not to mention the prosecutor or the District Court—did not anticipate the statutory repeal does not impugn the truth or reliability of his plea even if in retrospect that plea rested on the faulty premise that the boot camp program could be available to him after the first four years of imprisonment.

¶14 Nor do the other cases Newbary cites—*Lone Elk* and *Humphrey*—lend support for this rationale. In *Lone Elk*, ¶¶ 20-23, we adopted the federal voluntariness standard from *Brady* and affirmed the district court's denial of Lone Elk's motion to withdraw guilty plea. Based on our review of the record, we held in part that Lone Elk understood that his guilty

plea might require sexual offender treatment—which he had hoped to avoid by pleading guilty and waiving his right to trial. *Lone Elk*, ¶ 27. We had no occasion in that case to consider any "intervening circumstances" or "other reasons" showing good cause to withdraw a guilty plea. And in *Humphrey*, ¶ 22, we held that a defendant's subjective perceptions bear on the voluntariness of his plea—in that case, Humphrey's impression that the district court would follow the plea agreement instead of imposing a harsher sentence. We clarified, however, that the defendant's subjective impressions must reasonably be justified under the circumstances, judged by objective standards. *Humphrey*, ¶ 23 (citations omitted). Accordingly, we held that Humphrey's mistaken impression that the sentencing court would follow the plea agreement was not reasonably justified where the court merely sought to clarify the sentencing recommendation and ensure that Humphrey was "willing to go forward, knowing that that is truly what the *recommendation* is going to be[.]" *Humphrey*, ¶ 27.

¶15 Based on objective standards, we conclude that it was reasonable under the circumstances at the time of his plea for Newbary to believe the boot camp program would still be in operation at the end of his first four years of imprisonment. But this is not the dispositive inquiry. Rather, we must assess whether Newbary was reasonably justified in his mistaken impression that he would be accepted into and successfully complete the boot camp program and consequently be entitled to the suspension of all or part of his remaining sentence of imprisonment. In light of the circumstances already discussed above, we hold that he was not. Our analysis in *Humphrey* informs the voluntariness of a plea, not the existence of "intervening circumstances" or any "other reason" justifying withdrawal.

¶16 We find no support in the cited cases for Newbary's proposition that the Legislature's repeal of the boot camp program provides good cause to withdraw his plea.[4] Repeal or not, boot camp was never a foregone conclusion, but depended on later discretionary decisions and uncertainties—including whether Newbary would be accepted into the program and whether he would successfully complete it.

¶17 *2. Did the State breach the plea agreement?*

¶18 We reject Newbary's argument that the State retroactively breached the plea agreement when the Legislature repealed the boot camp program. A plea agreement is a contract between the State and a defendant and thus subject to contract law standards. *Rahn*, ¶ 14 (citing *State v. Rardon*, 2005 MT 129, ¶ 18, 327 Mont. 228, 115 P.3d 182). The State may not retain the benefits of a plea agreement and simultaneously avoid its obligations thereunder. *Rahn*, ¶ 14.

¶19 *Rahn* is instructive. In that case, the State agreed to recommend a lower sentence "contingent upon Mr. Rahn being designated a Level 2 [sexual offender] or lower by a MSOTA [Montana Sexual Offender Treatment Association] qualified evaluator." *Rahn*, ¶ 5. At sentencing, Rahn presented testimony from an MSOTA-certified evaluator that he was a Level 2 offender. *Rahn*, ¶ 6. Over Rahn's objection, the State presented conflicting testimony by another evaluator that Rahn should be designated a Level 3 offender. *Rahn*, ¶ 6. The court allowed the testimony, rejected the plea agreement's

[4] Newbary also cites in passing to *United States v. Turner*, 898 F.2d 705 (9th Cir. 1990) and *United States v. Rios-Ortiz*, 830 F.2d 1067 (9th Cir. 1987), but like *Brady*, *Lone Elk*, and *Humphrey*, these decisions do not support his argument.

recommended sentence, and imposed a harsher sentence. *Rahn*, ¶¶ 6-7. We held that the State breached the plea agreement and that the district court abused its discretion in overruling Rahn's objection. *Rahn*, ¶ 23.

