# CHAPTER 40

# PLEA BARGAINING*

## A. Introduction

The vast majority of criminal convictions in the United States result from guilty pleas. In federal court, 90% of cases end in guilty pleas.[1] In New York, 94% of felony cases and 99% of misdemeanor cases end in guilty pleas.[2] This Chapter addresses the plea-bargaining process and how to appeal a conviction based on a plea, focusing primarily on federal and New York State law.[3]

A plea bargain is a deal where the prosecutor agrees to reduce your charges or sentence in return for a guilty plea. Because a guilty plea has the same effect as a conviction,[4] pleading guilty gives up many important constitutional rights associated with the trial process, as well as multiple grounds to appeal. You should carefully consider the consequences of any plea deal before agreeing.

The government must follow certain procedures when entering into a plea bargain agreement with you. If you accepted a plea agreement, entered a guilty plea before a judge, or were sentenced and incarcerated, but the government failed to meet its legal requirements, you may be able to appeal or challenge your conviction or sentence. Depending on your claim, you may be able to challenge your conviction that resulted from a guilty plea through a habeas corpus petition or through filing a petition under Article 440 of the New York Criminal Procedure Law.[5]

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 in this Chapter. Although many states have modeled their plea-bargaining systems on federal law, the system in each state is unique. So, while this Chapter can still be useful to help you understand the basics, you should be sure to do research in your law library on the relevant statutes and court decisions on plea bargaining in your state.

This Chapter is divided into four parts. **Part B** lists the points you may want to consider before accepting a plea, such as the constitutional considerations, considerations related to appealing your conviction after your guilty plea, and other consequences that may come with your guilty plea. **Part C** describes the process of negotiating a plea bargain with the prosecutor, the types of plea agreements, rights waivers, and discrimination during the plea-bargaining process. **Part D** explains the requirements that courts must meet when accepting a plea bargain and the factors that may make a plea invalid. Finally, **Part E** discusses how to withdraw from a guilty plea prior to sentencing and what you must do to preserve some claims after sentencing.

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* This Chapter was revised by Christopher Cox based on previous versions written by Bryan Hull and Syed Wasim.

[1] John Gramlich, *Fewer Than 1% of Federal Criminal Defendants Were Acquitted in 2022,* PEW RSCH. CTR. (June 14, 2023), *available at* https://www.pewresearch.org/short-reads/2023/06/14/fewer-than-1-of-defendants-in-federal-criminal-cases-were-acquitted-in-2022/ (last visited Apr. 14, 2024).

[2] Alice Frontier et al., *The New York State Trial Penalty*, NEW YORK STATE ASS'N CRIM. DEF. LAWS. (Mar. 26, 2021), *available at* https://cdn.ymaws.com/nysacdl.org/resource/resmgr/docs/nystrpenreportupdatedfinal.pdf (last visited Apr. 14, 2024).

[3] The New York statute providing for plea bargaining is N.Y. CRIM. PROC. LAW § 220.10 (McKinney 2014). In the federal system, Rule 11 of the Federal Rules of Criminal Procedure governs plea bargaining. FED. R. CRIM. P. 11.

[4] N.Y. CRIM. PROC. LAW § 1.20(13) (McKinney 2018); Boykin v. Alabama, 395 U.S. 238, 242, 89 S. Ct. 1709, 1711–1712, 23 L. Ed. 2d 274, 279 (1969). *But see* Ohio v. Johnson, 467 U.S. 493, 500 n.9, 104 S. Ct. 2536, 2541 n.9, 81 L. Ed.2d 425, 434 n.9 (1984) (holding that a guilty plea does not invoke double jeopardy protections for less serious associated charges that are not plead guilty in the same way that "an adjudication on the merits after full trial" would.).

[5] *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."

## B. Plea Bargaining Considerations

To convince you to plead guilty, the prosecutor may offer various sentencing benefits, including reducing or dropping some of the charges or recommending a particular sentence to the court. Plea bargaining could have benefits for both you and the prosecutor. Plea bargaining is often faster than going to trial. A plea bargain establishes your guilt for a specific criminal charge against you, which removes the uncertainty about the outcome of the trial. In addition, accepting a plea agreement often reduces the risk that you could receive the maximum sentence. This phenomenon is often referred to as the "trial penalty," where people opting for a trial often face harsher penalties than those who came to a plea agreement.[6] The trial penalty may also explain why your attorney may be reluctant to go to trial.[7] 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. The speedier process also usually helps the prosecutor avoid having to spend time and resources preparing for trial.

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 bargain that a prosecutor offers and you always have the right to go to trial without fear of vindictiveness (taking revenge).[8] It is ultimately your choice, and *only* your choice, whether to accept a plea bargain.

### 1. Constitutional Considerations

When you accept a plea bargain, you give up important constitutional rights in exchange for a possibly more favorable sentence than you could receive if convicted after trial. When you enter a guilty plea, the constitutional rights that you waive (give up) include: the right to a trial by jury,[9] the right to testify or not to testify at trial,[10] the privilege against self-incrimination (meaning the right to not reveal information about criminal acts that you may have committed),[11] the right to confront your

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[6] *See* NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE NEW YORK STATE TRIAL PENALTY: THE CONSTITUTIONAL RIGHT TO TRIAL UNDER ATTACK 61–65 (2021), *available at* https://www.law.umich.edu/special/exoneration/documents/New_York_State_Trial_Penalty_Report_FINAL_03262021.pdf (last visited Mar. 11, 2024). In an analysis of state conviction data in New York County, researchers found that 66% of defendants experienced a trial penalty. The rate was higher for misdemeanors than it was for felonies. The trial penalty was found to be more severe when the original offer in the plea agreement was higher. For example, when the plea offered a sentence of five years, the expected sentence after a trial was found to be 7.5 years and when the plea offered a sentence of twenty years, the expected sentence after a trial was found to be twenty-eight years. *See also* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT 20 (2018), *available at* https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf (last visited Mar. 11, 2024). The trial penalty has also been documented in the federal system, where there is an average difference of 7.5 years between sentences from plea agreements compared to after trial.

[7] 94% of New York State attorneys reported that the existence of the trial penalty plays a role in the criminal defense practice. NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE NEW YORK STATE TRIAL PENALTY: THE CONSTITUTIONAL RIGHT TO TRIAL UNDER ATTACK 6 (2021), *available at* https://www.law.umich.edu/special/exoneration/documents/New_York_State_Trial_Penalty_Report_FINAL_03262021.pdf (last visited Mar. 11, 2024).

[8] Prosecutorial vindictiveness is when a prosecutor chooses to retaliate against a defendant who was exercising a legal right, such as choosing to go to trial. Blackledge v. Perry, 417 U.S. 21, 25, 94 S. Ct. 2098, 2101, 40 L. Ed. 2d 628, 633 (1974) (citing North Carolina v. Pearce, 395 U.S. 711, 724, 89 S. Ct. 2072, 2080, 23 L. Ed. 2d 656, 669 (1969) ("[I]mposition of a penalty upon the defendant for having successfully pursued a statutory right of appeal or collateral remedy would be . . . a violation of due process of law"). See Section C(3) of this Chapter, "Prosecutorial Discrimination in Plea Bargaining," for more information.

[9] *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) ("A defendant who enters such a plea simultaneously waives several constitutional rights . . . ."); *see also* FED. R. CRIM. P. 11(b)(1)(c).

[10] *See* Boykin v. Alabama, 395 U.S. 238, 243, 89 S. Ct. 1709, 1712, 23 L. Ed. 2d 274, 279–280 (1969).

[11] *See* Boykin v. Alabama, 395 U.S. 238, 243, 89 S. Ct. 1709, 1712, 23 L. Ed. 2d 274, 279–280 (1969); Malloy v.

accusers,[12] the right to plead "not guilty,"[13] 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,[14] 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.

### 2. Considerations Related to Appealing Your Conviction

Once you have accepted a plea bargain, it will be much harder to challenge your conviction. 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."[15] A guilty plea communicates that you do not intend to challenge the issue of your guilt.[16] The conviction is based on the validity of your plea and not on the constitutional or legal sufficiency of the proceedings.[17] By pleading guilty, you waive claims that your rights were violated in the legal proceedings before you entered the plea.[18] You also waive the right to challenge the underlying conviction[19] and the ability to appeal any non-jurisdictional defects in the case.[20]

### 3. Defects that Remain Appealable After Conviction

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Hogan, 378 U.S. 1, 6, 84 S. Ct. 1489, 1492, 12 L. Ed. 2d 653, 658 (1964) (holding that the privilege against self-incrimination applies in state criminal trials); *see also* U.S. CONST. amend. V.

[12] *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); U.S. CONST. amend. VI.

[13] U.S. CONST. amend. V; N.Y. CRIM. PROC. LAW § 220.10(1) (McKinney 2014); *see also* FED. R. CRIM. P. 11(b)(1)(F).

[14] 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) (affirming the right to compel favorable witnesses to testify in state criminal cases).

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

[16] People v. Campbell, 73 N.Y.2d 481, 486, 539 N.E.2d 584, 586, 541 N.Y.S.2d 756, 758 (1989). *But see* Menna v. New York, 423 U.S. 61, 62, 96 S. Ct. 241, 242, 46 L.Ed.2d 195, 197 (1975) ("Where the State is precluded by the United States Constitution from hailing a defendant into court on a charge, federal law requires that a conviction on that charge be set aside even if the conviction was entered pursuant to a counseled plea of guilty."); Class v. United States, 138 S. Ct. 798, 806–807, 200 L. Ed. 2d 37, 46–47 (2018) (holding that a defendant making a constitutional claim on a statute they previously pled guilty to is permissible, as the defendant was not contradicting any of the elements of his plea).

[17] People v. Di Raffaele, 55 N.Y.2d 234, 240, 433 N.E.2d 513, 515–516, 448 N.Y.S.2d 448, 450–451 (1982) (holding that when the defendant has pleaded guilty, the court is no longer concerned with any claims related to the proceedings that led to the conviction, only on the sufficiency of the plea itself).

[18] 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;" his conviction rests directly on the sufficiency of his plea, not on the legal or constitutional sufficiency of any proceedings which might have led to his conviction after trial."). *But see* Schmidt v. State, 909 N.W.2d 778, 789 (Iowa 2018) (holding that convicted defendants can attack their pleas when claiming actual innocence even if the attack is extrinsic to those pleas as well as overruling cases that do not allow defendants to attack their pleas based on extrinsic grounds when they claim innocence).

[19] People v. Seaberg, 74 N.Y.2d 1, 8, 541 N.E.2d 1022, 1025, 543 N.Y.S.2d 968, 971 (1989) ("[A] defendant, by pleading guilty, forfeits the right to challenge the underlying conviction and loses many privileges and protections granted defendants by courts.").

[20] *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, 319–320, 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.").

There are a couple of defects (errors) in the legal proceedings that you can still challenge after pleading guilty. These appealable 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 are directly about the guilty plea itself; or

(3) Defects in relation to the sentence you received, which was not part of the plea agreement.

Some particular situations that can fall under these categories include:

- If the indictment or other accusatory instrument (which are the documents that accuse you of a crime) did not charge an offense;[21]
- If the prosecutor knows the conviction or indictment is only supported by false evidence;[22]
- If the conviction was based on an unconstitutional statute;[23]
- If you did not voluntarily, knowingly, or intelligently enter your guilty plea (for example, if you were forced to plead guilty or did not understand the plea agreement);[24]
- If the prosecution violated the terms of the plea agreement;[25]
- If the proceedings did not meet the standards of a constitutional speedy trial;[26]
- If the judge encouraged you to plead guilty;[27]
- If you were given an illegal,[28] excessively harsh, or excessively severe sentence;[29] or

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[21] *See* Bousley v. United States, 523 U.S. 614, 618–619, 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, his counsel and the court had not correctly understood the "essential elements of the crime with which he was charged", subsequently making the plea not voluntary and intelligent); People v. Iaonnone, 45 N.Y.2d 589, 600, 384 N.E.2d 656, 664, 412 N.Y.S.2d 110, 117–118 (1978) (holding that an indictment is jurisdictionally defective "only if it does not effectively charge the defendant with the commission of a particular crime"); People v. Guerrero, 28 N.Y.3d 110, 116, 65 N.E.3d 51, 56, 42 N.Y.S. 3d 80, 85 (2016) ("Insufficiency of an indictment's factual allegations, however, does not constitute a jurisdictional defect that is reviewable by [the] Court, and, once a guilty plea has been entered 'the sufficiency of the evidence before the Grand Jury cannot challenged.'" (citations omitted)); 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); People v. Alejandro, 70 N.Y.2d 133, 511 N.E.2d 71, 517 N.Y.S.2d 927 (1987) (holding that a defendant may challenge an informational as facially insufficient after being convicted at trial if there are no non-hearsay allegations for each element of the crime in the charging document).

