ADVANCE SHEET HEADNOTE
July 1, 2019

**2019 CO 71**

**No. 16SC546, *People v. Mazzarelli*—Plea Agreements—Sentence Concessions—Prosecution's Authority to Withdraw After Guilty Plea Enters.**

The supreme court considers whether the People are entitled to withdraw from a plea agreement where, following the defendant's guilty plea, the trial court determines that a more lenient sentence than the one the parties set forth in the agreement is appropriate. Answering the question in the negative, the court holds that the statute and the rules governing plea agreements in Colorado allow the defendant, but not the People, to withdraw from a plea agreement when the trial court rejects a sentence concession after accepting the guilty plea. In so doing, the court reiterates what it has previously made clear: sentence concessions in a plea agreement—whether they are called sentence stipulations, sentence agreements, or something else—are sentence recommendations that the trial court, in the exercise of its independent judgment, may adopt or reject.

**The Supreme Court of the State of Colorado**
2 East 14th Avenue • Denver, Colorado 80203

---

**2019 CO 71**

---

**Supreme Court Case No. 16SC546**
*Certiorari to the Colorado Court of Appeals*
Court of Appeals Case No. 14CA1719

---

**Petitioner:**

The People of the State of Colorado,

v.

**Respondent:**

Christopher Anthon Mazzarelli.

---

**Judgment Affirmed and Opinion Vacated**
*en banc*
July 1, 2019

---

**Attorneys for Petitioner:**
Daniel H. May, District Attorney, Fourth Judicial District
Doyle J. Baker, Senior Deputy District Attorney
Jennifer L. Darby, Deputy District Attorney
*Colorado Springs, Colorado*

**Attorneys for Respondent:**
Megan A. Ring, Public Defender
Britta Kruse, Lead Deputy Public Defender
*Denver, Colorado*

**JUSTICE SAMOUR** delivered the Opinion of the Court.
**JUSTICE BOATRIGHT** dissents, and **JUSTICE MÁRQUEZ** joins in the dissent.

¶1 "[C]riminal justice today is for the most part a system of pleas, not a system of trials." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012). Nowhere is this more apparent than in the U.S. Supreme Court's recent estimation that "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas." *Missouri v. Frye*, 566 U.S. 134, 143 (2012). Against this backdrop, we must determine whether the People are entitled to withdraw from a plea agreement where, following the defendant's guilty plea, the trial court determines that a more lenient sentence than the one the parties set forth in the agreement is appropriate. Because the statute and the rules governing plea agreements in Colorado, section 16-7-302(2)–(3), C.R.S. (2018), Crim. P. 11(f)(5), and Crim. P. 32(d) ("the statute and rules"), allow the defendant, but not the People, to withdraw from a plea agreement when the trial court rejects a sentence concession after accepting the guilty plea, we answer the question in the negative.[1]

¶2 The statute and rules require the trial court to exercise its independent judgment in deciding whether to adopt or reject sentence concessions. Consistent with this authority, we reiterate what we made clear more than four decades ago: Regardless of what label the parties may attach to sentence concessions in a plea agreement—be it "sentence stipulations," "sentence agreements," or something else—they are nothing more than sentence recommendations that the trial court, in the exercise of its

[1] Our holding is limited to situations in which the trial court (1) rejects a sentence concession (2) after accepting the defendant's guilty plea.

independent judgment, may adopt or reject. And if the court rejects a sentence concession after a defendant pleads guilty, the statute and rules allow the defendant—and only the defendant—to withdraw from the plea agreement.

¶3 We recognize that we have sometimes applied general principles of contract law in analyzing plea agreements in the past. But here, we do not address a situation in which a party has allegedly breached a plea agreement.[2] Instead, the question we confront is whether the People may withdraw from a plea agreement when the trial court, in the exercise of its discretion, rejects a sentence concession in the agreement after accepting the defendant's guilty plea. Based on the statute and rules, we hold that the People may not do so.

¶4 We are not persuaded by the People's argument that a trial court violates the separation-of-powers doctrine when it accepts a guilty plea to an uncharged offense pursuant to a plea agreement but then rejects the parties' stipulated sentence without allowing the People to withdraw from the agreement. The People, not trial courts, provide the opportunity for a defendant to plead guilty to an uncharged offense as part of a plea agreement. And when defendants take advantage of such an opportunity, the trial courts, not the People, determine the appropriate sentence. The separation-of-powers doctrine requires nothing more.

---

[2] Nothing in this opinion should be viewed as passing judgment on the appropriate remedy, if any, when a party breaches a plea agreement after the defendant has pled guilty. That issue is not before us.

