# CHAPTER 40

# PLEA BARGAINING*

## A. Introduction

Most criminal cases in the United States court system end in guilty pleas.[1] This Chapter addresses the plea bargaining process and how to appeal a conviction based on a plea.

A plea bargain is a deal in which the prosecutor reduces your charges or sentence in return for a guilty plea. Because a guilty plea is the basically the same as a conviction (but without the trial),[2] if you plead guilty you are giving up many important constitutional rights associated with the trial process, and you are also giving up multiple grounds to appeal. You should carefully consider the consequences of any plea deal before agreeing.

The government must follow certain procedures and it must meet specific legal requirements before entering into a plea bargain agreement with you. If you have already accepted a plea agreement, entered a guilty plea before a judge, or were sentenced and incarcerated, but the government did not meet the legal and procedural requirements, you may be able to appeal or challenge your conviction or sentence. Depending on your claim, convictions based on a guilty plea may be challenged on direct appeal, in a state or federal habeas corpus petition, or under Article 440 of the New York Criminal Procedure Law.[3]

This Chapter focuses specifically on New York State law[4] and on federal law. If you have been sentenced in a state court outside of New York, the laws governing your ability to appeal from a guilty plea may be different from the New York laws and the federal laws described here. Although many states have modeled their plea bargaining systems on federal law, the system in each state is unique to that state. You should do research in your law library on the relevant statutes and court decisions on plea bargaining in your state.

Part B of this Chapter lists many important points to consider in accepting or challenging a plea. Part C describes the process of negotiating a plea bargaining agreement with the prosecutor. Part D explains the legal and constitutional requirements that courts must meet when accepting a plea bargain. Part E discusses how to withdraw from a guilty plea prior to sentencing and also discusses what you must do to preserve some claims after sentencing.

## B. Plea Bargaining Considerations

In order to convince you to plead guilty, the prosecutor may offer various sentencing benefits including: reducing the charges, dropping some of the charges, or recommending a particular sentence to the court. Plea bargaining may benefit both you and the prosecutor. Plea bargaining is usually faster than going to trial, which may benefit you. The speedier process also usually helps the prosecutor avoid having to spend time and resources preparing for trial. A plea bargain establishes your guilt for a specific criminal charge against you, which removes the uncertainty about how the trial would turn out. In addition, accepting a plea agreement will often reduce the risk that you could receive the maximum sentence. Sometimes the plea agreement will include the terms of a sentence, meaning it is unlikely that you or the prosecutor will be surprised by a lesser or greater sentence.

Although there may be benefits to accepting a plea agreement, there are many things you should consider when deciding whether or not to accept a plea bargain. You are never required to accept a plea

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*This Chapter was written by Bryan Hull and revised by Syed Wasim.

1. Nearly 93% of criminal cases in the federal court system and 91% in the state systems result in guilty pleas. In New York, the courts recognized plea bargaining as necessary due to the overcrowded justice system. People v. Seaberg, 74 N.Y.2d 1, 7, 541 N.E.2d 1022, 1024, 543 N.Y.S.2d 968, 970 (1989). The Supreme Court has held that plea bargaining is an essential component of the administration of justice. Santobello v. New York, 404 U.S. 257, 260, 92 S. Ct. 495, 498, 30 L. Ed. 2d 427, 432 (1971).

2. N.Y. Crim. Proc. Law § 1.20(13) (McKinney 2013); Boykin v. Alabama, 395 U.S. 238, 242, 89 S. Ct. 1709, 1711, 23 L. Ed. 2d 274, 279 (1969).

3. *See JLM*, Chapter 9, "Appealing Your Conviction or Sentence"; *JLM*, Chapter 13, "Federal Habeas Corpus"; and *JLM*, Chapter 20, "Using Article 440 of the New York Criminal Procedure Law to Attack Your Unfair Conviction or Illegal Sentence."

4. The New York statute providing for plea bargaining is N.Y. Crim. Proc. Law § 220.10(3)–(5) (McKinney 2013).

bargain that a prosecutor offers, and you always have the right to go to trial.[5] It is your choice, and only your choice, whether to accept a plea bargain.

When you accept a plea bargain, you give up important constitutional rights in exchange for a potentially more favorable sentence than you would receive if convicted after trial. The constitutional rights that you waive (give up) when you enter a guilty plea include: the right to a trial by jury,[6] the right to testify or not to testify at trial,[7] the privilege against self-incrimination (meaning the right to not reveal information about criminal acts that you may have committed),[8] the right to confront your accusers,[9] the right to plead "not guilty,"[10] the right to require the prosecution to prove your guilt beyond a reasonable doubt by an undivided verdict of the jurors, the right to compel favorable witnesses,[11] and the right to present any available defenses at trial. If you decide to plead guilty, you cannot later challenge your conviction, or appeal your case, by arguing you were not given these rights.

Once you have accepted a plea bargain, your ability to challenge a conviction resulting from that guilty plea will be very limited. New York courts have stated that a guilty plea "marks the end of a criminal case" and does not provide a "gateway to further litigation."[12] A guilty plea communicates that you do not intend to challenge the issue of your guilt.[13] The conviction is based on the sufficiency of your plea and not the constitutional or legal sufficiency of the proceedings.[14] By pleading guilty, you waive claims that you were deprived of your rights in the proceedings prior to entering the plea.[15] Your guilty plea also waives the right to challenge the underlying conviction,[16] and the ability to appeal any non-jurisdictional defects in the case.[17]

There are a couple of defects, or errors in the legal proceedings, that you can still challenge after pleading guilty. Such defects include:

(1) Jurisdictional defects, meaning that the particular court you were in did not have authority to convict you, no matter what evidence may have been presented against you at trial;
(2) Defects that go directly to the guilty plea itself; or

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5. U.S. Const. amend. VI. *See* Bordenkircher v. Hayes, 434 U.S. 357, 363, 98 S. Ct. 663, 668, 54 L. Ed. 2d 604, 610 (1978) (declaring that the state cannot punish defendant for exercising the right to a trial); N.Y. Crim. Proc. Law § 220.10(1) (McKinney 2013).

6. U.S. Const. amend. VI. *See* Boykin v. Alabama, 395 U.S. 238, 243, 89 S. Ct. 1709, 1712, 23 L. Ed. 2d 274, 279 (1969); Duncan v. Louisiana, 391 U.S. 145, 149, 88 S. Ct. 1444, 1447, 20 L. Ed. 2d 491, 496 (1968) (guaranteeing the right to a trial by jury in state criminal cases).

7. U.S. Const. amend. V.

8. U.S. Const. amend. V. *See* Boykin v. Alabama, 395 U.S. 238, 243, 89 S. Ct. 1709, 1712, 23 L. Ed. 2d 274, 279 (1969); Malloy v. Hogan, 378 U.S. 1, 6, 84 S. Ct. 1489, 1492, 12 L. Ed. 2d 653, 658 (1964) (applying the privilege against self-incrimination in state criminal trials).

9. U.S. Const. amend. VI. *See* Boykin v. Alabama, 395 U.S. 238, 243, 89 S. Ct. 1709, 1712, 23 L. Ed. 2d 274, 279 (1969). *See also* Pointer v. Texas, 380 U.S. 400, 406, 85 S. Ct. 1065, 1069, 13 L. Ed. 2d 923, 928 (1965) (extending the constitutional right to confront one's accusers to state criminal defendants).

10. U.S. Const. amend. V; N.Y. Crim. Proc. Law § 220.10(1) (McKinney 2013).

11. U.S. Const. amend. VI. *See* Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 1923, 18 L. Ed. 2d 1019, 1023 (1967) (guaranteeing the right to compel favorable witnesses to testify in state criminal cases).

12. People v. Taylor, 65 N.Y.2d 1, 5, 478 N.E.2d 755, 757, 489 N.Y.S.2d 152, 154 (1985).

13. People v. Campbell, 73 N.Y.2d 481, 486, 539 N.E.2d 584, 586, 541 N.Y.S.2d 756, 758 (1989).

14. People v. Di Raffaele, 55 N.Y.2d 234, 240, 433 N.E.2d 513, 515, 448 N.Y.S.2d 448, 450 (1982).

15. Tollett v. Henderson, 411 U.S. 258, 267, 93 S. Ct. 1602, 1608, 36 L. Ed. 2d 235, 243 (1973) ("When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea."); *see also* People v. Hansen, 95 N.Y.2d 227, 230, 738 N.E.2d 773, 776, 715 N.Y.S.2d 369, 372 (2000) (holding that a defendant who in open court admits guilt of an offense charged may not later seek review of claims relating to the deprivation of rights that took place before the plea was entered); People v. Di Raffaele, 55 N.Y.2d 234, 240, 433 N.E.2d 513, 515, 448 N.Y.S.2d 448, 450 (1982) ("Where defendant has by his plea admitted commission of the crime with which he was charged, his plea renders irrelevant his contention that the criminal proceedings preliminary to trial were infected with impropriety and error.").

16. People v. Seaberg, 74 N.Y.2d 1, 8, 541 N.E.2d 1022, 1025, 543 N.Y.S.2d 968, 971 (1989).

17. *See* United States v. Broce, 488 U.S. 563, 569, 109 S. Ct. 757, 762, 102 L. Ed. 2d 927, 935 (1989) (holding that defendants, convicted based on guilty pleas, can challenge only the constitutionality of the conviction; in other words, the only issues are whether the plea was both counseled and voluntary); People v. Thomas, 74 A.D.2d 317, 319, 428 N.Y.S.2d 20, 23 (2d Dept. 1980) ("[O]nly those issues fully disclosed in the record which relate either to the exercise of jurisdiction by the court or to the voluntary and knowing nature of the plea are appealable after a plea of guilty.").

(3) Defects in relation to the sentence subsequently imposed which was not part of the plea agreement.

Some examples that fall under these categories are if the indictment (or other accusatory instrument) failed to charge an offense,[18] conviction on an indictment that the prosecutor knows is only supported by false evidence,[19] conviction under an unconstitutional statute,[20] and a guilty plea that was not entered voluntarily, knowingly, or intelligently, (such as if you were forced to plead guilty or did not understand the plea agreement).[21] More examples include proceedings that did not meet the standards of a constitutional speedy trial,[22] an illegal sentence,[23] an excessively harsh or severe sentence,[24] or ineffective assistance of counsel in the plea bargaining process.[25] Because these issues are not waived by a guilty plea, you cannot waive these claims simply by pleading guilty and you may challenge your conviction based on one of these claims at a later time.

By pleading guilty, however, you do waive certain rights. Entering a plea of guilty likely means you will not be able to challenge or appeal any issues which relate to trial or pretrial rights because these rights only protect you at trial.[26] Some issues which you may not appeal or use to challenge your sentence and conviction include: no probable cause for arrest;[27] improperly seized evidence;[28] illegally obtained confession;[29] problems with the form of the accusatory instrument;[30] improperly failing to provide a bill of particulars;[31] insufficient factual allegation in the indictment;[32] the composition of the grand jury;[33] the

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18. *See* Bousley v. United States, 523 U.S. 614, 618–19, 118 S. Ct. 1604, 1609, 140 L. Ed. 2d 828, 837 (1998) (stating that a plea would be constitutionally invalid if the record revealed that a defendant had not correctly understood the "essential elements of the crime with which he was charged"); People v. Iaonnone, 45 N.Y.2d 589, 600, 384 N.E.2d 656, 664, 412 N.Y.S.2d 110, 117–18 (1978) (holding that an indictment is jurisdictionally defective "if it does not effectively charge the defendant with the commission of a particular crime"); People v. Case, 42 N.Y.2d 98, 100, 365 N.E.2d 872, 873, 396 N.Y.S.2d 841, 842 (1977) (holding that a defendant can challenge the substantive sufficiency of information in the indictment because sufficiency is a jurisdictional prerequisite to the conviction; however, defendants cannot challenge the form of the indictment after pleading guilty to it).

