

Bargaining for Freedom: Kansas Allows Criminal Defendants to Avoid Plea Agreement Sentences but Binds the State to Its Deals
[*State v. Boley*, 113 P.3d 248 (Kan. 2005)]

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*It is through contract that man attains freedom.*¹

I. INTRODUCTION

When an individual commits a crime, its impact is widespread. The criminal justice system assists in minimizing the effects of crime, and its success is critical to society. Kansas prosecutors rely on many tools in attaining justice, including plea agreements and punishment of criminal offenders. If prosecutors cannot rely on these tools, the proper functioning of the criminal justice system will be compromised.

The Kansas Supreme Court in *State v. Boley*² incorrectly held that the State could not use the frustration of purpose doctrine to withdraw from a plea agreement after the Kansas Court of Appeals remanded the case to the district court with directions to impose a reduced sentence.³ The court based its opinion on a flawed frustration of purpose analysis and overlooked compelling policy arguments in favor of releasing the State from its plea agreement. The court's holding effectively forces Kansas prosecutors to include sentencing appeal waivers in all plea agreements or bear the risk of any resulting appeals. As a result of the court's holding in *Boley*, Kansas criminal defendants may now bargain with the State for reduced criminal charges and abbreviated sentences and then circumvent their resulting punishments.

The proper use of plea agreements in criminal cases considerably impacts the efficacy of the United States criminal justice system.⁴ Without plea agreements, courts would require a full trial for criminal defendants, resulting in a shortage of personnel and facilities and a

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1. FRIEDRICH KESSLER ET AL., *CONTRACTS* 5 (3d ed. 1986) (quoting W.G. MILLER, *LECTURES IN THE PHILOSOPHY OF LAW* 216 (1884)).

2. 113 P.3d 248 (Kan. 2005).

3. The decision from the Kansas Court of Appeals was based on the recent ruling in *State v. McAdam*, 83 P.3d 161 (Kan. 2004).

4. *Santobello v. New York*, 404 U.S. 257, 260 (1971).

severe lack of judicial efficiency.⁵ Courts often consider contract principles when construing plea agreements⁶ because a primary function of contract law is “making certain that bargains [are] kept and that legitimate expectations created by contractual promises [are] honored.”⁷

Requiring the parties to comply with their obligations under a plea agreement ensures that criminal defendants serve appropriate sentences for their crimes, which is vital to the proper functioning of the justice system and to society as a whole. When criminals are punished, it deters them from becoming repeat offenders and deters others from committing similar crimes.⁸ Incapacitation of the criminal for a period of time prevents danger to society and provides the criminal justice system with an opportunity to rehabilitate the offender.⁹ Impeding these important sentencing objectives by allowing criminal offenders to bargain their way to lesser charges and avoid proper punishment under their plea agreements, as the court permitted in *Boley*, is detrimental to society.

II. CASE DESCRIPTION

In *Boley*, the State charged defendant Charles D. Boley with the crime of manufacturing methamphetamine or, alternatively, attempting to manufacture methamphetamine and conspiring to manufacture methamphetamine.¹⁰ Boley entered into a plea agreement in which he pleaded no contest to one count of attempt to manufacture methamphetamine pursuant to section 65-4159(a) of the Kansas Statutes Annotated, a severity level 1 drug felony.¹¹ The State agreed to dismiss the conspiracy charge and recommend a downward durational departure sentence of forty-eight months incarceration.¹² Prior to sentencing, Boley objected to the length of the sentence, arguing that it should not carry a drug severity level 1 penalty.¹³ Boley contended his offense should be a misdemeanor under section 65-4127c of the Kansas Statutes Annotated or should require a severity level 3 penalty

5. *Id.* Benefits derived from plea agreements include a swift and final resolution in most criminal cases; a reduced period of idle confinement for defendants who are denied pretrial release; public protection from defendants who may continue criminal activity during pretrial release; and a reduced time period between charging the defendant and disposition of the case, which increases the potential for rehabilitating the guilty when imprisoned. *Id.* at 261.

6. *State v. Smith*, 767 P.2d 1302, 1304 (Kan. 1989).

7. *KESSLER ET AL.*, *supra* note 1, at 4.

8. *See* WAYNE R. LAFAVE, *PRINCIPLES OF CRIMINAL LAW* § 1.5(a), at 23-25 (2003).

9. *See id.* at 24.

10. *State v. Boley*, 95 P.3d 1022, 1023 (Kan. Ct. App. 2004).

11. *Id.* at 1023-24. Section 65-4159(b) of the Kansas Statutes Annotated provides that “[a]ny person violating the provisions of this section with respect to the unlawful manufacturing or attempting to unlawfully manufacture any controlled substance or controlled substance analog, upon conviction, is guilty of a drug severity level 1 felony.”

12. *Boley*, 95 P.3d at 1023; *see infra* text accompanying notes 161-63.

13. *Boley*, 95 P.3d at 1024.

under section 65-4161(a).¹⁴ The district court overruled his objection and adopted the State's recommended downward departure, sentencing Boley to forty-eight months with the state department of corrections.¹⁵

Boley appealed the district court's imposition of a drug severity level 1 sentence.¹⁶ The Kansas Court of Appeals reversed based on the Kansas Supreme Court's holding in *State v. McAdam*.¹⁷ Seven months earlier in *McAdam*, the court held that a defendant convicted under section 65-4159 can only be sentenced to a severity level 3 drug felony rather than a severity level 1 drug felony.¹⁸ The State argued in response to Boley's appeal that if the court of appeals did not require Boley to serve the sentence he agreed to under the plea agreement, then the court should allow the State to restore the original dismissed charge based on the frustration of purpose doctrine.¹⁹ The Kansas Court of Appeals agreed, holding that Boley's resentencing would frustrate the State's purpose for entering into the plea agreement.²⁰ The Kansas Court of Appeals remanded the case, mandating that the district court resentence Boley in accordance with *McAdam*.²¹ The court instructed that, on remand, the State could withdraw from the plea agreement with Boley and re-file the previously dismissed charge.²²

Boley appealed the decision from the Kansas Court of Appeals, and the Kansas Supreme Court granted his petition for review.²³ Analyzing Boley's plea agreement with the State and determining that the State did not satisfy the required elements of the frustration of purpose doctrine, the court ruled that the State could not withdraw from its plea agreement with Boley.²⁴ The Kansas Supreme Court vacated the district court's sentence and remanded the case with instructions to resentence Boley in compliance with *McAdam*.²⁵

14. *Id.*

15. *Id.*

16. *Id.*

17. 83 P.3d 161, 168 (Kan. 2004) (holding that because sections 65-4161(a) and 65-4159(a) of the Kansas Statutes Annotated prohibit the same elements of the offense of conspiracy to unlawfully manufacture methamphetamine, the court could only sentence McAdam under section 65-4161(a), which carries the lesser penalty).

18. *Boley*, 95 P.3d at 1024.

19. Brief of Appellee at 7, *Boley*, 95 P.3d 1022 (No. 04-91804-A).

20. *Boley*, 95 P.3d at 1028.

21. *Id.*

22. *Id.*

23. *State v. Boley*, 113 P.3d 248, 251 (Kan. 2005).

24. *Id.* at 258.