¶5 The Achilles' heel of the People's separation-of-powers contention is that it assumes that a trial court's acceptance of a guilty plea pursuant to a plea agreement is contingent on the trial court's subsequent adoption of the sentence concessions in the agreement. The statute and rules belie such an assumption. Under the statute and rules, when the People create an opportunity for a defendant to plead guilty to an uncharged offense as part of a plea agreement, any sentence concessions in the agreement are mere recommendations that the trial court may accept or reject, and if the trial court rejects a sentence concession after the defendant pleads guilty, only the defendant may withdraw from the plea agreement. Because the statute and rules allowed only Mazzarelli to withdraw from the plea agreement after he pled guilty and the court rejected the sentence concession in the agreement, and because the People do not question the constitutionality of the statute and rules, we reject the separation-of-powers claim.

¶6 The court of appeals in this case upheld the trial court's refusal to allow the People to withdraw from the plea agreement after Mazzarelli pled guilty. We affirm its judgment. But we do so for markedly different reasons—our holding takes root in the statute and rules. Given this determination, we decline to address the merits of the conclusions reached by the court of appeals with respect to the two remaining issues on which we granted certiorari review.[3] Instead, we vacate its opinion in its entirety.

---

[3] We granted certiorari to review the following three issues:

1. Whether the court of appeals erred in upholding the trial court's actions as a matter of law and finding that it could sentence the defendant

## I. Facts and Procedural History

¶7 The People charged Christopher Anthon Mazzarelli with knowing or reckless child abuse resulting in serious bodily injury to his infant son, a class 3 felony. *See* § 18-6-401(1)(a), (7)(a)(III), C.R.S. (2018). The underlying factual allegations involved shaken-baby syndrome.

¶8 Mazzarelli and the People executed a plea agreement, which indicated that he wished to plead guilty to an added charge of criminally negligent child abuse resulting in serious bodily injury, a class 4 felony. *See* § 18-6-401(1)(a), (7)(a)(IV). In exchange for Mazzarelli's guilty plea, the prosecution agreed to dismiss the original charge. The parties further agreed as follows with respect to the sentence:

> The sentence will be a Department of Corrections Sentence within the Extraordinary Risk Crime Range of 2 to 8 years. Both sides are free to argue as to [the] actual amount of incarceration the Court should impose.

The plea agreement also included a clause that permitted Mazzarelli to withdraw from the agreement:

---

> outside the stipulated sentencing range contained in a plea agreement and accepted by all parties.
>
> 2. Whether the court of appeals erred in failing to answer the question about prosecutorial misconduct when the trial court specifically used the prosecutorial misconduct as a rationale for the sentence.
> 3. Whether the court of appeals erred in barring remand by holding that double jeopardy bars reversal of sentence and remand for resentencing since the defendant started serving his sentence.

> I understand that any sentence imposed by the judge must conform to [the] agreement. If, after I plead guilty, the judge decides not to accept the sentence recommendation or limitation, I will have the right to withdraw my guilty plea and have a trial.

¶9 During a hearing, Mazzarelli's counsel informed the court that the parties had reached a plea agreement. She explained the terms of the agreement, including the "stipulation for prison . . . between two and eight years." Following an advisement of his rights pursuant to Crim. P. 11(b), Mazzarelli pled guilty to the added charge and the court accepted his plea and granted the People's motion to dismiss the original charge. The court then postponed sentencing pending completion of a presentence report by the probation department.

¶10 At the sentencing hearing, the prosecutor acknowledged that Mazzarelli's son did not have any permanent injuries, but nevertheless urged the court to impose a sentence consistent with the plea agreement. The court expressed reluctance to punish Mazzarelli with imprisonment for "what might have happened." It also articulated concerns about sending Mazzarelli to prison based on its knowledge of the "great strides and progress" he had made in a related dependency and neglect proceeding and the substantial impact that such a sentence would have on his fifteen-month-old son. At the end of its comments, the court announced that it was "not going to accept the plea agreement" because it was "not willing to send [Mazzarelli] to prison." The court noted, however, that it would accept a plea agreement with "an open sentence" with potential placement in community corrections. Given this decision, the court asked the prosecutor if she wished to withdraw from the plea agreement. The prosecutor asked for a week to

consider how to proceed, and the court granted her request and scheduled a new hearing on the next available date.

¶11 The day before the new hearing took place, Mazzarelli filed a motion requesting the appointment of a special prosecutor, arguing that the prosecutor had made "blatantly false" statements during the previous hearing about the child-abuse incident. At the hearing held the following day, the prosecutor admitted she had misspoken and attempted to clarify the alleged misstatements. She apologized, opposed Mazzarelli's motion for a special prosecutor, and asked to withdraw from the plea agreement. The trial court found that the prosecutor's misstatements amounted to prosecutorial misconduct and denied her request to withdraw from the plea agreement as a sanction. Accordingly, the court moved forward with the sentencing hearing and sentenced Mazzarelli to supervised probation for a period of three years, instead of the agreed-upon prison sentence.