19. People v. Pelchat, 62 N.Y.2d 97, 108, 464 N.E.2d 447, 453, 476 N.Y.S.2d 79, 85 (1984).

20. People v. Lee, 58 N.Y.2d 491, 493, 448 N.E.2d 1328, 1329, 462 N.Y.S.2d 417, 418 (1983).

21. *See* People v. Seaberg, 74 N.Y.2d 1, 11, 541 N.E.2d 1022, 1026–27, 543 N.Y.S.2d 968, 972–73 (1989) (finding that defendants had validly waived their right to appeal in their plea bargains because the pleas were reasonable, voluntary, knowing, and intelligent); *see also* Boykin v. Alabama, 395 U.S. 238, 243 n.5, 89 S. Ct. 1709, 1712 n. 5, 23 L. Ed. 2d 274, 280 n.5 (1969) (stating that if defendant's plea was not entered voluntarily and knowingly, it has been obtained in violation of the Due Process Clause, and is therefore void).

22. People v. Blakley, 34 N.Y.2d 311, 314, 313 N.E.2d 763, 764, 357 N.Y.S.2d 459, 461 (1974).

23. People v. Lynn, 28 N.Y.2d 196, 203, 269 N.E.2d 794, 798, 321 N.Y.S.2d 74, 80 (1971).

24. People v. Coleman, 30 N.Y.2d 582, 583, 281 N.E.2d 845, 845, 330 N.Y.S.2d 797, 798 (1972); *see also* People v. Mayham, 709 N.Y.S.2d 265, 272 A.D.2d 951 (4th Dept. 2000) (holding that harshness of a sentence may be challenged if the defendant is not informed of the possible lengths of incarceration). *But see* People v. Hidalgo, 91 N.Y.2d 733, 737, 698 N.E.2d 46, 48, 675 N.Y.S.2d 327, 329 (1998) (holding that defendant who was informed of possible sentencing options could not challenge the harshness of the sentence).

25. *See* People v. Gonzalez, 171 A.D.2d 413, 413, 566 N.Y.S.2d 639, 639 (1st Dept. 1991) (finding that an evidentiary hearing was necessary to determine if counsel had coerced defendant to enter a guilty plea). On this issue, a motion should first be made to withdraw the plea or vacate the judgment under N.Y. Crim. Proc. Law § 440.10l *see JLM*, Chapter 20, for information on Article 440 motions, and *JLM*, Chapter 12, for information about ineffective assistance of counsel.

26. People v. Thomas, 74 A.D.2d 317, 321, 428 N.Y.S.2d 20, 24 (2d Dept. 1980); People v. Howe, 56 N.Y.2d 622, 624, 435 N.E.2d 1092, 1092 (1982).

27. People v. Smith, 34 N.Y.2d 758, 759, 314 N.E.2d 875, 875, 358 N.Y.S.2d 135, 135 (1974).

28. United States v. Bastian, 770 F.3d 212, 217 (2d Cir. 2014). Under New York state law, if you filed a motion to suppress evidence before pleading guilty and it was denied, you can still appeal that ruling after your guilty plea. N.Y. Crim. Proc. Law § 710.70 (McKinney).

29. People v. Nicholson, 11 N.Y.2d 1067, 1068, 184 N.E.2d 190, 191, 230 N.Y.S.2d 220, 221 (1962); People v. Dobson, 124 A.D.2d 744, 745, 508 N.Y.S.2d 246, 246 (2d Dept. 1986) (holding that a "knowing and voluntary" guilty plea prevents a defendant from appealing issues of illegally obtained confessions, when the defendant had never moved to suppress the confession prior to guilty plea). *But see* McMann v. Richardson, 397 U.S. 758, 767, 90 S. Ct. 1441, 1447 (1970) (holding that a guilty plea is "properly open to challenge . . . where the circumstances that coerced the confession have abiding impact and also taint the plea.")

30. *See* People v. Iannone, 45 N.Y.2d 589, 593–94, 384 N.E.2d 656, 660, 412 N.Y.S.2d 110, 113 (1978).

31. People v. Hendricks, 31 A.D.2d 982, 982, 297 N.Y.S.2d 838, 839 (3d Dept. 1969).

32. People v. Iannone, 45 N.Y.2d 589, 600, 384 N.E.2d 656, 664, 412 N.Y.S.2d 110, 117–18 (1978).

sufficiency of grand jury minutes;[34] a denial of a motion to dismiss the indictment in the interests of justice;[35] the correctness of a denial of a motion for a separate trial;[36] challenges to the underlying facts of the plea;[37] the racial composition of prospective jury pool;[38] the prosecutor's discriminatory use of peremptory challenges;[39] violation of speedy trial rights under N.Y. Crim. Proc. Law § 30.30;[40] violation of your double jeopardy rights under N.Y. Crim. Proc. Law § 40.20[41] or the Constitution;[42] statutory or transactional immunity (blanket immunity for crimes related to testimony);[43] statute of limitations;[44] and improper interpretation or application of a statute.[45]

Because a guilty plea is largely equivalent to a conviction in a trial, you will face the same consequences as if you had been convicted of the charge.[46] For example, you should consider the effects a conviction will have on your parole, probation, immigration status, and employment status. The side effects resulting from a conviction are often called "collateral effects." Your lawyer may not be obligated to advise you about these side effects.[47] However, if you are not an American citizen, your attorney *must* advise you there may be collateral effects that your conviction could have on your immigration status.[48]

The collateral effects are specific to you as an individual and generally result from actions taken by agencies (such as parole boards, the immigration authorities, and employers) that the court does not control.[49] Therefore, you should ask about these effects before you enter a guilty plea, and do research on your own. Even if the court or your attorney misinforms you about the collateral effects of your conviction, you may not be able to challenge your conviction on these grounds later.

### C. Plea Bargaining Agreements

There is no constitutional right to plea bargain. Therefore, the prosecutor has no obligation to negotiate with you for a reduced sentence.[50] If you wish to plead guilty, the prosecutor might require that you plead guilty to all of the charges against you. If the prosecutor has not consented (agreed) to a plea, the court can only accept a guilty plea to the entire indictment (all the charges brought against you initially).[51] The

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33. *See* People v. Siciliano, 40 N.Y.2d 996, 996, 359 N.E.2d 700, 700, 391 N.Y.S.2d 106, 106 (1976).

34. People v. O'Neal, 44 A.D.2d 830, 830, 355 N.Y.S.2d 21, 22 (2d Dept. 1974).

35. People v. Travis, 205 A.D.2d 648, 613 N.Y.S.2d 252 (2d Dept. 1994); People v. Merlo, 195 A.D.2d 576, 576, 600 N.Y.S.2d 494, 494 (2d Dept. 1993).

36. People v. Smith, 41 A.D.2d 893, 894, 342 N.Y.S.2d 513, 514 (4th Dept. 1973).

37. People v. Pelchat, 62 N.Y.2d 97, 108, 464 N.E.2d 447, 453, 476 N.Y.S.2d 79, 85 (1984).

38. People v. Green, 75 N.Y.2d 902, 904–05, 553 N.E.2d 1331 (1990)

39. *See* People v. Green, 75 N.Y.2d 902, 904, 553 N.E.2d 1331, 1332, 554 N.Y.S.2d 821, 822 (1990).

40. People v. O'Brien, 56 N.Y.2d 1009, 1010, 439 N.E.2d 354, 355, 453 N.Y.S.2d 638, 639 (1982).

41. People v. Prescott, 66 N.Y.2d 216, 219, 486 N.E.2d 813, 815, 495 N.Y.S.2d 955, 957 (1985).

42. *See* People v. Muniz, 91 N.Y.2d 570, 574–75, 696 N.E.2d 182, 185–86, 673 N.Y.S.2d 358, 361–62 (1998) (holding that waiver of a constitutional double jeopardy claim is implied in a general appeals waiver; however, if defendant does not waive the right to appeal, the constitutional double jeopardy claim is maintained).

43. People v. Flihan, 73 N.Y.2d 729, 731, 532 N.E.2d 96, 535 N.Y.S.2d 590 (1988).

44. People v. Dickson, 133 A.D.2d 492, 495, 519 N.Y.S.2d 419, 421 (3d Dept. 1987).

45. People v. Levin, 57 N.Y.2d 1008, 1009, 443 N.E.2d 946, 457 N.Y.S.2d 472 (1982).

46. N.Y. Crim. Proc. Law § 1.20(13) (McKinney 2013); Boykin v. Alabama, 395 U.S. 238, 242, 89 S. Ct. 1709, 1711, 23 L. Ed. 2d 274, 279 (1969).

47. Strickland v. Washington, 466 U.S. 668, 688–89, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674 (1984).

48. *See Padilla* v. Kentucky, 130 S. Ct. 1473, 176 L. Ed.2d 284 (2010) (holding that when the immigration consequences of pleading guilty are clear, attorneys must notify clients about these consequences. If the immigration consequences (such as deportation) are not clear, the lawyer must tell the client that there *may* be immigrant consequences to pleading guilty).

49. United States v. Sambro, 454 F.2d 918, 920 (D.C. Cir. 1971); *see also* People v. Ford, 86 N.Y.2d 397, 403, 657 N.E.2d 265, 268, 633 N.Y.S.2d 270, 273 (1995) (holding that a court is not under an obligation to inform defendant of collateral consequences, even deportation).

50. Weatherford v. Bursey, 429 U.S. 545, 561, 97 S. Ct. 837, 846, 51 L. Ed. 2d 30, 43 (1977); *see also* People v. Cohen, 186 A.D.2d 843, 844, 588 N.Y.S.2d 211, 212 (3d Dept. 1992) (finding that where the policy differences were based on different case loads and staffing, defendant was not denied right to equal protection by district attorney's policy not to accept pleas to less than top count of indictment, though other counties had different plea-bargaining policies).

51. People v. Antonio, 176 A.D.2d 528, 529, 574 N.Y.S.2d 718, 719 (1st Dept. 1991); *see also* People v. Melo, 160 A.D.2d 600, 600, 554 N.Y.S.2d 530, 531 (1st Dept. 1990) (finding that the trial court did not deny due process in refusing to accept defendant's plea to a lesser charge prior to trial; defendant had right to plead guilty only to the entire

prosecutor also has the discretion to decide what plea bargain to offer you, as long as the offer complies with the law.[52] In New York, state statutes limit the kinds of plea bargains that prosecutors can offer you. They cannot offer a lower sentence than is required for the type of charge, or for a person who has committed multiple felonies.[53] The prosecutor can require certain terms and conditions before agreeing to a plea bargain,[54] as long as the terms and conditions are reasonable[55] and do not deny basic fairness.[56]

Plea bargains in the federal system are governed by Rule 11 of the Federal Rules of Criminal Procedure.[57] New York does not have an equivalent rule, so you must look to past court decisions to understand how plea agreements are dealt with by prosecutors and courts in New York.

### 1. Types of Plea Agreements

There are many different types of plea agreements you may be offered in the course of a negotiation. A prosecutor may allow you to plead to a lesser charge or drop certain charges in exchange for a guilty plea.[58] This type of agreement is sometimes called a "charge agreement." The prosecutor may offer to recommend a specific sentence or agree not to oppose your attorney's recommendation for a sentence. However, you should remember that the actual sentence imposed is up to the judge.[59] Even if the prosecutor offers to agree to a specific sentence if you plead guilty, the judge is not required to follow this agreement and may choose not to accept the sentence recommendation.[60]

Another type of agreement the prosecutor may offer is a "cooperation agreement," in which you agree to cooperate with the government. For example, you could testify against another defendant in exchange for a reduced sentence or dropped charges. This type of plea bargain may require your cooperation for a long period of time, and your case may not be settled until you have completed your side of the agreement.

A "conditional plea" may allow you to enter a guilty plea without waiving the right to appeal certain pretrial motions.[61] For example, if the court rules that certain essential evidence is admissible at trial, but you believe the appellate court may reverse that decision and rule that the evidence cannot be introduced, you can enter a conditional plea of guilty, which preserves your right to appeal the evidentiary issue. If you appeal and the appellate court later rules that the evidence was not admissible, you have the right to withdraw your guilty plea and then either go to trial or enter into another plea bargain. A conditional plea cannot be made without the approval of the court and the prosecutor.[62] Note that conditional pleas are not valid in many states and most federal appeals courts.[63] In these jurisdictions, even if the trial court allows

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indictment and could plead guilty to lesser-included offense only with permission of court and consent of the People).

52. *See* N.Y. CRIM. PROC. LAW § 220.10(3), (4) (McKinney 2013); People v. Antonio, 176 A.D.2d 528, 529, 574 N.Y.S.2d 718, 719 (1st Dept. 1991) (explaining that the prosecutor may dictate the terms under which he or she will consent to accept a plea).