25. *Id.*

III. BACKGROUND

The plea bargaining process significantly contributes to the efficient functioning of the United States criminal justice system, provided it is appropriately managed.²⁶ Without plea agreements, every not-guilty plea would result in a full criminal trial for the State to secure a conviction.²⁷ This increase in criminal trials would create a considerable drain on judicial resources.²⁸ Thus, proper interpretation and application of plea agreements is essential to ensure the efficacy of the justice system.²⁹

A. Contract Analysis of Plea Agreements

“A plea bargain is, in law, just another contract”³⁰ Contract analysis often aids courts in construing plea agreements.³¹ This principle is particularly applicable when determining remedies for defendants deprived of their rights during plea negotiations.³² Although courts frequently follow this approach, they must also consider the constitutional implications involved in plea agreements.³³ Additionally, pure contract law analysis overlooks the trial court’s role in a plea agreement between a criminal defendant and the State.³⁴ Thus, contract analysis may be beneficial to courts when interpreting plea agreements, provided courts recognize the limits of such principles.³⁵

1. Application of the Frustration of Purpose Doctrine to Plea Agreements

The frustration of purpose doctrine provides the following:

26. *Santobello v. New York*, 404 U.S. 257, 260 (1971). The validity of a plea agreement depends on whether the agreement between the prosecutor and defendant is fairly secured. *Id.* at 261. A plea agreement requires the defendant’s plea to be knowing and voluntary; entered into with the assistance of counsel, unless waived; and if induced by promises, then the promises must be made known. *Id.* at 261-62.

27. *See id.* at 260.

28. *Id.* In 2002, only 2.9% of all federal criminal cases resulted in a trial. U.S. SENTENCING COMM’N, 2002 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 20 (2002). The remaining 97.1% were resolved with guilty pleas. *Id.*

29. *Santobello*, 404 U.S. at 261.

30. *Brooks v. United States*, 708 F.2d 1280, 1281 (7th Cir. 1983) (citing *United States v. Mooney*, 654 F.2d 482, 486 (7th Cir. 1981)).

31. *State v. Smith*, 767 P.2d 1302, 1304 (Kan. 1989). To the extent that there is any evolving body of law regarding plea agreements, it consists predominantly of contract law analogies. *See Cooper v. United States*, 594 F.2d 12, 16 (4th Cir. 1979).

32. *United States v. Calabrese*, 645 F.2d 1379, 1390 (10th Cir. 1981).

33. *State v. Boley*, 113 P.3d 248, 252 (Kan. 2005). Plea agreements implicate due process concerns for defendants because they must relinquish many of their constitutional rights as part of the agreements. *Smith*, 767 P.2d at 1304 (quoting Julie A. Lumpkin, Note, *The Standard of Proof Necessary to Establish that a Defendant Has Materially Breached a Plea Agreement*, 55 *FORDHAM L. REV.* 1059, 1065-67 (1987)). Defendants, therefore, have a due process interest in the State’s fulfillment of the plea agreements. *Id.*

34. *United States v. Ocanas*, 628 F.2d 353, 358 (5th Cir. 1980). The trial court has complete discretion in deciding whether to accept a plea bargain. *Id.*

35. *Boley*, 113 P.3d at 252.

Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.³⁶

The primary focus of the doctrine is “how to allocate the risks of harm and disappointment that result from supervening events occurring after the contract is made.”³⁷ Because parties must satisfy a difficult standard under the doctrine, courts rarely permit rescission of the contract.³⁸ The first element of the doctrine requires proof that the frustrated purpose is the crux of the contract, without which “the transaction would make little sense.”³⁹ Secondly, “the frustration must be substantial” and not “within the risks that [the party seeking rescission] assumed under the contract.”⁴⁰ When allocating the risk of the frustrating event's occurrence, courts consider several factors, including the interpretation of the contract itself, the foreseeability of the frustrating event, and case law precedent.⁴¹ The third element provides that “the non-occurrence of the frustrating event must have been a basic assumption on which the contract was made.”⁴² Courts recognize the foreseeability of the frustrating event as a factor in determining whether this element is satisfied; however, it is not dispositive.⁴³ Finally, the party requesting rescission must not have caused the frustration.⁴⁴

Two primary cases thoroughly analyze the frustration of purpose doctrine when determining the validity of plea agreements. The United States Court of Appeals for the Tenth Circuit, in *United States v. Bunner*,⁴⁵ analyzed a plea agreement under the frustration of purpose doctrine, granting relief to the Government.⁴⁶ Robert Dennis Bunner entered into a plea agreement with the Government, but due to a subsequent United States Supreme Court ruling, the facts supporting his plea no longer constituted a crime.⁴⁷ The defendant

36. RESTATEMENT (SECOND) OF CONTRACTS § 265 (1979).

37. 14 JAMES P. NEHF, CORBIN ON CONTRACTS § 74.1, at 9 (Joseph M. Perillo ed., 2001) [hereinafter CORBIN].

38. *See id.*

39. RESTATEMENT (SECOND) OF CONTRACTS § 265 cmt. a (1979).

40. *Id.*

41. CORBIN, *supra* note 37, § 74.15, at 92, 94-95.

42. RESTATEMENT (SECOND) OF CONTRACTS § 265 cmt. a (1979).

43. *Id.* Many courts assume that “foreseeability of the frustrating event is not alone enough to bar rescission if it appears that the parties did not intend the promisor to assume the risk of its occurrence.” *W. Los Angeles Inst. for Cancer Research v. Mayer*, 366 F.2d 220, 225 (9th Cir. 1966).

44. RESTATEMENT (SECOND) OF CONTRACTS § 265 (1979).

45. 134 F.3d 1000 (10th Cir. 1998).

46. *Id.* at 1005.

47. *Id.* at 1002. Bunner pleaded “guilty to using a firearm during the commission of a drug trafficking offense” in exchange for the Government's dismissal of additional counts in the in-

moved to vacate his sentence, and the district court granted his motion.⁴⁸ The Tenth Circuit considered whether the plea agreement between the Government and the defendant continued to bar the Government from recharging the defendant with the original offenses after the district court vacated his sentence.⁴⁹

In its frustration of purpose analysis, the Tenth Circuit determined that avoiding an unpredictable jury verdict was the parties' shared purpose for entering into the plea agreement.⁵⁰ Specifically, the Tenth Circuit noted that the defendant entered into the agreement to prevent the possibility of a jury convicting him of all four of the originally charged crimes, and the Government did so to ensure that the defendant was incarcerated for his criminal conduct.⁵¹ The parties would not have executed the plea agreement had they not believed that the underlying facts constituted the crime for which Bunner pleaded guilty.⁵² The court observed that, because Bunner was no longer bound by the plea agreement, his performance under the plea agreement was futile to the Government.⁵³ Under the frustration of purpose doctrine, the Tenth Circuit held that the Government could request the district court discharge it from its obligations under the plea agreement and that the Government could then reinstate the original charges.⁵⁴

Shortly after the Tenth Circuit decided *Bunner*, the United States Court of Appeals for the Fifth Circuit, in *United States v. Moulder*,⁵⁵ also applied the frustration of purpose doctrine to a plea agreement.⁵⁶ Similar to *Bunner*, the defendants in *Moulder*, as part of a plea agreement, pleaded guilty to conduct that the United States Supreme Court

dictment. *Id.* Bunner had served three years of a sixty-month sentence when he successfully moved to vacate his sentence. *Id.*

48. *Id.* The district court allowed the Government to reinstate the counts dismissed under the plea agreement based on Bunner's repudiation of the agreement. *Id.*

49. *Id.* at 1002-03. Bunner argued that the Tenth Circuit should adopt the Ninth Circuit's reasoning in *United States v. Sandoval-Lopez*, 122 F.3d 797 (9th Cir. 1997), which was factually analogous to his case. *Bunner*, 134 F.3d at 1003. In *Sandoval-Lopez*, the Ninth Circuit held that because the defendant's plea agreement did not expressly prohibit him from collaterally attacking his sentence, he did not breach the agreement. 122 F.3d at 801-02. The Tenth Circuit in *Bunner* agreed with the Ninth Circuit's rationale in *Sandoval-Lopez* but explained that the Ninth Circuit "stopped too soon" and should have determined what effects, such as intervening impracticality or frustration of purpose, the defendant's successful motion had on the Government's obligations under the plea agreement. *Bunner*, 134 F.3d at 1004.