¶12 The People appealed. A division of the court of appeals ruled that, "regardless of the trial court's sanction, the People were not entitled to withdraw from the plea agreement" and the trial court "had discretion to sentence Mazzarelli outside the terms of the stipulated sentencing range." *People v. Mazzarelli*, 2016 COA 35, ¶¶ 9, 33, __ P.3d __. The division gave four reasons for its ruling. First, it found that the trial court had accepted Mazzarelli's guilty plea, but had never agreed to be bound by the sentence recommendation in the plea agreement. *Id.* at ¶ 25. Second, the division noted that when the trial court accepted Mazzarelli's guilty plea, it had not yet received, much less reviewed, the presentence report. *Id.* at ¶ 26. The division reasoned that a trial court can

only be bound by sentencing concessions in a plea agreement if they are supported by the presentence report. *Id.* Third, it pointed out that the People had not alleged that Mazzarelli "materially and substantially breached the plea agreement." *Id.* at ¶ 33 (quoting *Keller v. People*, 29 P.3d 290, 297 (Colo. 2000)). According to the division, the People may not withdraw from a plea agreement after "acceptance of the entirety of the . . . agreement," unless there is a sentence reduction that amounts to "'a material and substantial breach of the plea agreement.'" *Id.* at ¶ 31 (quoting *Keller*, 29 P.3d at 297). Finally, the division explained that the prosecutor's misconduct led to the denial of her request to withdraw from the plea agreement. *Id.* at ¶ 28. Thus, the division affirmed the trial court's order.

## II. Analysis

¶13 Like the division, we conclude that the trial court correctly refused to allow the People to withdraw from the plea agreement. But we do so for different reasons—our decision rests on the statute and rules.

¶14 We first examine the statute and rules in detail. We then discuss our caselaw in this area. And we end by rejecting the People's separation-of-powers claim.

### A. The Statute and Rules Do Not Support the People's Position

¶15 Section 16-7-302(3) provides that, "[n]otwithstanding the reaching of a plea agreement between the district attorney and defense counsel or defendant, the judge in every case should exercise an independent judgment in deciding whether to grant . . . sentence concessions." Crim. P. 11(f)(5) contains an identical mandate. Therefore, under section 16-7-302(3) and Rule 11(f)(5), the trial court is always required to exercise its

independent judgment in determining whether to go along with or diverge from the "sentence concessions" in a plea agreement.[4] This is not surprising given what is at stake. Allowing the parties in a criminal case to require the judge to impose a particular sentence, regardless of whether she believes it is appropriate, justified, or fair, would bode ill for our criminal justice system. It is imperative that the trial court exercise its independent judgment in determining whether to adopt the sentence concessions in a plea agreement.

¶16 The question then is what options, if any, are available to the parties if, in the exercise of its independent judgment, the court rejects a sentence concession in a plea agreement after a defendant pleads guilty? Crim. P. 32(d) requires the court to "advise the defendant and the district attorney" that it is rejecting the sentence concession "and then call upon *the defendant* to either affirm or withdraw the plea of guilty." (Emphasis added.) Section 16-7-302(2) substantially mirrors Crim. P. 32(d). Significantly, neither section 16-7-302(2) nor Rule 32(d) contains a similar provision allowing *the People* to affirm the plea agreement or withdraw from it.[5] This omission is telling because the

---

[4] We view the reference to "sentence concessions" as including both sentence concessions by the defendant benefitting the People and sentence concessions by the People benefitting the defendant. There is no reasonable basis to construe the term otherwise.

[5] If the defendant were deprived of an opportunity to withdraw from the plea agreement after the trial court rejects a sentence concession, it would "remove[] the basis upon which [the] guilty plea was entered and draw[] into question the voluntariness of the plea." *People v. Walker*, 46 P.3d 495, 497 (Colo. App. 2002). As the U.S. Supreme Court has observed, "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such

statute and the rule expressly refer to the People elsewhere. Of particular relevance here, they both direct the trial court to advise *the defendant and the People* whenever it decides to reject a sentence concession after the defendant has pled guilty. Yet, in the very next part of that sentence, the statute and the rule provide that *the defendant* may then withdraw from the plea agreement.

¶17 Subsection (2) of section 16-7-302 confirms that the legislature did not intend to permit the People to withdraw from a plea agreement when the trial court rejects a sentence concession after the defendant has pled guilty. That subsection delineates the course of action the People may take in the event they are concerned that the court will disagree with a sentence concession in a plea agreement after the defendant pleads guilty:

> If a tentative plea agreement has been reached which contemplates entry of a plea of guilty . . . in the expectation that . . . sentence concessions will be granted, the trial judge may, upon request of the parties, permit the disclosure to him of the tentative agreement and the reasons therefor in advance of the time for tender of the plea. He may then indicate to the district attorney and defense counsel or defendant whether he will concur in the proposed disposition if the information in the presentence report is consistent with representations made to him.

§ 16-7-302(2).[6]

---

promise must be fulfilled." *Santobello v. New York*, 404 U.S. 257, 262 (1971). This constitutional concern is not present when the People are precluded from withdrawing from a plea agreement after the defendant pleads guilty.