53. *See* N.Y. CRIM. PROC. LAW § 220.10(5) (McKinney 2013). Thus, if you agree to plead guilty to specific charges, the prosecutor cannot offer you a sentence below the minimum required for the charged crime. Additionally, if you have prior felony convictions, the charged crime may require an enhanced sentence, and the prosecutor must comply with these statutory requirements.

54. People v. Respress, 231 A.D.2d 934, 934, 648 N.Y.S.2d 361, 361 (4th Dept. 1996).

55. *See* People v. Grant, 471 N.Y.S.2d 325, 99 A.D.2d 536 (2d Dept. 1984).

56. *See* People v. White, 32 N.Y.2d 393, 399–400, 298 N.E.2d 659, 663–64, 345 N.Y.S.2d 513, 518–20 (1973) (finding that the prosecutor's requirement that defendant plead guilty before the court decided defendant's speedy trial claim was coercive and denied defendant's fundamental right to a speedy trial); People v. Grant, 99 A.D.2d 536, 536, 471 N.Y.S.2d 325, 326 (2d Dept. 1984).

57 N.Y. CRIM. PROC. LAW § 11 (McKinney 2013).

58. *See* N.Y. CRIM. PROC. LAW § 220.10(3), (4) (McKinney 2013); FED. R. CRIM. P. 11(c)(1)(A).

59. FED. R. CRIM. P. 11(c)(1)(B); *see* People v. Selikoff, 35 N.Y.2d 227, 244, 318 N.E.2d 784, 795, 360 N.Y.S.2d 623, 639 (1974).

60. *See* FED. R. CRIM. P. 11(c)(1)(B); People v. Selikoff, 35 N.Y.2d 227, 244, 318 N.E.2d 784, 795, 360 N.Y.S.2d 623, 639 (1974).

61. FED. R. CRIM. P. 11(a)(2).

62. FED. R. CRIM. P. 11(a)(2).

63. People v. Thomas, 53 N.Y.2d 338, 344, 424 N.E.2d 537, 540, 441 N.Y.S.2d 650, 654 (noting that states and federal circuits are "about evenly divided on the acceptability of such pleas" and that the Fifth, Sixth, Seventh and Ninth Circuits have disapproved such pleas (*citing* United States v. Sepe, 486 F.2d 1044 (5th Cir. 1973); United States v. Cox, 464 F.2d 937 (6th Cir. 1972); United States v. Benson, 579 F.2d 508 (9th Cir. 1978))); *see also* People v. Di Donato, 87 N.Y.2d 992, 993, 665 N.E.2d 186, 187, 642 N.Y.S.2d 616, 617 (1996) (stating that conditional pleas are generally not allowed in New York); N.Y. CRIM. PROC. LAW §710.70[2]. Under New York law the only adverse pre-trial ruling that can

you to enter a conditional plea, appellate courts have held that conditional pleas are invalid on appeal, because a guilty plea automatically forfeits the right to appeal any non-jurisdictional issue, such as an evidentiary error.[64]

Keep in mind that bargaining for a specific sentence is riskier for you than bargaining for reduced charges. This is because when you bargain for a plea to a lesser offense, you immediately receive the benefit of the plea, but when you bargain for a specific sentence, there is a chance that the judge might not agree to the prosecutor's recommendation. However, it is rare for a judge to find the prosecutor's proposed sentence unacceptable.

If you accept a plea offer, make sure your agreement is in writing and is as thorough as possible, describing in specific detail your obligations and the prosecutor's obligations.[65] The written agreement should contain every term that you have agreed upon.[66] New York generally refuses to enforce off-the-record promises that a defendant claims were made by the prosecutor.[67] Your agreement should also describe what will happen if you or the prosecution breaks the agreement. Make sure you completely understand every part of the agreement. You also have a right to help from your attorney.[68]

### 2. Rights Waivers

Many prosecutors will require you to say that you waive certain rights in your plea bargain, and the courts will enforce your waivers.[69] Some prosecutors require you to waive your right to appeal your conviction, and the courts will generally uphold this waiver, provided it was accepted voluntarily, knowingly, and intelligently.[70] If you waive your right to appeal when you accept a plea bargain, not only will you lose the claims that are automatically forfeited by entering a guilty plea, but you will also waive the right to

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be appealed after a guilty plea is a ruling on a suppression motion, which is automatically preserved if not expressly waived as part of the plea bargain agreement.

64. *See* People v. Di Raffaele, 55 N.Y.2d 234, 240–41, 433 N.E.2d 513, 515–16, 448 N.Y.S.2d 448, 450–51 (1982); *see also* People v. Thomas, 74 A.D.2d 317, 324–25, 428 N.Y.S.2d 20, 26 (2d Dept. 1980) (interpreting case law as not allowing conditional pleas that try to preserve issues which no longer matter to the case after the defendant admits that he actually did the crime he is accused of doing).

65. *See* People v. Selikoff, 35 N.Y.2d 227, 244, 318 N.E.2d 784, 795, 360 N.Y.S.2d 623, 639 (1974) (articulating the "[d]esirability of having as complete a record as possible of the agreements and promises which have led to a guilty plea").

66. *See* People v. Selikoff, 35 N.Y.2d 227, 244, 318 N.E.2d 784, 795, 360 N.Y.S.2d 623, 639 (1974) (refusing to grant specific performance of defendants' alleged off-the-record promises or allow a withdrawn plea based on unfulfilled off-the-record promises).

67. *See* Siegel v. New York, 691 F.2d 620, 624 (2d Cir. 1982) (stating that, "with the exception of unusual cases, off-the-record promises made by the prosecutor or the court are a nullity and, accordingly, the defendant may not reasonably rely upon them; the defendant is entitled to rely only on recorded promises").

68 Missouri v. Frye, 132 U.S. 1399, 1407–1408, 182 L. Ed. 2d 379 (2012) (holding that the Sixth Amendment guarantees a defendant the right to counsel at all critical stages of the criminal proceeding, including the plea-bargaining phase); Lafler v. Cooper, 132 U.S. 1376, 182 L. Ed. 2d 398 (2012); *see* U.S. CONST. amend. VI.

69. *See* Schick v. United States, 195 U.S. 65, 72, 24 S. Ct. 826, 828, 49 L. Ed. 99, 103 (1904) (stating that accused can waive any right if there is no constitutional or statutory mandate and no public policy prohibits it), cited in People v. Seaberg, 74 N.Y.2d 1, 7, 541 N.E.2d 1022, 1024, 543 N.Y.S.2d 968, 970 (1989). These waivers are enforced with the understanding that the defendant bargained away these rights, in addition to the right to a trial, in order to receive a more favorable sentence. Once the more favorable sentence is received, the defendant must uphold his end of the bargain. *See also* United States v. Mezzanatto, 513 U.S. 196, 201, 115 S. Ct. 797, 801,130 L. Ed. 2d 697, 704 (1995) ("A criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution."). This case also stands for the proposition that rights guaranteed to defendants under the Federal Rules of Evidence are waivable. *See also* Ricketts v. Adamson, 483 U.S. 1, 10, 97 L. Ed. 2d 1, 11–12, 107 S. Ct. 2680, 2685 (1987) (double jeopardy defense waivable by pretrial agreement); Newton v. Rumery, 480 U.S. 386, 394, 107 S. Ct. 1187, 94 L. Ed. 2d 405 (1987) (a defendant may knowingly and voluntarily waive their right to bring a § 1983 action pursuant to a plea agreement); Boykin v. Alabama, 395 U.S. 238, 243, 23 L. Ed. 2d 274, 279, 89 S. Ct. 1709, 1712 (1969) (knowing and voluntary guilty plea waives privilege against compulsory self-incrimination, right to jury trial, and right to confront one's accusers); Johnson v. Zerbst, 304 U.S. 458, 465, 82 L. Ed. 1461, 1467, 58 S. Ct. 1019, 1023 (1938) (Sixth Amendment right to counsel may be waived).

70. United States v. Bushert, 997 F.2d 1343, 1350–51 (11th Cir. 1993) (holding that in most circumstances a judge must specifically discuss rights waiver with defendant for the defendant's waiver to be knowing and voluntary); People v. Moissett, 76 N.Y.2d 909, 911, 564 N.E.2d 653, 654, 563 N.Y.S.2d 43, 44 (1990) (upholding appeals waiver that was accepted knowingly, voluntarily, and intelligently).

appeal based on many of the claims that were not initially waived by the guilty plea. An appeals waiver, however, does not completely prevent your right to appeal, and you still can challenge the constitutionality of your sentence.[71]

Additionally, you cannot waive certain rights because of "society's interest in the integrity of criminal process."[72] These non-waivable rights include the constitutional right to a speedy trial,[73] the right to challenge the legality of the sentence,[74] or the right to be examined to determine if you are competent to stand trial.[75] Even if you explicitly waived these rights in your plea agreement, the courts will not enforce the waiver, and you can challenge your case if one of these rights was violated.

### 3. Prosecutorial Discrimination in Plea Bargaining

Because there is no constitutional right to a plea bargain, prosecutors have wide discretion to decide whether or not to negotiate with you. Prosecutors are not required to offer you the same bargain they offer another defendant who was charged with the same crime under similar circumstances. However, prosecutors cannot treat you differently from other defendants because of an "impermissible classification," such as race, gender, religion, or ethnicity.[76] Unfortunately, challenges to convictions based on discrimination in plea bargaining are not often successful. This is because it is difficult to prove the decision was based on an impermissible classification rather than any other reason.[77] If you believe the prosecutor has discriminated against you in the plea bargaining process, you should raise this issue before the trial begins and not while you are being sentenced. You should provide precise and specific evidence to support your discrimination claim.[78]

## D. Court Acceptance of a Plea Bargain

Once you reach a plea agreement with the prosecutor, it must be approved by the court.[79] The judge may accept one of the three possible forms of sentencing agreements in a plea bargain. In an open plea, the judge will not make any sentencing promises but has the ability to impose any punishment that is allowed for the charges to which you are pleading guilty. In a "cap plea," the judge will agree not to exceed a certain maximum punishment if you plead guilty. In a "sentence agreement plea," the judge agrees to impose the sentence that you and the prosecutor agreed upon in the plea bargain. However, although the prosecutor may not ask for a different sentence than the one you agreed upon, the judge retains the discretion to impose a different sentence if he thinks that sentence you and the prosecutor agreed upon is inappropriate.[80]

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71. *See* People v. Seaberg, 74 N.Y.2d 1, 9–10, 541 N.E.2d 1022, 1026, 543 N.Y.S.2d 968, 972 (1989) (holding defendant can still challenge the legality of the sentence or the voluntariness of the plea even after waiving the right to appeal).

72. People v. Callahan, 80 N.Y.2d 273, 280, 604 N.E.2d 108, 111, 590 N.Y.S.2d 46, 49 (1992).

73. People v. Blakley, 34 N.Y.2d 311, 314–15, 313 N.E.2d 763, 764–65, 357 N.Y.S.2d 459, 462 (1974) (holding that a defendant cannot waive his right to a speedy trial); Zedner v. United States, 547 U.S. 489, 502, 126 S. Ct. 1976, 1986, 164 L. Ed 2d 49, 764 (2006).

74. People v. Francabandera, 33 N.Y.2d 429, 434 n.2, 310 N.E.2d 292, 294 n.2, 354 N.Y.S.2d 609, 612 n.2 (1974).

75. *See* People v. Armlin, 37 N.Y.2d 167, 172, 332 N.E.2d 870, 874, 371 N.Y.S.2d 691, 697 (1975).

76. United States v. Bell, 506 F.2d 207, 221–22 (D.C. Cir. 1974) (stating that defendants must show a disparity in plea offers based on a constitutionally-suspect standard, such as race, gender, or religion).

77. *See* United States v. Alcarez-Peralta, 27 F.3d 439, 444 (9th Cir. 1994) (reversing District Court's determination that prosecutor discriminated in plea bargaining when defendant showed similarly situated female defendants received a significantly lesser sentence bargain than males, because defendant failed to meet burden of proving intentional gender discrimination); United States v. Moody, 778 F.2d 1380, 1386 (9th Cir. 1985) (denying defendants' appeals because they could not prove they were intentionally singled out because of race or another classification when the prosecutor entered a bargain with only one defendant).