¶20 *Rahn* stands in sharp contrast to what occurred here. The prosecutor did precisely what she was obligated to do under the plea agreement: recommend Newbary for placement in the boot camp program and a term of imprisonment far below the statutory maximum for each offense, to run concurrently instead of consecutively. The State did not breach its agreement with Newbary, and the District Court did not abuse its discretion in so holding.

¶21 Newbary urges this Court to apply our rules of statutory construction to the plea agreement to ascertain the parties' intent at the time of his guilty plea and to resolve the ambiguity created by the plea agreement's promise of a "boot camp recommendation." For reasons we have discussed in detail above, we find no ambiguity with respect to the State's agreement to recommend Newbary be placed in the boot camp program. There is no evidence in the record to support Newbary's contention that the "recommendation" had "two conflicting meanings" or that he ever understood that his enrollment was guaranteed. We therefore decline Newbary's invitation to apply the rules of statutory construction to his plea agreement. The District Court correctly held that Newbary's plea was voluntary and that the State fulfilled its obligations under the plea agreement despite the Legislature's repeal of the boot camp program.

¶22 *3. Did the Legislature's repeal of the Boot Camp Incarceration Program constitute an* ex post facto *law?*

¶23 Newbary contends for the first time on appeal that the boot camp program was a sentence reduction program, and thus that its repeal constitutes an *ex post facto* law. We generally do not consider arguments raised for the first time on appeal. *See, e.g., Rahn,* ¶ 22 (citing *State v. Long,* 2005 MT 130, ¶ 35, 327 Mont. 238, 113 P.3d 290). Under the plain error doctrine, however, "[t]his Court may discretionarily review claimed errors that implicate a criminal defendant's fundamental constitutional rights, even if no contemporaneous objection is made . . . where failing to review the claimed error at issue may result in a manifest miscarriage of justice, may leave unsettled the question of fundamental fairness of the trial or proceeding, or may compromise the integrity of the judicial process." *State v. Price,* 2002 MT 284, ¶ 23, 312 Mont. 458, 59 P.3d 1122 (citation omitted).

¶24 "[T]here is no question that *ex post facto* application of the law, if present in this case, violates [the defendant's] fundamental constitutional rights" under our federal and state constitutions. *Price,* ¶ 24. We decline to reverse Newbary's conviction for plain error because he has not demonstrated that the Legislature's repeal of the boot camp program amounted to an *ex post facto* application of the law.

¶25 An *ex post facto* law is one which "makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action, or that aggravates a crime, or makes it greater than it was, when committed." *State v. Goebel,* 2001 MT 155, ¶ 27, 306 Mont. 83, 31 P.3d 340 (citing *Bouie v. Columbia,*

378 U.S. 347, 353, 84 S. Ct. 1697, 1702 (1964)); *see also State v. Mount*, 2003 MT 275, ¶ 24, 317 Mont. 481, 78 P.3d 829 (In criminal matters, a law is *ex post facto* if it: (1) punishes as a crime an act that was not unlawful when committed; (2) makes punishment for a crime more burdensome; or (3) deprives a person charged with a crime of any defense available under the law at the time the act was committed).[5] In *Goebel*, ¶ 29, we rejected a defendant's *ex post facto* claim because the statute in question "did not alter the definition of or the punishment for the [offenses] with which he [was] charged." In contrast, in *Price*, ¶ 11, the State charged Price with the offense of felony nonsupport for failing to pay child support for the period between March 1988 and May 1996. Price raised an *ex post facto* challenge on appeal. He pointed out that the Montana Legislature amended the offense of nonsupport on October 1, 1993, to provide for felony penalties in addition to misdemeanor penalties; thus his failure to make child support payments from March 1988 to October 1993 was punishable only as a misdemeanor. *Price*, ¶ 27. We reversed, agreeing that it was impossible to determine the period for which Price was convicted for felony nonsupport, and remanded for a new trial. *Price*, ¶ 30.