[6] We do not understand this provision to require that a presentence report be available before the defendant enters a guilty plea. Rather, we read it to mean that the trial court judge may communicate her tentative approval of a proposed disposition contingent on any presentence report subsequently prepared being consistent with the parties' representations. If no presentence report is ordered, the trial court may simply indicate

¶18 The People mistakenly view sentence concessions in a plea agreement as becoming binding on the trial court after the defendant pleads guilty. It is true that subsections (2) and (3) of section 16-7-302, as well as Crim. P. 11(f)(5) and Crim. P. 32(d), refer to "sentence concessions" in plea agreements. But, in the context of plea agreements, we have equated that term with "sentence recommendations" that have no binding effect on the trial court:

> [F]ailure to equate sentence concessions with sentence recommendations[] renders reference to sentence concessions in [Crim. P. 32(d)] meaningless. . . . [A] district attorney, as part of a plea bargain, can only agree to make favorable recommendations concerning the sentence. The reference in [Rule 32(d)] to "sentence concessions . . ." is, therefore, a reference to sentence recommendations by the district attorney.

*People v. Wright*, 573 P.2d 551, 552–53 (Colo. 1978) (citation omitted).[7]

¶19 In *Wright*, we declined the People's invitation to draw a distinction "between a *prosecutorial recommendation* of a particular sentence[] and a *prosecutorial agreement*" to require the court to impose a particular sentence. *Id.* at 552 (emphases added). Instead, we equated a sentence concession with a sentence recommendation because the drafters of Rule 32(d) and Rule 11(f)(2)(I) did the same. *Id.* at 552–53. And even after we equated

---

to the parties whether she will go along with the proposed disposition. Of course, the judge must avoid participating in plea discussions. § 16-7-302(1); Crim. P. 11(f)(4).

[7] Rule 32(d) refers to "*sentence concessions* contemplated by a plea agreement, as provided in Rule 11(f)." (Emphasis added.) Rule 11(f)(2)(I), in turn, provides in pertinent part that the People may "make or not . . . oppose favorable *recommendations concerning the sentence to be imposed*." (Emphasis added.) It follows that the reference in Rule 32(d) to *sentence concessions* (as provided in Rule 11(f)) must be understood to be a reference to *sentence recommendations*. *Wright*, 573 P.2d at 552–53.

"sentence concessions" with "sentence recommendations" in *Wright*, the legislature has continued to use "sentence concessions" in section 16-7-302. *See* § 16-7-302(2)–(3).

¶20 We now reiterate that, in the context of plea agreements, "sentence stipulations," "sentence agreements," "sentence concessions," and other similar terms are nothing more than sentence recommendations that the trial court is free to accept or reject, including after the defendant's guilty plea. This conclusion at once (1) honors the intent of the drafters of the statute and the rules and (2) recognizes the trial court's obligation to exercise independent judgment in imposing a sentence pursuant to a plea agreement.

¶21 Relying on Crim. P. 11(b)(5), though, the People assert that when the trial court accepted Mazzarelli's guilty plea, it agreed to be bound by the plea agreement's terms, including the stipulated sentence, so long as the presentence report supported the imposition of that sentence. The People misread Rule 11(b)(5).

¶22 Rule 11(b)(5) requires a trial court to determine, *before accepting a guilty plea*, that the defendant understands that the court is not "bound by any representations made to [him] by anyone concerning the penalty to be imposed . . . , unless such representations are included in a formal plea agreement approved by the court and supported by the findings of the presentence report." The thrust of Rule 11(b)(5) is to ensure that the defendant is aware that any representations made to him regarding the potential sentence will have no effect during the sentencing hearing unless they are included in the plea agreement. In other words, a sentencing representation that is not mentioned in the plea agreement is of no consequence. Contrary to the People's assertion, this does not mean that, *following a guilty plea*, a trial court is required either to adopt every sentence

concession included in the plea agreement or to afford both parties an opportunity to withdraw from the agreement.

¶23 The People's construction of Rule 11(b)(5) clashes with the plain meaning of Rule 11(f)(5) and section 16-7-302(3), both of which require the trial court to "exercise an independent judgment" in deciding whether to adopt or reject a sentence concession in a plea agreement. It is also incompatible with the plain meaning of Rule 32(d) and section 16-7-302(2), both of which mention only the defendant as a party that may withdraw from a plea agreement following his guilty plea. Rather than embrace the People's discordant construction of Rule 11(b)(5), we consider the statute and rules together, and "give consistent, harmonious, and sensible effect to all of [their] parts," *UMB Bank, N.A. v. Landmark Towers Ass'n, Inc.*, 2017 CO 107, ¶ 22, 408 P.3d 836, 840, avoiding any interpretation that "render[s] certain words or provisions superfluous or ineffective," *Kinder Morgan $CO_2$ Co. v. Montezuma Cty. Bd. of Comm'rs*, 2017 CO 72, ¶ 24, 396 P.3d 657, 664. *See also Indus. Claim Appeals Office v. Zarlingo*, 57 P.3d 736, 737 (Colo. 2002) ("As with statutes, specific and general rules of court should be construed harmoniously where possible.").