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

[23] People v. Lee, 58 N.Y.2d 491, 493, 448 N.E.2d 1328, 1329, 462 N.Y.S.2d 417, 418 (1983); Class v. United States, 138 S. Ct. 798, 806–807, 200 L. Ed. 2d 37, 46–47 (2018).

[24] *See* People v. Seaberg, 74 N.Y.2d 1, 11–12, 541 N.E.2d 1022, 1026–1027, 543 N.Y.S.2d 968, 972–973 (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").

[25] Puckett v. United States, 556 U.S. 129, 137–138, 129 S. Ct. 1423, 1430, 173 L. Ed. 2d 266, 276 (2009) (holding that the government violating the terms of a plea agreement is analogous to a contractual violation, that may lead the defendant being entitled to recission of the agreement or forcing the government to adhere to the agreement); People v. Di Raffaele, 55 N.Y.2d 234, 241, 433 N.E.2d 513, 516, 448 N.Y.S.2d 448, 451 (1982) (holding that when a defendant's plea agreement was conditioned on conditions that could not be met, the proper remedy was to allow him to withdraw his plea and not to grant specific performance of the plea bargain). See part D(2)(f) of this chapter for on this topic.

[26] People v. Blakley, 34 N.Y.2d 311, 314, 313 N.E.2d 763, 764, 357 N.Y.S.2d 459, 461–462 (1974).

[27] United States v. Davila, 569 U.S. 597, 609–610, 133 S. Ct. 2139, 2148–2149, 186 L.Ed.2d 139, 150–151 (2013). However, the defendant must show that there was prejudice from this encouragement. This means the defendant has to show that if it was not for the judge's encouragement they would not have agreed to the plea.

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

[29] 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, 272 A.D.2d 951, 709 N.Y.S.2d 265 (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).

- If you had ineffective assistance of counsel during the plea-bargaining process.[30]

Because these issues are not waived by a guilty plea, you cannot waive these claims simply by pleading guilty and you can challenge your conviction based on one of these claims. There may also be instances where state law allows you to plead guilty without waiving certain rights.[31]

### 4. Collateral Consequences of Your Guilty Plea

Since a guilty plea is roughly the same as a conviction from trial, you will face the same consequences as if you had been convicted of the charge.[32] For example, you should consider the effects a conviction will have on your parole, housing, probation, immigration status, employment status, and professional licensure.[33] These side effects resulting from a conviction are often called "collateral effects." Your lawyer may not be obligated to advise you about these side effects.[34] However, if you are not an American citizen, your attorney *must* advise you of the collateral consequences that may affect your immigration status.[35]

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[30] *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 § 440.10 (McKinney 2023). See *JLM*, Chapter 20, "Using Article 440 of the New York Criminal Procedure Law to Attack Your Unfair Conviction of Illegal Sentence," for information on Article 440 motions, and *JLM*, Chapter 12, "Appealing Your Conviction Based on Ineffective Assistance of Counsel," for information about ineffective assistance of counsel.

[31] Lefkowitz v. Newsome, 420 U.S. 283, 293, 95 S. Ct. 886, 891–892, 43 L. Ed. 2d 196, 204 (1975) ("[W]hen state law permits a defendant to plead guilty without forfeiting his right to judicial review of specified constitutional issues, the defendant is not foreclosed from pursuing those constitutional claims in a federal habeas corpus proceeding.").

[32] The only difference between a guilty plea and a conviction gained from trial is related to the process of getting the conviction, or in other words, whether or not you had a trial first. *See* Kercheval v. United States, 274 U.S. 220, 223, 47 S. Ct. 582, 583, 71 L. Ed. 1009, 1012 (1927) ("A guilty plea . . . is itself a conviction. Like a verdict of jury, it is conclusive."); N.Y. CRIM. PROC. LAW § 1.20(13) (McKinney 2018); Boykin v. Alabama, 395 U.S. 238, 242, 89 S. Ct. 1709, 1711–1712, 23 L. Ed. 2d 274, 279 (1969).

[33] AMERICAN BAR ASSOCIATION, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: JUDICIAL BENCH BOOK 5 (2018) *available at* https://www.ojp.gov/pdffiles1/nij/grants/251583.pdf (last visited Mar. 11, 2024). People who have convictions face many barriers, such as having a more difficult time obtaining employment, denial or eviction of public housing, lower life term earnings, receiving public assistance, suspension of licensure, and possible deportation. *See also* N.Y. GEN. BUS. LAW §89-f (McKinny 2022) This regulation is one example of the many collateral consequences that can arise from a conviction. The regulation bars the employment of anyone as a security guard in NY if they have previously been convicted of a "serious offense". Note that there can be similar consequences even from non-criminal proceedings, such as a finding of neglect or abuse in family court preventing healthcare or childcare employment.

[34] *See, e.g.*, United States v. Ayala, 601 F.3d 256, 270 (4th Cir. 2010) ("[Defendant's] plea was not invalid simply because he was not informed of the possibility that it might be used against him in a subsequent federal prosecution."); Ruelas v. Wolfenbarger, 580 F.3d 403, 408 (6th Cir. 2009) ("[A] defendant need not know all the possible consequences of his plea, like the loss of his right to vote or own a gun, or the effect of future sentence ...."); Virsnieks v. Smith, 521 F.3d 707, 715 (7th Cir. 2008) ("The [sex offender] registration order was a collateral consequence about which the State was not required to inform him."); Moore v. Hinton, 513 F.2d 781, 782–783 (5th Cir. 1975) ("[A] defendant need not be informed, before pleading guilty to a charge of driving while intoxicated, that as a collateral consequence of his conviction, his driver's license will be suspended."); Meaton v. United States, 328 F.2d 379, 381 (5th Cir. 1964) ("There was no abuse of discretion in the refusal of the court to grant leave to withdraw the plea of guilty because the appellant failed to understand the collateral effects such as the loss of civic rights [which, in this case, included voting and foreign travel]."). *But see* Padilla v. Kentucky, 599 U.S. 356, 360, 130 S. Ct. 1473, 1478, 176 L. Ed. 2d 284, 290 (2010) ("We agree with Padilla that constitutionally competent counsel would have advised him that his conviction for drug distribution made him subject to automatic deportation."); Bauder v. Dept. of Corr. Fla., 619 F.3d 1272, 1275 (11th Cir. 2010) ("Even if one could argue that the law was unclear, the Supreme Court has noted that when the law is unclear a criminal defense attorney must advise his client that the 'pending criminal charges may carry a risk of adverse [collateral] consequences.'" (citing Padilla v. Kentucky, 559 U.S. 356, 369, 130 S. Ct. 1473, 1483, 176 L. Ed. 2d 284, 296 (2010))); See section D(2)(d) of this chapter for more information on if you made a guilty plea but did not understand its consequences.

[35] *See* Padilla v. Kentucky, 559 U.S. 356, 368–369, 130 S. Ct. 1473, 1483, 176 L. Ed. 2d 284, 295—296 (2010)

The collateral effects are specific to you as an individual and generally result from actions taken by agencies (such as parole boards, employers, or immigration).[36] 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.[37]

### C. Plea Bargaining Agreements

There is no constitutional right to a plea bargain, and the prosecutor does not have to negotiate with you for a reduced sentence.[38] 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).[39] The prosecutor also has the discretion to decide what plea bargain to offer you, as long as the offer does not violate the law.[40] In New York, state statutes limit the kinds of plea bargains that prosecutors can offer you. The law sets limits on how low of a sentence prosecutors can offer based on the underlying charge or for someone who has committed multiple felonies.[41] The prosecutor can require certain terms and conditions before agreeing to a plea bargain,[42] as long as the terms and conditions are reasonable[43] and do not deny basic fairness.[44]

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(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).

[36] United States v. Sambro, 454 F.2d 918, 920 (D.C. Cir. 1971); (noting a defendant faced deportation after pleading guilty to drug possession); *see also* People v. Ford, 86 N.Y.2d 397, 403, 657 N.E.2d 265, 267–268, 633 N.Y.S.2d 270, 272–273 (1995) (holding that a court is not under an obligation to inform defendant of many collateral consequences), *overruled in part by* People v. Peque, 22 N.Y.3d 168, 3 N.E.3d 617, 980 N.Y.S.2d 280 (2013) (noting that a court's failure to advise a defendant of potential deportation does affect the validity of the defendant's plea).

[37] Chaidez v. United States, 568 U.S. 342, 356, 133 S. Ct. 1103, 1112, 185 L.Ed.2d 149, 161 (2013) (holding that *Padilla* is confined to immigration related advice and noting that only a minority of courts had relief for material misrepresentations about collateral issues). However, some jurisdictions do allow a defense of misrepresentation. *See* Sims v. United States, 785 F. App'x 632, 634–635 (11th Cir. 2019) (*unpublished*) ("[A]ffirmative misadvice about the collateral consequences of a guilty plea may constitute ineffective assistance of counsel . . . .").

[38] Weatherford v. Bursey, 429 U.S. 545, 561, 97 S. Ct. 837, 846, 51 L. Ed. 2d 30, 43 (1977); ("[T]here is no constitutional right to plea bargain; the prosecutor need not do so if he prefers to go to trial."); *see also* People v. Bank, 28 N.Y.3d 131, 137, 65 N.E.3d 680, 683, 42 N.Y.S.3d 651, 654 (2016) ("[A] defendant is entitled to the effective assistance of competent counsel at the plea negotiations stage. A defendant, however, has no constitutional right to a plea bargain.").

[39] N.Y. CRIM. PROC. LAW § 220.10(2)–(4) (McKinney 2014); 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 indictment and could plead guilty to lesser-included offense only with permission of court and consent of the People).

[40] *See* N.Y. CRIM. PROC. LAW § 220.10(3)–(4) (McKinney 2014); 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 they will consent to accept a plea).

[41] *See* N.Y. CRIM. PROC. LAW § 220.10(5) (McKinney 2014). 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.

[42] People v. Antonio, 176 A.D.2d 528, 529, 574 N.Y.S.2d 718, 719 (1st Dept. 1991) (stating that "The prosecutor is free to dictate the terms under which he or she will agree to consent to accept a guilty plea, and where such terms are not met, consent may be withheld. Further, the withholding of such consent, by statutory mandate, renders the court without authority to accept a plea to anything less than the entire indictment.").

[43] *See* People v. Grant, 99 A.D.2d 536, 536, 471 N.Y.S.2d 325, 326 (2d Dept. 1984).