¶26 It is true that the Legislature's repeal of the boot camp program rendered impossible Newbary's enrollment in that program, as well as any sentence reduction that might have resulted from his successful completion of it. The repeal does not, however, violate the *ex post facto* clause. In contrast to *Price*, Newbary's criminal act constituted a felony offense prior to the repeal of the boot camp program. And the repeal of the boot camp

[5] We do not accept the State's reliance on the "intents-effects" test we adopted in *Mount*, ¶ 26, to analyze *ex post facto* challenges in civil sanction contexts.

program did not affect the maximum potential sentence or enhance Newbary's punishment for the charged offense. The District Court sentenced him to twenty years' imprisonment, with twelve years suspended, and a four-year parole restriction. With or without the boot camp program, he was eligible for parole after serving four years of incarceration.[6] Furthermore, as explained in detail above, Newbary's placement in boot camp was never a guarantee. Newbary does not allege, nor does the record suggest, that the ultimate unavailability of the boot camp program deprived Newbary of any defense available under the law at the time he committed the offense. As in *Goebel*, the statute in question did not alter the definition of or the punishment for the offenses with which Newbary was charged.

¶27 We are thus unpersuaded that the Legislature's repeal of the boot camp program violates Newbary's right to be free from *ex post facto* application of the law.[7]

CONCLUSION

¶28 In sum, the District Court did not err in denying Newbary's motion to withdraw his guilty plea. Despite the Legislature's later repeal of the boot camp program, Newbary's plea was voluntary at the time of sentencing. The District Court did not err in determining

[6] Available public records indicate that Newbary was paroled in October 2019.

[7] Justice Sandefur's Dissent argues that the subsequent repeal of the boot camp program effected a material failure of contract consideration warranting equitable rescission of the plea agreement and withdrawal of Newbary's guilty plea. Dissent, ¶ ___. He recognizes, however, that Newbary did not raise this argument either before the District Court or on appeal. Dissent, ¶____. Likewise, Newbary did not make the argument Justice McKinnon advances, which would not apply contract law here, concluding that it would be unfair to do so. Dissent, ¶ ___. On the contrary, Newbary argues forcefully for the application of contract principles here to invalidate the plea agreement. We decline to consider either of the Dissents' propositions in the absence of a developed argument or briefing by the parties. *See, e.g., State v. Allum*, 2005 MT 150, ¶ 20, 327 Mont. 363, 114 P.3d 233 (declining to address an issue not raised in the trial court or on appeal).

that Newbary failed to establish good cause to withdraw his plea or that the State fulfilled its obligations under the plea agreement. Finally, the repeal of the boot camp program does not constitute an *ex post facto* law. We affirm.

/S/ BETH BAKER

We Concur:

/S/ MIKE McGRATH
/S/ JAMES JEREMIAH SHEA
/S/ JIM RICE

Justice Ingrid Gustafson, specially concurring.

¶29 I concur with affirming the District Court's denial of Newbary's motion to withdraw his guilty plea but do so on other grounds than those set forth in the Opinion.[1] I would conclude the State did not breach the plea agreement, as Newbary, in essence, received the benefit of his bargain, despite repeal of the boot camp program.[2] After being advised by

[1] I do not concur with the Opinion's conclusion that since the prosecutor recommended Newbary for participation in the boot camp, the State met its obligation under the plea agreement. It was clear from the plea agreement, the parties had a legitimate expectation that if the Court accepted the plea agreement, *the court* would recommend Newbary for the boot camp and if the court was not willing to do so, the court would reject the plea agreement. While it is true that a judicial recommendation is not technically binding on DOC, DOC routinely followed judicial recommendations unless the offender engaged in additional inappropriate conduct between sentencing and placement in the boot camp. All parties had a legitimate expectation the boot camp program would be available to Newbary as a means toward sentence reduction, if he had not been paroled.

[2] I concur with Justice Sandefur in application of contract law as the starting point for determining whether Newbary should be permitted to withdraw his guilty plea. I also concur with Justice McKinnon that overarching considerations of fundamental fairness must be employed in making this determination.

the District Court it would add a four-year parole restriction to the sentence recommended in the plea agreement, Newbary accepted the plea with the added parole restriction. Pursuant to the plea he accepted, Newbary was eligible for parole following a four-year restriction, with or without the boot camp program. The purpose of being able to participate in the boot camp was to provide a means for sentence reduction in the event Newbary was not paroled after expiration of the four-year restriction. Upon expiration of the four-year restriction, Newbary was paroled on October 29, 2019. As such, repeal of the boot camp program did not result in a harsher or enhanced sentence over that to which he had originally agreed.