¶24 To recap, we conclude that the statute and rules (1) require the trial court to exercise its independent judgment in deciding whether to accept or reject sentence concessions in a plea agreement, and (2) allow the defendant, but not the People, to withdraw from a plea agreement when the trial court rejects a sentence concession after the defendant has pled guilty. Therefore, we hold that the trial court did not err in

precluding the People from withdrawing from the plea agreement after Mazzarelli pled guilty.

### B. Our Caselaw Does Not Alter Our Conclusion

¶25 We recognize that we said in *Keller v. People* that there are limited "bases for allowing the prosecution to withdraw from an accepted plea agreement," such as "where the defendant has materially and substantially breached the plea agreement by her action or inaction." 29 P.3d at 296. But *Keller* is factually distinguishable. There, we determined "whether the prosecution may withdraw from a plea agreement in response to a defendant's successful motion for a reduction" of the sentence imposed in accordance with the parties' plea agreement. *Id.* at 291. Here, there is no allegation that Mazzarelli breached the plea agreement by his actions or inactions. Rather, the trial court, on its own, rejected the sentence concession in the plea agreement after Mazzarelli pled guilty.

¶26 That we have adhered to general principles of contract law in analyzing plea agreements in some cases in the past, *see id.* at 297–98, does not affect our analysis either. Like *Keller*, those cases involved a party's alleged breach of a plea agreement. *See, e.g.*, *People v. McCormick*, 859 P.2d 846, 856–57 (Colo. 1993). Today we simply conclude that when the trial court rejects a sentence concession in a plea agreement after accepting the defendant's guilty plea, the statute and rules do not permit the People to withdraw from the agreement. Our court has never applied general principles of contract law under these circumstances to allow the People to withdraw from the plea agreement—i.e., to force the defendant to withdraw his guilty plea.

¶27 Because we do not resolve this appeal based on contract law, our decision does not hinge on the specific terms of Mazzarelli's plea agreement or the wording used to express those terms. Rather, it is tethered to the statute and rules. Consequently, we reject Mazzarelli's assertion that the People can always add a provision in a plea agreement that expressly allows them to withdraw from it after entry of the guilty plea in the event the court disagrees with the parties' sentence concessions.[8] There is simply no authority that permits the People to withdraw from a plea agreement when the trial court rejects a sentence concession after the defendant has entered a guilty plea. And the parties cannot negotiate or bargain for that which is not permitted by the statute and rules.

### C. The People's Separation-of-Powers Argument Is Untenable

¶28 The People acknowledge the statute and rules. But they nevertheless posit that when a trial court rejects a stipulated sentence in a plea agreement after the defendant has pled guilty, they must be allowed to withdraw from the agreement based on separation-of-powers principles. The separation-of-powers doctrine, assert the People, affords them sole discretion to make charging decisions, including to offer a defendant the opportunity to plead guilty to an uncharged offense in exchange for a stipulated sentence. Thus, they maintain that when a trial court accepts a defendant's guilty plea to an uncharged offense pursuant to a plea agreement but then rejects the stipulated sentence without allowing them to withdraw from the agreement, it usurps their

[8] Mazzarelli advanced this contention both in his answer brief and during oral argument.

charging province and offends fundamental separation-of-powers precepts. We are unpersuaded.

¶29 Article III of the Colorado Constitution provides that the powers of the state government are divided into three different branches—the legislative, executive, and judicial branches—and that "no person . . . charged with the exercise of powers properly belonging to one . . . shall exercise any power properly belonging to either of the others," unless expressly directed or permitted by the Colorado Constitution. Put simply, one branch of government may not invade another's role. Article III proves problematic here, according to the People, because the trial court accepted Mazzarelli's guilty plea to an uncharged offense pursuant to the plea agreement but then rejected the stipulated sentence without allowing them to withdraw from the agreement.

¶30 We conclude that no violation of the separation-of-powers doctrine occurred. Mazzarelli pled guilty to an uncharged offense pursuant to the People's plea offer. At the sentencing hearing, the trial court exercised its independent judgment and decided to reject the sentence concession in the plea agreement. Because Mazzarelli, through his counsel, affirmed the guilty plea, the trial court moved forward with sentencing. In accordance with Article III, the People made the *charging* decision to allow Mazzarelli to plead guilty to an added offense, and the trial court then made the *sentencing* decision.

¶31 We acknowledge that the People, not the court, may add an uncharged offense, and that the People, not the court, may offer the defendant the opportunity to plead guilty to it as part of a plea agreement. *See* § 16-7-301(1)–(2), C.R.S. (2018); Crim. P. 11(f)(1)–(2). But when the People do so, any sentence concessions, agreements, or stipulations in the

plea agreement are mere recommendations that the trial court is free to reject. Hence, when the People entered into the plea agreement with Mazzarelli, their decision to allow him to plead guilty to an uncharged offense did not bind the court to impose a particular sentence, including after accepting the defendant's guilty plea.