50. *Bunner*, 134 F.3d at 1004.

51. *Id.* at 1004-05.

52. *Id.* at 1005. The Tenth Circuit, in a footnote, commented that "a fair construction of the plea agreement . . . requires that [the] [d]efendant and the [G]overnment share the risk that a subsequent change in the law may undermine the basis of the agreement," despite the Ninth Circuit's requirement that the Government solely bear the risk of a change in law. *Id.* at 1005 n.3.

53. *Id.* at 1005.

54. *Id.*

55. 141 F.3d 568 (5th Cir. 1998).

56. *Id.* at 572.

later determined was no longer criminal.⁵⁷ On the defendants' motions, the district court vacated their convictions.⁵⁸ The Government then indicted the defendants on the additional charges it had dismissed under the plea agreement.⁵⁹ The defendants moved to dismiss the new charges, but the district court denied their motions, holding that the defendants effectively repudiated the plea agreement with their motions to vacate.⁶⁰

On appeal, the Fifth Circuit analyzed the circumstances surrounding the plea agreement under the frustration of purpose doctrine rather than as a breach of contract.⁶¹ The Fifth Circuit followed *Bunner*, holding that the district court's decision to vacate the defendants' sentences frustrated the Government's purpose for entering into the plea agreement.⁶² The court ruled that the Government was justified in withdrawing from the plea agreement and reinstating the original charges.⁶³

Although two federal circuits applied the frustration of purpose doctrine to plea agreements, the holdings are only binding within those circuits. Other federal circuits and state courts may determine whether to apply the doctrine to plea agreements. As a result, the doctrine continues to evolve as a suitable method for relieving the State of its duties under a plea agreement when the State's purpose has been frustrated by the defendant's successful appeal of his sentence.

2. Application of Mutual Mistake of Law or Fact Doctrine to Plea Agreements

Another useful tool for analyzing the validity of a plea agreement, the contracts doctrine of mutual mistake, provides that when a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of the mistake.⁶⁴

57. *See id.* at 570.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 571.

62. *Id.* at 572.

63. *Id.* One of the defendants in *Moulder* also argued that the Government's reinstatement of the original, more serious charges was prosecutorial vindictiveness. *Id.* The court denied the defendant's claim, holding that a reasonable defendant under similar circumstances should have realized that dismissal of the conviction would provide the Government reason to reinstate the dismissed charges. *Id.*

64. RESTATEMENT (SECOND) OF CONTRACTS § 152 (1979).

A contract is voidable under the doctrine only if the mistake relates “to a basic assumption on which both parties made the contract.”⁶⁵ A court will not release a party from a contract if that party bears the risk of the mistake.⁶⁶

A party bears the risk of a mistake when (a) the risk is allocated to him by agreement of the parties, or (b) he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or (c) the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so.⁶⁷

The primary authority in analyzing whether mutual mistake may be used to permit the State to rescind a plea agreement is *Jolly v. State*.⁶⁸ In *Jolly*, Gerald Dean Jolly pleaded guilty under a plea agreement to a charge that both parties believed carried a mandatory three-year sentence.⁶⁹ The offense that the defendant pleaded guilty to, however, was not included in the offenses requiring a minimum sentence of three years.⁷⁰ The plea, therefore, was based on the parties' mutual mistake regarding the applicable law.⁷¹ On appeal, the District Court of Appeal of Florida held that the plea was invalid.⁷²

The Florida court determined that, because the defendant's sentence was incorrect, the parties' only available remedies were to reinstate plea negotiations or retry the defendant.⁷³ If the court required resentencing of the defendant but allowed the plea agreement to stand, then the defendant would reap the benefits of his bargain, while the State would be denied any gains under the agreement.⁷⁴ The plea agreement could not bind the State because it no longer bound the defendant.⁷⁵ The potential delay accompanying a post-conviction motion could negatively impact the State's ability to procure witnesses or evidence for a trial.⁷⁶ The court concluded that

the state should be given the option of either agreeing that both the judgment and sentence should be vacated and taking the defendant to trial on all original charges, or agreeing that only the excessive sentence should be vacated, while having the judgment stand and allowing the defendant to be resentenced.⁷⁷

65. *Id.* § 152 cmt. b.

66. *Id.* § 152.

67. *Id.* § 154.

68. 392 So. 2d 54 (Fla. Dist. Ct. App. 1981).

69. *Id.* at 56.

70. *Id.*

71. *Id.*

72. *See id.*

73. *Id.* (“If the foundation of the sentence is defective, a new sentence cannot correct it.”).

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

In addition to *Jolly*, other notable opinions have recognized that mutual mistake may be a sufficient reason to rescind a plea agreement; however, those courts determined that the elements of mutual mistake were not satisfied.⁷⁸ The Utah Court of Appeals, in *State v. Patience*,⁷⁹ upheld the State's plea agreement with the defendant and remanded the case to the trial court for resentencing based on the defendant's illegal sentence under the plea agreement.⁸⁰ Utah charged Jayne I. Patience with three counts of forgery, and she entered into a plea agreement with the State under which she agreed to plead guilty to three counts of attempted forgery, a lesser crime.⁸¹ After the State charged the defendant, but before it entered into the plea agreement, the Utah legislature amended the applicable statute to impose less severe penalties.⁸² Both parties were unaware of the statutory changes, and the district court sentenced the defendant as provided under the plea agreement.⁸³ On appeal, the defendant argued that her sentences were illegal and that the Utah Court of Appeals should remand her case to the district court for resentencing in accordance with the amended statute.⁸⁴ The State agreed that the defendant's sentences were illegal, but it argued that the court of appeals should vacate the plea agreement because the agreement was based on a mutual mistake of fact and allow the State to recharge Patience with the original offenses.⁸⁵

The Utah Court of Appeals applied contract theories to the plea agreement and determined that the State was not entitled to withdraw from the agreement because it assumed the risk that a mistake of law may exist.⁸⁶ The court reasoned that "[t]he State is generally in the better position to know the correct law, given that the State has control over the charges in the information and final say over whether to accept a defendant's plea, and the State must be deemed to know the

78. The Kansas Court of Appeals applied the Florida court's reasoning in *Jolly* in two different cases, and neither case resulted in relief for the State from its plea agreement. In *State v. Boswell*, 37 P.3d 40, 44-45 (Kan. Ct. App. 2001), the court held that when a sentencing court imposes an illegal sentence, as recommended by a plea agreement, "the State may either allow the defendant to withdraw his or her guilty plea, or agree that the illegal portion of the sentence be vacated and the defendant be resentenced to the proper lesser term." The Kansas Court of Appeals in *State v. Johnson*, 55 P.3d 927, 928 (Kan. Ct. App. 2002), clarified *Boswell*, holding that "[w]hat the *Boswell* panel intended to say is that the State may acquiesce in the defendant's request for a new trial or, in the alternative, may insist the defendant be resentenced to the proper lesser term."