[44] *See* People v. White, 32 N.Y.2d 393, 399–401, 298 N.E.2d 659, 663–664, 345 N.Y.S.2d 513, 519–520 (1973)

Plea bargains in the federal system are governed by Rule 11 of the Federal Rules of Criminal Procedure.[45] 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. A prosecutor may allow you to plead to a lesser charge or drop certain charges in exchange for a guilty plea.[46] This type of agreement is sometimes called a "charge agreement." An example of a charge agreement would be an agreement with the prosecutor where the defendant pleads guilty for a lesser charge of manslaughter instead of murder. The prosecutor may propose a specific sentence or agree not to oppose your attorney's recommended sentence. However, you should remember that the actual sentence that you may be charged with is up to the judge.[47] 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 prosecutor's recommended sentence.[48] However, it is rare for a judge to find the prosecutor's recommended sentence unacceptable. In these rare cases, you may be unable to withdraw your plea if the judge has properly informed you of your lack of such a right.[49]

Another type of agreement the prosecutor may offer is a "cooperation agreement," in which you agree to cooperate with the government. For example, you may be asked to 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.[50] The plea is "conditioned" on the review of these legal issues. For example, if the trial court admits evidence that you think is inadmissible (should not be entered into evidence) and would be found to be inadmissible on appeal, you may enter a conditional plea based on this issue. If you then succeed on your appeal of this issue, you have the right to withdraw your guilty plea and then either go to trial or enter into another plea bargain.[51] A conditional plea cannot be made without the approval of the court and the prosecutor.[52] Note that conditional pleas are not valid in many states

(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).

[45] FED. R. CRIM P. § 11.

[46] *See* N.Y. CRIM. PROC. LAW § 220.10(3)–(4) (McKinney 2014); FED. R. CRIM. P. 11(c)(1)(A).

[47] *See* FED. R. CRIM. P. 11(c)(1)(B); United States v. Norris, 486 F.3d 1045, 1047 n. 1 (8th Cir.2007) (*en banc*) (plurality opinion) (stating that "The plea agreement was made in accordance with Fed. R. Crim. P. 11(c)(1)(B), under which a sentencing 'recommendation or request does not bind the court.'"); United States v. Gomez, 326 F.3d 971, 975 (8th Cir. 2003) (involving a plea agreement that did not bind the court); People v. Selikoff, 35 N.Y.2d 227, 241, 318 N.E.2d 784, 793, 360 N.Y.S.2d 623, 636 (1974) (noting that "Any attempt to undermine judicial control in the sentencing process must be rejected as must be any attempt to undermine the prosecutor's responsibility in recommending lesser pleas.").

[48] *See* FED. R. CRIM. P. 11(c)(1)(B); Lynch v. Overholser, 369 U.S. 705, 719, 82 S. Ct. 1063, 1072, 8 L.Ed.2d 211, 220 (1962) (stating that "This does not mean, of course, that a criminal defendant has an absolute right to have his guilty plea accepted by the court"); People v. Selikoff, 35 N.Y.2d 227, 242, 318 N.E.2d 784, 794, 360 N.Y.S.2d 623, 639 (1974).

[49] FED. R. CRIM. 11(c)(3); *see also* United States v. Villa-Vazquez, 536 F.3d 1189, 1201 (10th Cir. 2008) (holding that "The government's recommendation . . . was not binding on the court."); United States v. Camacho-Bordes, 94 F.3d 1168, 1175 (8th Cir. 1996) (finding that plea agreement, which promised that the "Government" would recommend against deportation, only bound the U.S. Attorney's Office and not the Immigration and Naturalization Service).

[50] FED. R. CRIM. P. 11(a)(2).

[51] FED. R. CRIM. P. 11(a)(2).

[52] FED. R. CRIM. P. 11(a)(2).

and most federal appeals courts.[53] In these jurisdictions, even if the trial court allows 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 (outside of your court's area of control) issue, such as an evidentiary error.[54] In New York, it is still permissible to challenge evidence like this in a motion, even after a guilty plea.[55]

A "*nolo contendere*" (no contest) plea may be available to defendants in the federal system or states other than New York, but this plea is not available in New York.[56] Defendants using this plea don't explicitly admit nor deny guilt, but will not contest the charges and waive rights in a way similar to that of a guilty plea.[57] An "*Alford*" guilty plea is similar, and is a type of guilty plea that is permissible in New York, but may not be in all states.[58] These pleas largely have the same effect on defendants as a guilty plea would, although there are minor differences between the two.[59] It is important to note that there may be negative collateral consequences for pleading *nolo contendere* or by an *Alford* plea, and it may cause more serious penalties due to a lack of "remorse" shown.[60]

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[53] *See* Marjorie Whalen, *"A Pious Fraud": The Prohibition of Conditional Guilty Pleas in Rhode Island*, 17 ROGER WILLIAMS U. L. REV. 480, 487–489 (2012) (discussing how many states prohibit conditional pleas, and how about half of the federal circuit courts used to prohibit conditional pleas prior to a 1983 statutory amendment in the Federal Rules Of Criminal Procedure explicitly allowed them.); FED. R. CRIM. P. 11(a)(2); *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) (McKinney 2011) maintains that denial of a motion to suppress evidence may be reviewed upon appeal from a conviction judgement even if that judgement is entered upon a guilty plea.

[54] *See also* People v. Thomas, 74 A.D.2d 317, 324–325, 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)

[55] N.Y. CRIM. PROC. LAW § 710.70(2) (McKinney 2011); *see also* People v. Thomas, 74 A.D.2d 317, 324–325, 428 N.Y.S.2d 20, 26 (2d Dept. 1980) (finding that "The State's statutory scheme already has provided an expansive approach to appealability by preserving the right to raise post-plea objection where suppression motions asserting claims of illegally obtained or improperly tainted evidence have been denied.").

[56] *See* People v. Daiboch, 265 N.Y. 125, 128, 191 N.E. 859, 860 (1934) (finding that "The plea of *non vult* or *nolo contendere* is an ancient plea in criminal cases still in use in some of the States but abolished here."); N.Y. CRIM. PROC. LAW § 220.10 (McKinney 2014).

[57] *See* Hudson v. United States, 272 U.S. 451, 457, 47 S. Ct. 127, 129, 71 L. Ed. 347, 352 (1926) (holding that a federal court may impose a prison sentence after accepting a plea of *nolo contendere*, a plea by which a defendant does not expressly admit their guilt, but nonetheless waives his right to a trial and authorizes the court for purposes of the case to treat him as if they were guilty).

[58] *See* North Carolina v. Alford, 400 U.S. 25, 36–38, 91 S. Ct. 160, 167–168 (1970) (holding that a person may properly plead guilty while maintaining their innocence if they have intelligently concluded that the plea is the best option and that the record strongly indicates their guilt); Silmon v. Travis, 95 N.Y.2d 470, 475, 718 N.Y.S.2d 704, 706, 741 N.E.2d 501, 503 (2000) ("In New York, such a plea is allowed only when, as in *Alford* itself, it is the product of a voluntary and rational choice, and the record before the court contains strong evidence of actual guilt.").

[59] *See* Jenny Elayne Ronis, *The Pragmatic Plea: Expanding Use of the* Alford *Plea to Promote Traditionally Conflicting Interests of the Criminal Justice System*, 82 TEMP. L. REV. 1389 (2010); Michael Conklin, *The* Alford *Plea Turns Fifty: Why it Deserves Another Fifty Years,* 54 CREIGHTON L. REV. 1 (2020). Since an *Alford* plea is a type of guilty plea, the principles of collateral estoppel apply towards defendants who make such a plea (defendants would be prohibited from making arguments in future litigation about issues from their guilty plea, as they already had a "chance" and motive to contest them in court). On the other hand, *nolo contendere* pleas would not implicate collateral estoppel.

[60] *See* Silmon v. Travis, 95 N.Y.2d 470, 472, 718 N.Y.S.2d 704, 705, 741 N.E.2d 501, 502 (2000) (holding that it was permissible for a parole board to consider a defendant's lack of remorse when applying for parole, when they had entered an *Alford* plea and maintained their innocence); Bryan H. Ward, *A Plea Best Not Taken: Why Criminal Defendants Should Avoid the* Alford *Plea*, 68 MO. L. REV. 913, 921–933 (2003). Since remorse is often an element of sentencing, defendants making an *Alford* may be subject to harsher penalties than someone who did not make such a plea. Seeking parole may also be difficult for a similar reason.

There are also other types of options that may be available to benefit you, such as an adjournment in contemplation of dismissal, or "ACD."[61] An adjournment in contemplation of dismissal is an adjournment (to push back until a later time) of the action for a certain period of time (up to 6 or 12 months), with the charge being dismissed at the end of the period.[62] An adjournment in contemplation of dismissal is not a conviction or an admission of guilt, and when it is dismissed, the charge will not appear on your criminal record.[63] However, these agreements often come with conditions, such as attending services, performing community service, or not getting arrested, that must be followed or else the charges can be reopened. In New York, an adjournment in contemplation of dismissal is only available for misdemeanor charges.[64]

New York courts generally refuse to enforce off-the-record promises that a defendant claims were made by the prosecutor.[65] Therefore, make sure that any promises given by prosecutors appear on the record.[66] 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.[67] The written agreement should contain every term that you have agreed upon.[68] 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 and have read the agreement closely. You also have the right for your attorney to help you receive your plea agreement and understand it.[69]

### 2. Rights Waivers

Many prosecutors will require you to waive certain rights in your plea bargain, such as a "privacy waiver" of the things you said to prosecutors during plea bargaining.[70] Courts will generally uphold

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[61] N.Y. CRIM. PROC. LAW § 170.55 (McKinney 2007). *See generally* Smith v. Bank of Am. Corp., 865 F. Supp. 2d 298, 302 (E.D.N.Y. 2012). This procedure may be called something different in other states, such as "probation before judgment," "pre-trial diversion," "deferred prosecution," or a "conditional discharge."

[62] N.Y. CRIM. PROC. LAW § 170.55 (2) (McKinney 2007).

[63] N.Y. CRIM. PROC. LAW § 170.55 (8) (McKinney 2007).

[64] N.Y. CRIM. PROC. LAW § 170.55 (McKinney 2007).

[65] *See* Siegel v. New York, 691 F.2d 620, 624 (2d Cir. 1982) ("[W]ith 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."); *In re* S., 55 N.Y.2d 116, 120, 432 N.E.2d 777, 779, 447 N.Y.S.2d 905, 907 (1982).

[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) (articulating the "desirability of having as complete a record as possible of the agreements and promises which have led to a guilty plea").

[67] *See generally* State v. Frey, 817 N.W.2d 436, 343 Wis. 2d 358, 453 (Wis. 2012) ("The plea agreement should be reduced to writing if at all possible."); Booth v. State, 174 P.3d 171, 179 (Wyo. 2008) ("It is, of course unfortunate, if not inexcusable, that a plea bargain of this magnitude . . . was not reduced to writing so that its perimeters could be better understood."). *But see* United States v. Graham, 704 F.3d 1275, 1278 n.5 (10th Cir. 2013) (plea agreement that was not reduced as a writing was still treated as a valid agreement). While some states or jurisdictions may still honor unwritten plea agreements, it is still wise to ensure that any such agreement be reduced to writing.

[68] *See generally* State v. Frey, 817 N.W.2d 436, 343 Wis. 2d 358, 453 (Wis. 2012); Booth v. State, 174 P.3d 171, 179 (Wyo. 2008).

[69] Missouri v. Frye, 566 U.S. 134, 143–144, 132 S. Ct. 1399, 1407–1408, 182 L. Ed. 2d 379, 389–390 (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, 566 U.S 156, 165–167, 132 S. Ct. 1376, 1385–1387. 182 L. Ed. 2d 398, 408–410 (2012) ("Its protections are not designed simply to protect the trial, even though 'counsel's absence [in these stages] may derogate from the accused's right to a fair trial.'"); *see* U.S. CONST. amend. VI.