¶32 We are aware of no authority supporting the proposition that the failure to allow the People to withdraw from the plea agreement after Mazzarelli pled guilty and the court rejected the sentence concession in the agreement ran afoul of the separation-of-powers doctrine. Because the statute and rules allowed only Mazzarelli to withdraw from the plea agreement after he pled guilty and the court rejected the sentence concession in the agreement, and because the People do not question the constitutionality of the statute and rules, we reject the separation-of-powers contention.

## III. Conclusion

¶33 The practical effect today's decision is likely to have on our trial courts is not lost on us. After all, we are keenly aware that the general practice in many courtrooms is inconsistent with this opinion. While we are confident our opinion will not be the death knell of plea agreements, it will no doubt change the landscape in which plea agreements occur. Even so, we are duty-bound to apply the law as written. If the statute and rules are amended in the future, we will apply them as amended. But enforcing the statute and rules as they exist requires the conclusion we reach today.

¶34 We conclude that the court of appeals correctly held that, following Mazzarelli's guilty plea, the People were not allowed to withdraw from the plea agreement simply because the trial court rejected the sentence concession in the agreement. Therefore, we

affirm the court of appeals' judgment, albeit on different grounds. Since we do so, and since we do not reach the merits of the conclusions that court reached with respect to the prosecutorial misconduct and double jeopardy issues, we vacate its opinion in its entirety.

**JUSTICE BOATRIGHT** dissents, and **JUSTICE MÁRQUEZ** joins in the dissent.

JUSTICE BOATRIGHT, dissenting.

¶35 Today we learned that a stipulation is only binding on one party that enters into an agreement even though this is not what "stipulation" means. Many judicial districts in Colorado rely on the practice of stipulations to help forge agreements for pleas to some degree. The practice has functioned well for decades because at the core of these agreements is predictability. I fear that today's holding by the majority will unnecessarily have a negative impact on the orderly resolution of cases by injecting uncertainty into the process. As the majority correctly points out, ninety-four percent of state convictions are the result of plea agreements. Maj. op. ¶ 1.

¶36 In reaching their holding, the majority interprets a rule that, in my view, is ambiguous, and applies it in a way that causes words to lose their common meaning. Conversely, Crim. P. 32(d) can reasonably be read in a way that does not prohibit the prosecution from withdrawing from the plea agreement in this case. In so doing, words would retain their everyday meaning. Hence, I respectfully dissent.

¶37 To be clear, I do not disagree with how the case is being resolved for Mr. Mazzarelli. Apparently, the trial judge's work on Mr. Mazzarelli's dependency and neglect case allowed the judge to gain insights that helped him fashion a probationary sentence that was appropriate and just. The record before us indicates that Mr. Mazzarelli has completed that sentence. Under any definition of double jeopardy, his involvement in this case is over. In fact, this case should be resolved based on a finding of mootness. But it is not decided on mootness. Hence, my disagreement is about how the unique

circumstances of this case will unnecessarily impact how business is done in Colorado's criminal justice system.

¶38 As a preliminary matter, I agree with the majority that it is essential that judges exercise independent judgment when imposing a sentence. Further, a judge cannot lose that independent judgment because of an agreement between the parties. Where I part ways with the majority is the conclusion that a prosecutor can be bound by a plea agreement that she did not agree to. In my view, just like when any attempt to have an agreement fails to come to fruition, *both* parties should have an opportunity to be restored to their original position. This is simply common sense.

## I. Facts

¶39 The majority conveys most of the relevant facts of the case, so a detailed recitation is unnecessary. Some additional facts, however, are important because they demonstrate that Mazzarelli, the prosecution, and the trial judge all believed that the parties were bound by the terms of the plea agreement if the agreement was accepted by the trial court.

¶40 Mazzarelli and the prosecution entered into a plea agreement whereby the prosecution would dismiss the original class 3 felony charge for child abuse in exchange for Mazzarelli pleading guilty to an added class 4 felony charge for child abuse. The parties also stipulated that Mazzarelli would be sentenced in the range of two to eight years in the Department of Corrections. The plea agreement informs Mazzarelli of this in bold font. Consistent with the stipulation, the trial judge did not even mention the possibility of probation during Mazzarelli's verbal advisement of rights. Furthermore, during the sentencing hearing the prosecution made it clear that the possibility of

probation was not part of the plea agreement, which Mazzarelli never refuted. And at the sentencing hearing when the trial judge expressed his independent judgment and indicated that he would not sentence Mazzarelli to prison, he gave the prosecution the opportunity to withdraw from the plea agreement. Mazzarelli did not object to the trial judge's offer to the prosecution to withdraw from the plea agreement. Everyone understood what was happening. No one was treated unfairly when the parties entered into the plea agreement, nor was anyone treated unfairly when the trial judge exercised his independent judgment. The process worked until the prosecution was prevented from withdrawing from the plea agreement.