79. 944 P.2d 381 (Utah Ct. App. 1997).

80. *Id.* at 388.

81. *Id.* at 383.

82. *Id.*

83. *Id.* at 383-84.

84. *Id.* at 384.

85. *Id.* at 385.

86. *Id.* at 387-88.

law it is enforcing.”⁸⁷ The Utah Court of Appeals held the State to its plea agreement and remanded the case for resentencing under the amended statute.⁸⁸

Relying on the reasoning in *Patience*, the Arizona Court of Appeals, in *Coy v. Fields*,⁸⁹ also recognized the doctrine of mutual mistake but determined that its elements were not satisfied.⁹⁰ The district court sentenced Frederick John Coy under a plea agreement to a probation term of fifteen years; however, his conviction carried a maximum probation term of three years.⁹¹ When the defendant moved to modify his sentence to comply with Arizona law, the district court denied his request, setting aside the plea agreement as the State requested.⁹² Explaining that the State assumed the risk of a mistake of law, the Arizona Court of Appeals vacated the district court’s order and remanded the case for resentencing.⁹³

Although these courts have applied the doctrine of mutual mistake to plea agreements, no court has permitted a state to withdraw from a plea agreement based on the doctrine. Thus, it is unclear whether the doctrine will become a viable tool for prosecutors to obtain relief.

B. *Resentencing Boley: McAdam’s Interpretation of Kansas Criminal Statutes*

Before discussing the Kansas Supreme Court’s decision in *Boley* and its implications for the criminal justice system, it is important to understand the court’s basis for remanding the case for resentencing. The court remanded *Boley* based on its holding in *State v. McAdam*, in which it examined whether a conviction for conspiracy to unlawfully manufacture methamphetamine should carry a drug severity level 1 felony sentence.⁹⁴ The district court sentenced the defendant for violating section 65-4159(a) of the Kansas Statutes Annotated, a drug severity level 1 felony.⁹⁵ The defendant argued to the Kansas Court of Appeals that the district court should have sentenced him

87. *Id.* at 388. The court distinguished the facts in this case from one in which the law was unclear or the State’s mistake was somehow induced. *Id.*

88. *Id.*

89. 27 P.3d 799 (Ariz. Ct. App. 2001).

90. *Id.* at 803.

91. *Id.* at 800.

92. *Id.*

93. *Id.* at 803. The court noted that if the defendant had been motivated by bad faith when entering into the plea agreement, such as not intending to comply with the terms of the agreement or knowing the State’s mistake of law, then the State would have been allowed to withdraw from the plea agreement. *Id.*

94. *State v. McAdam*, 83 P.3d 161, 163 (Kan. 2004).

95. *Id.* at 165. Under Kansas law, it is “unlawful for any person to manufacture any controlled substance or controlled substance analog.” KAN. STAT. ANN. § 65-4159 (2002).

under section 65-4161(a), a drug severity level 3 felony.⁹⁶ Sections 65-4159(a) and 65-4161(a) prohibited the same offense for which the State charged the defendant, the conspiracy to unlawfully manufacture methamphetamine.⁹⁷ The Kansas Court of Appeals explained that the purpose of section 65-4161(a) was to supplement section 65-4159(a); therefore, the conflict between the statutes' sentencing provisions should be resolved in favor of the specific statute, section 65-4159(a).⁹⁸

The Kansas Court of Appeals held that the district court properly sentenced McAdam to a drug severity level 1 felony under section 65-4159(a).⁹⁹ The defendant appealed his sentence to the Kansas Supreme Court, which reversed the court of appeals, holding that sections 65-4159(a) and 65-4161(a) were identical statutes rather than specific and general statutes.¹⁰⁰ The Kansas Supreme Court followed the reasoning in *State v. Nunn*¹⁰¹ and vacated the defendant's sentence, remanding the case to the district court with instructions to re-sentence the defendant under the lesser penalty provision of section 65-4161(a).¹⁰² The Kansas Supreme Court later ruled in *State v. Barnes*,¹⁰³ however, that the holding in *McAdam* was not new law but rather an application of principles from prior cases.¹⁰⁴ Thus, the rule in *McAdam* should apply to cases on direct appeal.¹⁰⁵

96. *McAdam*, 83 P.3d at 165. Kansas law provides that it is unlawful for any person to sell, offer for sale or have in such person's possession with intent to sell, deliver or distribute; prescribe; administer; deliver; distribute; dispense or compound any opiates, opium or narcotic drugs, or any stimulant designated in subsection (d)(1), (d)(3) or (f)(1) of [section] 65-4107 [of the Kansas Statutes Annotated] and amendments thereto.

KAN. STAT. ANN. § 65-4161.

97. *McAdam*, 83 P.3d at 167.

98. *State v. McAdam*, 66 P.3d 252, 260 (Kan. Ct. App. 2003). The Kansas Court of Appeals considered whether sections 65-4159(a) and 65-4161(a) were identical statutes or general and specific statutes. *Id.* The court determined that the Kansas legislature intended section 65-4161 to be a supplement to the Uniform Controlled Substances Act based on language in section 65-4161(g) that "[t]he provisions of this section shall be part of and supplemental to the uniform controlled substances act." *Id.* (quoting KAN. STAT. ANN. § 65-4161(g)). When a conflict exists between a general and a specific statute, the specific statute controls unless the legislature intended otherwise. *Id.*

99. *Id.*

100. *McAdam*, 83 P.3d at 167. The Kansas Supreme Court held that the appropriate analysis involved only whether the statutes had identical elements. *Id.* If the statutes were identical, the court could only sentence McAdam under the statute specifying the lesser penalty. *Id.*

101. 768 P.2d 268, 284 (Kan. 1989) ("Where two criminal offenses have identical elements but are classified differently for purposes of imposing a penalty, a defendant convicted of either crime may be sentenced only under the lesser penalty provision."). Previously, in *State v. Frazier*, 42 P.3d 188, 193 (Kan. Ct. App. 2002), the Kansas Court of Appeals followed *Nunn* in holding that the defendant Troy D. Frazier could only be sentenced under the lesser of two statutes when both statutes prohibited the same conduct for which Frazier was charged.

102. *McAdam*, 83 P.3d at 168.

103. 92 P.3d 578 (Kan. 2004).

104. *Id.* at 583.