78. *See* United States v. Alcarez-Peralta, 27 F.3d 439, 442 (9th Cir. 1994) (holding that more than "minimal evidence" is needed for a finding of intentional discrimination).

79. People v. Huertas, 85 N.Y.2d 898, 898, 650 N.E.2d 408, 408, 626 N.Y.S.2d 750, 750 (1995); *see* N.Y. Crim. Proc. Law § 220.10(3), (4) (McKinney 2013); *see also* Fed. R. Crim. P. 11(c)(3).

80. *See* People v. Farrar, 52 N.Y.2d 302, 305–06, 419 N.E.2d 864, 865, 437 N.Y.S.2d 961, 962 (1981). Many judges are hesitant to accept a sentence agreement plea because it removes their power to impose a sentence. In this situation, the defendant may seek a pre-plea investigation, which will be conducted by the probation department. Following the investigation, the judge will determine what sentence would be imposed if the defendant entered a guilty plea. *See* People v. Louis, 161 Misc. 2d 667, 675 n.6, 614 N.Y.S.2d 888, 893 n.6 (Sup. Ct. N.Y. County 1994).

Whether the judge accepts the prosecutor's sentence recommendations depends on whether that sentence is lawful and appropriate in light of the pre-sentence report and other relevant information.[81] The judge may accept or reject the agreement, but he rejects it, you must be offered the opportunity to withdraw your guilty plea.[82]

### 1. Constitutional Requirements for Accepting a Guilty Plea

Before the court accepts a plea bargain, the judge must ensure that it meets certain constitutional requirements. The judge must ensure that your guilty plea is entered "knowingly, voluntarily, and intelligently."[83] In most courts, the judge will address you personally and ask you a number of questions to determine whether your guilty plea was entered knowingly, voluntarily, and intelligently. The judge will want to ensure that you are not agreeing to the plea bargain because you were coerced or promised something other than the terms of the agreement,[84] that there is a sufficient factual basis for your plea,[85] that you understand the nature of the charges,[86] that you understand the rights you are giving up as a result of your plea bargain,[87] and that you know the possible penalties.[88]

Before accepting a guilty plea, the trial court must ensure that the plea meets the constitutional requirements by considering the terms of the plea agreement and the reasonableness of the bargain, as well as your age, experience, and background.[89] If you enter a plea bargain based on a promised sentence, it must appear on the court record at the time you enter the plea.[90] This is necessary to ensure that the plea was entered with your knowledge and consent.[91]

If your guilty plea did not meet the constitutional "knowing, voluntary, and intelligent" standards, you may challenge your conviction.[92] A conviction based on a guilty plea that was coerced or uninformed is unconstitutional, even if there was strong evidence of your guilt.[93] Courts will assume that you have not waived any of your constitutional rights unless there is indication or evidence that you "intelligently and

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81. People v. Farrar, 52 N.Y.2d 302, 306, 419 N.E.2d 864, 865–66, 437 N.Y.S.2d 961, 962–63 (1981).

82. Fed. R. Crim. P. 11(c)(5)(B); People v. Selikoff, 35 N.Y.2d 227, 241, 318 N.E.2d 784, 793, 360 N.Y.S.2d 623, 635 (1974).

83. *See* Boykin v. Alabama, 395 U.S. 238, 243 n.5, 89 S. Ct. 1709, 1712 n.5, 23 L. Ed. 2d 274, 280 n.5 (1969); Brady v. United States, 397 U.S. 742, 748, 90 S. Ct. 1463, 1469, 25 L. Ed. 2d 747, 756 (1970) (holding that "waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences"); People v. Harris, 61 N.Y.2d 9, 17–18, 459 N.E.2d 170, 174, 471 N.Y.S.2d 61, 65 (1983) (trial judge accepting guilty plea has vital responsibility to make sure that accused has full understanding of what the plea means and its consequences).

84. Fed. R. Crim. P. 11(b)(2); Brady v. United States, 397 U.S. 742, 755, 90 S. Ct. 1463, 1472, 25 L. Ed. 2d 747, 760 (1970).

85. *See* People v. Lopez, 71 N.Y.2d 662, 666, 525 N.E.2d 5, 6–7, 529 N.Y.S.2d 465, 466–67 (1988).

86. Fed. R. Crim. P. 11(b)(1)(G); People v. Moore, 71 N.Y.2d 1002, 1005, 525 N.E.2d 740, 741–42, 530 N.Y.S.2d 94, 95–96 (1988) (citing Henderson v. Morgan, 426 U.S. 637, 645 n.13, 96 S. Ct. 2253, 2258 n.13, 49 L. Ed. 2d 108, 114 n.13 (1976)).

87. Henderson v. Morgan, 426 U.S. 637, 645 n.13, 96 S. Ct. 2253, 2258 n.13, 49 L. Ed. 2d 108, 114 n.13 (1976).

88. Fed. R. Crim. P. 11(b)(1)(H)–(J);*see* People v. Camacho, 102 A.D.2d 728, 728–29, 476 N.Y.S.2d 566, 567–68 (1st Dept. 1984) (allowing defendant to withdraw guilty plea because convicting court misstated the maximum permissible sentence due to mistake about defendant's age). *But see* People v. Garcia, 92 N.Y.2d 869, 870–71, 700 N.E.2d 311, 677 N.Y.S.2d 772 (1998) (holding awareness of possible penalties is only a factor in determining voluntariness of the plea; it is not dispositive).

89. *See* People v. Hidalgo, 91 N.Y.2d 733, 736, 698 N.E.2d 46, 47, 675 N.Y.S.2d 327, 328 (1998) (citing People v. Seaberg, 74 N.Y.2d 1, 11, 541 N.E.2d 1022, 1026–27, 543 N.Y.S.2d 968, 972–73 (1989)).

87. N.Y. Crim. Proc. Law § 220.50(5) (McKinney 2013).

91. N.Y. Crim. Proc. Law § 220.50(5) (McKinney 2013); *see* People v. Davey, 193 A.D.2d 1108, 1108–09, 598 N.Y.S.2d 637, 638 (4th Dept. 1993) (granting defendant ability to withdraw from guilty plea because judge should not have sentenced defendant based on an unclear sentence agreement without allowing him opportunity to withdraw guilty plea).

92. *See* Boykin v. Alabama, 395 U.S. 238, 243 n.5, 89 S. Ct. 1709, 1712 n.5, 23 L. Ed. 2d 274, 280 n.5 (1969) (affirming that, on the face of the record, it was erroneous for a trial judge to accept a petitioner's guilty plea without an affirmative showing that it was intelligent or voluntary); *see also* Tollett v. Henderson, 411 U.S. 258, 267, 93 S. Ct. 1602, 1608, 36 L. Ed. 2d 235, 243 (1973) (holding that defendant can only attack voluntary and intelligent character of guilty plea, and cannot claim to be deprived of constitutional rights prior to entering the plea).

93. *See* Henderson v. Morgan, 426 U.S. 637, 644–45, 96 S. Ct. 2553, 2557–58, 49 L. Ed. 2d 108, 114 (1976).

understandingly rejected" your rights.[94] To preserve a claim that the plea was not knowing, voluntary, or intelligent, you must file a motion with the judge that accepted your plea.[95] New York law requires that before you appeal your plea, you must give the trial court an opportunity to correct any mistake they may have made.[96] You can do this either at the plea proceeding by asking that the plea be vacated,[97] or you can file a motion to vacate judgment.[98]

### 2. Factors Making a Plea Not Voluntary, Knowing, or Intelligent

#### (a) Coercion

Your guilty plea must be entered voluntarily, which means that you were not threatened or forced by the court, the prosecutor, or your defense attorney.[99] The judge will ask you about the facts of the crime. If your statement of the facts presents significant doubt as to whether you are actually guilty or not, the court is required to ask follow up questions before accepting the plea.[100] This questioning is simply to ensure you entered the plea agreement on your own free will.[101] If you later claim that you did not enter the plea voluntarily or you want to challenge the constitutionality of the plea, the judge will need to find ample evidence in the record that supports your contention.[102]

The court cannot coerce you into accepting a plea bargain by threatening to give you a more severe sentence if you decide to go to trial instead of entering a guilty plea.[103] However, merely receiving a higher sentence after trial than was offered in plea negotiations is not in itself an indication that you were punished for exercising your right to a trial.[104] Unless there is a large difference between your actual sentence and the plea offer made to you, or your sentence is excessive for the crime you were convicted of, your constitutional rights have not been violated.[105] The court may inform you of the possible sentences you would receive if

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94. *See* People v. Harris, 61 N.Y.2d 9, 17, 459 N.E.2d 170, 173, 471 N.Y.S.2d 61, 64 (1983) (holding that waiver of constitutional rights, required by a guilty plea, cannot be presumed from a silent record).

92. Fed. R. Crim. P. 12(b)(3)(A).

96. *See* People v. Lopez, 71 N.Y.2d 662, 665–66, 525 N.E.2d 5, 6, 529 N.Y.S.2d 465, 466 (1988) ("In order for there to be a question of law reviewable by this court, the trial court generally must have been given an opportunity to correct any error in the proceedings below at a time when the issue can be dealt with most effectively.").

97. N.Y. Crim. Proc. Law § 220.60(3) (McKinney 2013).

98. N.Y. Crim. Proc. Law § 440.10 (McKinney 2013).

99. Brady v. United States, 397 U.S. 742, 750, 90 S. Ct. 1463, 1470, 25 L. Ed. 2d 747, 757 (1970) (state may encourage guilty plea, but the plea cannot be produced by actual or threatened physical harm or by mental coercion overbearing the defendant's will).

100. People v. Lopez, 71 N.Y.2d 662, 666, 525 N.E.2d 5, 6–7, 529 N.Y.S.2d 465, 466–67 (1988) (stating that "where a defendant's factual recitation negates an essential element of the crime pleaded to, the court may not accept the plea without making further inquiry to ensure that defendant understands the nature of the charge and that the plea is intelligently entered").

101. People v. Murphy, 243 A.D.2d 954, 955, 663 N.Y.S.2d 378, 379 (3d Dept. 1997) (affirming County Court's decision to deny defendant's motion to withdraw the guilty plea because court had conducted sufficient inquiry when allocution called into question the voluntariness of the guilty plea and defendant denied being coerced or threatened).

102. *See* People v. Sung Min, 249 A.D.2d 130, 132, 671 N.Y.S.2d 480, 481 (1st Dept. 1998) (holding that defendant's motion to withdraw plea should have been granted because his allegations of coercion were supported by the record. The record showed that the lower court wrongly burdened the defendant's right to a trial by telling defendant that he would "receive the maximum sentence, or maximum consecutive sentences, after trial, but a significantly lighter sentence after a plea," which was inaccurate); People v. Tien, 228 A.D.2d 280, 281, 643 N.Y.S.2d 345, 345 (1st Dept. 1996); People v. Jimenez, 179 A.D.2d 840, 840, 579 N.Y.S.2d 173, 174 (3d Dept. 1992) (affirming lower court's decision to deny defendant's motion to appeal because the record did not support defendant's claim "that the court 'threatened' to impose a greater sentence if defendant opted to go to trial").

103. *See* People v. Christian, 139 A.D.2d 896, 527 N.Y.S.2d 1020 (4th Dept. 1988) ("To capitulate and enter a plea under a threat of an 'or else' can hardly be regarded as the result of the voluntary bargaining process between the defendant and the People sanctioned by propriety and practice") (quoting People v. Picciotti, 4 N.Y.2d 340, 344, 151 N.E.2d 191, 194, 175 N.Y.S.2d 32, 35 (1958)); People v. Wilson, 245 A.D.2d 161, 163, 666 N.Y.S.2d 164, 165–66 (1st Dept. 1997) (finding judge's statement that defendant *would* receive greater sentence if convicted at trial, rather than *could* receive a greater sentence, was a virtual promise of an increased sentence and coerced defendant to plead guilty).

104. People v. Patterson, 483 N.Y.S.2d 55, 57, 106 A.D.2d 520, 521 (2d Dept. 1984). *See* People v. Pena, 50 N.Y.2d 400, 412, 406 N.E.2d 1347, 1353, 429 N.Y.S.2d 410, 416 (1980) (holding that court was free, after finding defendant guilty at trial, to impose a greater term of imprisonment than the sentence offered in the plea bargain context).