## II. Analysis

¶41 I first explain why I disagree with the majority's conclusion that Crim. P. 32(d) only permits a defendant to withdraw from a plea agreement. I instead view Crim. P. 32(d) as ambiguous. Second, I explain how Crim. P. 32(d) can be reasonably read in a way that does not prohibit the prosecution from withdrawing from a plea agreement. Finally, because the issue is not before the court, I disagree with the majority's choice to address the issue of possible provisions in plea agreements that expressly allow the prosecution to withdraw from it if the court disagrees with the parties' concessions.

### A. Crim. P. 32(d) Is Ambiguous

¶42 The majority concludes that because Crim. P. 32(d) does not contain a "provision allowing *the People* to . . . withdraw from [a plea agreement]," the prosecution has no right to withdraw from a plea agreement. Maj. op. ¶ 16. There is logic to that conclusion, but it misses a crucial point. Crim. P. 32(d) only addresses the court's failure to accept a

"concession." Both charge concessions and sentence concessions are what constitute the benefit of the bargain for defendants. Since the rejection of the concession eliminates only the defendant's incentive to enter into the plea,[1] the rule only speaks of the defendant's right to withdraw from the plea agreement. Outside of the duty and desire to do justice, the prosecution does not benefit from concessions. Their tangible benefit from a plea agreement is that the disposition of the case provides a just resolution that avoids years of appeals which provides certainty for the victim and the community. Because Crim. P. 32(d) does not mention the court not accepting "the agreement," the prosecution's right to withdraw from the agreement is not implicated by the rule. In my view, it is significant that "concession" and "agreement" are not interchangeable terms. Neither party says that they are. The majority, however, effectively equates the terms.

¶43 At the heart of the reason that Crim. P. 32(d) only talks about the defendant's ability to withdraw from the agreement is that when a concession is rejected by the court, it is the defendant's voluntariness in entering into the plea that becomes an issue. *See Chae v. People*, 780 P.2d 481, 486 (Colo. 1989). In the simplest of terms, the prosecution's incentives for entering into a plea agreement do not suffer by the court's rejection of a *concession*; therefore, they cannot withdraw from an agreement for that reason, which

---

[1] Without any analysis, the majority pronounces that sentence concessions benefit the prosecution. I disagree. Only the defendant serves the sentence. Therefore, only the defendant benefits from a sentence concession.

explains the silence in Crim. P. 32(d). In other words, Crim. P. 32(d) is there to protect defendants, not to bind the prosecution.

¶44 I therefore disagree with the majority's conclusion that the failure of Crim. P. 32(d) to mention the prosecution's ability to withdraw from a plea agreement is dispositive of the issue.[2] Not only is there a reasonable alternative reading of the rule, but the majority's interpretation of the rule causes a contortion of the ordinary meaning of words. This case is a good example of that. To satisfy the majority's perceived meaning of the rule, the majority is forced to conclude that "'sentence stipulations,' 'sentence agreements,' 'sentence concessions,' and other similar terms are nothing more than sentence recommendations." Maj. op. ¶ 20. These phrases are not equivalent. They mean different things. For example, the plea agreement in this case was a stipulation, which is "a material condition or requirement in an agreement." *Stipulation*, Black's Law Dictionary (11th ed. 2019). Stipulations are binding on the parties to an agreement. A "recommendation," on the other hand, is "a specific piece of advice about what to do." *Recommendation*, Black's Law Dictionary (11th ed. 2019). A recommendation is advisory. Hence, a stipulation is not the same thing as a recommendation. When an interpretation of a rule causes words to lose their everyday meaning, that interpretation must be

---

[2] The majority also relies on section 16-7-302(2), C.R.S. (2018), to support their conclusion that the prosecution cannot withdraw from a plea agreement. Maj. op. ¶ 16. I agree with the majority that section 16-7-302(2) and Crim. P. 32(d) are functionally equivalent. *Id.* Hence, my arguments that Crim. P. 32(d) does not prohibit the prosecution from withdrawing from a plea agreement apply equally to section 16-7-302(2).

questioned and is an indication that the rule is ambiguous. On the other hand, if you give words their ordinary meaning, then the silence in Crim. P. 32(d) about the prosecution's ability to withdraw from a plea agreement makes sense.

### B. The Majority's Conclusion Does Not Conform with How Plea Bargaining Has Been Conducted in This Jurisdiction for Decades

¶45 The majority attempts to distinguish case law that has provided a core principle of plea agreements in Colorado for over forty years.

¶46 In 1978 in *People ex. rel. VanMeveren v. District Court*, we held that a prosecutor has a right to withdraw from a plea agreement if the trial court intends to modify the terms of the agreement. 575 P.2d 4, 7 (Colo. 1978). We revisited and narrowed *VanMeveren* in *Keller v. People*, 29 P.3d 290 (Colo. 2000). In *Keller*, we explained that plea agreements are contractual in nature and, thus, a prosecutor can only withdraw from a court's modification of a plea agreement when that modification amounts to a material and substantial breach of the plea agreement.[3] *Id.* at 295.