105. *Id.*

IV. COURT'S DECISION

In *Boley*, the Kansas Supreme Court considered whether the State may withdraw from its plea agreement with the defendant when the court remands the case with instructions to reduce the defendant's sentence to comply with *State v. McAdam*.¹⁰⁶ The court focused on fundamental contract principles because such principles offer the most appropriate method for interpreting plea agreements, provided that the court considers the constitutional implications for the criminal defendant.¹⁰⁷ Boley entered into a plea agreement with the State under which he agreed to plead guilty to a drug severity level 1 felony in exchange for the dismissal of a conspiracy charge and a reduced sentence.¹⁰⁸

On appeal, the State argued that the Kansas Court of Appeals should require Boley to fulfill his contractual obligations because he agreed to a drug severity level 1 felony.¹⁰⁹ Alternatively, the State asserted that it should be allowed to restore the original charge dismissed under the plea agreement.¹¹⁰ The State contended that, without reinstating the original offense, the defendant would receive "two bites at the apple with [the] double benefit of a favorable plea agreement and a sentence for a lesser offense."¹¹¹ Boley maintained that under the agreement, he agreed to plead guilty to attempted manufacture of methamphetamine; however, he "did not agree to recommend any particular sentence" because "parties cannot contract for a specific sentence or stipulate to a certain severity level."¹¹² Additionally, Boley claimed that the terms of the plea agreement did not prohibit him from seeking a reduced sentence.¹¹³ Persuaded by Boley's arguments, the Kansas Supreme Court held that Boley did not breach the plea agreement when he challenged his sentence on appeal.¹¹⁴

The Kansas Supreme Court next examined whether the district court could release the State from its obligations under the plea agreement because Boley's successful appeal of his sentence frustrated the purpose of the plea agreement.¹¹⁵ The first inquiry under the frustration of purpose doctrine is "whether the frustrated purpose was 'so

106. *State v. Boley*, 113 P.3d 248, 250-51 (Kan. 2005).

107. *Id.* at 252.

108. Brief of Appellee at 2, *State v. Boley*, 95 P.3d 1022 (Kan. Ct. App. 2004) (No. 04-91804-A).

109. *Id.* at 7. The State's arguments on appeal focused on the court's ability to resentencing Boley, and its argument that the court should release it from the plea agreement based on Boley's successful appeal of his sentence was limited. *Id.* at 7-8.

110. *Id.* at 7.

111. *Id.* at 7-8.

112. Brief of Appellant at 7-8, *Boley*, 95 P.3d 1022 (No. 04-91804-A).

113. *Id.* at 7.

114. *State v. Boley*, 113 P.3d 248, 252 (Kan. 2005).

115. *Id.* at 253.

completely the basis of the contract that . . . without it the transaction would make little sense.’”¹¹⁶ The court determined that the State achieved its objectives for entering into the plea agreement because it avoided a trial and the accompanying risk that a jury would acquit Boley and because Boley was incarcerated.¹¹⁷ A specific sentence was not guaranteed when the State entered into the plea agreement.¹¹⁸ Thus, the length of Boley’s sentence was not the basis of the contract or necessary for the transaction to make sense.¹¹⁹

The court then considered the second element of the doctrine: “The frustration must be so severe that it is not fairly to be regarded as within the risks . . . assumed under the contract.”¹²⁰ Boley argued that the State received the benefit of its bargain by obtaining a conviction without proving guilt to a jury, regardless of whether he received the sentence that the State expected.¹²¹ The court noted that, although Boley’s resentencing may have partially frustrated the State’s purpose, the State did not lose the total value it bargained for under the plea agreement because Boley would still be incarcerated.¹²² Both parties assumed the risk that the district court would not impose the sentence stipulated to in the plea agreement.¹²³ The State also assumed the risk that Boley would appeal his sentence because it failed to include a provision in the plea agreement forbidding an appeal.¹²⁴ Accordingly, the court reasoned that the State assumed the risk under the plea agreement that the district court would resentence Boley.¹²⁵

The third element of the doctrine “is that the ‘non-occurrence of the frustrating event must have been a basic assumption on which the contract was made.’”¹²⁶ The court explained that when the State entered into the plea agreement with Boley, “the issue of whether someone convicted of manufacture of methamphetamine could be sentenced to a severity level 1 drug felony had been percolating in the [c]ourt of [a]ppeals.”¹²⁷ The prosecutor conceded at oral argument that he considered the implications of *State v. McAdam*¹²⁸ and *State v.*

116. *Id.* at 253-54 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 265 cmt. a (1979)).

117. *Id.* at 254.

118. *Id.*

119. *Id.*

120. *Id.* (quoting RESTATEMENT (SECOND) OF CONTRACTS § 265 cmt. a (1979)).

121. Brief of Appellant at 9, *Boley*, 113 P.3d 248 (No. 04-91804-A).

122. *Boley*, 113 P.3d at 254.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 255 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 265 cmt. a (1979)).

127. *Id.*

128. 83 P.3d 161 (Kan. 2004).

*Frazier*¹²⁹ when he entered into the plea agreement with Boley.¹³⁰ Thus, the court concluded that the State could have foreseen the risk that the Kansas Court of Appeals would overturn Boley's sentence.¹³¹

Boley also argued that the parties' mutually mistaken belief regarding the offense's appropriate severity level did not void the plea agreement.¹³² The Kansas Supreme Court agreed with Boley and the court of appeals that there was no mutual mistake of law.¹³³ The court added that "*McAdam* did not announce a new rule of law but merely applied the principles enunciated in prior cases to existing statutes. Thus, it would not be inequitable to allow the risk of the mistake of law to fall to the State in this case."¹³⁴ The Kansas Supreme Court, in determining that the State should bear the risk of mistake, was persuaded by the decisions in *Coy v. Fields* from the Arizona Court of Appeals and *State v. Patience* from the Utah Court of Appeals because both were factually analogous to the present case.¹³⁵ Although *Coy* and *Patience* involved prosecutors who were mistaken about the statutes in effect at the time the plea agreements were executed, the Kansas Supreme Court determined that the difference between those cases and *Boley*, which dealt with statutory construction, was not a critical distinction.¹³⁶ Thus, the State could not rescind the plea agreement based on mutual mistake.¹³⁷

The Kansas Supreme Court next considered the District Court of Appeal of Florida's holding in *Jolly v. State* that the defendant's motion to correct an illegal sentence was not proper and that the defendant must choose between performing in accordance with the plea agreement or setting aside the plea.¹³⁸ The Kansas Supreme Court differentiated *Jolly*, noting that, under Florida law, a defendant may withdraw a plea if the judge imposes a greater sentence than that provided in the plea agreement.¹³⁹ In Kansas, however, the parties' agreed upon sentence is only a recommendation; therefore, it does not

129. 42 P.3d 188 (Kan. Ct. App. 2002). In *Frazier*, a jury convicted Troy D. Frazier of possession of ephedrine or pseudoephedrine and imposed a drug severity level 1 felony sentence. *Id.* at 190. Both section 65-7006(a) of the Kansas Statutes Annotated, a drug severity level 1 felony, and section 65-4152(a)(3), a drug severity level 4 felony, prohibited the same conduct for which Frazier was convicted. *Frazier*, 42 P.3d at 192. The Kansas Court of Appeals held that because the statutes proscribed identical crimes, the court could only punish the defendant under the lesser drug severity level 4 felony. *Id.* at 193.

130. *Boley*, 113 P.3d at 255.

131. *Id.*

132. Brief of Appellant at 8, *Boley*, 113 P.3d 248 (No. 04-91804-A).

133. *Boley*, 113 P.3d at 255-56.

134. *Id.* at 255.

135. *Id.* at 256. The Kansas Supreme Court likely relied on out-of-state authority because Kansas courts had not addressed the issue.

136. *Id.*

137. *Id.*

138. *Id.* at 258.