/S/ INGRID GUSTAFSON

Justice Dirk Sandefur, dissenting.

¶30 I dissent. The Court correctly holds that the Legislature's subsequent repeal of the boot camp program did not affect the voluntariness of Newbary's plea agreement *at the time of formation*, did not constitute a breach of the terms of the agreement, and did not constitute an ex post facto law as applied. However, those are not the dispositive issues. Overlooked by Newbary, and in turn the Court, the dispositive issue in order to avoid a fundamental miscarriage of justice is whether the subsequent repeal of the boot camp program effected a material failure of contract consideration warranting equitable rescission of the plea agreement and withdrawal of the resulting guilty plea. I would so hold, reverse, and remand with leave to Newbary to withdraw his guilty plea.

¶31 Except as otherwise provided by statute, plea agreements are contracts governed by generally applicable contract law. *State v. Keys*, 1999 MT 10, ¶ 18, 293 Mont. 81, 973 P.2d 812. Accordingly, because they effect a waiver of fundamental constitutional rights, criminal defendants have, at least, a constitutional due process right, as a matter of fundamental fairness, to governance of plea agreements in accordance with generally applicable contract law. *See State v. Rardon*, 1999 MT 220, ¶ 14, 296 Mont. 19, 986 P.2d 424, *partially overruled on other grounds by State v. Munoz*, 2001 MT 85, ¶ 38, 305 Mont. 139, 23 P.3d 922 (choice of specific performance or rescission on state breach of plea agreement lies in hands of non-breaching defendant rather than discretion of the court); *Santobello v. New York*, 404 U.S. 257, 262-63, 92 S. Ct. 495, 499 (1971) (requiring safeguards to ensure fundamental fairness of plea bargaining).[1]

¶32 In contrast to mutual assent/consent, valuable consideration is a distinct element of enforceable contract formation. Section 28-2-102(4), MCA.[2] Even in the absence of a mutual mistake of fact or law at the time of formation, or a subsequent material breach relieving reciprocal performance, an otherwise validly formed contract is independently subject to equitable rescission if, before rendered to the benefitted party, the consideration

[1] Strict compliance with applicable contract law standards is a relevant safeguard but not necessarily the full extent of the due process requirement for fundamental fairness in the plea bargaining process in every circumstance. *See State v. Allen*, 685 P.2d 333, 335 (Mont. 1982); *Santobello*, 404 U.S. at 262-63, 92 S. Ct. at 499. *But see Munoz*, ¶¶ 14-15 (noting *Allen* and *Santobello* resemblance or analogy to equitable quasi-contract principles).

[2] In contrast to valuable consideration, voluntariness is an issue of the distinct contract formation element of mutual assent or consent. *See* §§ 28-2-102 and -301 through -303, MCA; *Lenz v. FSC Secs. Corp.*, 2018 MT 67, ¶ 18, 391 Mont. 84, 414 P.3d 1262.

subsequently fails for any reason in any material regard. Section 28-2-1711(4), MCA.[3] *Accord Norwood v. Serv. Distrib., Inc.*, 2000 MT 4, ¶ 33, 297 Mont. 473, 994 P.2d 25.

¶33 Here, regardless of its non-binding, contingent nature, Newbary clearly bargained for the *opportunity* to have the Montana Department of Corrections (DOC) consider and place him in the boot camp program, followed by probation upon successful completion. Though both community placements, probation is significantly different from parole in terms of status and consequences in the event of violation. As recognized in the Court's opinion, an opportunity for DOC placement in the boot camp program, with probation to follow, was clearly a material aspect of the consideration bargained for by Newbary in return for waiver of his fundamental constitutional rights and change of plea. When the Legislature later eliminated the boot camp program, that material consideration failed in toto prior to rendering, thereby denying Newbary a material benefit of the bargain. As a matter of state contract law and the related fundamental fairness guaranteed by the due process clauses of the United States and Montana Constitutions, he was then clearly entitled to rescission of the plea agreement.