105. *See* People v. Howard, 217 A.D.2d 530, 530, 629 N.Y.S.2d 765, 765 (1st Dept. 1995) (holding that defendant

convicted on the charges at trial.[106] The court is acting coercively if it indicated that you will receive the maximum sentence if you go to trial, but a significantly lighter sentence if you plead guilty.[107] However, the Court requiring that you accept or decline a plea offer within a brief period of time is not considered coercive.[108]

Guilty pleas that are coerced by threats or deception by the prosecutor cannot meet the standard of knowing, voluntary, and intelligent agreement.[109] However, the prosecutor does have the ability to control the charges against you, and in the course of plea negotiations, the prosecutor may increase the charges or seek additional charges if you do not plead guilty.[110] As long as you have the choice to accept or reject the prosecutor's offer regardless of the offer's consequences, the offer does not have an element of coercion.[111]

It is not coercion for your defense attorney to encourage you to accept a favorable plea agreement as long as the record demonstrates the plea was made knowingly, intelligently, and voluntarily.[112] However, a hearing may be required if there is evidence that your defense attorney engaged in coercive conduct and you made a motion to withdraw your plea.[113]

(b) Duress

Your guilty plea may not be voluntary if you entered the plea under circumstances of duress.[114] Circumstances of duress include situations where you were threatened or otherwise forced to plead guilty. If you are claiming that you were under duress, your claim must be well supported by evidence in the record.[115]

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was punished for exercising his right to a trial because he was sentenced based on the facts of uncharged crimes rather than the crime for which he was convicted); People v. Cosme, 203 A.D.2d 375, 376, 610 N.Y.S.2d 293, 294 (2d Dept. 1994) (finding that defendant was punished for exercising his right to a trial on two remaining charges when judge imposed a harsher sentence for the first charged crime than the judge had offered for all three charges).

106. People v. Tien, 228 A.D.2d 280, 281, 643 N.Y.S.2d 345(1st Dept. 1996) (affirming conviction because judge's informing defendant of possible sentences under the indictment was not coercion); People v. Jimenez, 179 A.D.2d 840, 840, 579 N.Y.S.2d 173, 174 (3d Dept. 1992) (finding that the reality that trial may expose defendant to a harsher sentence is not sufficient to establish coercion).

107. People v. Sung Min, 249 A.D.2d 130, 132, 671 N.Y.S.2d 480, 481 (1st Dept. 1998) (acourt wrongly burdens the defendant's exercise of his right to trial when it indicates he will receive the maximum sentence, or maximum consecutive sentences, after trial, but a significantly lighter sentence after a plea.).

108. People v. Lesame, 239 A.D.2d 801, 802, 657 N.Y.S.2d 544, 545 (3d Dept. 1997); People v. Eaddy, 200 A.D.2d 896, 897, 606 N.Y.S.2d 928, 929 (3d Dept. 1994).

109. *See* People v. Jones, 44 N.Y.2d 76, 81, 375 N.E.2d 41, 44, 404 N.Y.S.2d 85, 88 (1978) (citing People v. O'Neill, 7 N.Y.2d 867, 164 N.E.2d 869, 196 N.Y.S.2d 998 (1959)).

110. United States v. Goodwin, 457 U.S. 368, 381–82, 102 S. Ct. 2485, 2493, 73 L. Ed. 2d 74, 86 (1982) (After initially expressing an interest in pleading on misdemeanor charges, respondent decided not to plead guilty and requested a trial by jury. While the misdemeanor charges were still pending, the prosecutor brought a felony charge arising out of the same incident as the misdemeanor charges. Respondent moved to set aside the verdict on the ground of prosecutorial vindictiveness, but the Court held that the prosecutor was allowed to increase the charges).

111. Bordenkircher v. Hayes, 434 U.S. 357, 363, 98 S. Ct. 663, 668, 54 L. Ed. 2d 604, 611 (1978) (holding no constitutional violation occurred when prosecutor re-indicted defendant for a more serious offense after defendant refused to plead guilty). *But see* Blackledge v. Perry, 417 U.S. 21, 28–29, 94 S. Ct. 2098, 2103, 40 L. Ed. 2d 628, 635 (1974) (holding prosecutor who sought higher charges on retrial violated constitutional rights of defendant by coercing him not to exercise right to a new trial).

112. *See, e.g.*, People v. Babcock, 304 A.D.2d 912, 913, 758 N.Y.S.2d 412, 414 (3d Dept. 2003) (holding that "counsel's advice to accept the plea offer to avoid the possibility of a harsher sentence after trial does not, contrary to defendant's contention, constitute undue pressure or coercion"); People v. Coco, 220 A.D.2d 312, 313, 650 N.Y.S. 2d 636 (1st Dept. 1995) (finding no coercion where defendant claimed he was "almost forced" by his attorney to accept a favorable plea offer because of evidence on record that plea was voluntary, knowing, and intelligent); People v. Franklin, 211 A.D.2d 453, 453, 621 N.Y.S.2d 857, 857(1st Dept. 1995) (finding no coercion when defendant claimed he "felt pressured" to plead guilty, because the allocution showed the plea was voluntary, knowing, and intelligent).

113. People v. Gonzalez, 171 A.D.2d 413, 566 N.Y.S.2d 639, 640 (1st Dept. 1991) (remanding for a hearing because the record was too incomplete to determine if the plea was coerced by counsel and because the evidence raised a question of attorney conflict of interest).

114. *See* People v. Flowers, 30 N.Y.2d 315, 319, 284 N.E.2d 557, 558–59, 333 N.Y.S.2d 393, 395–96 (1972) (finding that defendant suffered duress during guilty plea because of sexual abuse and beatings in local jail; after entering guilty plea, defendant inquired if he could finally be moved to another jail).

115. *See* People v. Flowers, 30 N.Y.2d 315, 317, 284 N.E.2d 557, 557, 333 N.Y.S.2d 393, 394 (1972) ("[Duress] is ... often asserted, and entitled more often than not to short shrift when supported only by the convicted defendant's say-so." Evidence in the record was sufficient to show duress, as it showed "that prison conditions were intolerable in that

Even if duress was only part of the reason for your plea, you must still be given the option to withdraw your plea.[116] The situation causing duress must be severe enough to make your decision involuntary or unintelligent.[117] Simply claiming to be frightened or upset at the time of your plea will not be severe enough to constitute duress. Further, fear of the death penalty is also not enough to render your guilty plea unconstitutional.[118] The United States Supreme Court has found that a guilty plea encouraged by fear of the death penalty is not considered involuntary.[119]

(c) Not Understanding the Charges

If you do not know or understand the true nature of the charges against you, your plea cannot be voluntary and intelligent.[120] In assessing whether you fully understand the charges, the court will attempt to determine that a factual relationship exists between the acts that you say you have committed and the crime to which you are pleading guilty.[121] This is accomplished in the "plea allocution" or "plea colloquy," where the court will require you to admit the facts of your case that are the necessary elements of the crime with which you are charged.[122] If your description of the case presents doubt that you are guilty of the charged crime, the court must conduct further inquiry to determine that you understand the charges to which you are pleading guilty.[123] If you do not or will not admit a fact that is an element of the crime, the judge should not accept your guilty plea without further inquiry or clarification, unless it can easily be inferred from the facts.[124]

However, if you plead guilty to a lesser crime than the one you were charged with originally, the court is not required to match the facts of your case with the elements necessary for that charge.[125] Additionally, if you plead guilty while asserting that you are innocent or do not recall the crime, the court may sentence you without requiring you to admit the facts making up the crime, as long as your plea is entered knowingly,

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defendant was sexually abused, beaten, and in potential danger of his life, so long as he remained in the local jail."); People v. Nash, 288 A.D.2d 937, 732 N.Y.S.2d 201, 201 (4th Dept. 2001) (refusing to allow defendant to withdraw a plea based on a duress claim because defendant's allegation of having been beaten in the holding center was not supported in the record).

116. People v. Flowers, 30 N.Y.2d 315, 319, 284 N.E.2d 557, 558, 333 N.Y.S.2d 393, 395 (1972) (finding it "immaterial that the hearing court did not believe that the alleged duress was the *only* motivation for the plea") (emphasis added).

117. *See* People v. Wood, 207 A.D.2d 1001, 617 N.Y.S.2d 248 (4th Dept. 1994).

118. People v. Van Dyne, 179 Misc. 2d 467, 469, 685 N.Y.S.2d 591, 593 (Co. Ct. Monroe County 1999). *See also* Brady v. United States, 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747, (1970) (holding that where defendant was advised by competent counsel and tendered his plea after his codefendant, who had already given a confession . . . . defendant's plea of guilty was not rendered involuntary he was gripped by fear of the death penalty.).

115. Brady v. United States, 397 U.S. 742, 747, 90 S. Ct. 1463, 1468, 25 L. Ed. 2d 747, 756 (1970).

120. People v. Moore, 71 N.Y.2d 1002, 1005, 525 N.E.2d 740, 741, 530 N.Y.S.2d 94, 95 (1988) (citing Henderson v. Morgan, 426 U.S. 637, 645 n.13, 96 S. Ct. 2253, 2257 n.13, 49 L. Ed. 2d 108, 114 n.13 (1976)). *See also* Bousley v. United States, 523 U.S. 614, 618–19, 118 S. Ct. 1604, 1609, 140 L. Ed. 2d 828, 837 (1998) (stating that if neither defendant, nor his counsel, nor the trial court correctly understood the essential elements of the crime with which defendant was charged, defendant's guilty plea would be invalid under due process clause).

121. *See* People v. Serrano, 15 N.Y.2d 304, 308, 206 N.E.2d 330, 332, 258 N.Y.S.2d 386, 388–89 (1965).

122. *See* People v. Lopez, 71 N.Y.2d 662, 664–65, 525 N.E.2d 5, 5–6, 529 N.Y.S.2d 465, 466 (1988); *see also* People v. Zeth, 148 A.D.2d 960, 538 N.Y.S.2d 963, 963-64 (4th Dept. 1989) (finding admission of the facts necessary for each offense to which defendant pleaded guilty).

123. People v. Lopez, 71 N.Y.2d 662, 666, 525 N.E.2d 5, 6–7, 529 N.Y.S.2d 465, 466–67 (1988).

124. *See* People v. Lopez, 71 N.Y.2d 662, 666 & n.2, 525 N.E.2d 5, 7 & n.2, 529 N.Y.S.2d 465, 467 & n.2 (1988) (holding that an indication that a guilty plea is "improvident or baseless" may trigger a judge to inquire further).

125. People v. Clairborne, 29 N.Y.2d 950, 951, 280 N.E.2d 366, 329 N.Y.S.2d 580 (1972) (holding that "a bargained guilty plea to a lesser crime makes unnecessary a factual basis for the particular crime confessed"). *See also* People v. Anderson, 63 A.D.3d 1617, 1617, 879 N.Y.S.2d 784, 784 (4th Dept. 2009) (applying the *Clairborne* rule).

voluntarily, and intelligently.[126] If the court is aware of a possible defense given the facts of your case, the judge must inform you of it and determine that you knowingly waive the defense.[127]

While the court will attempt to ensure that you understand the charges through the plea discussion, it will consider all of the circumstances surrounding your plea. Failure to admit an element of the crime may not in itself raise a constitutional question if the court determines based on the circumstances that you understood the nature of the charges against you and that you voluntarily and intelligently pleaded guilty to the charges.[128] Additionally, your defense counsel's explanation of the nature of the offense may be enough to guarantee that you understand the nature of the charges.[129]

### (d) Not Understanding the Consequences of a Guilty Plea

In order to plead guilty, you must understand the rights you are giving up by doing so.[130] In most states, the trial judge will inform you of your rights and ask you to acknowledge that you are waiving these rights. The judge is not required to recite any specific list of rights you are giving up before accepting a guilty plea, but must ensure that you were not coerced, that you know what you are doing, and that you generally understand the rights you give up by pleading guilty.[131] If your defense counsel explains the effects of a guilty plea, that explanation may be enough to ensure your plea is knowledgeable and intelligent.[132] In addition to the direct consequences of your guilty plea, if you are not a United States citizen, your defense counsel must inform you of the risk of deportation.[133]

However, the judge is only required to make sure you know the direct consequences of your plea, not the collateral consequences.[134] A direct consequence "is one which has a definite, immediate and largely automatic effect on defendant's punishment."[135] A collateral consequence is something that affects you in particular because of your personal characteristics, such as your immigration or parole status.[136] Examples of collateral consequences are the "loss of the right to vote or travel abroad, loss of civil service employment,

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126. This is called an *Alford* plea. *See* North Carolina v. Alford, 400 U.S. 25, 37–38, 91 S. Ct. 160, 167–68, 27 L. Ed. 2d 162, 171–72 (1970) (affirming conviction of defendant who could not recall the events surrounding the crime, but confronted with overwhelming evidence against him, knowingly, voluntarily, and intelligently pleaded guilty to a lesser charge); People v. Francabandera, 33 N.Y.2d 429, 434–35, 310 N.E.2d 292, 294, 354 N.Y.S.2d 609, 612–13 (1974) (applying the *Alford* rule where a defendant pleaded guilty to a lesser crime even though he did not remember committing the crime and finding that defendant's plea was voluntary and intelligent).