139. *Id.*

bind the trial court.¹⁴⁰ Additionally, the Florida court in *Jolly* examined the facts under a mistake of law analysis, which the Kansas Supreme Court determined did not apply in *Boley*.¹⁴¹

After analyzing the case under the frustration of purpose and mutual mistake doctrines, the Kansas Supreme Court reversed the court of appeals.¹⁴² The State could not withdraw from its plea agreement with Boley and reinstate the original dismissed charge.¹⁴³ As a result, the Kansas Supreme Court vacated Boley's sentence and remanded the case to the district court for appropriate resentencing.¹⁴⁴

V. COMMENTARY

The Kansas Supreme Court's holding in *Boley* enables criminal defendants to bargain for reduced sentences and then use direct appeals to avoid their bargained-for sentences, yet it requires that the State remain bound by its plea agreements. The court's holding that the State could not withdraw from its plea agreement with Boley and restore the original dismissed charge was based on a flawed contracts analysis. In addition, the result ignores compelling public policy arguments regarding the punishment of criminals and waiver of rights in plea agreements.

A. *Fallacies in the Court's Reasoning*

The Kansas Supreme Court applied a flawed frustration of purpose analysis in holding that the State could not withdraw from its plea agreement with Boley and reinstate the original dismissed charge. The doctrine allows a court to discharge the parties from their contractual obligations when "a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made."¹⁴⁵ The State's purpose for executing the plea agreement with Boley was substantially frustrated when Boley successfully appealed the length of his sentence; therefore, the court should have released the State from the agreement.

The doctrine requires that the frustrated purpose "be so completely the basis of the contract that, as both parties understand, without it the transaction would make little sense."¹⁴⁶ In *Boley*, the Kansas Supreme Court determined that the State achieved its objec-

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. RESTATEMENT (SECOND) OF CONTRACTS § 265 (1979).

146. *Id.* § 265 cmt. a.

tives for entering into the plea agreement because it “avoided a trial and the attendant risk of a not guilty verdict.”¹⁴⁷ The court, however, overlooked the State’s primary motivation for ensuring a guilty verdict: the punishment of the defendant for his criminal conduct.¹⁴⁸ Obtaining a defendant’s guilty plea would be futile for the State if a court did not require the defendant to serve the specific punishment bargained for under the plea agreement. The State would only realize its objective on paper, not in substance.

The court also noted that the State’s purpose behind Boley’s punishment was satisfied because Boley would serve a prison sentence.¹⁴⁹ It concluded that the reduction in Boley’s sentence only “partially frustrated” the State’s purpose for entering into the plea agreement, which was insufficient to satisfy the elements of the doctrine.¹⁵⁰ Even though the State’s frustration was only partial, it was “substantial,” as required by the doctrine, because Boley received a significant reduction in his sentence.¹⁵¹

In *United States v. Bunner*, the parties believed that the defendant’s admitted conduct constituted the crime for which he pleaded guilty.¹⁵² The court called this belief “[a] basic assumption underlying the parties’ purposes,” and without it, “neither party would have entered into the . . . plea agreement.”¹⁵³ In *Boley*, the Kansas Supreme Court distinguished *Bunner* because, unlike *Boley*, the Tenth Circuit vacated the defendant’s sentence instead of reducing it.¹⁵⁴ This distinction, however, was trivial. Like the parties in *Bunner*, the parties in *Boley* mistakenly believed that the conduct to which Boley pleaded guilty required a severity level 1 drug felony sentence.¹⁵⁵ The State would never have agreed to the recommended downward durational departure sentence of forty-eight months if it believed Boley was pleading guilty to a severity level 3 drug felony, which provided for a considerably reduced sentence.¹⁵⁶ Thus, the extent of Boley’s punishment was the basis of the parties’ plea agreement as contemplated by the frustration of purpose doctrine.

Under this doctrine, the frustration must be proven substantial and “must be so severe that it is not fairly to be regarded as within the risks that [the party seeking rescission] assumed under the con-

147. *Boley*, 113 P.3d at 254.

148. *See United States v. Bunner*, 134 F.3d 1000, 1005 (10th Cir. 1998).

149. *Boley*, 113 P.3d at 254.

150. *Id.*

151. *See* RESTATEMENT (SECOND) OF CONTRACTS § 265 cmt. a (1979).

152. *Bunner*, 134 F.3d at 1005.

153. *Id.*

154. *Boley*, 113 P.3d at 254.

155. *See id.* at 251.

156. *See id.*

tract.”¹⁵⁷ In *Boley*, the Kansas Supreme Court concluded that the parties to a plea agreement bear the risk that the judge will impose a sentence different from that recommended in the plea agreement because such recommendations are not binding on the court.¹⁵⁸ Because the trial court had full sentencing discretion, it could have originally sentenced Boley to the same reduced sentence he would receive on remand.¹⁵⁹ Thus, the court reasoned that the State assumed this risk.¹⁶⁰

It is arguable, however, whether the State assumed this risk. Under the Kansas Sentencing Guidelines, a severity level 1 drug felony carries a presumptive sentence of 142 to 161 months, with a middle term of 150 months, for a defendant with Boley’s criminal history.¹⁶¹ The judge is required to sentence the offender in “the center of the range in the usual case and reserve the upper and lower limits for aggravating and mitigating factors insufficient to warrant a departure.”¹⁶² A departure is allowed only if “the judge finds substantial and compelling reasons.”¹⁶³ Although the State was aware that the trial court had the authority to disregard the sentence recommended in the plea agreement, it is also reasonable to assume that the State was familiar with the boundaries that the Kansas Sentencing Guidelines placed upon the court. The State would not have reasonably expected the court to impose a reduced sentence of only seventeen to nineteen months for Boley’s crime, which carried a presumptive sentence of 142 to 161 months. The State, therefore, did not assume the risk of such a severe reduction in sentence.

Additionally, the court erroneously analyzed the final requirement for rescission under the frustration of purpose doctrine. This requirement provides that “the non-occurrence of the frustrating event must have been a basic assumption on which the contract was made.”¹⁶⁴ The court in *Boley* held that the reduced sentence was foreseeable because “the issue of whether someone convicted of manufacture of methamphetamine could be sentenced to a severity level 1 drug felony had been percolating in the [c]ourt of [a]ppeals.”¹⁶⁵ Because the prosecutor admitted at oral argument that he considered *State v. Frazier* and *State v. McAdam* when he entered into the plea

157. RESTATEMENT (SECOND) OF CONTRACTS § 265 cmt. a (1979).

158. *Boley*, 113 P.3d at 254.

159. *Id.*

160. *See id.* at 255.

161. KAN. STAT. ANN. § 21-4705 (Supp. 2004).

162. *Id.* § 21-4705(c)(1).

163. *Id.* § 21-4716(a).

164. RESTATEMENT (SECOND) OF CONTRACTS § 265 cmt. a (1979).

165. *Boley*, 113 P.3d at 255.

agreement with Boley, the court reasoned that Boley's resentencing was foreseeable.¹⁶⁶

Even though the State considered *Frazier* and *McAdam*, Boley's resentencing was not foreseeable. First, the holding in *Frazier* addressed statutes that prohibit possession of ephedrine and drug paraphernalia, crimes different from those for which Boley was charged.¹⁶⁷ Second, the Kansas Supreme Court granted review in *McAdam* only five days prior to the execution of Boley's plea agreement.¹⁶⁸ It is unlikely that the State could have foreseen that the Kansas Supreme Court would reverse the court of appeals in *McAdam* or extend its application to cases on direct appeal in *State v. Barnes*.¹⁶⁹ Thus, the State could not have foreseen Boley's resentencing when it entered into the plea agreement.