¶34 In the plea agreement context, rescission necessarily includes the opportunity to withdraw the resulting guilty plea, thereby restoring the defendant to his or her pre-agreement/pre-plea position, with reinstatement of his or her fundamental constitutional and statutory rights. *Munoz*, ¶ 18. The District Court thus abused its

[3] Rescission due to failure of consideration is a ground for rescission separate and distinct from rescission due to mutual mistake of fact or law at the time of contracting. *See* §§ 28-2-401(1)(e) and -1711(1), MCA.

discretion in denying Newbary's motion to withdraw his guilty plea.

¶35 I dissent.

/S/ DIRK M. SANDEFUR

Justice Laurie McKinnon, dissenting.

¶36 Newbary negotiated a plea agreement with the State for two concurrent twenty-year sentences; each sentence would have twelve years suspended, the boot camp program would be recommended by the District Court, and the court would suspend all or a part of the remaining sentence upon successful completion of boot camp. The District Court agreed with these recommendations, but added an additional requirement to the agreement that Newbary would not be eligible for parole for the first four years of his sentence. The court gave Newbary time to consider the additional condition. Thereafter, Newbary pleaded guilty, accepting the court's modification to the plea agreement.

¶37 Newbary's judgment, consistent with participation in the boot camp program and § 53-30-402, MCA, allowed the District Court to retain jurisdiction over Newbary's sentence. Furthermore, the judgment did not allow for any discretion in suspending at least a portion of the sentence, as it expressly provided that upon successful completion of boot camp all or part of the remainder of the sentence "shall" be suspended. Due to the Legislature's termination of the boot camp program, Newbary lost this significant benefit negotiated with the State and, under the circumstances here, also negotiated with the court. When it became consequential to Newbary, and under the timeframe contemplated in the plea agreement and judgment, Newbary no longer had the opportunity to participate in

boot camp or receive a significantly reduced sentence. The State and this Court maintain that Newbary nonetheless received the benefit of his plea agreement.

¶38 The substance of the Court's reasoning appears to be that because Newbary was not *guaranteed* boot camp and a reduction in sentence, but was only to receive a *recommendation* for boot camp, Newbary received what he bargained for. It is apparently of no consequence to the Court that when Newbary inculpated himself by admitting to the offense, he did so on the basis that he would have the *opportunity* to participate in boot camp and thereafter receive a reduction in his sentence. However, at the time the negotiated recommendation became of consequence to Newbary, and through no fault of Newbary, he lost his opportunity for a reduced sentence. The Court's reasoning rings hollow and is similar to an argument frequently made when a prosecutor fails to abide by an agreement to make a recommendation in a nonbinding plea agreement and thereafter maintains that the recommended sentence would nevertheless not have been binding on the court. Here, Newbary was entitled to whatever benefit, if any, such a recommendation might confer upon him. Newbary negotiated fundamental constitutional rights, based on representations made by the State and the District Court, and relinquished them for the opportunity to successfully complete the boot camp program and have his sentence reduced. Nothing changed regarding what Newbary bargained for when he waived fundamental constitutional rights to secure a recommendation from the court to participate in a program for an anticipated reduction of his sentence. To deny relief because the recommendation was nonetheless made, albeit to a non-existent program, rings hollow and

ignores fundamental considerations of fairness which should inform inquiries regarding the process of negotiating a plea.