[70] *See* United States v. Mezzanatto, 513 U.S. 196, 201, 115 S. Ct. 797, 801,130 L. Ed. 2d 697, 704 (1995); United States v. Jim, 786 F.3d 802, 809 (10th Cir. 2015) (holding that Rule 410 waivers are enforceable, even if the defendant ultimately does not plead guilty); FED. R. EVID. 410. In federal courts, Federal Rule of Evidence 410 normally protects defendants from statements they say to prosecutors during plea bargaining from being admitted into evidence against them. These "Mezzanatto" waivers allow prosecutors to use these statements against

and enforce these waivers.[71] Some prosecutors require you to waive your right to appeal your conviction. Courts will generally uphold this waiver, as long as you accepted it voluntarily, knowingly, and intelligently.[72] If you waive your right to appeal, you will lose the claims that are normally forfeited by entering a guilty plea, and you will also waive the right to appeal based on many of the claims that were not waived by the guilty plea itself. An appeals waiver, however, does not completely prevent your right to appeal, and you still can challenge the constitutionality of your sentence.[73]

Aside from an express waiver agreement with the prosecutor, entering a plea of guilty automatically waives other rights.[74] Entering a plea of guilty likely means you will not be able to challenge or appeal any issues that relate to trial or pretrial rights because these rights only protect you at trial.[75] Some issues that you may have waived when you entered your guilty plea include:

(1) no probable cause for arrest;[76]

(2) illegally obtained confession;[77]

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defendants later at trial, for both impeachment and their case in chief. *See also* Kyle Fleck, *Plea Negotiations: Why the Presumption of Waivability Does Not Apply to Federal Rule of Evidence 410*, 51 J. MARSHALL L. REV. 839, 859–861 (2018).

[71] *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); 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 can bargain these additional rights away and that a plea bargain itself is already bargaining away many of these rights, such as the right to a trial and the right to confront witnesses. *See also* Ricketts v. Adamson, 483 U.S. 1, 10, 107 S. Ct. 2680, 2685, 97 L. Ed. 2d 1, 11–12 (1987) (finding that the double jeopardy defense is waivable by pretrial agreement); Newton v. Rumery, 480 U.S. 386, 394, 107 S. Ct. 1187, 1193 94 L. Ed. 2d 405, 417 (1987) (stating that 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, 89 S. Ct. 1709, 1712, 23 L. Ed. 2d 274, 279 (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, 58 S. Ct. 1019, 1023, 82 L. Ed. 1461, 1467 (1938) (holding that the 6th Amendment right to counsel may be waived).As part of the bargain, once the more favorable sentence is received, the defendant must uphold their end of the bargain. *See* 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.

[72] United States v. Bushert, 997 F.2d 1343, 1351 (11th Cir. 1993) (holding that, in most circumstances, a judge must specifically discuss rights waiver with the 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).

[73] *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 that defendant can still challenge the legality of the sentence or the voluntariness of the plea even after waiving the right to appeal); Class v. United States, 138 S. Ct. 798, 803, 200 L.Ed.2d 37, 42 (2018) ("The question is whether a guilty plea by itself bars a federal criminal defendant from challenging the constitutionality of the statute of conviction on direct appeal. We hold that it does not".).

[74] People v. Sobotker, 61 N.Y.2d 44, 48, 459 N.E.2d 187, 189, 471 N.Y.S.2d 78, 80 (1984) ("In cases where a constitutional right survives a plea, we have held that a related statutory right is forfeited by the plea when the statute would confer on the defendant greater rights than the Constitution demands.").

[75] People v. Thomas, 74 A.D.2d 317, 321, 428 N.Y.S.2d 20, 24 (2d Dept. 1980); People v. Prescott, 66 N.Y.2d 216, 218, 486 N.E.2d 813, 814, 495 N.Y.S.2d 955, 956 (1985) (holding that defendant forfeited right to challenge the trial court's adverse ruling on her statutory previous prosecution claim when she pleaded guilty to a reduced charge).

[76] People v. Smith, 34 N.Y.2d 758, 759, 314 N.E.2d 875, 875, 358 N.Y.S.2d 135, 135 (1974) ("Defendants' claim that no probable cause existed for their arrest on the charge of loitering was waived when they pleaded guilty to that charge.")

[77] 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. 759, 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"); People v. Berger, 9 N.Y.2d 692, 693, 173 N.E.2d 243, 243, 212 N.Y.S.2d 425, 425 (1961) (reversing appellate court's denial of the defendant's writ of error

(3) problems with the form of the accusatory instrument;[78]
(4) improperly failing to provide a bill of particulars;[79]
(5) insufficient factual allegation in the indictment (unless it had been preserved by a previous on-the-record motion);[80]
(6) the composition of the grand jury;[81]
(7) the sufficiency of grand jury minutes;[82]
(8) a denial of a motion to dismiss the indictment in the interests of justice;[83]
(9) the correctness of a denial of a motion for a separate trial;[84]
(10) challenges to the underlying facts of the plea;[85]
(11) the racial composition of prospective jury pool (which includes peremptory challenges, or objections to jurors without explicit explanation why);[86]
(12) violation of your speedy trial rights under N.Y. Crim. Proc. Law § 30.30;[87]
(13) violation of your double jeopardy rights under N.Y. Crim. Proc. Law § 40.20[88] or the Constitution;[89]
(14) statutory or transactional immunity (blanket immunity for crimes related to testimony);[90]
(15) a claim of vindictive or selective prosecution;[91]
(16) statute of limitations;[92]

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*coram nobis* [equivalent of writ of habeas corpus for people who are not incarcerated] and remitting for trial of defendant's claim that he was coerced into pleading guilty to a lesser charge).

[78] *See* People v. Iannone, 45 N.Y.2d 589, 600, 384 N.E.2d 656, 664, 412 N.Y.S.2d 110, 117 (1978).

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

[80] People v. Iannone, 45 N.Y.2d 589, 600, 384 N.E.2d 656, 663–664, 412 N.Y.S.2d 110, 117–118 (1978).

[81] *See* People v. Siciliano, 40 N.Y.2d 996, 997, 359 N.E.2d 700, 700, 391 N.Y.S.2d 106, 106 (1976); People v. Green, 146 A.D.2d 281, 283, 50 N.Y.S.2d 95, 96, (4th Dept. 1989) ("Numerous other rights of both constitutional and non-constitutional dimension, however, have been held not to survive, including:…[a] challenge based on allegedly discriminatory composition of the grand jury)

[82] People v. O'Neal, 44 A.D.2d 830, 830, 355 N.Y.S.2d 21, 22 (2d Dept. 1974); People v. Thomas, 74 A.D.2d 317, 321, 428 N.Y.S.2d 20, 24 (2d Dept. 1980) ("If the defendant's complaint relates to the loss of trial and pretrial rights and safeguards, a plea of guilty surrenders both the constitutional and nonconstitutional protections. Thus…the sufficiency of Grand Jury minutes . . . [is] effectively waived by a guilty plea.").

[83] People v. Travis, 205 A.D.2d 648, 648, 613 N.Y.S.2d 252, 253 (2d Dept. 1994); People v. Merlo, 195 A.D.2d 576, 576, 600 N.Y.S.2d 494, 494 (2d Dept. 1993).

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

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

[86] People v. Green, 75 N.Y.2d 902, 904–905, 553 N.E.2d 1331, 1332, 554 N.Y.S.2d 821, 822 (1990).

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

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

[89] *See* People v. Muniz, 91 N.Y.2d 570, 574–575, 696 N.E.2d 182, 185–186, 673 N.Y.S.2d 358, 361–362 (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).

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

[91] People v. Rodriguez, 55 N.Y.2d 776, 777, 447 N.Y.S.2d 246, 431 N.E.2d 972 (1981) ("Order affirmed . . . as it determined that defendant's claim of selective and vindictive prosecution was forfeited by his plea of guilty.").

[92] People v. Dickson, 133 A.D.2d 492, 494, 519 N.Y.S.2d 419, 421 (3d Dept. 1987) (stating that a guilty plea forfeits the defense of Statutory of Limitations: "In our view, since defendant failed to raise the Statute of Limitations as a defense, he waived this challenge upon entry of his plea of guilty" (citation omitted)); People v. Parilla, 8 N.Y.3d 654, 656, 870 N.E.2d 142, 143, 838 N.Y.S.2d 824, 825 (2007) ("We conclude that defendant waived review of the statute of limitations issue when he entered his guilty plea"); United States v. Najjar, 283 F.3d 1306, 1308 (11th Cir. 2002) ("[Defendant] argues that in a criminal case, the statute of limitations is a jurisdictional bar that cannot be waived in a plea agreement. We disagree.")

(17) improper interpretation or application of a statute.[93]

Even though you waive many rights when you enter a guilty plea, there are some rights that cannot be waived. Non-waivable rights include the constitutional right to a speedy trial,[94] the right to challenge the legality of the sentence,[95] or the right to be examined to determine if you are competent to stand trial.[96] 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 deal they offered another defendant who was charged with the same crime under similar circumstances. However, there are limits to this. Prosecutors cannot treat you differently from other defendants because of an "impermissible classification," such as race, gender, religion, or ethnicity.[97] 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.[98] If you believe the prosecutor has discriminated against you in the plea-bargaining process, you should raise this issue to your lawyer before the trial begins and not while you are being sentenced. You should provide precise and specific evidence to support your discrimination claim.[99]

Another type of discrimination that you may be able to contest is 'selective prosecution,' which is when you are prosecuted based on an impermissible classification.[100] A successful claim of selective prosecution requires a showing of both (1) discriminatory effect (that is, that people who are similarly situated had not been prosecuted for the conduct), and (2) discriminatory intent (that the prosecution was motivated by a discriminatory purpose.).[101] These types of claims are unfortunately also difficult

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

[94] People v. Blakley, 34 N.Y.2d 311, 314–315, 313 N.E.2d 763, 764–765, 357 N.Y.S.2d 459, 462 (1974) (holding that a defendant cannot waive his right to a speedy trial).

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

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

[97] United States v. Bell, 506 F.2d 207, 221–222 (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).

[98] *See* McCleskey v. Kemp, 481 U.S. 279, 290–297, 107 S. Ct. 1756, 1765–1770, 95 L. Ed. 2d 262, 277–282 (1987) (finding that there was not sufficient evidence for discriminatory purpose when defendants presented statistical evidence showing disparate impact of race on sentencing; nor was this study sufficient to overcome the "wide discretion" traditionally afforded to prosecutors); Hernandez v. New York, 500 U.S. 352, 371–372, 111 S. Ct. 1859, 1872–1873, 114 L. Ed. 2d 395, 413–414 (1991) (finding that there was no intentional discrimination when a prosecutor excluded Hispanic jurors as they were able to provide a "race-neutral" explanation for the exclusion); United States v. Alcaraz-Peralta, 27 F.3d 439, 444 (9th Cir. 1994) (reversing lower 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).

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

[100] Wayte v. United States, 470 U.S. 598, 604–606, 105 S. Ct. 1524, 1529–1530, 84 L. Ed. 2d 547, 554–555 (1985).

[101] Wayte v. United States, 470 U.S. 598, 605–606, 105 S. Ct. 1524, 1529–1530, 84 L. Ed. 2d 547, 554–555 (1985).

to prove and have a "demanding" standard.[102] In the plea-bargaining context, the remedy for a claim of selective prosecution may be limited to a better plea deal, not vacating the underlying charge or dismissal.[103]

Another similar claim you may be able to raise is one of "vindictive prosecution," where the prosecution punishes you for exercising a protected statutory or constitutional right.[104] However, it is important to note that the bar for prosecutorial or judicial vindictiveness is very high, and prosecutors offering wildly disparate sentences probably does not meet this bar alone.[105]

### D. Court Acceptance of a Plea Bargain

Once you reach a plea agreement with the prosecutor, it must be approved by the court.[106] 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

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[102] United States v. Armstrong, 517 U.S. 456, 463–464, 116 S. Ct. 1480, 1486, 134 L. Ed. 2d 687, 698 (1996) ("These cases afford a 'background presumption' that the showing necessary to obtain discovery should itself be a significant barrier to the litigation of insubstantial claims." (citation omitted)); United States v. Bass, 536 U.S. 862, 863-64, 122 S. Ct. 2389, 153 L. Ed. 2d 769, 772 (2002) (holding that nationwide statistical data was not relevant because it wasn't specific to similarly situated defendants); Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 489, 119 S. Ct. 936, 946, 142 L. Ed. 2d 940, 956–957 (1999) ("Even in the criminal-law field, a selective prosecution claim is a *rara avis* [i.e., a rare event]. . . . [W]e have emphasized that the standard for proving them is particularly demanding, requiring a criminal defendant to introduce 'clear evidence' displacing the presumption that a prosecutor has acted lawfully."); *see also* People v. Blount, 90 N.Y.2d 998, 999, 665 N.Y.S.2d 626, 626, 688 N.E.2d 500, 500 (1997) ("To establish such a claim, a litigant must show that the law was enforced with both an 'unequal hand' and an 'evil eye' . . . .").