127. People v. Costanza, 244 A.D.2d 988, 989, 665 N.Y.S.2d 487, 488 (4th Dept. 1997); *see also* People v. Braman, 136 A.D.2d 382, 384, 527 N.Y.S.2d 104, 105 (3d Dept. 1988) (vacating a guilty plea in part because a defendant's statement to the court, that he was so "loaded" at the time the offense was committed that he had no recollection of the events, not only pertained to the impairment of his ability to honestly admit guilt, but also clearly raised the possibility of an effective defense of intoxication).

128. People v. Moore, 71 N.Y.2d 1002, 1005, 525 N.E.2d 740, 741–42, 530 N.Y.S.2d 94, 95–96 (1988).

129. *See* Henderson v. Morgan, 426 U.S. 637, 647, 96 S. Ct. 2253, 2258, 49 L. Ed. 2d 108, 115–16 (1976) (finding that it is appropriate in most cases to presume that defendant's attorney explained the nature of the crime in enough detail that defendant understood what he was pleading to, but not where defendant had low mental capacity and where the trial court found as a fact that defendant's attorney did not explain the element of intent).

130. Henderson v. Morgan, 426 U.S. 637, 645 n.13, 96 S. Ct. 2253, 2258 n.13, 49 L. Ed. 2d 108, 114 n.13 (1976).

131. *See* People v. Nixon, 21 N.Y.2d 338, 353, 234 N.E.2d 687, 695–96, 287 N.Y.S.2d 659, 670–71 (1967) (finding that it is up to the court's discretion to decide how far it should go in questioning a defendant before accepting a guilty plea); *see also* People v. Carty, 96 A.D.3d 1093, 1097, 947 N.Y.S.2d 617, 621 (3d Dept. 2012) (finding that trial courts are under no obligation to advise a defendant of collateral consequences of a guilty plea. Though defense counsel must inform clients of the risk of deportation if it is a collateral consequence of pleading guilty, a trial judge need not do so).

132. *See* People v. Harris, 61 N.Y.2d 9, 16–17, 459 N.E.2d 170, 173, 471 N.Y.S.2d 61, 64 (1983) ("[T]here is no requirement that the Judge conduct a *pro forma* inquisition in each case on the off-chance that a defendant who is adequately represented by counsel may nevertheless not know what he is doing.").

127. Padilla v. Kentucky, 130 S. Ct. 1473, 1483, 176 L.Ed.2d 284 (2010) (Defense attorney had a duty to "advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences . . . [and] when the deportation consequence is truly clear . . . the duty to give correct advice is equally clear.").

134. People v. Catu, 4 N.Y.3d 242, 244, 825 N.E.2d 1081, 1082, 792 N.Y.S.2d 887, 888 (2005). *See also* Zhang v. United States, 506 F.3d 162, 167 (2d Cir. 2007) (stating that a court does not need to "inform a defendant about the 'collateral' consequences of a guilty plea").

135. People v. Ford, 86 N.Y.2d 397, 403, 657 N.E.2d 265, 267, 633 N.Y.S.2d 270, 272 (1995)

130. *See* Part B of this Chapter.

loss of a driver's license, loss of the right to possess firearms, or an undesirable discharge from the Armed Services."[137]

If the judge or your attorney fails to inform you of the collateral consequences of a conviction, it will not usually make your plea unknowing, involuntary, or unintelligent.[138] However, one collateral consequence that your defense counsel *must* inform you about is the possibility of deportation.[139] Depending on where you live, the trial court may not have to inform you of the risk of deportation, even if your defense counsel does.[140]

(e) Misrepresentation or Incorrect Information

If you plead guilty based on the judge's or prosecutor's misrepresentation of fact or false information that they provided, your plea was not voluntary and intelligent.[141] In challenging a plea based on misrepresentation, you must show that you relied on the incorrect information when you entered your guilty plea, and that you would have pleaded not guilty and gone to trial if you had received the correct information.[142] For example, if you received incorrect or misleading sentencing information and you would have pled "not guilty" if you had received the correct information, a guilty plea would not be voluntary, knowing, and intelligent.[143]

(f) Broken Promises

If you pleaded guilty because you were persuaded by a promise that was not kept or a misrepresentation by the prosecutor or the court, your plea was not voluntary and not intelligent, and it must either be removed or the promise must be honored.[144] However, the court is not required to impose the sentence you agreed upon with the prosecutor. But if the court determines the sentence in the plea bargain agreement is not acceptable and should be increased, it must give you the option to withdraw the plea or accept the harsher sentence.[145] Furthermore, if the court states on the record the sentence it expects to impose when it accepts the guilty plea, it must grant the sentence unless the pre-sentence report or facts that later become available show that the sentence would not be appropriate.[146]

A prosecutor must uphold your plea agreement unless you fail to obey it or other circumstances justify breaking the promise.[147] If you fail to perform promises that are part of the plea agreement, the prosecution no longer has to uphold your plea agreement and may re-charge you. The courts often require very strict compliance and complete cooperation with the terms of your plea agreement.[148] A violated plea agreement

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137. People v. Ford, 86 N.Y.2d 397, 403, 657 N.E.2d 265, 267–68, 633 N.Y.S.2d 270, 272–73 (1995).

138. People v. Ford, 86 N.Y.2d 397, 403, 657 N.E.2d 265, 267–68, 633 N.Y.S.2d 270, 272–73 (1995).

134. Padilla v. Kentucky, 130 S. Ct. 1473, 176 L.Ed.2d 284 (2010).

135. People v. Carty, 96 A.D.3d 1093, 1097, 947 N.Y.S.2d 617, 621 (3d Dept. 2012).

141. Randall v. Rothwax, 161 A.D.2d 70, 76, 560 N.Y.S.2d 409, 413 (1st Dept. 1990) (finding that "a plea induced by materially false information imparted by a trial judge, has been coerced and cannot be permitted to stand").

142. *See for example,*, People v. Burnett, 221 A.D.2d 355, 355, 633 N.Y.S.2d 365, 366 (2d Dept. 1995) (affirming the court's decision not to permit a withdrawal of the plea based on incorrect sentencing information because the information would not have had an effect on defendant's decision to enter a guilty plea).

143. People v. Gotte, 125 A.D.2d 331, 508 N.Y.S.2d 607, 608 (2d Dept. 1986); People v. Camacho, 102 A.D.2d 728, 729, 476 N.Y.S.2d 566, 567–68 (1st Dept. 1984).

144. People v. Selikoff, 35 N.Y.2d 227, 241, 318 N.E.2d 784, 793, 360 N.Y.S.2d 623, 636 (1974) (citing Santobello v. New York, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971)).

145. People v. Michael, 190 A.D.2d 758, 593 N.Y.S.2d 292, 293 (2d Dept. 1993) (finding error when court imposed a greater sentence than agreed to in the plea bargain without permitting defendant to withdraw the plea); People v. Easterling, 191 A.D.2d 579, 581, 594 N.Y.S.2d 805, 807 (2d Dept. 1993) (finding error when the court vacated the guilty plea and ordered a trial, rather than permitting defendant to decide whether or not to maintain the guilty plea). *See also* People v. Selikoff, 35 N.Y.2d 227, 238–39, 318 N.E.2d 784, 792, 360 N.Y.S.2d 623, 634 (1974) (affirming lower court decision that guilty pleas negotiated with the prosecution and entered into in reliance on promised sentences were still valid despite the fact that sentencing courts later imposed harsher sentences, as defendants failed to take advantage of the opportunity given to withdraw their guilty pleas).

146. People v. Selikoff, 35 N.Y.2d 227, 240, 318 N.E.2d 784, 792–93, 360 N.Y.S.2d 623, 635 (1974) (stating that an opinion of the pleading court as to the prospective sentence was sufficient to constitute a promise by that court).

147. *See* Santobello v. New York, 404 U.S. 257, 262, 92 S. Ct. 495, 499, 30 L. Ed. 2d 427, 433 (1971) ("[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.").

148. *See, for example*, Ricketts v. Adamson, 483 U.S. 1, 8–9, 107 S. Ct. 2680, 2685, 97 L. Ed. 2d 1, 9–10 (1987)

may not present a "double jeopardy" issue and allows the government to prosecute even higher charges.[149]Double jeopardy prevents a criminal defendant from being tried twice for the same offense.[150]

Even if the specific plea agreement is not broken, other circumstances may release the prosecution from the bargain, such as committing additional crimes or not appearing for sentencing after the agreement.[151] Some of these circumstances may not allow the court to sentence you to greater punishment than you and the prosecutor had agreed in your plea bargain, unless you are given the opportunity to withdraw the plea.[152] However, if you do not tell the prosecutor relevant information, and it is brought to light, such as a prior felony record or failure to comply with the terms of the agreement, the court may impose a more severe sentence without allowing you to withdraw the plea.[153]

The prosecution is free to control the terms of the plea agreement, like requiring all co-defendants to accept the plea. Additionally, the prosecution may refuse to uphold the plea agreement if the terms are not met.[154] If the court decides to impose a lesser sentence than the prosecutor and you agreed upon, the prosecutor also has the ability to withdraw consent to the plea.[155] Before the court accepts your plea, the prosecutor may withdraw the offer for a plea bargain at any time, without violating your constitutional rights.[156] Normally, the prosecutor will not attempt to withdraw the offer, unless you have violated the agreement, been arrested, or misrepresented your past criminal record. Also, if a prosecutor promises not to recommend a sentence, later in court a prosecutor may not recommend a sentence.[157] Even implied actions suggesting a possible sentence may be a violation of the agreement by the prosecutor.[158]

To avoid disputes about what promises were made when the guilty plea was entered, the entire plea agreement should explicitly and clearly appear in the court record.[159] Promises that do not appear in the record will rarely be enforced.[160] Federal courts have held that unclear agreements are generally interpreted against the government and in favor of the defendant.[161]

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(assuming that defendant breached an agreement to testify against co-defendants, even though he testified against them at trial, because he refused to testify when the case was reversed on appeal and remanded for a new trial).

149. *See* Ricketts v. Adamson, 483 U.S. 1, 8, 107 S. Ct. 2680, 2685, 97 L. Ed. 2d 1, 10–11 (1987) (holding that defendant's "breach of the plea arrangement to which the parties had agreed removed the double jeopardy bar to prosecution of respondent on the first-degree murder charge").

144. U.S. Const. amend. V.

151. *See* People v. Gianfrate, 192 A.D.2d 970, 973, 596 N.Y.S.2d 933, 935 (3d Dept. 1993) (affirming court's decision to impose longer sentence than reached in plea bargain when defendant was clearly informed that failure to appear at sentencing would result in higher sentence, and defendant failed to appear). *But see* People v. Moreno, 196 A.D.2d 850, 602 N.Y.S.2d 28, 28–29 (2d Dept. 1993) (holding court could not impose lengthier sentence than reached in plea bargain on defendant who did not appear at sentencing but was not informed that she would receive a higher sentence for failing to appear).

152. People v. Annunziata,105 A.D.2d 709, 709, 481 N.Y.S.2d 148,149 (2d Dept. 1984).

153. *See* People v. DaForno, 73 A.D.2d 893, 895, 424 N.Y.S.2d 195, 197 (1st Dept. 1980).