¶47 The majority concludes that *Keller* is factually distinguishable because it involved a breach of a plea agreement by the defendant, whereas Mazzarelli did not affirmatively act in breaching the plea agreement here. Maj. op. ¶¶ 25–26. While there is that factual

[3] The *Keller* court acknowledged that *VanMeveren* had the analytical underpinnings of a contractual analysis, but comments that *VanMeveren*'s rationale was nonetheless not fully explained. *Keller*, 29 P.3d at 295.

difference, I do not believe that difference makes the rule announced in *Keller* inapplicable here.

¶48 First, the rule in *Keller* is not limited to situations where the defendant's actions cause the breach of a plea agreement. *Keller* held that "the prosecution will be permitted to withdraw from a plea agreement . . . if it shows that a reduction in sentence amounts to a material and substantial breach of the plea agreement." *Keller*, 29 P.3d at 291. Thus, the rule in *Keller* is triggered when the plea agreement is modified in a material and substantial way and is not limited to situations where only a defendant breaches the plea agreement. Clearly, the plea agreement here was modified in a material and substantial way.

¶49 Significantly, the trial court here indicated by its conduct that it had agreed to be bound by the terms of the plea agreement. The trial court was advised by the parties that the plea agreement was a stipulation and that the defendant was to be sentenced to the Department of Corrections. The written Rule 11 advisement titled "Plea Agreement" states in bold print that "the sentence will be a Department of Corrections Sentence within the Extraordinary Risk Crime Range of 2 to 8 years." At no point during the colloquy between the trial judge and the defendant was probation ever mentioned. Furthermore, the trial judge at no point advised the parties that it would not be bound by the agreement. That colloquy evinces that the trial judge was accepting the plea agreement and agreeing to be bound by it. The trial judge's later conduct confirms that he believed that he was bound by the agreement. When the trial judge concluded that prison was not the appropriate sentence, he offered the prosecution the opportunity to withdraw from

the plea agreement. When the prosecution indicated that it was going to withdraw, the judge then imposed a sanction against the prosecution as a basis to deny the withdrawal. The judge knew that he had agreed to be bound by the plea agreement. If he didn't, he would have just imposed the probation sentence, making the imposition of a sanction unnecessary.

¶50 Hence, while I agree that the facts in *Keller* are different than the facts of this case, the core principle in both cases remains the same. When a clearly defined plea agreement that everyone has voluntarily entered is modified in a material way, the party who is negatively impacted by the modification has a right to withdraw from the agreement and be restored to her original position. Importantly, application of this principle retains the trial court's ability to exercise its independent judgment.

¶51 I agree with the majority that the trial judge here could have rejected the plea agreement even after agreeing to be bound by it. I only disagree about the consequences of that decision. It does not make sense that one party can be bound to an agreement that is materially changed without some type of indication that doing so was a possibility. Therefore, I believe that the remedy should have been to allow the prosecution to withdraw from the plea agreement. After all, there cannot be *an* agreement without everyone being *in* agreement.

### C. The Majority Decides an Issue That Is Not Before the Court

¶52 I also disagree with the majority's choice to address the issue of possible provisions in a plea agreement that expressly allow the prosecution to withdraw from it if the court disagrees with the parties' concessions. Maj. op. ¶ 27. I disagree for two reasons.

¶53 First, such a conclusion exceeds the issues in this case. *See PDK Labs. Inc. v. U.S. Drug Enf't Admin.*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in the judgment) ("[T]he cardinal principle of judicial restraint [is] if it is not necessary to decide more, it is necessary not to decide more.").

¶54 Second, this conclusion contradicts *Keller*, where we said that "[b]ecause the plea agreement did not foreclose the future possibility of a reduction in sentence, the ordered sentence reduction could not amount to a material and substantial breach of the plea agreement between the parties." 29 P.3d at 298. In other words, a plea agreement can be tailored to include specific conditions. In fact, the more specific the agreement is the less likely there will be disagreements like the one here.

## III. Conclusion

¶55 I believe that Crim. P. 32(d) does not forbid a prosecutor from withdrawing from a plea agreement that is modified by a trial court. But I acknowledge that the rule is ambiguous as to that point. To resolve any ambiguity, I would recommend that this court amend Crim. P. 32(d) to reflect the realities of how Colorado's criminal justice system actually functions.[4] After all, rules should assist and reflect everyday practice, not inhibit it. In amending Crim. P. 32(d), I would focus on drafting a rule that gives words their plain, everyday meaning. A stipulation would be binding on both parties, whereas a recommendation would be advisory only. Any amendment should confirm the practice

[4] I would encourage the General Assembly to amend section 16-7-302(2) for the same reason.

that a court, after exercising its independent judgment, may decide not to be bound by the agreement; and at that point either side can withdraw from the agreement resulting in both sides being restored to their original position. This would accomplish three things: (1) it would protect a defendant's right to enter into any agreement voluntarily; (2) it would preserve the ability of the trial court to exercise its independent judgment; and (3) it would restore predictability to the process.

¶56 For the forgoing reasons, I respectfully dissent.

I am authorized to state that JUSTICE MÁRQUEZ joins in this dissent.