[103] *See* United States v. Waw, No. 09CR3138-LAB, 2010 U.S. Dist. LEXIS 156948, at *12 (S.D. Cal. Feb. 9, 2010) (*unpublished*).

[104] "Prosecutorial vindictiveness" is when the prosecutor retaliates against a defendant simply because they chose to exercise a legal right. United States v. Goodwin, 457 U.S. 368, 372-74, 102 S. Ct. 2485, 2488-89 (1982). Vindictiveness must be shown by a "preponderance of the evidence standard" (more likely than not). In rare situations, vindictiveness may be presumed if a negative action was taken towards the defendant by the prosecutor after the defendant exercised a legal right. However, the court may only do so if there is a "reasonable likelihood of vindictiveness." This presumption can still be rebutted by the prosecution. *See also* State v. Wesley, 161 So. 3d 1039, 1043 (La. Ct. App. 2015) ("If a defendant raises a presumption of vindictiveness, the prosecutor may rebut the presumption by showing objective reasons for its charges."); United States v. Dvorin, 817 F.3d 438, 455 (5th Cir. 2016) ("The defendant must prove prosecutorial vindictiveness by a preponderance of the evidence, and may do so either by showing actual animus or 'show[ing] sufficient facts to give rise to a presumption of vindictiveness.'" (citing United States v. Saltzman, 537 F.3d 353, 359 (5th Cir. 2008))); People v. Martinez, 26 N.Y.3d 196, 199, 42 N.E.3d 693, 695, 21 N.Y.S.3d 196, 198 (2015) ("Under the Due Process Clause of the New York State Constitution, a presumption of vindictiveness applies where a defendant successfully appeals an initial conviction, and is re-tried, convicted, and given a greater sentence than that imposed after the initial conviction." (citations omitted)). *But see* United States v. Gamez-Orduno, 235 F.3d 453, 462 (9th Cir. 2000) ("[I]n the context of pretrial plea negotiations vindictiveness will not be presumed simply from the fact that a more severe charge followed on, or even resulted from, the defendant's exercise of a right.").

[105] *See* Bordenkircher v. Hayes, 434 U.S. 357, 363, 98 S. Ct. 663, 668, 54 L. Ed. 2d 604, 610–611 (1978) ("But in the 'give-and-take' of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer.") In this case, the defendant was given an original plea offer of 5 years, which he declined. After trial, he was given a life sentence since the prosecutor added charges when the plea was declined. The Supreme Court ultimately upheld this and found that there was no prosecutorial vindictiveness. Bordenkircher v. Hayes, 434 U.S. 357, 364–365, 98 S. Ct. 663, 668–669, 54 L. Ed. 2d 604, 611–612 (1978); *see also* Alabama v. Smith, 490 U.S. 794, 802, 109 S. Ct. 2201, 2205, 104 L. Ed. 2d 865, 874 (1989) (holding that an increased sentence from a retrial after an overturned guilty plea did not constitute judicial vindictiveness, even though the same judge was presiding); Jordan v. Fisher, 576 U.S. 1071, 1071, 135 S. Ct. 2647, 2647, 192 L. Ed. 2d 948, 948 (2015) (denying to hear a defendant's claim of prosecutorial vindictiveness where the prosecutor refused to re-offer a plea for a life sentence, rather than the death penalty, on remand for resentencing because the defendant had violated his previous agreement to not appeal his plea and life-without-parole sentence); People v. Pena, 50 N.Y.2d 400, 412, 406 N.E.2d 1347, 1353, 429 N.Y.S.2d 410, 416 (1980) ("Given that the *quid pro quo* of the bargaining process will almost necessarily involve offers to moderate sentences . . . it is also to be anticipated that sentences handed out after trial may be more severe than those proposed in connection with a plea.").

[106] *See* People v. Huertas, 85 N.Y.2d 898, 899, 650 N.E.2d 408, 408, 626 N.Y.S.2d 750, 751 (1995); N.Y. CRIM. PROC. LAW § 220.10(3)–(4) (McKinney 2014); *see also* FED. R. CRIM. P. 11(c)(3).

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 sentence different from the one you agreed upon, the judge has the power to impose a different sentence if they think that the sentence you and the prosecutor agreed upon is inappropriate.[107] For this reason, it is riskier for you to bargain for a specific sentence than it is for a reduced charge. This is because when you bargain for a plea to a lesser offense, you immediately receive the benefit of the plea (your charge is reduced), but when you bargain for a specific sentence, there is a chance that the judge might not agree to the prosecutor's recommendation.

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.[108] The judge may accept or reject the agreement. If the judge rejects the agreement, you must be offered the opportunity to withdraw your guilty plea.[109] On appeal, a judge's rejection of a guilty plea is held to the abuse of discretion standard,[110] which is a relatively deferential standard towards judges.[111] Before 2005, federal judges mostly adhered to the Federal Sentencing Guidelines, and were likely to reject any plea agreement that fell outside of these guidelines.[112] However, a Supreme Court case held that these guidelines are only "advisory," not mandatory, so judges may be less rigid in this aspect.[113]

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

Before the court accepts a plea bargain, the judge must be sure that it meets certain requirements that are protected by the Federal Constitution. Specifically, the judge must confirm that your guilty plea is entered "knowingly, voluntarily, and intelligently."[114] In most courts, the judge will address you and ask you a number of questions to determine whether your guilty plea was entered knowingly, voluntarily, and intelligently. The judge will ask you to say that you are not agreeing to the plea bargain because you were coerced or promised something other than what is stated in the plea

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[107] *See* People v. Farrar, 52 N.Y.2d 302, 305–306, 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).

[108] People v. Farrar, 52 N.Y.2d 302, 306, 419 N.E.2d 864, 865–866, 437 N.Y.S.2d 961, 962–963 (1981).

[109] 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).

[110] United States v. Jabbour, No. 05-11225, 2006 U.S. App. LEXIS 28997, at *5 (11th Cir. Nov. 21, 2006) (*unpublished*).

[111] *See* United States v. Ocanas, 628 F.2d 353, 358 (5th Cir. 1980) ("Only in unusual circumstances will the rejection of a plea bargain be an abuse of discretion."); People v. Harris, 57 A.D.2d 663, 393 N.Y.S.2d 608, 609 (3d Dept. 1977) ("The imposition of the sentence rests within the sound discretion of the trial court, and we should not interfere unless there has been a clear abuse of discretion or extraordinary circumstances.").

[112] *See* Jenia I. Turner, *Judicial Participation in Plea Negotiations: A Comparative View,* 54 AM. J. COMP. L. 199, 206–210 (2006).

[113] United States v. Booker, 543 U.S. 220, 246, 125 S. Ct. 738, 757, 160 L.Ed.2d 621, 651 (2005) ("The other approach, which we now adopt, would . . . make the Guidelines system advisory."); *see also* Jenia I. Turner, *Judicial Participation in Plea Negotiations: A Comparative View,* 54 AM. J. COMP. L. 199, 206–210 (2006).

[114] *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) (finding that trial judge accepting guilty plea has vital responsibility to make sure that the accused fully understands what the plea means and its consequences).

agreement.[115] To be "coerced" is to be persuaded to do something with the use of force or threats. When ensuring that your plea is legal, the judge will also make sure that the facts of the case support your plea,[116] that you understand the nature of the charges against you,[117] that you understand the rights you are giving up by pleading guilty,[118] and that you know the possible penalties.[119]

The court will check whether your plea is legal by reviewing the terms of the plea agreement and the reasonableness of the bargain. The court will also consider your age, experience, and background.[120] If you enter a plea bargain because you were promised a particular sentence, this must appear on the court record at the time you enter the plea.[121] This is necessary to prove that the plea was entered with your knowledge and consent.[122]

If your guilty plea is not "knowing, voluntary, and intelligent." you may challenge your conviction.[123] Challenging your conviction allows the court to take another look at your case. Even if there was strong evidence of your guilt, a conviction that comes from a coerced or uninformed guilty plea is still unconstitutional.[124] The court will not believe that you have waived your constitutional rights unless there is evidence that you "intelligently and understandingly rejected" those rights.[125] If during the "plea colloquy" you told the court that you were entering this plea knowingly and

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[115] 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).

[116] *See* People v. Lopez, 71 N.Y.2d 662, 666, 525 N.E.2d 5, 6–7, 529 N.Y.S.2d 465, 466–467 (1988).

[117] FED. R. CRIM. P. 11(b)(1)(G); People v. Moore, 71 N.Y.2d 1002, 1005, 525 N.E.2d 740, 741–742, 530 N.Y.S.2d 94, 95–96 (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)).

[118] 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).

[119] FED. R. CRIM. P. 11(b)(1)(H)–(J); *see* People v. Camacho, 102 A.D.2d 728, 728–729, 476 N.Y.S.2d 566, 567–568 (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, 870–871, 700 N.E.2d 311, 677 N.Y.S.2d 772 (1998) (holding that awareness of possible penalties is not dispositive but rather is only one factor to consider when determining voluntariness of the plea (citing People v. Hidalgo, 91 N.Y.2d 733, 736, 698 N.E.2d 46, 47, 675 N.Y.S.2d 327, 328 (1998) ("The trial court must assess a number of relevant factors, including the nature and terms of the agreement, the reasonableness of the bargain, and the age and experience of the accused.")).

[120] *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, 1026–1027, 543 N.Y.S.2d 968, 972–973 (1989)).

[121] N.Y. CRIM. PROC. LAW § 220.50(5) (McKinney 2014).

[122] N.Y. CRIM. PROC. LAW § 220.50(5) (McKinney 2014); *see* People v. Davey, 193 A.D.2d 1108, 1108–1109, 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 the opportunity to withdraw guilty plea).

[123] *See* Boykin v. Alabama, 395 U.S. 238, 242, 89 S. Ct. 1709, 1712, 23 L. Ed. 2d 274, 279–280 (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, after making the plea, raise an independent claim that he was deprived of constitutional rights prior to entering the plea).

[124] *See* Henderson v. Morgan, 426 U.S. 637, 644–645, 96 S. Ct. 2253, 2257–2259, 49 L. Ed. 2d 108, 114 (1976) ("Since respondent did not receive adequate notice of the offense to which he pleaded guilty, his plea was involuntary and the judgment of conviction was entered without due process of law."); Smith v. O'Grady, 312 U.S. 329, 334, 61 S. Ct. 572, 574, 85 L. Ed. 859, 862 (1941) ("The petitioner charged that he had been denied any real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process . . . .").

[125] *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); Buchanon v. Mintzes, 734 F.2d 274, 281 (6th Cir. 1984) ("[W]e cannot presume a waiver by mere silence (absent other corroborated proof of a waiver) . . . .").

voluntarily then appeal courts may deny claims that this was not the case.[126] To preserve a claim that the plea was not knowing, voluntary, or intelligent, you should file a motion with the judge that accepted your plea. If you have entered a plea of guilty or nolo contendere and would like to withdraw the plea, the timing of the withdrawal is important. If the court has not accepted the plea yet, you may withdraw the plea at any time for any reason or no reason.[127] If the court has accepted the plea, but has not imposed a sentence yet, you may withdraw the plea if the court has rejected a plea agreement or you can show a fair and just reason for requesting the withdrawal.[128] After a sentence is imposed, your plea cannot be withdrawn and can only be set aside on a direct appeal or a collateral attack, which is when you try to overturn a judgment in a proceeding that is not your original action or an appeal from the original action.[129] New York law demands that before you challenge your plea, you give the trial court an opportunity to correct any mistake they may have made.[130] You can do this either at the plea proceeding by asking that the plea be vacated,[131] or you can file a motion to vacate judgment.[132] To vacate a plea in this context would mean that you withdraw it because it was not entered voluntarily or knowingly.