154. People v. Antonio, 176 A.D.2d 528, 528, 574 N.Y.S.2d 718, 719 (1st Dept. 1991); *see also* Gribetz v. Edelstein, 66 A.D.2d 788, 788, 410 N.Y.S.2d 873, 874 (2d Dept. 1978) (holding that a district attorney could dictate the terms under which he would consent to accept a plea agreement, which in this case was that both co-defendants must accept his plea bargain or his offer would be withdrawn and consent to the plea withheld).

155. People v. Farrar, 52 N.Y.2d 302, 307–08, 419 N.E.2d 864, 866, 437 N.Y.S.2d 961, 963 (1981).

156. *See* Mabry v. Johnson, 467 U.S. 504, 510–11, 104 S. Ct. 2543, 2548, 81 L. Ed. 2d 437, 444–45, (1984) (holding that a withdrawn offer could not induce a guilty plea, and a subsequently accepted plea was not the result of government deception).

157. *See* Santobello v. New York, 404 U.S. 257, 262, 92 S. Ct. 495, 499, 30 L. Ed. 2d 427, 433 (1971) (remanding case and allowing defendant to withdraw plea or be resentenced because prosecutor did not uphold the promise of former prosecutor not to recommend sentence).

158. People v. Tindle, 61 N.Y.2d 752, 754, 460 N.E.2d 1354, 1355, 472 N.Y.S.2d 919, 920 (1984) (finding that the prosecutor's description of the case as "very, very serious" and reference to defendant's flight and perjury was essentially a request for a lengthy prison term and in breach of the agreement not to take a position in sentencing). *See also* People v. Di Tullio, 85 A.D.2d 783, 784, 445 N.Y.S.2d 322, 324 (3d Dept. 1981) (finding that prosecutor inadvertently breached the essence of the agreement not to take a part in sentencing when he released information on the crime to the news media).

159. People v. Selikoff, 35 N.Y.2d 227, 244, 318 N.E.2d 784, 795, 360 N.Y.S.2d 623, 639 (1974), *cited in* People v. Davey, 193 A.D.2d 1108, 1108, 598 N.Y.S.2d 637, 638 (4th Dept. 1993).

160. *See, for example*, People v. Hood, 62 N.Y.2d 863, 865, 466 N.E.2d 161, 161–62, 477 N.Y.S.2d 621, 622 (1984) (holding that defendants were not entitled to specific performance of an alleged plea bargain that was never formally entered on the record, stating that the statements on the record by the prosecutor rejecting the proposed plea bargain at issue were inconsistent with defendants' contention that there had been an prior off-the-record unconditional acceptance

When you claim that a prosecutor violated an agreement, the major legal question that comes up is if the agreement was actually broken. The courts will not use your personal understanding of the agreement to determine whether it was broken, but will take into account the side of the prosecution as well.[162]

If the prosecutor breaks the agreement, the sentencing court has the discretion to determine whether the appropriate remedy is specific performance or withdrawal of the plea.[163] Specific performance of a plea agreement requires the government to comply with the original terms of the agreement. A different judge will usually perform the re-sentencing, and the prosecutor will be compelled to maintain the plea agreement. If the court allows you to withdraw the plea, you would then go to trial, unless another plea agreement could be reached.

In some situations, specific performance, or an order by a court to perform a specific act, of the plea agreement may be the only means to serve justice.[164] For example, defendants who place themselves in a position of "no return" by carrying out the obligations of a cooperative plea agreement, such as waiving the privilege against self-incrimination or testifying extensively against co-defendants, would not be restored to their pre-plea status by a withdrawn plea, and they are therefore entitled to specific performance.[165]

### (g) Ineffective Assistance of Counsel

If your defense attorney inappropriately advised you to plead guilty and you can prove ineffective assistance of counsel, your plea may not meet the constitutional standards of "knowing, voluntary, and intelligent."[166] Simply being unsatisfied or unhappy with your assigned counsel will not make your guilty plea involuntary or unknowing.[167] You must prove:

(1) The advice of your counsel did not meet the competency standard demanded of attorneys in criminal cases,[168] and
(2) If your counsel had not made these errors, there would have been a reasonable possibility that you would have pleaded "not guilty" and insisted on a trial.[169]

If you *did not* accept the agreement because your defense attorney did not give you adequate advice, you must show that if you did not receive ineffective advice from your counsel there is a reasonable probability that:

(1) The plea offer would have been presented to the court (in other words, the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), and
(2) That the court would have accepted its terms, and
(3) The conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.[170]

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by the People); In re S., 55 N.Y.2d 116, 120–21, 432 N.E.2d 777, 779, 447 N.Y.S.2d 905, 907 (1982) (refusing to recognize an off-the-record promise if it is flatly contradicted by the record, if the defendant stated no other promises were made to induce the guilty plea, or if inconsistent terms appeared in the record).

161. United States v. Cimino, 381 F.3d 124, 127 (2d Cir. 2004) (holding that "plea agreements are subject to ordinary contract law principles, except that any ambiguity is resolved 'strictly against the Government.'" (quoting United States v. Ready, 82 F.3d 551, 559 (2d Cir. 1996)). *See also* United States v. Giorgi, 840 F.2d 1022, 1026 (1st Cir. 1988) (construing lack of clarity in agreement against government because of disparity in bargaining power); United States v. Anglin, 215 F.3d 1064, 1067 (9th Cir. 2000) (holding that "plea agreements are generally construed according to the principles of contract law, and the government, as drafter, must be held to an agreement's literal terms").

162. People v. Cataldo, 39 N.Y.2d 578, 580, 349 N.E.2d 863, 864, 384 N.Y.S.2d 763, 763 (1976).

163. Santobello v. New York, 404 U.S. 257, 263, 92 S. Ct. 495, 499, 30 L. Ed. 2d 427, 433 (1971).

164. People v. McConnell, 49 N.Y.2d 340, 347–48, 402 N.E.2d 133, 136, 425 N.Y.S.2d 794, 797–98 (1980).

165. People v. Danny G., 61 N.Y.2d 169, 171–72, 461 N.E.2d 268, 268–69, 473 N.Y.S.2d 131, 131–32 (1984); People v. McConnell, 49 N.Y.2d 340, 347–48, 402 N.E.2d 133, 136, 425 N.Y.S.2d 794, 797–98 (1980).

166. Brady v. United States, 397 U.S. 742, 748, 90 S. Ct. 1463, 1469, 25 L. Ed. 2d 747, 756 (1970). *See JLM*, Chapter 12, "Appealing Your Conviction Based on Ineffective Assistance of Counsel."

167. People v. Artis, 199 A.D.2d 839, 840, 605 N.Y.S.2d 545, 546 (3d Dept. 1993).

168. Hill v. Lockhart, 474 U.S. 52, 56–57, 106 S. Ct. 366, 369, 88 L. Ed. 2d 203, 208–09 (1985).

169. Hill v. Lockhart, 474 U.S. 52, 57, 106 S. Ct. 366, 369, 88 L. Ed. 2d 203, 209 (1985).

170. Lafler v. Cooper, 132 S. Ct. 1376, 1385, 182 L. Ed. 2d 398, 407 (2012). See also Missouri v. Frye, 132 S. Ct. 1399, 1409, 182 L. Ed. 2d 379, 391 (2012) (laying out a similar test for the situation where defense counsel fails to communicate a plea offer to his client).

If the court finds that your attorney's performance did not affect the plea bargaining process, it will assume your plea was entered knowingly, voluntarily, and intelligently.[171] This means you will have waived any non-jurisdictional claims on which you could have appealed your conviction, including ineffective assistance of counsel.

A claim of ineffective assistance of counsel may exist in plea bargaining cases where counsel was not aware of the applicable law and unable to advise the defendant if it was best to accept a plea bargain[172] or where the defense attorney did not place the terms of the plea bargain on the record.[173] The claim may also exist where an attorney did not communicate the existence of a plea offer to the defendant, even when the defendant maintained his innocence and wanted to go to trial.[174]

You do not have a claim of ineffective assistance of counsel with respect to plea bargaining if:

(1) Your defense counsel held a reasonable but incorrect interpretation of the applicable criminal law;[175]
(2) Your defense counsel did not advise you to accept or reject a plea bargain;[176]
(3) Your defense counsel did not participate in the proceedings to withdraw your guilty plea, you had the opportunity to present your case or no basis to withdraw the plea, and counsel's lack of participation worked no discernable prejudice;[177]
(4) Your defense counsel did not engage in certain pretrial procedures and this decision was based on a legitimate strategy;[178] or
(5) You make a general claim that the plea was ill-advised, without reference to specific instances of ineffectiveness.[179]

Ineffective assistance of counsel claims should be raised on a motion to vacate the judgment and conviction under New York Criminal Procedure Law Section 440.10.[180]

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171. *See, for example,* People v. Dunn, 261 A.D.2d 940, 940, 690 N.Y.S.2d 349, 349 (4th Dept. 1999).

172. People v. Butler, 94 A.D.2d 726, 462 N.Y.S.2d 263, 263–64 (2d Dept. 1983) (holding that defendant did not receive effective assistance of counsel where defense counsel did not know the applicable criminal laws, could not effectively counsel defendant to take a plea bargain for a lesser charge, and was not prepared for trial).

173. People v. Roy, 122 A.D.2d 482, 483-84, 505 N.Y.S.2d 242, 243–44 (3d Dept. 1986) (finding ineffective assistance of counsel where defendant pleaded guilty after being told incorrectly that his burglary charge would be dismissed after completing alcohol counseling but defense attorney did not put his understanding on the record where prosecution could have corrected the mistake).

174. People v. Alexander, 136 Misc. 2d 573, 585, 518 N.Y.S.2d 872, 879 (Sup. Ct. Bronx County 1987).

175. *See* People v. Angelakos, 70 N.Y.2d 670, 673–74, 512 N.E.2d 305, 307, 518 N.Y.S.2d 784, 786 (1987) (finding that the defendant received adequate representation by her attorney where, even if attorney correctly understood one element of the crime, attorney could have reasonably still advised defendant to plead guilty and where defendant "sought the result she received" when she avoided multiple criminal charges and jail time).

176. People v. Hoffman, 256 A.D.2d 1195, 1195, 685 N.Y.S.2d 142, 143 (4th Dept. 1998) (holding that defendant received effective assistance of counsel where defendant's counsel did not advise defendant to accept a plea bargain but defendant was aware of the plea bargain and aware of the consequences of not accepting it).

177. People v. Rodriguez, 188 A.D.2d 623, 623–24, 591 N.Y.S.2d 846, 846 (2d Dept. 1992) (holding that defendant failed to show that he would have gone to trial if he had received effective assistance and that the failure of the defense counsel in withdrawing the plea was not ineffective counseling because defendant was still given an opportunity to be heard); People v. Campbell, 180 A.D.2d 808, 809, 580 N.Y.S.2d 445, 447 (2d Dept. 1992) (finding that the defense counsel's lack of participation in the defendant's application to withdraw his plea did not amount to ineffective representation because there was no basis for withdrawing the plea and the defendant's accomplice had received a substantially greater sentence after a trial).

178. People v. Rivera, 71 N.Y.2d 705, 709, 525 N.E.2d 698, 701, 530 N.Y.S.2d 52, 54 (1988), cited in People v. Mouck, 145 A.D.2d 758, 758–59, 535 N.Y.S.2d 273, 274–75 (3d Dept. 1988) (finding that defendants did not show ineffective assistance of counsel where they did not show that there was no legitimate reason for defense counsel not to seek a pretrial hearing or that the reason that defense counsel did not seek a pretrial hearing was illegitimate).

179. *See* People v. Florian, 145 A.D.2d 645, 645-46, 536 N.Y.S.2d 705, 705 (2d Dept. 1988) (holding allegations of counsel's bad advice to enter a guilty plea are not sufficient to make out a claim of ineffective assistance of counsel; defendant must allege specific instances of ineffective representation).

180. People v. Angelakos, 70 N.Y.2d 670, 673, 512 N.E.2d 305, 307, 518 N.Y.S.2d 784, 786 (1987) (citing People v. Brown, 45 N.Y.2d 852, 854, 382 N.E.2d 1149, 1149, 410 N.Y.S.2d 287, 287 (1978)). *See JLM* Chapter 20 for more information on § 440.10 of the New York Criminal Procedure Law.