The Kansas Supreme Court should have released the State from its plea agreement with Boley based on the frustration of purpose doctrine. Because Boley's successful appeal of his sentence substantially frustrated the State's purpose for entering into the plea agreement, the Kansas Supreme Court should have discharged the State's obligations and allowed it to reinstate the original dismissed charge.

B. Boley Is Contrary to Public Policy

"Just punishment means, in essence, that the punishment must fit the crime."¹⁷⁰ Punishing offenders for their crimes serves vital purposes in the criminal justice system; however, the Kansas Supreme Court allowed Boley to avoid the appropriate sentence for the crime he committed. The court's decision barring the State from withdrawing from its plea agreement with Boley has significant public policy implications.

Scholars advance several purposes for criminal punishment, including incapacitation, specific and general deterrence, rehabilitation, education, and retribution.¹⁷¹ First, incapacitating offenders protects society from dangerous criminals because offenders are unable to commit additional crimes while incarcerated.¹⁷² The Kansas Supreme Court reduced Boley's sentence, which will allow him to reenter society only a short time after committing a serious drug crime.¹⁷³ Alter-

166. *Id.*

167. *See id.* The Kansas Court of Appeals in *McAdam* further distinguished the statutes at issue in *Frazier*, observing that the legislature intended section 65-4161(a) to supplement section 65-4159(a). *State v. McAdam*, 66 P.3d 252, 260 (Kan. Ct. App. 2003).

168. *Boley*, 113 P.3d at 255.

169. *See id.* at 251; *supra* text accompanying notes 103-05.

170. *United States v. Wilson*, 350 F. Supp. 2d 910, 916 (D. Utah 2005).

171. *See LAFAYE, supra* note 8.

172. *See Jones v. White*, 992 F.2d 1548, 1563 n.19 (11th Cir. 1993).

173. *See Boley*, 113 P.3d at 258.

natively, requiring Boley to serve the appropriate sentences for the crimes that he committed would have ensured that he had fewer opportunities to commit additional drug-related offenses.

Second, punishment promotes deterrence. Specific deterrence “aims to deter the criminal himself . . . from committing further crimes, by giving him an unpleasant experience he will not want to endure again.”¹⁷⁴ Experts suggest that “incarceration of dangerous persons in recent years has demonstrably reduced crime, through both incapacitative and deterrent effects.”¹⁷⁵ Allowing Boley to bargain with the State for a reduced sentence and dismissal of one of the charges and then successfully appeal his resulting sentence, the Kansas Supreme Court did not likely deter Boley from future criminal conduct. Rather, it probably reinforced his criminal behavior by suggesting that he could commit substantial crimes with minimal punishment. Punishing criminal offenders also achieves general deterrence, which seeks to prevent other members of society from committing similar future crimes.¹⁷⁶ If society perceives a limited likelihood of punishment, the deterrent effect of punishment breaks down.¹⁷⁷ The court’s holding in *Boley* not only fails to deter others in society from committing crimes, but also encourages criminal behavior by demonstrating that the appropriate punishment will not be imposed.

Third, rehabilitation enables criminal offenders, through treatment, to return to society without their previous motivations to commit further crimes.¹⁷⁸ The importance of rehabilitation to the justice system is embedded in the Kansas Sentencing Guidelines, which include punishments aimed at “reestablishing offenders within communities.”¹⁷⁹ Reforming criminal offenders to function normally within society reduces recidivism.¹⁸⁰ Rehabilitation uses incarceration “as an opportunity to provide training for skills useful in the marketplace, treatment for psychological problems and drug addiction, or even an opportunity for penitent reflection.”¹⁸¹ Reformed criminal offenders

174. LAFAVE, *supra* note 8.

175. *Wilson*, 350 F. Supp. 2d at 919.

176. LAFAVE, *supra* note 8, § 1.5(a), at 24-25. General deterrence is a primary factor courts must consider when determining whether sentences are appropriate. *See Wilson*, 350 F. Supp. 2d at 918.

177. *Jones*, 992 F.2d at 1563 n.19.

178. LAFAVE, *supra* note 8, § 1.5(a), at 24.

179. KAN. SENTENCING GUIDELINES DESK REFERENCE MANUAL 21 (2005). Federal sentencing guidelines also emphasize the importance of rehabilitation as one of the sentencing objectives that courts should consider. *See* 18 U.S.C. § 3553 (2000).

180. *See* Michele Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313, 1316 (2000).

181. *Id.* at 1316-17. Research indicates that prison-based rehabilitation programs may control prisoner drug and alcohol addiction and reduce criminal activity. Steven Belenko, *The Challenges of Integrating Drug Treatment into the Criminal Justice Process*, 63 ALB. L. REV. 833, 854-55 (2000).

may produce substantial economic and social benefits.¹⁸² Society gains approximately \$68,800 for each incarcerated offender who successfully completes treatment and returns to society sober, educated, and employed.¹⁸³ Corrections facilities need sufficient time to complete rehabilitation; therefore, any attempts to rehabilitate Boley would likely fail because the court imposed such a short sentence.

Finally, retribution, or “just desserts,” is the oldest and most recognized justification for criminal punishment.¹⁸⁴ When a person commits a crime, it causes an imbalance among the criminal, the victim, and society.¹⁸⁵ Under the theory of retribution, appropriately punishing criminals remedies this imbalance.¹⁸⁶ Central to the theory of retribution is the concept that the criminal act deserves punishment.¹⁸⁷ Retribution “assumes that the criminal should be hurt, and that the injury caused by the criminal offense calls for a like infliction of injury on the criminal as a moral penalty.”¹⁸⁸ The Kansas Supreme Court in *Boley* undermined the purpose of retribution by imposing a sentence that was immensely disproportionate to the crime committed. This decision defies the growing trend to embrace the theory of retribution.¹⁸⁹

The Kansas Supreme Court’s decision allowing Boley to avoid the appropriate sentence sends a grim message to society. After *Boley*, criminal offenders may extract concessions from the State in plea agreements and then avoid serving their resulting sentences. This decision ignores the critical objectives for punishing criminals and has the devastating potential to encourage similar criminal behavior.

C. *The Sentencing Appeal Waiver Controversy Under Boley*

In *Boley*, the Kansas Supreme Court determined that the State assumed the risk that Boley would appeal his sentence because the State failed to include a provision in the plea agreement requiring Boley to waive his right to appeal.¹⁹⁰ Even if Boley’s plea agreement had contained a sentencing appeal waiver, the court likely would have

182. See Belenko, *supra* note 181, at 866.

183. *Id.* These economic benefits include “\$5000 in reduced crime savings, . . . \$7300 in reduced arrest and prosecution costs[,] . . . \$19,600 in reduced incarceration costs[,] . . . \$4800 in health care and substance abuse treatment cost savings, . . . [and] \$32,100 in economic benefits.” *Id.*

184. LAFAVE, *supra* note 8, § 1.5(a), at 25-26.

185. Randy E. Barnett, Comment, *Getting Even: Restitution, Preventive Detention, and the Tort/Crime Distinction*, 76 B.U. L. REV. 157, 159 (1996). By refusing to obey the law, criminal offenders gain an unfair advantage by reaping the benefits that flow from law-abiding citizens. J. G. MURPHY, *MARXISM AND RETRIBUTION* (1973), reprinted in *A READER ON PUNISHMENT* 44, 44 (R. A. Duff & David Garland eds., 1994).