### 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.[133] The judge will ask you about the facts of the crime to determine this. If what you say raises doubt about whether you are actually guilty, the court must ask additional questions before accepting your plea.[134] The judge's questions will make sure that you entered the plea agreement on your own free will.[135] If you later claim that you did not enter the

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[126] People v. Manor, 27 N.Y.3d 1012, 1013, 54 N.E.3d 1143, 1144, 35 N.Y.S.3d 272, 273 (2016) (holding that defendant's plea was entered knowing and voluntary when they said so affirmatively at the trial court, even though there was evidence of them being intoxicated at the time.); People v. Lopez, 71 N.Y.2d 662, 666, 525 N.E.2d 5, 6, 529 N.Y.S.2d 465, 466 (1988) ("In that rare case, however, where the defendant's recitation of the facts underlying the crime pleaded to clearly casts significant doubt upon the defendant's guilt or otherwise calls into question the voluntariness of the plea, we have held that the trial court has a duty to inquire further to ensure that defendant's guilty plea is knowing and voluntary.").

[127] FED. R. CRIM. P. 11(d)(1); N.Y. CRIM. PROC. LAW § 220.60 (McKinney 2014).

[128] FED. R. CRIM. P. 11(d)(2).

[129] FED. R. CRIM. P. 11(e); N.Y. CRIM. PROC. LAW § 440.10-20 (McKinney 2023).

[130] *See* People v. Lopez, 71 N.Y.2d 662, 665–666, 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.").

[131] N.Y. CRIM. PROC. LAW § 220.60(3) (McKinney 2014).

[132] N.Y. CRIM. PROC. LAW § 440.10 (McKinney 2023).

[133] 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); *see also* People v. Lang, 127 A.D.3d 1253, 1255, 7 N.Y.S.3d 618, 620 (3d Dept. 2015) (finding that a guilty plea was coercive when the court threatened to start trial within a matter of days, before defense had a chance to find an expert witness).

[134] People v. Lopez, 71 N.Y.2d 662, 666, 525 N.E.2d 5, 6–7, 529 N.Y.S.2d 465, 466–467 (1988) ("[W]here 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."); People v. Worden, 22 N.Y.3d 982, 984, 3 N.E.3d 654, 655, 980 N.Y.S.2d 317, 318 (2013) (finding that defendant's factual description in his guilty plea did not sufficiently support rape conviction).

[135] 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); People v. Hanley, 255 A.D.2d 837, 838, 682 N.Y.S.2d 245, 246 (App. Div. 3rd Dept. 1998) (finding that there was no abuse of discretion to deny the defendant's withdrawal of a guilty plea when he alleged coercion by corrections officers, as during his allocution he testified that his plea was knowing and voluntary.).

plea voluntarily or you want to challenge the constitutionality of the plea, the judge will need to find enough evidence in the record that supports your claims.[136]

The court cannot force you to accept a plea bargain by threatening to give you a harsher sentence if you decide to go to trial.[137] However, if the sentence you receive after trial is higher than the sentence offered to you during plea negotiations, that alone is not enough to show that you were punished for choosing to have a trial.[138] Unless the sentence you were given after trial is much higher than the plea offer, or the sentence does not match the crime you were convicted of, your constitutional rights have not been violated.[139] The court may tell you, in advance, of the possible sentences you would receive if convicted on the charges at trial.[140] The court acted coercively if it told you that you will receive the highest sentence if you go to trial, but a much lighter sentence if you plead guilty.[141] However, the court requiring that you accept or decline a plea offer within a short period of time is not considered coercive.[142]

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[136] *See, e.g.*, People v. Sung Min, 249 A.D.2d 130, 131–132, 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) (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"); People v. Jimenez, 179 A.D.2d 840, 840, 579 N.Y.S.2d 173, 174 (3d Dept. 1992) (holding that "the fact that defendant exhibited some reluctance in entering plea did not establish that the plea was not voluntary and knowing" such that defendant could withdraw plea ).

[137] *See* People v. Christian, 139 A.D.2d 896, 897, 527 N.Y.S.2d 1020, 1021 (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, 165–166 (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); *but see* People v. Cook, 252 A.D.2d 595, 596, 675 N.Y.S.2d 384, 385 (3d Dept. 1998) ("The fact that defense counsel advised defendant to plead guilty because he could receive a harsher sentence if convicted after trial is not tantamount to coercion."); People v. Pitcher, 126 A.D.3d 1471, 1472, 6 N.Y.S.3d 352, 354 (4th Dept. 2015) ("[T]he court did not coerce defendant into pleading guilty merely by informing him of the range of sentences that he faced if he proceeded to trial and was convicted.").

[138] *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); Gonzales v. Cain, 525 F. App'x 251, 254 (5th Cir. 2013) (*unpublished*) ("[T]he mere imposition of a harsher sentence after trial than was offered during plea negotiations does not warrant a presumption that the trial judge sought to punish [defendant] for exercising his right to stand trial absent some other indicia of actual vindictiveness."); cf. People v. Patterson, 483 N.Y.S.2d 55, 57, 106 A.D.2d 520, 521 (2d Dept. 1984) (reducing the defendant's sentence because the record established that the trial court did not properly weigh the relevant factors when imposing the sentence and instead "impermissibly increased defendant's punishment solely for asserting his right to a trial").

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

[140] 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).

[141] People v. Sung Min, 249 A.D.2d 130, 132, 671 N.Y.S.2d 480, 481 (1st Dept. 1998) ("[A] court 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.").

[142] *See* 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).

Guilty pleas that are entered because of threats or deception by the prosecutor cannot be a knowing, voluntary, and intelligent agreement.[143] An incorrect assessment of the prosecutor's case against you is not coercion.[144] However, the prosecutor controls the charges against you, and during plea negotiations they may increase the charges or seek additional charges if you do not plead guilty.[145] As long as you have the choice to accept or reject the prosecutor's offer, the offer is not coercion.[146]

It is not coercion if your defense attorney encourages you to accept a plea agreement that is favorable to you, as long as the plea was made knowingly, intelligently, and voluntarily.[147] A favorable plea agreement is one that benefits you or is in your best interest to accept. However, the court may hold a hearing if there is evidence that your defense attorney forced you to plead guilty and you later made a motion to withdraw your plea.[148]

(b) Duress

Your guilty plea may not be voluntary if you entered the plea under circumstances of duress.[149] 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.[150] Even if duress was only part of the reason for your plea, you must still be given the

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[143] *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)).

[144] Brady v. United States, 397 U.S. 742, 757, 90 S. Ct. 1463, 1473, 25 L.Ed.2d 747, 761 (1970) ("The rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision."); United States v. Lara-Joglar, 400 F. App'x 565, 567 (1st Cir. 2010) (*unpublished*) (finding that defendant miscalculating quality of the prosecution's case does not, on its own, mean that the plea was involuntary (citing Ferrara v. United States, 456 F.3d 278, 291 (1st Cir. 2006))).

[145] *See* United States v. Goodwin, 457 U.S. 368, 381–382, 102 S. Ct. 2485, 2493, 73 L. Ed. 2d 74, 86 (1982). In this case, the respondent had initially expressed an interest in pleading on misdemeanor charges, but he ultimately decided not to plead guilty and requested a jury trial. While the misdemeanor charges were still pending, the prosecutor brought a felony charge arising out of the same incident as the misdemeanor charges. A jury convicted respondent on the felony charge and on one misdemeanor charge. The respondent then 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 prior to trial.

[146] 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 appeal).

[147] *See, e.g.*, People v. Babcock, 304 A.D.2d 912, 913, 758 N.Y.S.2d 412, 414 (3d Dept. 2003) (holding that defense "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 there was evidence on the record that the 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' into pleading guilty," because the allocution showed the plea was voluntary, knowing, and intelligent).

[148] People v. Gonzalez, 171 A.D.2d 413, 414, 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).

[149] *See* People v. Flowers, 30 N.Y.2d 315, 319, 284 N.E.2d 557, 558–559, 333 N.Y.S.2d 393, 395–396 (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).

[150] *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 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, 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).

option to withdraw your plea.[151] The situation causing duress must be serious enough to make your decision involuntary or unintelligent.[152] Simply claiming to be frightened or upset at the time of your plea will not be enough to constitute duress. The fact that a guilty plea may have a positive effect on third parties, such as a family member, also does not constitute as duress as long as it is voluntarily, knowingly, and intelligently made.[153] Further, fear of the death penalty is also not enough to render your guilty plea unconstitutional.[154]

(c) Not Understanding the Charges

If you do not know or understand the charges against you, your plea cannot be voluntary and intelligent.[155] To determine whether you fully understand the charges, the court will see if the acts that you say you have committed and the crime you are pleading guilty to are similar.[156] This is done in the "plea allocution" or "plea colloquy," where the court will ask you to admit the facts of your case that are the necessary elements of the crime you are charged with.[157] Elements of a crime describe what must happen for a person to be charged and convicted of the crime. For example, if an arson statute requires intent to damage a building, the plea colloquy must ask if you intended to damage the building.[158] If your description of what occurred raises doubt that you are guilty of the crime you are charged with, the court must go further to determine whether you understand the charges you are pleading guilty to.[159] 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 asking for further clarification.[160] The judge may not ask for further clarification if it can easily be inferred from the facts.

However, if you plead guilty to a lesser crime than the one you were charged with originally, the court does not have to match the facts of your case with the elements required for the lesser charge.[161] Additionally, if you plead guilty while insisting 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. To do so,

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[151] People v. Flowers, 30 N.Y.2d 315, 319, 284 N.E.2d 557, 559, 333 N.Y.S.2d 393, 395 (1972) (finding it to be "immaterial that the hearing court did not believe that the alleged duress was the *only* motivation for the plea") (emphasis added).

[152] *See* People v. Wood, 207 A.D.2d 1001, 1001, 617 N.Y.S.2d 248, 249 (4th Dept. 1994) (holding that the fact that defendant was frightened and upset when he entered the plea was not enough to make his decision involuntary or unintelligent).

[153] People v. Fiumefreddo, 82 N.Y.2d 536, 538, 605 N.Y.S.2d 671, 672, 626 N.E.2d 646, 647 (1993); People v. Price, 195 A.D.3d 1570, 1572, 150 N.Y.S.3d 459, 461–462 (4th Dept. 2021).

[154] People v. Van Dyne, 179 Misc. 2d 467, 469, 685 N.Y.S.2d 591, 593 (Co. Ct. Monroe County 1999), *reversed on other grounds by* People v. Van Dyne, 12 A.D.3d 120,784 N.Y.S.2d 795 (4th Dept. 2004); *see also* Brady v. United States, 397 U.S. 742, 758, 90 S. Ct. 1463, 1474, 25 L. Ed. 2d 747, 762 (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 because he was gripped by fear of the death penalty.).

[155] 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, 618–619, 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).

[156] *See* People v. Serrano, 15 N.Y.2d 304, 308, 206 N.E.2d 330, 332, 258 N.Y.S.2d 386, 388–389 (1965).

[157] *See* People v. Lopez, 71 N.Y.2d 662, 664–665, 525 N.E.2d 5, 5–6, 529 N.Y.S.2d 465, 465–466 (1988); *see also* People v. Zeth, 148 A.D.2d 960–961, 538 N.Y.S.2d 963, 964 (4th Dept. 1989) (finding admission of the facts necessary for each offense to which defendant pleaded guilty).

[158] People v. Zeth, 148 A.D.2d 960–961, 538 N.Y.S.2d 963, 964 (4th Dept. 1989).

[159] People v. Lopez, 71 N.Y.2d 662, 666, 525 N.E.2d 5, 6–7, 529 N.Y.S.2d 465, 466–467 (1988).

[160] *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) (noting that an indication that a guilty plea is "improvident or baseless" may trigger a judge to inquire further).