(h) Not competent to enter a guilty plea

You must be competent to realize you are entering a guilty plea. If you were determined competent to stand trial, you are also considered to be competent to plead guilty.[181] Conversely, if you were not competent to assist in your own defense at trial, you would not have been competent to enter a guilty plea.[182] If the trial court was aware of the possibility of mental incompetence at the time the plea was entered, it should have ordered a mental examination to determine if you were competent to enter the plea.[183] However, if there was no indication of incompetence in the record, and you did not seek an examination, the court was not required to order one.[184] The right to a competency hearing is not waived by a guilty plea, and it may be raised for the first time on appeal.[185] However, based on how courts have ruled in the past, it may be very difficult for you to successfully bring a competency claim on appeal in New York.[186]

## E. Withdrawing from a Plea Bargain

In New York, you must move to withdraw a guilty plea in the trial court[187] or move to vacate the judgment of conviction and sentence[188] in the trial court to preserve any claims for appellate review that the plea was unconstitutional.[189]

### 1. Withdrawal Prior to Sentencing

You may withdraw from a plea bargain that you have already accepted if the plea did not meet the constitutional standards of knowing, voluntary, and intelligent, or if the court in its discretion permits you to withdraw from the guilty plea.[190]

If the court does not accept a bargain you have entered with the prosecution, you may be able to withdraw your guilty plea and maintain your right to a trial. In this circumstance, your guilty plea cannot be used as evidence against you during the trial.[191] However, certain types of plea arrangements do not allow withdrawal of a guilty plea after sentencing. If you have agreed to a *non-binding* recommendation for a particular sentence, the court may accept the bargain but decide not to follow the recommendation, and you cannot withdraw the plea at that point.[192]

In New York, you may be able to file a motion to withdraw a guilty plea. To withdraw, a court will first determine why you wish to withdraw the plea.[193] The courts do not have a specific fact-finding procedure to decide your motion. A limited review may be enough as long as you are given a reasonable opportunity to

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181. Godinez v. Moran, 509 U.S. 389, 400–01, 113 S. Ct. 2680, 2687, 125 L. Ed. 2d 321, 333-34 (1993) (holding that no greater standard of competency is required for entering a guilty plea than for standing trial).

182. *See* People v. Francabandera, 33 N.Y.2d 429, 435, 310 N.E.2d 292, 295, 354 N.Y.S.2d 609, 613 (1974) (stating that the defendant (1) must know what he was doing when he entered the plea and (2) cannot be forced to plead guilty due to a mental condition which prevented him from assisting in his own defense at trial).

183. People v. Frazier, 114 A.D.2d 1038, 1038–39, 495 N.Y.S.2d 478, 478–79 (2d Dept. 1985).

184. People v. Dover, 227 A.D.2d 804, 805, 642 N.Y.S.2d 438, 439 (3d Dept. 1996) (finding a presumption of defendant's sanity, which is not rebutted merely by showing past mental illness).

185. People v. Armlin, 37 N.Y.2d 167, 172, 332 N.E.2d 870, 874, 371 N.Y.S.2d 691, 697 (1975).

186. *See, for example.*, People v. Rivas, 206 A.D.2d 549, 550, 614 N.Y.S.2d 753, 754 (2d Dept. 1994) (defendant's coherent responses during plea proceedings was enough to prove his competence for purposes of the plea); People v. Hall, 168 A.D.2d 310, 311 562 N.Y.S.2d 641, 642 (1st Dept. 1990) (suicidal defendant's plea upheld since his responses during the plea allocution were more than just "monosyllabic responses" and reflected normal thinking).

187. N.Y. Crim. Proc. Law § 220.60(3) (McKinney 2013).

188. N.Y. Crim. Proc. Law §§ 440.10, 440.20 (McKinney 2013).

189. People v. Lopez, 71 N.Y.2d 662, 665–66, 525 N.E.2d 5, 6, 529 N.Y.S.2d 465, 466 (1988). *See also* People v. Mackey, 77 N.Y.2d 846, 849, 569 N.E.2d 442, 442, 567 N.Y.S.2d 639, 639–40 (1991) (denying appeal because defendant must raise each issue in the motion to withdraw plea or it is not preserved for appeal).

190. N.Y. Crim. Proc. Law § 220.60(3) (McKinney 2002).

191. *See* Fed. R. Crim. P. 11(f); *see also* Kercheval v. United States, 274 U.S. 220, 225, 47 S. Ct. 582, 584, 71 L. Ed. 1009, 1013 (1927) (plea of guilty withdrawn by leave of court is inadmissible in subsequent prosecution); People v. Spitaleri, 9 N.Y.2d 168, 173, 173 N.E.2d 35, 37, 212 N.Y.S.2d 53, 56 (1961) ("We should say flatly and finally that a plea so allowed to be withdrawn is out of the case forever and for all purposes.").

192. *See* Fed. R. Crim. P. 11(e).

193. *See, e.g.,* People v. Stone, 193 A.D.2d 838, 597 N.Y.S.2d 538 (3d Dept. 1993) (holding that defendant's mere conclusory statements about innocence, coercion, and distress are not sufficient).

present your claims.[194] Courts will allow you to withdraw a plea that was not voluntary, knowing, and intelligent.[195] Defendants are also allowed to withdraw a guilty plea if they do not receive the sentence the prosecutor promised to recommend to the judge,[196] if the sentence cannot legally be enforced,[197] if the prosecutor did not have the authority to make the promise,[198] or if the defendant was not adequately informed about the effects of the plea. Courts are not required to allow a defendant to withdraw the plea if the defendant breaches the plea agreement,[199] or if the plea was entered knowingly, voluntarily, and intelligently.[200]

A withdrawn guilty plea cannot be admitted as evidence against you in the trial, or in any subsequent civil trial or administrative proceeding.[201] Additionally, statements made in plea discussions or the factual allocution cannot be admitted in a trial.[202]

### 2. Withdrawal Following Sentencing

In New York, if you want to withdraw from a guilty plea after you have been sentenced, you must make a motion to vacate the judgment of conviction and sentence under Article 440 of the New York Criminal Procedure Law.[203] This motion preserves your claim that the guilty plea was not entered voluntarily, knowingly, or intelligently.[204] These issues must be raised in the court of first instance (the trial court) and cannot be raised for the first time in an appeal.[205] If, however, when you pleaded guilty you stated facts that

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194. People v. Tinsley, 35 N.Y.2d 926, 927, 324 N.E.2d 544, 544, 365 N.Y.S.2d 161, 162 (1974) (stating defendants will rarely be allowed an evidentiary hearing and often a limited interrogation by the court will be sufficient). *See also* People v. Brown, 205 A.D.2d 436, 436, 613 N.Y.S.2d 903, 904 (1st Dept. 1994) (remanding for further proceedings because court did not inquire into defendant's allegations of coercion which were the basis for his motion to withdraw the guilty plea). *But see* People v. Braun, 167 A.D.2d 164, 165, 561 N.Y.S.2d 244, 245 (1st Dept. 1990) (upholding court's decision to deny motion to withdraw guilty plea without further inquiry because motion was based on coercion and ineffective assistance of counsel, and the court had observed counsel's representation and defendant's bare allegations were unsupported by the record).

195. People v. Jones, 44 N.Y.2d 76, 81, 375 N.E.2d 41, 44, 404 N.Y.S.2d 85, 88 (1978). *See* United States v. Baum, 380 F. Supp. 2d 187, 203 (S.D.N.Y. 2005) (holding that, in determining whether there is a fair and just reason for withdrawal of a guilty plea, courts may look to "whether the defendant has raised a significant question about the voluntariness of the original plea"); People v. Britt, 200 A.D.2d 401, 402, 606 N.Y.S.2d 208, 209 (1st Dept. 1994) (ordering evidentiary hearing to determine if plea was involuntarily entered). Note that facts suggesting the lack of a knowing and voluntary decision must appear in the record. People v. Coco, 220 A.D.2d 312, 650 N.Y.S. 2d 636 (1st Dept. 1995) (denying defendant's motion to withdraw guilty plea because record showed it was entered knowingly, voluntarily, and intelligently).

196. Santobello v. New York, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971); People v. Selikoff, 35 N.Y.2d 227, 241, 318 N.E.2d 784, 793, 360 N.Y.S.2d 623, 636 (1974), *cited in* People v. Frederick, 45 N.Y.2d 520, 524, 382 N.E.2d 1332, 1334, 410 N.Y.S.2d 555, 558 (1978) ("[A] guilty plea induced by an unfulfilled promise either must be vacated or the promise honored.").

197. People v. Cameron, 193 A.D.2d 752, 753, 597 N.Y.S.2d 724, 725 (2d Dept. 1993); People v. Tubbs, 157 A.D.2d 915, 916, 550 N.Y.S.2d 441, 442–43 (3d Dept. 1990).

198. People v. Selikoff, 35 N.Y.2d 227, 241, 318 N.E.2d 784, 793, 360 N.Y.S.2d 623, 636 (1974).

199. People v. Madden, 186 A.D.2d 49, 49, 587 N.Y.S.2d 637, 637 (1st Dept. 1992).

200. *See, for example* People v. Coco, 650 N.Y.S. 2d 636, 220 A.D.2d 312 (1st Dept. 1995) (denying defendant's motion to withdraw guilty plea because record showed it was entered knowingly, voluntarily, and intelligently).

201. *See* Fed. R. Crim. P. 11(f), Fed. R. Evid. 410; *see also* Kercheval v. United States, 274 U.S. 220, 225, 47 S. Ct. 582, 584, 71 L. Ed. 1009, 1013 (1927) (holding that a guilty plea withdrawn by leave of court is inadmissible in subsequent prosecution); People v. Spitaleri, 9 N.Y.2d 168, 173, 173 N.E.2d 35, 37, 212 N.Y.S.2d 53, 56 (1961) (holding that a withdrawn guilty plea is completely out of the case and cannot be used for any purpose).

202. Fed. R. Crim. P. 11(f), Fed, R. Evid. 410; *see also* People v. Moore, 66 N.Y.2d 1028, 1030, 489 N.E.2d 1295, 1296, 499 N.Y.S.2d 393, 394 (1985) (stating that the contents of plea allocution, in addition to withdrawn guilty plea, cannot be used against defendant for any purpose).

203. *See JLM*, Chapter 20, "Using Article 440 of the New York Criminal Procedure Law to Attack Your Unfair Conviction or Illegal Sentence."

204. *See, for example.*, People v. Lopez, 71 N.Y.2d 662, 665–66, 525 N.E.2d 5, 6, 529 N.Y.S.2d 465, 466 (1988) (trial court made appropriate inquiry of defendant during guilty plea hearing to ensure that defendant's plea to first-degree manslaughter was knowing and voluntary, and thus defendant waived any challenge to allocution on appeal based on his failure to move in trial court for vacation of conviction or withdrawal of guilty plea).

205. *See* People v. Pellegrino, 60 N.Y.2d 636, 637, 454 N.E.2d 938, 467 N.Y.S.2d 355, 356 (1983) (holding that because defendant failed to raise his arguments that he should be relieved of his guilty plea in the court of first instance, his conviction must be affirmed).

clearly cast doubt on your guilt and the court did not ask more questions to ensure that it was a valid guilty plea, there is a narrow exception that allows you to challenge on direct appeal the court's acceptance of your plea.[206] In your motion to vacate the judgment, you must clearly state the reasons why it should be vacated; if you fail to list an issue in your motion, you will not be able to raise it on appeal.[207] Chapter 20 of the *JLM* provides a thorough explanation of the process of vacating a sentence and conviction under Article 440.

206. People v. Lopez, 71 N.Y.2d 662, 666, 525 N.E.2d 5, 6–7, 529 N.Y.S.2d 465, 466–67 (1988) (noting that where the defendant's recitation of the facts casts doubt upon the defendant's guilt or otherwise calls into question the voluntariness of the plea, the trial court has a duty to inquire further to ensure that the guilty plea is both knowing and voluntary. If the trial court fails to conduct this inquiry, the defendant's right to appeal may be preserved even if the issue was not raised in the court of first instance.).

207. *See, for example,* People v. Mackey, 77 N.Y.2d 846, 847, 569 N.E.2d 442, 442, 567 N.Y.S.2d 639, 639 (1991) (holding that defendant did not preserve error for review where he did not raise his claim that he should have been permitted to withdraw his plea, because plea allocution suggested availability of agency defense, in his motion to withdraw plea or otherwise in court of first instance).