¶39 I would not draw on principles of contract law to resolve this case; rather, I would draw on the substantive right of a defendant to be treated fairly when relinquishing fundamental rights of confrontation, self-incrimination, and other significant trial rights by entering a plea of guilty. There is little doubt that plea bargains are essential to the administration of criminal justice. However, in *Santobello v. New York*, 404 U.S. 257, 261-63, 92 S. Ct. 495, 498-99 (1971), the United States Supreme Court recognized the need for fairness and attendant safeguards to ensure the integrity of the plea-bargaining process. Beyond these general principles of fairness, the precise source and specific content of the right recognized in *Santobello*—the substantive right of a defendant to be treated fairly in the plea-bargaining process—remained undeveloped. Courts have drawn on substantive and remedial contract law to order the practices of plea bargaining and afford defendants relief who were aggrieved in the negotiating process. *Santobello*, however, made it plain that the core concept is the existence of a constitutional right of the defendant to be treated fairly throughout the process, and not the application of contract law. *Santobello*, 404 U.S. at 261-62, 92 S. Ct. at 498 ("This phase 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."). The constitutional right to "fairness" is, for instance, wider in scope than that defined by the law of contracts. When an offer is made, the State may not withdraw the offer in the face of unequivocal acceptance by the defendant within a reasonable time frame, unless some

circumstance during the interval affecting the propriety of the offer occurs and is unknown to the State. Yet, under the law of contracts, no contract has been formed because the State withdrew its offer prior to a defendant's acceptance of the offer.

¶40 While there is some utility in contract analogies which protect a defendant, there are limits to that utility. The source of a right of "fairness" is the constitutional right of fundamental fairness embraced in the substantive due process guarantees of the Fourteenth Amendment. *Herring v. New York*, 422 U.S. 853, 866, 95 S. Ct. 2550, 2557 (1975) (Rehnquist, J., dissenting) ("The Due Process Clause of the Fourteenth Amendment has long been recognized as assuring 'fundamental fairness' in state criminal proceedings."). The search for an appropriate remedy when a defendant has relinquished fundamental rights in return for a benefit in sentencing is perhaps assisted by contract law principles primarily when the State has not lived up to its side of the agreement. Conduct by a prosecutor that in the marketplace would constitute a breach of contract would almost always reflect constitutionally unfair conduct in the plea-bargaining process, but the opposite does not follow. Just because the elements of a contract or promissory estoppel have been realized in a particular plea negotiation does not mean that unfairness is lacking in the constitutional sense. Contract law is morally, in most instances, neutral and has no ethical cast. Parties may execute contracts even if the result may seem unfairly balanced, and courts must interpret the language of the contract as it is written. However, criminal justice and constitutional decisions cannot turn on mechanical rules of offers, acceptances, withdrawals, consideration, fortuities of communications, or the like. While contract law may help to "order" plea negotiating and insure the State is bound by

its conduct, it is inadequate to address the circumstances here, where a defendant has waived significant constitutional rights in order to secure a benefit which is no longer attainable through no fault of his own. Where a defendant cannot realize the benefit of a negotiated plea agreement, his constitutional rights should not be eroded by strained applications of offer, acceptance, consideration, or other concepts imbedded in the law of contracts.

¶41 I am aware of the irony of enforcing a constitutional right of a defendant to have the State live up to its commitments, while a defendant is not held to the same measure. Enforcing a defendant's right to be treated fairly by the State does not afford a concomitant right to the State when a defendant dishonors his own commitments. A defendant cannot be held to an executed plea agreement and may "breach" that agreement up until the time he enters a knowing and voluntary guilty plea waiving his constitutional rights. The State, however, will be held to the plea agreement. This is, however, as it should be. A defendant in his criminal proceeding is shrouded with constitutional guarantees protecting him from proscribed conduct by the State. The State must meet its burden of proof while treating the defendant fairly because "[t]here is more at stake than just the liberty of this defendant. At stake is the honor of the [State,] public confidence in the fair administration of justice, and the efficient administration of justice." *United States v. Carter*, 454 F.2d 426, 428 (4th Cir. 1972). Consistent with these principles, I would resist the temptation to take the relative certainties of contract law too far in deciding difficult constitutional issues of substantive due process and fundamental fairness in plea bargaining.

¶42 Here, it is undisputed that Newbary waived his right of self-incrimination and other fundamental trial rights for the opportunity to participate in the boot camp program and thereafter receive a shorter probationary sentence. While the State is not at fault for termination of the boot camp program, it is this Court's responsibility to examine the fairness of Newbary's plea. It is impossible for Newbary to receive the benefit for which he waived significant constitutional rights. This unfairness, and not principles of contract law, should guide the Court's decision.

¶43 I dissent.

/S/ LAURIE McKINNON