[161] People v. Clairborne, 29 N.Y.2d 950, 951, 280 N.E.2d 366, 367, 329 N.Y.S.2d 580, 581 (1972) (holding that "a bargained guilty plea to a lesser crime makes unnecessary a factual basis for the particular crime confessed"); People v. Anderson, 63 A.D.3d 1617, 1617, 879 N.Y.S.2d 784, 784 (4th Dept. 2009) (applying the *Clairborne* rule).

however, your plea must be entered knowingly, voluntarily, and intelligently.[162] If the court is aware of a possible defense that can be raised in your case, the judge must inform you of it and determine that you knowingly waive the defense.[163]

While the court will try to make sure that you understand your charges during the plea discussion, the court will consider all of the circumstances surrounding your plea. Failure to admit to an element of the crime may not raise a constitutional question if the court determines that you understood the nature of the charges against you and that you voluntarily and intelligently pleaded guilty to the charges.[164] Your attorney's explanation of the nature of the offense may also be enough to guarantee that you understand the nature of the charges.[165]

### (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.[166] 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 read any specific list of rights that you are giving up before the judge accepts your guilty plea. The judge must make sure, however, that you were not pressured into a plea, that you know what you are doing, and that you generally understand the rights you give up by pleading guilty.[167] If your defense counsel explains the consequences of a guilty plea, that explanation may be enough to ensure your plea is knowledgeable and intelligent.[168] 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.[169]

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[162] This is called an *Alford* plea. *See* North Carolina v. Alford, 400 U.S. 25, 37–38, 91 S. Ct. 160, 167–168, 27 L. Ed. 2d 162, 171–172 (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, 434–435, 310 N.E.2d 292, 294, 354 N.Y.S.2d 609, 612–613 (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); Silmon v. Travis, 95 N.Y.2d 470, 475, 718 N.Y.S.2d 704, 706, 741 N.E.2d 501, 503 (2000) ("In New York, such a plea is allowed only when, as in *Alford* itself, it is the product of a voluntary and rational choice, and the record before the court contains strong evidence of actual guilt."). As mentioned earlier, there may be negative collateral consequences to making an *Alford* plea. *See* Bryan H. Ward, *A Plea Best Not Taken: Why Criminal Defendants Should Avoid the Alford Plea*, 68 MO. L. REV. 913, 921–933 (2003).

[163] 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).

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

[165] *See* Henderson v. Morgan, 426 U.S. 637, 647, 96 S. Ct. 2253, 2258–2259, 49 L. Ed. 2d 108, 115–116 (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).

[166] 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).

[167] *See* People v. Nixon, 21 N.Y.2d 338, 353, 234 N.E.2d 687, 695–696, 287 N.Y.S.2d 659, 670–671 (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).

[168] *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.").

[169] Padilla v. Kentucky, 130 S. Ct. 1473, 1483, 176 L.Ed.2d 284, 296 (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.").

However, the judge is only required to make sure you know the direct consequences of your plea, not the collateral consequences.[170] A "direct consequence" is "one which has a definite, immediate and largely automatic effect on defendant's punishment," such as a prison term or probation.[171] A "collateral consequence" is something that affects you in particular because of your personal characteristics, such as your immigration or parole status.[172] Examples of collateral consequences are the "loss of the right to vote or travel abroad, loss of civil service employment, loss of a driver's license, loss of the right to possess firearms, or an undesirable discharge from the Armed Services."[173]

If the judge or your attorney does not tell you about the collateral consequences of a conviction, it will not usually make your plea unknowing, involuntary, or unintelligent.[174] However, one collateral consequence that your defense counsel *must* tell you about is the possibility of deportation.[175] Depending on where you live, the trial court may not have to tell you about the risk of deportation, even if your defense counsel does.[176]

### (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.[177] To challenge 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.[178] 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.[179]

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[170] 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").

[171] People v. Ford, 86 N.Y.2d 397, 403, 657 N.E.2d 265, 267, 633 N.Y.S.2d 270, 272 (1995), *overruled on other grounds by* People v. Peque, 22 N.Y.3d 168, 3 N.E.3d 617, 980 N.Y.S.2d 280 (2013).

[172] *See* Part B of this Chapter.

[173] People v. Ford, 86 N.Y.2d 397, 403, 657 N.E.2d 265, 267–268, 633 N.Y.S.2d 270, 272–273 (1995), *overruled on other grounds by* People v. Peque, 22 N.Y.3d 168, 3 N.E.3d 617, 980 N.Y.S.2d 280 (2013)).

[174] People v. Ford, 86 N.Y.2d 397, 403, 657 N.E.2d 265, 267–268, 633 N.Y.S.2d 270, 272–273 (1995); El-Nobani v. United States, 287 F.3d 417, 421 (6th Cir. 2002) ("A 'defendant need only be aware of the direct consequences of the plea, however; the trial court is under no constitutional obligation to inform the defendant of all the possible collateral consequences of the plea.'" (quoting King v. Dutton, 17 F.3d 151, 153 (6th Cir. 1994))).

[175] Padilla v. Kentucky, 559 U.S. 356, 369, 130 S. Ct. 1473, 1483, 176 L. Ed. 2d 284, 296 (2010). However, this obligation is only *your attorney's* obligation, and it is generally not the court's obligation to inform you of these risks. This may vary depending on your jurisdiction. *See* United States v. Rodriguez-Penton, 547 F. App'x 738, 739 (6th Cir. 2013) (*unpublished*) ("*Padilla* addressed an attorney's obligations under the Sixth Amendment, however, and not a court's obligations under the Due Process Clause of the Fifth Amendment.").

[176] People v. Carty, 96 A.D.3d 1093, 1097, 947 N.Y.S.2d 617, 621 (3d Dept. 2012) (finding that the trial court is not required to inform the defendant of the risk of deportation). However, in New York, a trial court is "compelled" to let the defendant know of the risk of deportation. However, if he is not informed, that does not automatically mean that he is entitled to withdraw his guilty plea. *See* People v. Peque, 22 N.Y.3d 168, 176 (2013) (finding that a trial court is compelled to tell the defendant that he may be deported if he is not an American citizen, but that he still has to establish "the existence of a reasonable probability that, had the court warned the defendant of the possibility of deportation, he or she would have rejected the plea and opted to go to trial" in order to withdraw the guilty plea).

[177] 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").

[178] *See, e.g.*, 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).

[179] People v. Gotte, 125 A.D.2d 331, 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, 567–568 (1st Dept. 1984).

### (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.[180] However, the court is not required to choose the sentence that you agreed upon with the prosecutor.[181] But if the court determines the sentence in the plea bargain agreement is not acceptable and should be increased, the court must give you the option to withdraw the plea or accept the harsher sentence.[182] Furthermore, if the court states on the record the sentence it expects to impose when it accepts the guilty plea, the court must grant the sentence unless the pre-sentence report or facts that later become available show that the sentence would not be appropriate.[183]

A prosecutor must uphold your plea agreement unless you fail to obey it or other circumstances justify breaking the promise.[184] If you fail to perform promises you made 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.[185] A violated plea agreement may not present a double jeopardy issue and allows the government to prosecute even higher charges.[186] "Double jeopardy" prevents someone from going to trial twice for the same offense.[187]

Even if the specific plea agreement is not broken, other circumstances may allow the prosecution to break the bargain, such as a person committing additional crimes or not appearing for sentencing

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[180] 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)). *But see* Puckett v. United States, 556 U.S. 129, 141–142, 129 S. Ct. 1423, 1432–1433, 173 L.Ed.2d 266, 279 (2009) ("The defendant whose plea agreement has been broken by the Government will not always be able to show prejudice, either because he obtained the benefits contemplated by the deal anyway (e.g., the sentence that the prosecutor promised to request) or because he likely would not have obtained those benefits in any event (as is seemingly the case here."); United States v. Carter, 814 F. App'x 1000, 1008 (6th Cir. 2020) (*unpublished*) (holding that there was no breach of a plea agreement when a prosecutor made a mistake calculating the defendant's base offense level during negotiations, in contrast to the Probation Office's report; despite this "tricky situation" the court upheld the conviction with the greater offense level); United States v. Keller, 665 F.3d 711, 715 (6th Cir. 2011).

[181] Puckett v. United States, 556 U.S. 129, 137, 129 S. Ct. 1423, 1430, 173 L.Ed.2d 266, 276 (2009) ("But rescission is not the only possible remedy; in *Santobello* we allowed for a resentencing at which the Government would fully comply with the agreement—in effect, specific performance of the contract.").

[182] People v. Michael, 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, 580, 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, 238–239, 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).

[183] People v. Selikoff, 35 N.Y.2d 227, 240, 318 N.E.2d 784, 793, 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).

[184] *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.").

[185] *See, e.g.*, Ricketts v. Adamson, 483 U.S. 1, 8–9, 107 S. Ct. 2680, 2684–2685, 97 L. Ed. 2d 1, 10 (1987) (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).

[186] *See* Ricketts v. Adamson, 483 U.S. 1, 8, 107 S. Ct. 2680, 2685, 97 L. Ed. 2d 1, 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").

[187] U.S. CONST. amend. V.

after the agreement.[188] Some of these circumstances may not allow the court to sentence you to greater punishment than you and the prosecutor accepted in your plea bargain unless you are given the opportunity to withdraw the plea.[189] However, if you do not tell the prosecutor relevant information, and that information is discovered, 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.[190]

The prosecution is free to decide the terms of the plea agreement. For example, the prosecution could require that all co-defendants (when you have another person who is accused of committing the same crime) accept the plea. Additionally, the prosecution may break the plea agreement if the terms are not met.[191] 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.[192] Before the court accepts your plea, the prosecutor may withdraw the offer for a plea bargain at any time, without violating your constitutional rights.[193] 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, a prosecutor may not recommend a sentence later in court.[194] Even actions by the prosecutor that suggest a possible sentence may be a violation of the agreement by the prosecutor.[195]

To avoid disagreements about what promises were made when the guilty plea was entered, the entire plea agreement should clearly appear in the court record.[196] Promises that do not appear in the

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[188] *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 that reached in plea bargain where 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, 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).

[189] *See, e.g.*, People v. Annunziata,105 A.D.2d 709, 709, 481 N.Y.S.2d 148,149 (2d Dept. 1984).

[190] *See* People v. Da Forno, 73 A.D.2d 893, 895, 424 N.Y.S.2d 195, 197 (1st Dept. 1980).

[191] People v. Antonio, 176 A.D.2d 528, 529, 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).

[192] People v. Farrar, 52 N.Y.2d 302, 307–308, 419 N.E.2d 864, 866, 437 N.Y.S.2d 961, 963 (1981).

[193] *See* Mabry v. Johnson, 467 U.S. 504, 510–511, 104 S. Ct. 2543, 2548, 81 L. Ed. 2d 437, 444–445, (1984) (holding that a withdrawn offer could not induce a guilty plea, and a subsequently accepted plea was not the result of government deception).

[194] *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).

[195] People v. Tindle, 61 N.Y.2d 752, 753–754, 460 N.E.2d 1354, 1355, 472 N.Y.S.2d 919, 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, 323–324 (3d Dept. 1981) (finding that the prosecutor inadvertently breached the essence of an agreement not to take part in sentencing when he released information on the crime to the news media).

[196] 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).

record will usually not be enforced.[197] Federal courts have held that unclear agreements are generally interpreted against the government and in favor of the defendant.[198]

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 instead examine the agreement from an objective (neutral) perspective.[199]

If the prosecutor breaks the agreement, the sentencing court is allowed to determine whether the appropriate remedy is specific performance or withdrawal of the plea.[200] "Specific performance," or an order by a court to perform a specific act, of a plea agreement requires the government to carry out the original terms of the agreement. A different judge will usually perform the re-sentencing, and the prosecutor will be forced to maintain the plea agreement. If the court allows you to withdraw the plea, you will then go to trial, unless another plea agreement can be reached.