186. See MURPHY, *supra* note 185.

187. Cotton, *supra* note 180, at 1315.

188. *Id.* at 1317.

189. See LAFAVE, *supra* note 8, § 1.5(b), at 28.

190. *State v. Boley*, 113 P.3d 248, 254 (Kan. 2005).

heard his appeal because he received an improper sentence. The court's holding forces Kansas prosecutors to include sentencing appeal waivers in all plea agreements or assume the risk that criminal defendants will avoid their bargained-for sentences through appeals. The use of such waivers, however, poses considerable risks for defendants and the effective functioning of the criminal justice system.

Much federal litigation has resulted from the propriety of sentencing appeal waivers.¹⁹¹ The U.S. Department of Justice requires that all federal plea agreements include a waiver of the defendant's right to appeal judicial sentencing errors.¹⁹² Most appellate courts have upheld these waivers; however, there is a consensus that a "waiver does not foreclose all challenges to the sentence."¹⁹³ An appeal waiver will not bind a defendant if it is not knowingly and voluntarily executed or if the defendant did not receive effective assistance of counsel.¹⁹⁴ Courts have also disregarded waivers and permitted appeals when sentences exceeded statutory limits or were influenced by impermissible factors.¹⁹⁵ Thus, the Kansas Supreme Court in *Boley* likely would have heard Boley's case even if he had waived his right to appeal because he was sentenced under the incorrect drug severity level.¹⁹⁶

Although they exist, advantages to sentencing appeal waivers are outweighed by the disadvantages. Sentencing appeal waivers promote the benefits of plea agreements, including "speed, economy, and finality."¹⁹⁷ Defendants use waivers as bargaining tools to gain concessions from prosecutors, and waivers assist in "preserv[ing] the finality of judgments and sentences."¹⁹⁸ The Department of Justice requires waivers to limit the number of frivolous appeals.¹⁹⁹ Despite such benefits, there is an inherent risk that defendants do not knowingly waive their rights to appeal.²⁰⁰ Defendants can only speculate on the sentences for which they are waiving their rights to appeal because "it is only after the judge has sentenced the defendant that the latter

191. See Jack W. Campbell IV & Gregory A. Castanias, *Sentencing-Appeal Waivers: Recent Decisions Open the Door to Reinvigorated Challenges*, CHAMPION, May 2000, at 34, 35.

192. *Id.* at 34 (citing *United States v. Raynor*, 989 F. Supp. 43, 44-45 (D.D.C. 1997)).

193. *Id.* at 35.

194. *United States v. Johnson*, 410 F.3d 137, 151 (4th Cir. 2005) (citing *United States v. Craig*, 985 F.2d 175, 178 (4th Cir. 1993)). The record must indicate whether the defendant knowingly and voluntarily waived his right to appeal. *United States v. Woolley*, 123 F.3d 627, 632 (7th Cir. 1997) (quoting *United States v. Agee*, 83 F.3d 882, 885 (7th Cir. 1996)).

195. Campbell & Castanias, *supra* note 191, at 35. The United States Court of Appeals for the Fourth Circuit remarked that "a defendant who waives his right to appeal does not subject himself to being sentenced entirely at the whim of the district court." *United States v. Marin*, 961 F.2d 493, 496 (4th Cir. 1992).

196. See *State v. Boley*, 95 P.3d 1022, 1024 (Kan. Ct. App. 2004).

197. *Deroo v. United States*, 223 F.3d 919, 923 (8th Cir. 2000).

198. *Id.*

199. See, e.g., *United States v. Raynor*, 989 F. Supp. 43, 48 (D.D.C. 1997). Frivolous appeals, however, are generally uncommon. *Id.*

200. See Campbell & Castanias, *supra* note 191, at 35.

knows which rights he has waived, and whether those rights included the right to appeal a sentence in which the court may have . . . ordered an illegal or even unconstitutional sentence.”²⁰¹

Additionally, due process concerns are implicated when a defendant waives his right to appeal.²⁰² Although the right to appeal is statutory rather than constitutional, “a criminal defendant’s ability to appeal may not be unduly burdened.”²⁰³ The undue burden of a sentencing appeal waiver may violate due process, particularly when included in a plea agreement.²⁰⁴ Courts do not allow the Government to encourage defendants to relinquish their rights to counsel in a plea agreement because it violates due process.²⁰⁵ Similarly, a defendant’s right to appeal his sentence is essential to his due process rights.²⁰⁶ These due process concerns greatly outweigh the speed and judicial economy accomplished by waivers.²⁰⁷

Sentencing appeal waivers also negatively affect the development of appellate law that interprets and applies sentencing statutes.²⁰⁸ If all defendants are required to waive their rights to appeal their sentences, courts may be unable to address improper application of sentencing statutes. For example, if the defendant in *State v. McAdam* had waived his right to appeal his sentence, then the Kansas Supreme Court would never have reached the sentencing issue that led to its decision in *Boley*.²⁰⁹

Forcing the State to bear the risk that defendants will appeal their sentences after a plea agreement, the Kansas Supreme Court in *Boley* sent a message to Kansas prosecutors that the only way to ensure criminal defendants will serve appropriate sentences is to require defendants to waive their rights to appeal. Thus, Kansas prosecutors in the future may include sentencing appeal waivers as boilerplate clauses in all plea agreements. This result disregards the inherent risks involved with sentencing appeal waivers.

VI. CONCLUSION

The Kansas Supreme Court in *State v. Boley* incorrectly held that the State could not use the frustration of purpose doctrine to withdraw from a plea agreement after the Kansas Court of Appeals re-

201. *United States v. Johnson*, 992 F. Supp. 437, 439 (D.D.C. 1997).

202. *United States v. Perez*, 46 F. Supp. 2d 59, 67 (D. Mass. 1999).

203. *Id.* (quoting *United States v. Ready*, 82 F.3d 551, 554 (2d Cir. 1996)).

204. *See id.*

205. *Id.*

206. *See id.*

207. *See id.*

208. *See id.* at 68 (stating that sentencing appeal waivers would impair the development of law regarding the application of sentencing guidelines).

209. *See, e.g., State v. McAdam*, 83 P.3d 161, 168 (Kan. 2004).

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manded the case to the district court with directions to impose a reduced sentence. The court improperly applied the elements of the frustration of purpose doctrine to the plea agreement and overlooked compelling policy arguments in favor of releasing the State from its plea agreement. The result in *Boley* allows Kansas criminal defendants to bargain for reduced criminal charges and sentences and then circumvent their bargained-for punishments.

The holding in *Boley* creates an opportunity for criminal offenders in Kansas to avoid the terms of their plea agreements. A criminal defendant may now enter into a plea agreement with a specified sentence and then appeal the length of that sentence after the court adopts the agreement. The State, however, cannot withdraw from the plea agreement upon the defendant's successful appeal. This inequitable result has far-reaching effects on the Kansas criminal justice system. Prosecutors must require defendants to waive their rights to appeal the length of their sentences in all plea agreements or assume the risk of any resulting appeals. The court's holding enables criminals to benefit from plea agreements, while failing to perform their agreed-upon obligations. As a result of the court's decision in *Boley*, Kansas prosecutors are unable to hold offenders accountable for their actions. Thus, the decision weakens the criminal justice system and endangers society.