In some situations, specific performance of the plea agreement may be the only means to serve justice.[201] For example, if you placed yourself in a position of "no return" by carrying out the requirements of a cooperative plea agreement, such as by waiving the privilege against self-incrimination or testifying at length against co-defendants, you would not be returned to your pre-plea status by a withdrawn plea, and you are therefore entitled to specific performance of the original plea agreement.[202]

### (g) Ineffective Assistance of Counsel[203]

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."[204] Simply being unsatisfied or unhappy with your assigned counsel will not make your guilty plea involuntary or unknowing.[205] To prove "ineffective assistance of counsel," you must show:

(1) The advice of your counsel did not meet the competency standard required of attorneys in criminal cases,[206] and

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[197] *See, e.g.*, People v. Hood, 62 N.Y.2d 863, 865, 466 N.E.2d 161, 161–162, 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 by the People); *In re* S., 55 N.Y.2d 116, 120–121, 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).

[198] 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, 1026–1027 (1st Cir. 1988) (stating "the government must shoulder a greater degree of responsibility than the defendant for imprecisions or ambiguities in plea agreements"); 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").

[199] People v. Cataldo, 39 N.Y.2d 578, 580, 349 N.E.2d 863, 864, 384 N.Y.S.2d 763, 763 (1976) ("Compliance with a plea bargain is to be tested against an objective reading of the bargain, and not against a defendant's subjective interpretation thereof.").

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

[201] People v. McConnell, 49 N.Y.2d 340, 347–348, 402 N.E.2d 133, 136, 425 N.Y.S.2d 794, 797–798 (1980).

[202] People v. Danny G., 61 N.Y.2d 169, 171–172, 461 N.E.2d 268, 268–269, 473 N.Y.S.2d 131, 131–132 (1984); People v. McConnell, 49 N.Y.2d 340, 347–348, 402 N.E.2d 133, 136, 425 N.Y.S.2d 794, 797–798 (1980).

[203] See *JLM*, Chapter 12, "Appealing Your Conviction Based on Ineffective Assistance of Counsel," for more information on appealing convictions based on ineffective assistance of counsel.

[204] Brady v. United States, 397 U.S. 742, 748–749, 90 S. Ct. 1463, 1469, 25 L. Ed. 2d 747, 756–757 (1970); *see also JLM*, Chapter 12, "Appealing Your Conviction Based on Ineffective Assistance of Counsel."

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

[206] Hill v. Lockhart, 474 U.S. 52, 56–57, 106 S. Ct. 366, 369, 88 L. Ed. 2d 203, 208–209 (1985). Ineffective

(2) If your counsel had not made these errors, there would have been a reasonable possibility that you would have pleaded "not guilty" and demanded a trial.[207]

If you *did not* accept the agreement because your defense attorney did not give you adequate advice, you must show that, if it was not for the ineffective advice you were given, there is a reasonable chance 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 better than under the judgment and sentence that in fact were imposed.[208]

Your attorney failing to tell you of an existing plea offer would likely be a good claim for an ineffective assistance of counsel argument.[209] Similarly, your attorney admitting guilt over your objection would be another viable claim.[210] If the court finds that your attorney's performance did not affect the plea bargaining process, the court will assume that your plea was entered knowingly, voluntarily, and intelligently.[211] This decision means that 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 against your lawyer 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[212] or where the defense attorney did not place the terms of the plea bargain on the record.[213] Another claim would be if your attorney failed to inform you of any immigration-related consequences from your conviction.[214]

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assistance of counsel claims is generally governed by the *Strickland* standard. *See* Strickland v. Washington, 466 U.S. 668, 671, 104 S. Ct. 2052, 2056, 80 L.Ed.2d 674, 683 (1984). An ineffective assistance of counsel claim requires a showing that your counsel's assistance was sufficiently deficient, and that this deficiency caused prejudice. Depending on the context of the ineffective assistance of counsel depends on how you have to demonstrate prejudice.

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

[208] Lafler v. Cooper, 566 U.S. 156, 164, 132 S. Ct. 1376, 1385, 182 L. Ed. 2d 398, 407 (2012); *see also* Missouri v. Frye, 566 U.S. 134, 147, 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).

[209] Missouri v. Frye, 566 U.S. 134, 135, 132 S. Ct. 1399, 1402, 182 L. Ed. 2d 379, 384 (2012) ("As a general rule, defense counsel has the duty to communicate formal prosecution offers to accept a plea on terms and conditions that may be favorable to the accused."). You still must prove of this failure to be informed by a preponderance of the evidence standard, or that it was more likely than not. *See also* People v. Alexander, 136 Misc. 2d 573, 585, 518 N.Y.S.2d 872, 879 (Sup. Ct. Bronx County 1987).

[210] McCoy v. Louisiana, 138 S. Ct. 1500, 1505, 200 L. Ed. 2d 821, 827 (2018) ("With individual liberty—and, in capital cases, life—at stake, it is the defendant's prerogative, not counsel's, to decide on the objective of his defense: to admit guilt in the hope of gaining mercy at the sentencing stage, or to maintain his innocence, leaving it to the State to prove his guilt beyond a reasonable doubt.").

[211] *See* People v. Dunn, 261 A.D.2d 940, 940–941, 690 N.Y.S.2d 349, 349–350 (4th Dept. 1999).

[212] People v. Butler, 94 A.D.2d 726, 726, 462 N.Y.S.2d 263, 263–264 (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).

[213] People v. Roy, 122 A.D.2d 482, 483–484, 505 N.Y.S.2d 242, 243–244 (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).

[214] Padilla v. Kentucky, 559 U.S. 356, 364–365, 130 S. Ct. 1473, 1480–1481, 176 L. Ed. 2d 284, 292–293 (2010); *see also* United States v. Urias-Marrufo, 744 F.3d 361, 368 (5th Cir. 2014) ("[Defendant] correctly argues that, under *Padilla*, she was required to be advised of the certain deportation consequences of her plea prior to her plea hearing."). However, under the prejudice prong of *Strickland*, you still must show that there is a reasonable probability that if you were informed of these consequences that you would not have pled guilty. *See* Strickland v. Washington, 466 U.S. 668, 671, 104 S. Ct. 2052, 2056, 80 L.Ed.2d 674, 683 (1984); People v. Hernandez, 22 N.Y.3d 972, 974, 978 N.Y.S.2d 711, 713, 1 N.E.3d 785, 787 (2013) ("[D]efendant had not established the existence of a reasonable probability that, but for counsel's inadequate advice, he would not have pleaded guilty.").

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;[215]

(2) Your defense counsel did not advise you to accept or reject a plea bargain;[216]

(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;[217]

(4) Your defense counsel did not engage in certain pretrial procedures and this decision was based on a legitimate strategy;[218] or

(5) You make a general claim that the plea was ill-advised, without reference to specific instances of ineffectiveness.[219]

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.[220]

### (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.[221] 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.[222] 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.[223] However, if there was no indication of incompetence in the record, and you did not seek an

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[215] *See* People v. Angelakos, 70 N.Y.2d 670, 673–674, 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).

[216] 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).

[217] People v. Rodriguez, 188 A.D.2d 623, 623–624, 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).

[218] 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, 758–759, 535 N.Y.S.2d 273, 274–275 (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).

[219] *See* People v. Florian, 145 A.D.2d 645, 645–646, 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); *see also* People v. Bourdonnay, 160 A.D.2d 1014, 1015, 555 N.Y.S.2d 134, 136 (2d Dept. 1990) (citing People v. Florian for the same point).

[220] 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)). For more information on Section 440.10, see *JLM,* Chapter 20, "Using Article 440 of the New York Criminal Procedure Law to Attack Your Unfair Conviction or Illegal Sentence."

[221] Godinez v. Moran, 509 U.S. 389, 400–401, 113 S. Ct. 2680, 2687, 125 L. Ed. 2d 321, 333–334 (1993) (holding that no greater standard of competency is required for entering a guilty plea than for standing trial).

[222] *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 inquiry is not whether the defendant knew what they were doing, especially if they clearly did, but that the defendant cannot be forced to plead guilty due to a mental condition which prevented him from assisting in his own defense at trial).

[223] People v. Frazier, 114 A.D.2d 1038, 1038–1039, 495 N.Y.S.2d 478, 478–479 (2d Dept. 1985).

examination, the court was not required to order one.[224] The right to a competency hearing is not waived by a guilty plea, and it may be raised for the first time on appeal.[225] 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.[226]

## E. Withdrawing from a Plea Bargain

In New York, you must move to withdraw a guilty plea in the trial court[227] or move to vacate the judgment of conviction and sentence[228] in the trial court to preserve any claims for appellate review that the plea was unconstitutional.[229]

### 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.[230]

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.[231] 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.[232]

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.[233] 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 present your claims.[234] Courts will allow you to withdraw a plea that was not voluntary,

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[224] 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).

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

[226] *See, e.g.*, 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).

[227] N.Y. CRIM. PROC. LAW § 220.60(3) (McKinney 2014).

[228] N.Y. CRIM. PROC. LAW §§ 440.10, 440.20 (McKinney 2023).

[229] People v. Lopez, 71 N.Y.2d 662, 665–666, 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, 639–640 (1991) (denying appeal because defendant must raise each issue in the motion to withdraw plea or it is not preserved for appeal).

[230] N.Y. CRIM. PROC. LAW § 220.60(3) (McKinney 2014).

[231] *See* FED. R. CRIM. P. 11(f); *see also* Kercheval v. United States, 274 U.S. 220, 223, 47 S. Ct. 582, 583, 71 L. Ed. 1009, 1012 (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.").

[232] *See* FED. R. CRIM. P. 11(e).

[233] *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).

[234] 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).

knowing, and intelligent.[235] Defendants are also allowed to withdraw a guilty plea if they do not receive the sentence the prosecutor promised to recommend to the judge,[236] if the sentence cannot legally be enforced,[237] if the prosecutor did not have the authority to make the promise,[238] 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,[239] or if the plea was entered knowingly, voluntarily, and intelligently.[240]

A withdrawn guilty plea cannot be admitted as evidence against you in the trial, or in any subsequent civil trial or administrative proceeding.[241] Additionally, statements made in plea discussions or the factual allocution cannot be admitted in a trial.[242]

### 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.[243] This motion preserves your claim that the guilty plea was not entered voluntarily, knowingly, or intelligently.[244] 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.[245] If, however, when you pleaded guilty you stated facts that 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

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[235] 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).

[236] 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.").

[237] 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, 442–443 (3d Dept. 1990).

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

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

[240] *See, e.g.*, 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).

[241] *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).

[242] 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). *But see* United States v. Mezzanatto, 513 U.S. 196, 201, 115 S. Ct. 797, 801,130 L. Ed. 2d 697, 704 (1995). Rule 410 can be waived, and when it has, those discussions can be used against you. Depending on the waiver, it can be used to impeach (contradict) or even as the prosecutor's case in chief (main argument).

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

[244] *See, e.g.*, People v. Lopez, 71 N.Y.2d 662, 665–666, 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).

[245] *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).

direct appeal the court's acceptance of your plea.[246] 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.[247] *JLM*, Chapter 20, "Using Article 440 of the New York Criminal Procedure Law to Attack Your Unfair Conviction of Illegal Sentence," provides a thorough explanation of the process of vacating a sentence and conviction under Article 440. *JLM*, Chapter 9, "Appealing Your Conviction or Sentence" provides information on appealing your conviction generally.

## F. Conclusion

Today, most of the criminal justice system *is* plea bargaining. You may benefit from taking a plea deal, but it is important to make an informed decision, where you weigh all of the considerations, before accepting one. You still have rights when going through the plea-bargaining process, and the prosecutors and court may not violate those rights. If the government offers you a plea agreement, make sure that you understand all of the consequences of the plea, including the potential collateral consequences on your immigration status, job prospects, housing, and other significant parts of your life. It is also important to get every part of the plea agreement in writing. And finally, if you are represented by a lawyer, make sure you talk to your lawyer before you sign or agree to any plea agreement. Doing these things will help make sure that you get the best plea agreement possible, so you are not faced with the very difficult task of trying to vacate your plea agreement later on.

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[246] People v. Lopez, 71 N.Y.2d 662, 666, 525 N.E.2d 5, 6–7, 529 N.Y.S.2d 465, 466–467 (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.).

[247] *See, e.g.*, 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).